



POLICY ROUNDTABLES

Access to Key Transport Facilities 2006

Introduction

The OECD Competition Committee debated the access to key transport facilities in February 2006. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. John Hilke for the OECD, written submissions from Australia, the European Commission, Germany, Hungary, Indonesia, Israel, Italy, Japan, Korea, Mexico, the Netherlands, Portugal, Romania, Russia, Slovenia, Switzerland, Chinese Taipei and the United States, as well as an aide-memoire of the discussion.

Overview

New entrants in transportation markets often require access to key infrastructure. Public policies about infrastructure access can, therefore, be a critical component of entry conditions. Such access can range from impractical to easy depending upon whether there are strong economies of vertical integration that could make it inefficient or risky to share use of the infrastructure with independent upstream or downstream suppliers.

Maintaining efficient incentives for infrastructure investment should be a major consideration in developing essential facilities access policies or alternative remedies. Simply imposing a contractual obligation to offer equal access to transportation infrastructure could be insufficient to ensure equal access on reasonable terms if the owner of the essential facility has incentives and the ability to discriminate or to indirectly deny access to entrants and existing competitors.

Related Topics

OECD Guiding Principles for Regulatory Quality and Performance (2005)

Structural Reform in the Rail Industry (2005)

Regulating Market Activities by the Public Sector (2004)

Recommendation of the Council concerning Structural Separation in Regulated Industries (2001)

Restructuring Public Utilities for Competition (2001)

Unclassified

DAF/COMP(2006)29



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

09-Nov-2006

English/French

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 27 October 2006

ACCESS TO KEY TRANSPORT FACILITIES

JT03217453

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

DAF/COMP(2006)29
Unclassified

English/French

FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Competition to Ensuring Access to Key Capacity for New Entrants which was held by the Working Party n°2 of the Competition Committee in February 2006.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la concurrence pour garantir aux nouveaux entrants l'accès aux capacités d'infrastructure essentielle, qui s'est tenue en février 2006 dans le cadre du Groupe de Travail n°2 du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

Visit our Internet Site -- Consultez notre site Internet

<http://www.oecd.org/competition>

OTHER TITLES

SERIES ROUNDTABLES ON COMPETITION POLICY

1.	Competition Policy and Environment	OCDE/GD(96)22
2.	Failing Firm Defence	OCDE/GD(96)23
3.	Competition Policy and Film Distribution.....	OCDE/GD(96)60
4.	Competition Policy and Efficiency Claims in Horizontal Agreements	OCDE/GD(96)65
5.	The Essential Facilities Concept.....	OCDE/GD(96)113
6.	Competition in Telecommunications.....	OCDE/GD(96)114
7.	The Reform of International Satellite Organisations	OCDE/GD(96)123
8.	Abuse of Dominance and Monopolisation	OCDE/GD(96)131
9.	Application of Competition Policy to High Tech Markets	OCDE/GD(97)44
10.	General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises	OCDE/GD(97)53
11.	Competition Issues related to Sports.....	OCDE/GD(97)128
12.	Application of Competition Policy to the Electricity Sector	OCDE/GD(97)132
13.	Judicial Enforcement of Competition Law	OCDE/GD(97)200
14.	Resale Price Maintenance	OCDE/GD(97)229
15.	Railways: Structure, Regulation and Competition Policy	DAFFE/CLP(98)1
16.	Competition Policy and International Airport Services.....	DAFFE/CLP(98)3
17.	Enhancing the Role of Competition in the Regulation of Banks	DAFFE/CLP(98)16
18.	Competition Policy and Intellectual Property Rights	DAFFE/CLP(98)18
19.	Competition and Related Regulation Issues in the Insurance Industry.....	DAFFE/CLP(98)20
20.	Competition Policy and Procurement Markets	DAFFE/CLP(99)3
21.	Regulation and Competition Issues in Broadcasting in the light of Convergence	DAFFE/CLP(99)1

22.	Relationship between Regulators and Competition Authorities	DAFFE/CLP(99)8
23.	Buying Power of Multiproduct Retailers	DAFFE/CLP(99)21
24.	Promoting Competition in Postal Services	DAFFE/CLP(99)22
25.	Oligopoly	DAFFE/CLP(99)25
26.	Airline Mergers and Alliances	DAFFE/CLP(2000)1
27.	Competition in Professional Services	DAFFE/CLP(2000)2
28.	Competition in Local Services	DAFFE/CLP(2000)13
29.	Mergers in Financial Services	DAFFE/CLP(2000)17
30.	Promoting Competition in the Natural Gas Industry	DAFFE/CLP(2000)18
31.	Competition Issues in Electronic Commerce	DAFFE/CLP(2000)32
32.	Competition and Regulation Issues in the Pharmaceutical Industry	DAFFE/CLP(2000)29
33.	Competition Issues in Joint Ventures	DAFFE/CLP(2000)33
34.	Competition Issues in Road Transport	DAFFE/CLP(2001)10
35.	Price Transparency	DAFFE/CLP(2001)22
36.	Competition Policy in Subsidies and State Aid	DAFFE/CLP(2001)24
37.	Portfolio Effects in Conglomerate Mergers	DAFFE/COMP(2002)5
38.	Competition and Regulation Issues in Telecommunications	DAFFE/COMP(2002)6
39.	Merger Review in Emerging High Innovation Markets	DAFFE/COMP(2002)20
40.	Loyalty and Fidelity Discounts and Rebates	DAFFE/COMP(2002)21
41.	Communication by Competition Authorities	DAFFE/COMP(2003)4
42.	Substantive Criteria used for the Assessment of Mergers	DAFFE/COMP(2003)5
43.	Competition Issues in the Electricity Sector	DAFFE/COMP(2003)14
44.	Media Mergers	DAFFE/COMP(2003)16
45.	Non Commercial Services Obligations and Liberalisation	DAFFE/COMP(2004)19
46.	Competition and Regulation in the Water Sector	DAFFE/COMP(2004)20

47.	Regulating Market Activities by Public Sector.....	DAFFE/COMP(2004)36
48.	Merger Remedies.....	DAF/COMP(2004)21
49.	Cartels: Sanctions against Individuals	DAF/COMP(2004)39
50.	Intellectual Property Rights	DAF/COMP(2004)24
51.	Predatory Foreclosure	DAF/COMP(2005)14
52.	Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling.....	DAF/COMP(2005)44
53.	Enhancing Beneficial Competition in the Health Professions	DAF/COMP(2005)45
54.	Evaluation of the Actions and Resources of Competition Authorities	DAF/COMP(2005)30
55.	Structural Reform in the Rail Industry.....	DAF/COMP(2005)46
56.	Competition on the Merits	DAF/COMP(2005)27
57.	Resale Below Cost Laws and Regulations.....	DAF/COMP(2005)43
58.	Barriers to Entry.....	DAF/COMP(2005)42
59.	Prosecuting Cartels without Direct Evidence of Agreement	DAF/COMP/GF(2006)7
60.	The Impact of Substitute Services on Regulation.....	DAF/COMP(2006)18
61.	Competition in the Provision of Hospital Services.....	DAF/COMP(2006)20

TABLE OF CONTENTS

EXECUTIVE SUMMARY	7
SYNTHÈSE.....	11
BACKGROUND NOTE.....	17
NOTE DE RÉFÉRENCE.....	69
NATIONAL CONTRIBUTIONS	
Australia.....	127
Germany.....	143
Hungary	149
Italy	157
Japan	161
Korea.....	169
Mexico	177
The Netherlands.....	199
Portugal.....	209
Switzerland	215
United States.....	219
European Commission.....	233
and	
Indonesia.....	247
Israel	251
Romania.....	255
Russia.....	261
Slovenia	265
Chinese Taipei	269
SUMMARY OF THE DISCUSSION	275
RÉSUMÉ DE LA DISCUSSION	293

EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the delegates' submissions and the background paper, several key points emerge.

- (1) *New entrants in transportation markets often require access to key infrastructure. Public policies about infrastructure access can, therefore, be a critical component of entry conditions.*

Prominent potential examples of key infrastructure include airports in air transport markets, ports in shipping and ferry service markets, rails in railroad markets, and terminals in bus transportation markets. It should be noted that some facilities that are essential to operating in a particular mode of transportation are not likely to be "essential facilities" in an antitrust sense because that mode of transportation competes in multi-modal transportation markets.

- (2) *Access to key infrastructure can range from impractical to easy depending upon whether there are strong economies of vertical integration that could make it inefficient or risky to share use of the infrastructure with independent upstream or downstream suppliers. Available capacity or the cost and speed with which incremental infrastructure capacity can be added also can determine ease of access to key infrastructure.*

In the transportation sector, geographic features or land use patterns often confine participants in an industry to use a single terminus in serving each population center. Economies of scale and scope in operating facilities also can contribute to incentives to use a single terminus in each metropolitan area. But unlike some other markets, the economies of scale and scope in transportation terminal facilities are not necessarily associated with compelling vertical economies in using the facility. Hence, more often than not, it is feasible for upstream and downstream firms to share the use of the facility. This may not always be the case, however, as some safety concerns raised in the U.K. railway sector suggest.

Access issues still can arise even if firms commonly share a facility if the available capacity is already fully used by incumbent suppliers. In those situations, access issues can be particularly contentious unless the essential facility can be expanded quickly and at low cost at the behest of entrants or incumbents seeking to expand.

- (3) *Policy decisions regarding access to key infrastructure are the most complex, yet potentially the most fruitful under the conditions in which the essential facilities doctrine originated.*

Access issues are most complex and most important to competition when:

- lack of access to a facility would impose a substantial cost disadvantage on any suppliers in the market;

- such a lack of access for one or more suppliers would harm consumers;
- capacity at the facility is constrained;
- the facility is not subject to timely expansion and entry (or product repositioning) is difficult;
- access to the facility is not subject to compelling economies of vertical integration (efficiency or safety), scale, or scope; and
- changes are feasible in the allocation of existing infrastructure capacity to and among independent suppliers that will benefit consumers.

These are the conditions in which the essential facilities doctrine originated and under which it is most commonly applied. Australia's system of making access decisions through a regulatory process also focuses on these conditions.

- (4) *When the above conditions exist, requiring access through use of the essential facilities doctrine may be attractive compared to regulation of a franchised, vertically integrated monopolist.*

Mandated access through the essential facilities doctrine can be better than regulation of an integrated monopolist because the access remedy can harness the incentive of competition to reduce prices, increase quality, and innovate in upstream and downstream markets.

Viewing mandatory access as a substitute for intensive natural monopoly regulation offers decision makers an opportunity to examine both the long- and short-term costs and benefits of the alternatives. The long term diminution of incentives to minimize costs and to innovate that are often associated with regulation, can make the mandatory access alternative more attractive. This follows to the extent that an access order can allow the related upstream and downstream markets to operate competitively and, therefore, to retain the associated incentives to lower prices, increase quality, and introduce innovations.

- (5) *Maintaining efficient incentives for infrastructure investment should be a major consideration in developing essential facilities access policies or alternative remedies.*

A major concern in designing a mandatory access order is the potential negative effect of such an order on incentives of the owner of a key facility to invest in future infrastructure improvements. For example, a duty to provide access to competing firms can deter initial investment in a key facility. Alternative ownership structures for the key facility may help to reduce disincentives to invest in key infrastructure improvements and expansions.

- (6) *Simply imposing a contractual obligation to offer equal access to transportation infrastructure could be insufficient to ensure equal access on reasonable terms if the owner of the essential facility has incentives and the ability to discriminate or to indirectly deny access to entrants and existing competitors.*

Access can be the subject of subtle forms of discrimination that are difficult to detect and document. Case law and regulatory proceedings have detailed a wide variety of behavior that dilutes the effectiveness of obligations to offer equal access. The background paper and roundtable discussion highlight several examples:

- In ferry boat service, the incumbent undermined the ability of the entrant to operate. It scheduled its own service to disrupt the loading and unloading of passenger by the entrant. In another case, a firm interested in entering was denied access to the existing harbour facility, but then found its efforts to construct a new harbour were blocked by government on behalf of the incumbent.
- In the shipping industry, an entrant seeking to provide port services was able to obtain permission to offer services, but then was denied access to the incineration facility necessary to offer port services.
- In the bus industry, a rival firm was required to use the ticketing system of the incumbent, but the incumbent delayed passing on the ticket revenues to the entrant.
- In the airline industry, the space within the airport designated for the entrant was as far as possible from the airport entrance.
- In the electric power industry, transmission owners employed more subtle and difficult to document forms of discrimination against independent generators when behavioral rules against transmission discrimination were put in place.

Structural changes that reduce incentives to discriminate, such as vertical separation, should be considered as an alternative or supplement to behavioral rules or contractual obligations.

(7) *There are four potentially worthwhile, but less commonly used, approaches for providing access to entrants and other suppliers who do not own the essential facility at the onset.*

Four additional approaches to providing access are:

- contracts for shared operating and expansion rights;
- club ownership;
- auctioning or trading of access rights; and
- customer vertical integration for a portion of a key facility.

Advantages and potential drawbacks of these approaches were explored in the background paper and roundtable discussion. For example:

- Sharing a local natural gas distribution network can be successful, but it requires detailed agreements on discrimination and potential expansions of service for customers of the entrant.
- An expert, neutral third party can be an attractive approach for monitoring the agreement and settling disputes.
- Club ownership can promote both efficient pricing and shared access, but can fail to accommodate entrants because the incumbents share an interest in excluding them.

- Auctioning or trading of landing rights at airports promotes efficiency by shifting capacity to the user with the highest value, but the mechanics of coordinating auction results for both the originating and destination facilities raises difficulties.
- Vertical integration by customers responsible for a portion of an essential facility can alleviate the issue of a single owner seeking to discriminate, but there may be difficulties in coordinating the operating and maintenance decisions so that the facility as a whole operates efficiently and so that it is maintained adequately despite the diverse maintenance incentives of the users of the facility.

All of these options warrant careful consideration when competition authorities are designing remedies to ensuring access to key infrastructure for entrants and incumbent suppliers seeking to expand.

(8) *New essential facility access issues can arise when a transportation industry is restructured through corporatisation and privatization.*

In economies moving toward a market orientation, essential facilities access issues may have been dormant because state ownership precluded competition or imposed access through compulsion. Once private ownership and competition arise in a market setting, the individual incentives of enterprises can come to the surface---including incentives to discriminate against competitors seeking access to an essential facility. Competition authorities in these countries can avoid harm to consumers and to competition by anticipating where essential facilities issues are likely to arise and to harm consumers. The agency can seek to coordinate with a sector regulator or privatization agency in order to remedy potential, essential facility access issues before harm is done.

SYNTHÈSE

Par le Secrétariat

Plusieurs idées dominantes se dégagent de la discussion qui a eu lieu lors de la Table ronde, des contributions des délégués et du document de référence.

- (1) *Les nouveaux entrants sur les marchés des transports ont souvent besoin d'accéder aux infrastructures de base. Les politiques publiques concernant l'accès aux infrastructures peuvent donc constituer un élément essentiel des conditions d'accès.*

Parmi les principaux exemples que l'on peut donner des infrastructures de base, on peut citer les aéroports pour les marchés du transport aérien, les ports pour les marchés des services de transport maritime et de ferry, les voies ferrées pour les marchés des transports ferroviaires et les gares routières pour les marchés de transport par autocar/autobus. Il y a lieu de noter que certaines installations qui sont essentielles au fonctionnement d'un mode particulier de transport peuvent ne pas constituer des « installations essentielles » au sens de la politique de la concurrence dans la mesure où ce mode de transport se trouve en concurrence sur les marchés de transport multimodaux.

- (2) *Les difficultés d'accès aux infrastructures de base varient selon qu'il existe ou non d'importantes économies résultant de l'intégration verticale qui pourraient rendre inefficace ou risqué le partage de l'utilisation d'infrastructures avec des fournisseurs indépendants en amont ou en aval. Les capacités disponibles ou les conditions de coût et de délai requises pour l'adjonction d'infrastructures additionnelles peuvent également influencer sur la facilité d'accès aux infrastructures de base.*

Dans le secteur des transports, les caractéristiques géographiques ou les règles d'urbanisme obligent souvent les entreprises d'un secteur à utiliser un seul terminus pour desservir chaque centre urbain. Des économies d'échelle et de gamme dans les installations d'exploitation peuvent également contribuer à l'incitation à utiliser un terminus unique dans chaque zone métropolitaine. Cependant, contrairement au cas d'autres marchés, les économies d'échelle et de gamme en matière d'installations de terminaux de transport ne sont pas nécessairement liées à des économies déterminantes liées à l'intégration verticale pour l'utilisation de l'installation. Par conséquent, assez souvent, il est possible que des entreprises opérant en amont et en aval partagent l'utilisation de l'installation. Ce n'est cependant pas toujours le cas, comme le montrent certaines préoccupations de sécurité évoquées au sujet du secteur des transports ferroviaires au Royaume-Uni.

Des problèmes d'accès peuvent également se produire même si les entreprises partagent généralement une installation lorsque la capacité disponible est déjà entièrement utilisée par les fournisseurs en place. Dans ces situations, les problèmes d'accès peuvent être particulièrement épineux à moins que l'équipement de base ne puisse être développé rapidement et à un faible coût sur ordre des nouveaux entrants ou des fournisseurs en place qui cherchent à se développer.

- (3) *Les décisions publiques concernant l'accès aux infrastructures de base sont les plus complexes et pourraient être pourtant les plus fructueuses compte tenu des conditions dans lesquelles la théorie des installations essentielles à pris naissance.*

Les questions d'accès sont les plus complexes et les plus importantes du point de vue de la concurrence lorsque :

- L'absence d'accès à une installation imposerait un handicap important en termes de coût à tout fournisseur sur le marché ;
- Cette absence d'accès pour un ou plusieurs fournisseurs causerait un préjudice aux consommateurs ;
- La capacité offerte par l'installation est limitée ;
- Le développement de cette installation n'est pas suffisamment rapide et l'accès (ou le repositionnement du produit) est difficile ;
- L'accès à l'installation ne donne pas lieu à des économies déterminantes liées à l'intégration verticale (en termes d'efficacité ou de sécurité), à l'échelle ou à la gamme : et
- Il est possible de modifier l'affectation des capacités d'infrastructure existantes entre des fournisseurs indépendants d'une manière qui soit profitable aux consommateurs.

Telles sont les conditions dans lesquelles la théorie des installations essentielles a pris naissance et dans lesquelles elle est le plus couramment appliquée. Le système en vigueur en Australie, qui consiste à prendre les décisions d'accès en suivant une procédure réglementaire met également l'accent sur ces conditions.

- (4) *Lorsque les conditions ci-dessus sont réunies, la formule de l'obligation d'accès reposant sur la théorie des installations essentielles peut être préférable à la réglementation d'un monopoleur verticalement intégré bénéficiant d'une concession.*

L'obligation d'accès reposant sur la théorie des installations essentielles peut être préférable à la réglementation d'un monopoleur intégré, dans la mesure où la formule de l'obligation d'accès peut permettre de mettre à profit l'aiguillon de la concurrence pour réduire les prix, améliorer la qualité et innover sur les marchés en amont et en aval.

Si les décideurs considèrent l'obligation d'accès comme un substitut à une réglementation détaillée d'un monopole naturel, cela leur offre la possibilité d'examiner les coûts et avantages à long et à court terme des deux formules. La diminution à long terme des incitations à réduire les coûts et à innover qui correspond souvent à la réglementation peut rendre la formule de l'accès obligatoire plus attrayante. Cela résulte du fait que l'obligation d'accès peut permettre un fonctionnement concurrentiel des marchés correspondants en amont et en aval et préserver par conséquent les incitations correspondantes à abaisser les prix, améliorer la qualité et à innover.

- (5) *La nécessité de maintenir des incitations suffisantes à l'investissement en infrastructures doit être pleinement prise en compte dans la mise en œuvre de politiques d'accès aux installations essentielles ou de formules alternatives.*

L'un des principaux problèmes à prendre en compte dans l'instauration d'une obligation d'accès est l'effet négatif potentiel d'une telle décision sur l'incitation, pour le propriétaire d'une

installation essentielle, à investir à l'avenir dans l'amélioration des infrastructures. Par exemple, l'obligation de fournir l'accès aux entreprises concurrentes peut avoir un effet dissuasif sur l'investissement initial dans une installation essentielle. L'application d'autres régimes de propriété à ces installations pourrait contribuer à atténuer cet effet dissuasif sur l'investissement dans l'amélioration et le développement des infrastructures essentielles

- (6) *Le simple fait d'imposer une obligation contractuelle d'offrir un accès égal aux infrastructures de transport risque d'être insuffisant pour assurer un accès égal dans des conditions acceptables si le propriétaire d'une installation essentielle est incité à opérer une discrimination à l'encontre des nouveaux entrants et des concurrents existants ou à leur refuser indirectement l'accès et s'il a la capacité de le faire.*

L'accès peut faire l'objet de formes subtiles de discrimination qui sont difficiles à détecter et à prouver. La jurisprudence et la procédure réglementaire ont fait apparaître des comportements très divers qui ont pour effet de diluer l'efficacité des obligations d'offrir un égal accès. Le document de référence et les discussions qui ont eu lieu au cours de la Table ronde font apparaître plusieurs exemples :

- Dans le cadre de services de transport par ferry, l'entreprise en place a entravé le fonctionnement du nouvel entrant. Elle a organisé ses propres services de manière à entraver les opérations d'embarquement et de débarquement de passagers effectuées par l'entrant. Dans un autre cas, une société désireuse d'accéder au marché s'est vu refuser l'accès aux installations portuaires existantes mais elle a ensuite constaté que ses efforts en vue de construire un nouveau port étaient bloqués par le gouvernement pour le compte de l'entreprise déjà en place.
- Dans le secteur des transports maritimes, un entrant qui cherchait à fournir des services portuaires a été en mesure d'obtenir l'autorisation d'offrir ces services, mais il s'est vu refuser l'accès aux installations d'incinération nécessaires pour les fournir.
- Dans le secteur des transports par autocar/autobus, une entreprise concurrente a été obligée d'utiliser le système de distribution de billets de l'entreprise en place mais celle-ci a tardé à reverser les recettes de la vente de billets au nouvel entrant.
- Dans le secteur des transports aériens, l'espace attribué à un nouvel entrant au sein de l'aéroport se trouvait aussi loin que possible de l'entrée de l'aéroport.
- Dans le secteur de la distribution de l'électricité, les propriétaires de lignes de transports utilisaient des formes de discrimination plus subtiles et plus difficiles à prouver à l'encontre des producteurs indépendants lorsque des règles de comportement destinées à lutter contre les discriminations dans le transport sont entrées en vigueur.

Des réformes structurelles réduisant l'incitation à la discrimination, telles que la séparation verticale, devraient être considérées comme une solution alternative ou complémentaire à des règles de comportement ou à des obligations contractuelles.

- (7) *Il existe quatre approches potentiellement intéressantes mais moins couramment utilisées pour fournir l'accès aux entrants et autres fournisseurs qui ne sont pas propriétaires de l'installation essentielle au départ.*

Les quatre approches additionnelles de la fourniture d'accès sont les suivantes :

- contrats pour le partage de droits d'exploitation et de développement ;
- participation à un club ;
- adjudication ou négociation de droits d'accès ; et
- intégration verticale des clients pour une partie d'une installation essentielle.

Les avantages et inconvénients potentiels de ces approches ont été examinés dans le document de référence et au cours de la Table ronde. Par exemple :

- La mise en commun d'un réseau local de distribution de gaz naturel peut être efficace mais elle nécessite des accords détaillés sur la discrimination et le développement potentiel des services aux clients de l'entreprise entrante.
- Le recours à un expert indépendant et neutre peut constituer une méthode prometteuse pour le suivi de l'accord et le règlement des différends.
- La participation à un club peut permettre de promouvoir à la fois une fixation efficace des prix et le partage de l'accès mais n'est peut-être pas satisfaisante pour les entrants, dans la mesure où les entreprises déjà en place ont un intérêt commun à les exclure.
- L'adjudication ou la négociation de droits d'atterrissage dans les aéroports permet de promouvoir l'efficacité en mettant les capacités à la disposition de l'utilisateur le plus offrant mais les mécanismes de coordination des résultats de l'adjudication, aussi bien pour les installations d'origine que pour celles de destination, présentent des difficultés.
- L'intégration verticale des clients responsables d'une partie d'une installation essentielle peut permettre d'atténuer les problèmes posés par l'existence d'un propriétaire unique qui s'efforce de pratiquer des discriminations, mais il peut être difficile de coordonner les décisions d'exploitation et d'entretien de manière que l'installation dans son ensemble fonctionne efficacement et qu'elle soit entretenue de manière appropriée malgré les divergences d'objectifs de ses utilisateurs.

Toutes ces options méritent d'être examinées avec soin lorsque les autorités de contrôle de la concurrence conçoivent des mesures permettant l'accès aux infrastructures essentielles pour les nouveaux entrants et les fournisseurs en place qui cherchent à se développer.

(8) *De nouveaux problèmes d'accès aux installations essentielles peuvent se poser lorsqu'un secteur de transport est restructuré par la constitution en société et la privatisation.*

Dans les économies qui s'efforcent de faire jouer davantage les mécanismes du marché, des problèmes d'accès aux installations essentielles peuvent être restés latents du fait que la propriété de l'Etat empêchait la concurrence ou imposait l'accès par la contrainte. Dès lors que la propriété privée et la concurrence s'imposent dans le cadre d'une économie de marché, les incitations individuelles des entreprises peuvent réapparaître – et notamment l'incitation à opérer des discriminations à l'encontre des concurrents qui cherchent à accéder à une installation essentielle. Dans ces pays, les autorités de contrôle de la concurrence peuvent éviter de porter préjudice aux consommateurs et à la concurrence en prévoyant les cas dans lesquels des problèmes d'accès aux installations essentielles risquent de se poser et d'être dommageables pour les consommateurs. L'autorité de contrôle de la concurrence peut s'efforcer de coordonner

son action avec celle d'une autorité chargée de la réglementation d'un secteur ou de la privatisation afin de remédier aux problèmes potentiels d'accès aux installations essentielles avant qu'un préjudice soit causé.

BACKGROUND NOTE¹

1. Introduction and Summary

1.1 Overview and Organisation

Several transportation industries involve stages of production that involve use of uniquely situated capital intensive facilities and these facilities may not be easily or quickly expanded to meet increased demand. Examples of such facilities include: ports, pipelines, airports, railway infrastructure and electricity grids. Access by multiple suppliers to such infrastructure may be important in fostering competition and consumer welfare if competition from other modes of transportation is limited. At least for some period of time, such facilities can be effectively natural monopolies.² As a result, questions may arise about how to treat this temporal natural monopoly.³ Although regulation of a franchised monopoly is a common policy approach to natural monopoly, under some circumstances, allocating access to this transportation infrastructure for independent downstream or upstream firms may allow competition that benefits consumers. In other instances, strong economies of vertical integration may make access by independent suppliers problematic or it could harm consumers in the long run by discouraging efficient investment in the infrastructure.

This paper finds: (1) Access problems may be particularly severe in seemingly minor affiliated services for which policy makers have not provided full access rights. For example, ports may grant dock access to ships that do not use the port as a provider of services but then refuse access to the port's incinerators which are, by regulation, required for disposal of a ship's waste. (2) At times, investment can be retarded or deterred because of access policies, notably because of a lack of certainty about future access obligations. Certain facilities may be built as a result of a long-term fixed quantity supply contract (e.g. Liquefied Petroleum Gas terminals) but would not naturally be built with excess capacity for use by third parties unless third parties participated in the initial financing and construction of the terminal. Therefore policy makers need to make efforts to ensure that sufficient certainty exists over future access

¹ This paper was prepared by John Hilke.

² A natural monopoly occurs when one firm can produce the socially optimal output at a lower cost than two or more firms. A natural monopoly may be sustainable or unsustainable. A sustainable natural monopoly generally has decreasing average costs over the whole relevant range of output. An unsustainable natural monopoly has increasing average costs over part of the socially optimal level of output. This condition makes it vulnerable to entry by a firm producing at the level of output at which average cost is minimised. This, however, is less than the socially optimal level of output. Government may have to restrict entry to preserve an unsustainable natural monopoly. OECD, "Natural Monopoly and Entry," Appendix 2, "Background Note, Roundtable on Non-Commercial Service Obligations and Liberalization," (October 2003), pp. 48-51, available at www.oecd.org/dataoecd/43/35/33691140.pdf, and John C. Hilke and Michael G. Vita, "Statement of FTC Staff" in *Monopoly Theory Inquiry*, Docket No. RM89-4, Washington, D.C.: U.S. Postal Rate Commission, November 1989, pp. 357-390.

³ When a natural monopoly is likely to be temporary, it may not be feasible or worthwhile to establish a regulatory regime to address the associated market power concerns, even if the harm of the unregulated natural monopoly is substantial. However, net benefits to consumers could be available through another less costly or quicker type of intervention such as providing access to the natural monopoly at rates less than the monopoly's profit maximising price. Doing so might also promote innovation and quality improvements in upstream and downstream markets that might not occur without access to the natural monopoly stage of production at the lower prices.

requirements that beneficial investment is not deterred. To the extent that additional costs arise for a facility owner in order to ensure access is possible, the facility owner should not be forced to bear all such costs. (3) Finally, the report finds that great care should be taken to enhance competition when incumbent firms, such as airlines at many airports, have an ability to veto facility expansions (potentially paid for by the entrant or an investor) that would increase competitor access to the facility.

This background paper focuses on the practicalities of requiring access for rival firms to essential transportation infrastructure when:

- The facility is capacity constrained;
- The facility is not subject to timely expansion and/or entry;
- Use of the facility is not subject to compelling economies of vertical integration (efficiency or safety), scale, or scope;
- It is feasible to reallocate use of the facility among competing upstream or downstream suppliers.

These conditions, particularly the last three, are those in which requiring access to such transport facilities may have the most beneficial effects. When the facility is capacity constrained, the problem of how to provide access becomes more complex.

For purposes of this paper, essential transportation infrastructure means that supplying a mode of transportation service is substantially more difficult without access to this infrastructure and that a monopolist owner of this infrastructure would find it profitable to impose at least a small but significant non-transitory price increase above the competitive level for access to this infrastructure. Alternatively stated, a firm owning the infrastructure must have substantial market power for the facility to be deemed an essential facility. If the firm owning the facility also operates in upstream or downstream markets, it would be competing with its customers in using the facility. This could give the owner incentives and the ability to discriminate against its customers in favour of its own upstream or downstream affiliates if it cannot maximise its profits solely through the pricing of access to the facility.

The four conditions listed above coincide with the conditions in which the essential facilities doctrine and related access remedies are likely to make the most economic sense and are least likely to conflict with other policy objectives.⁴ The background paper will not generally address industries in which natural monopoly conditions persist at every stage of production or in which complete vertical integration provides compelling efficiency or safety advantages. Neither will it cover the complex trade offs regarding infrastructure access in the presence of substantial network externalities⁵ or intellectual property (IP). Some

⁴ For discussion of the essential facilities doctrine in general, see, for example, Robert Pitofsky, Donna Patterson and Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), pp. 443-462; Abbott B. Lipsky Jr. and J. Gregory Sidak, "Essential Facilities," *Stanford Law Review* 51:5 (May 1999), pp. 1187-1248, and American Bar Association Sections on Antitrust Law, Intellectual Property and International Law and Practice, "Comments on the Report of the Study Group on the Antimonopoly Act of Japan" (30 January 2004), available at www.abanet.org/intelprop/Advocacy/joint_comments.pdf, and citations therein.

⁵ See Paul L. Joskow and Roger G. Noll, "The Bell Doctrine: Applications in Telecommunications, Electricity, and other Network Industries," *Stanford Law Review* 51:5 (1999) and Joseph Farrell and Philip J. Weiser, "Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age," Competition Policy Center, University of California, Berkeley, CPC02035 (2003), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?>

examples from network or IP industries may be used, however, to illustrate more general points.⁶ The emphasis will be on transportation infrastructure operators facing regulatory or contractual obligations to allow access by unaffiliated suppliers, particularly access issues and approaches that have not been extensively treated in previous roundtables. The emphasis will not be on situations in which complete vertical unbundling has been determined to be the only practical remedy. Examples discussed in the background paper are drawn from the air travel, shipping, pipeline, highway, railroad, and bus industries. Fresh essential facilities disputes may arise when such facilities are privatised because the new private owners have incentives to deny access or discriminate that were often limited by the fact of state ownership and by a state enterprise's obligation not to discriminate.⁷

This paper proceeds with a review of the essential facilities literature (Section II.) because it is the principle policy instrument used to require access to transportation infrastructure. This is followed by a discussion and examples of difficulties in providing competitive access to transportation infrastructure (Section III) focused on identifying essential facilities access problems; incentives to discriminate in providing access to essential transportation infrastructure; potential complexities in the terms of access agreements, issues in monitoring compliance with access agreements or orders; potential difficulties in adjusting access for competing firms. The final section (Section IV) presents examples of competitive access approaches that have reportedly been successfully applied, at least in part.

article=1033&context=iber/cpc. See Adam Thierer and Clyde Wayne Crews, Jr., *What's Yours Is Mine: Open Access and the Rise of Infrastructure Socialism*, Cato Institute (2003) for a critique of open access policies, including the essential facilities doctrine, using examples of industries with network economies.

⁶ For a discussion of recent perceived tensions between European essential facilities cases involving IP, see Valentine Korah, "The Interface between Intellectual Property and Antitrust: The European Experience," *Antitrust Law Journal* 69:3 (2002), pp. 801-839, and Latham and Watkins, LLP, "Essential Facilities: A Doctrine Clearly in Need of Limiting Principles," Bulletin No. 470 (5 August 2005) available at www.lw.com/resources/Publications/ClientAlerts/clientAlert.asp?pid=1325. Also see, more generally, Abbott B. Lipsky Jr. and J. Gregory Sidak, "Essential Facilities," *Stanford Law Review* 51:5 (May 1999), pp. 1187-1248, Sections II.E. and III. The Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property (1995, reprinted in 4 Trade Reg. Rep. (CCH) par. 13.132) indicate that "the Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property." It is noteworthy that although the essential facilities doctrine developed first with respect to railroads (U.S. v Terminal Railroad Association of St. Louis, 224 U.S. 383 (1912) and David Reifen and Andrew Kleit, "Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly," FTC Bureau of Economics working paper #172 (1989)), its most widely publicized applications in recent years have been outside of transportation in sectors where network effects and intellectual property rights are important elements. See Robert Pitofsky, Donna Patterson and Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), pp. 443-462, Section III, and James Turney, "Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: the Primacy of Securing Optimal Innovation," *Northwestern Journal of Technology and Intellectual Property* 3:2 (Spring 2005), available at www.law.northwestern.edu/journals/njtip/v3/n2/5/. Arguably there is some risk that opposition to the application of the essential facilities doctrine in network industries and IP cases will develop into opposition to the concept more generally. The above cited Thierer and Crews (2003) publication is an example of such generalization.

⁷ See, for example, John Anderson (Acting Prime Minister) Media Release, "Anderson Guarantees No Trickery on Regional Airline Access to Sydney Airport in Peak Periods" (11 January 2001) available at www.ministers.dotars.gov.au/ja/releases/2001/january/a7_2001.htm; and James Turney, "Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: the Primacy of Securing Optimal Innovation," *Northwestern Journal of Technology and Intellectual Property* 3:2 (Spring 2005), available at www.law.northwestern.edu/journals/njtip/v3/n2/5/. Under Article 86 of the EC Treaty, utilities have a duty to act impartially.

1.2 *Executive Summary of Key Findings:*

The following is a list and summary discussion of key findings from the background paper.

- Access requirements from a competition policy perspective are most relevant in the transportation sector when:
 1. Lack of access to a facility would impose a substantial cost disadvantage on any suppliers in the market.
 2. Such a lack of access for one or more suppliers would harm consumers.
 3. Capacity is constrained.
 4. The facility is not subject to timely expansion and entry (or product repositioning) is difficult.
 5. Access to the facility is not subject to compelling economies of vertical integration (efficiency or safety), scale, or scope.
 6. Changes are feasible in the allocation of existing infrastructure capacity to and among independent suppliers that will benefit consumers.
- When these conditions are absent, there generally is not an access problem that is likely to harm consumers or if there is a problem, providing access could harm consumers. When they are present, requiring access through use of the essential facilities doctrine may be attractive compared to regulation of a franchised, vertically integrated monopolist because an access remedy can harness the incentives of competition to reduce prices, increase quality, and innovate in the upstream and downstream markets.
- When the firm(s) with control over an essential facility provide complementary services that rely on the facility, access policies are a potential substitute for other remedies. Even under the limited circumstances listed above, regulation or restructuring may be preferable policies if they are more effective in maintaining investment incentives or they have lower administrative costs. For example, vertical separation will remove incentives to discriminate against independent upstream or downstream firms and is likely to be more effective than access rules in preventing discrimination. Vertical separation is likely to be easier before privatisation takes place rather than after. A cost/benefit framework is appropriate for determining which, if any, potential remedies yield net consumer and efficiency benefits.
- Maintaining incentives to invest in essential infrastructure should be a major consideration in developing essential facilities access policies or substitute policies. Policy makers should be particularly sensitive to imposing access or investment obligations on private owners of essential facilities that could drive such firms out of business or create inefficient investment incentives. One way to help maintain the investment incentives of the facility owner is to require independent users to pay for the costs of investments in the facility that benefit them. An obligation on the owner of an essential transportation infrastructure facility to serve upstream or downstream firms generally should not translate into an obligation to invest in serving these customers without compensation.
- The justification for application of access policies or substitute remedies in essential facilities situations is strongest when substantial harm to consumers results from access denial and when

the government financed, facilitated, acquiesced in arranging or created the natural monopoly facility or conditions.

- The presence of a contractual obligation to offer equal access to transportation infrastructure facilities could be insufficient to ensure equal access at reasonable terms if the owner of the essential facility has incentives and the ability to discriminate or indirectly deny access. Competition agencies or others will often need to monitor compliance and compel compliance in a timely matter.
- Challenges for effective access policies include separating valid essential facilities access situation from other claims about access; identifying incentives and the ability to deny or discriminate in granting access; determining efficient terms of access, monitoring compliance with access obligations and developing efficient methods to reallocate access between interested suppliers and to expand essential facilities.
- Potentially worthwhile, but less common access approaches include contracts for shared operating and expansion rights, club ownership, auctioning or trading of access rights and vertical integration by customers. Policy makers should recognise and consider these alternatives when issues involving access to an essential transportation infrastructure facility arise based on their respective benefits and costs to consumers. New essential transportation facilities access issues are particularly likely to arise when a transportation industry is restructured through corporatisation and privatisation.

2. Background on the Essential Facilities Doctrine and Recent Developments

The essential facilities doctrine is the most commonly used policy instrument for requiring access to privately owned transportation infrastructure. Although it was first articulated with respect to transportation infrastructure nearly 100 years ago, the essential facilities doctrine remains a source of controversy among economists and policy makers. Application of the doctrine to intellectual property matters and network industries has been intensely debated in the past decade. As a result of the controversies, articulation and application of the doctrine continues to evolve. This section reviews the doctrine and updates the 1996 roundtable on the subject. The updates include court cases from the U.S. and Europe. Australia's administrative approach to essential facilities issues is also discussed.

2.1 General Background

Definitions of an essential facility vary in the economic and legal literatures.⁸ One view is that an essential facility is a scarce resource that a rival needs to use in order to survive.⁹ The definition used in this paper is somewhat different. A facility is essential if it is substantially more costly to supply a market without access¹⁰ and if a monopolist facility owner would find it profitable to impose at least a small but

⁸ Robert Pitofsky, Donna Patterson and Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), pp. 443-462, at fn 1, citing Phillip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," *Antitrust Law Journal*, 58 (1989), pp 841 and 852.

⁹ Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* 3rd Ed. (2000), p. 634.

¹⁰ For a similar definition, see *Hecht*, 570 F.2d at 992-93, cited in Robert Pitofsky, Donna Patterson and Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), fn 24. "To be essential, a facility need not be indispensable, it is sufficient if duplication of the facility would be economically infeasible and if denial of it use inflicts a severe handicap on potential market entrants." Also see, Abbott B. Lipsky Jr. and J. Gregory Sidak, "Essential Facilities," *Stanford Law Review* 51:5 (May 1999), pp. 1187-1248, at 1203-1205.

significant non-transitory price increase above the competitive level for access to this infrastructure. The second definition differs from the first in two important respects. Firstly, it requires that the facility be essential for operating in a market, not just a line of business. Hence, if intermodal competition is intense, a facility that is essential for one mode would not be essential for serving the market. There remains a question about a facility that is essential to provide localised competition within a market, but is not essential for serving that market generally. This issue parallels the concern about loss of localised competition (localised market power) when a horizontal merger occurs between the closest competitors in a market with differentiated products. Secondly, it does not require that lack of access be fatal. It only requires that lack of access results in substantially higher costs or inferior service. The second element helps to avoid inconsistencies in identifying essential facilities. For example, if access to the infrastructure provides a 40% cost advantage and survival is used as the definition, then the infrastructure would be judged to be essential if the owner charged less than a 40% price premium above the costs to competitors. But it would not be essential if the owner charged more than a 40% price premium because some rivals without access could survive under the latter circumstance. At the same time, the definition used in this paper leaves the threshold open for finding a “substantial cost disadvantage.”

Essential facilities cases have been described by some economists as a subset of vertical refusal to deal cases.¹¹ In a vertical refusal to deal matter, one or more parties either completely refuses to do business with one or more other parties (despite the desire of the latter to do business with the former), or the former agrees to do business only on terms that have an effect similar to a refusal to deal. For example, the access price for critical infrastructure could be set above the price that maximises profits in that market alone. However, the price could be profit-maximising for the owner of the essential facility in a multi-market setting because it prevents the growth of competition in other markets.

Another interpretation is that access cases arise as a substitute for regulation of a natural monopoly or as a substitute for structural remedies, primarily unbundling, when a natural monopoly is vertically integrated with stages of production that are potentially competitive. In a natural monopoly setting, social cost is minimised when only a single firm supplies the good or service and this firm is efficient. In an infrastructure natural monopoly situation of the greatest interest here, the facility itself is a natural monopoly, but the use of it is not. Opening access in these circumstances can successfully substitute for regulation of use of the facility if competition between users is effective enough to prevent exercise of market power. Open access may not be a good substitute for regulation of the facility itself, however, because the owner of the facility might be able to exercise market power by increasing the price of access above the competitive level. Similarly, access requirements can be a substitute for full divestiture of a natural monopoly facility by the vertically integrated supplier. In this case, the access creates an opportunity for downstream (or upstream) firms to enter. The market power of the vertically integrated firm may be dissipated if competition in the potentially competitive downstream (or upstream) markets erodes market power from owning the infrastructure facility (e.g., access of mobile phone networks to wireline networks may potentially erode some of the market power of the wireline network) or if access rates for the infrastructure facility are constrained to a level that is less than the profit maximising price. Long-term contractual terms or regulation, for example, could provide such constraints.

¹¹ Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* 3rd Ed. (2000), p. 633-635.

Some commentators decry viewing the essential facilities doctrine in this manner.¹² However, there are important examples where it is difficult not to view essential facilities cases from this perspective. For example, the original essential facilities case, *Terminal Railroad*,¹³ offered the courts an opportunity to break up the mergers that had created the access issue. But they chose to order access instead.¹⁴ In *Otter Tail Power*,¹⁵ the court understood that the sector regulator could institute an open regulatory requirement, but chose to order access on the basis of antitrust concerns. In the *AT&T* case,¹⁶ the Department of Justice concluded that access regulation was not sufficient to prevent discrimination and, therefore, pursued structural unbundling remedy. The Justice Department did not press the courts for an essential facilities remedy with a judicial access order.¹⁷ In *Trinko*,¹⁸ the court ruled that since regulators were addressing the access issue, there should be no additional antitrust liability.

Yet another interpretation of some essential facilities cases is that they are a substitute for litigation based on theories of deception or breach of an implicit contract. For example, in *Kodak*, the firm refused to continue supplying parts to its downstream competitors who also repaired and serviced Kodak copiers and printers. But the harm to consumers arguably stemmed not from this policy, but from the “hold up” or “lock in” effects—service competition was eliminated after many consumers had purchased Kodak machines with the expectation that service competition for Kodak machines would continue.¹⁹ A reasonable assumption, and one that could be investigated empirically, is that if Kodak had disclosed the risk that it would eliminate service competition, many consumers would not have purchased the Kodak machines to begin with. They would have switched to other machines with lower expected service costs. Note that because it did not disclose this risk, Kodak could be viewed as having an implicit contract with consumers stating that it would continue to allow competition in servicing Kodak machines. Note also that owners of Kodak machines could not readily resell their machines without a loss because buyers of used machines are aware of the new, higher service prices for Kodak machines, and that self-service may not be

¹² See, for example, Dennis Carlton, “A General Analysis of Exclusionary Conduct and Refusal to Deal—Why *Aspen* and *Kodak* Are Misguided,” *Antitrust Law Journal* 68:3 (2001), pp. 659-683. In this treatment, Carlton maintains that the antitrust essential facilities doctrine should not be viewed as an appropriate substitute for regulation of natural monopolies. He also acknowledges that recent dynamic models show how under certain circumstances a monopoly at one stage of production can create or protect additional upstream or downstream market power, but he concludes that it is extremely difficult to distinguish such cases from other refusals-to-deal situations that he believes generally benefit consumers. For a positive view of the essential facilities doctrine that includes viewing it as a remedy in natural monopoly situations, see Robert Pitofsky, Donna Patterson and Jonathan Hooks, “The Essential Facilities Doctrine Under U.S. Antitrust Law,” *Antitrust Law Journal* 70:2 (2002), pp. 443-462.

¹³ *United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912).

¹⁴ David Reiffen and Andrew Kleit, “Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly?” Federal Trade Commission, Bureau of Economics Working Paper 172 (April 1989).

¹⁵ *Otter Tail Power Co. v United States*, 410 U.S. 366, 377-79 (1973).

¹⁶ The case was filed as *United States v. Western Electric*, 569 F. Supp 990 (D.D.C. 1983).

¹⁷ Paul L. Joskow and Roger G. Noll, “The Bell Doctrine: Applications in Telecommunications, Electricity, and other Network Industries,” *Stanford Law Review* 51:5 (1999), and William F. Baxter, “Conditions Creating Antitrust Concerns with Vertical Integration in Regulated Industries---‘For Whom the Bell Doctrine Tolls’” *Antitrust Law Journal* 52 (1983), pp. 243-247.

¹⁸ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 682, (2004).

¹⁹ Plaintiffs described their monopolization theory as “installed base opportunism.” The economics of the Kodak case are discussed in Steven C. Salop, “The First Principles Approach to Antitrust, *Kodak*, and Antitrust at the Millennium,” *Antitrust Law Journal* 68:1 (2000), pp. 187-202.

effective and also requires purchasing replacement parts from Kodak. Continued competition in the primary market (for new machines or used machines) would not be sufficient to protect consumers in the secondary market who had previously purchased a Kodak machine.

Not all essential facilities matters involve a bottleneck at one stage of production that creates market power at other stages of production in the same industry.²⁰ For example, if products are differentiated and consumers have diverse tastes or enjoy variety, they may prefer to buy a bundle of products from a supplier that includes products of rival firms.²¹ If so, being able to offer such a bundle may be essential or at least very important to the survival of one or more firms in the market. However, a less vulnerable rival firm may cease offering its products for such bundled sales, even if it is profitable to do so. The firm has a strategic incentive to cease to allow bundling of its products with a rival if it believes that so doing will reduce future competition from its rivals by weakening them or driving them out of business. In this essential facilities scenario, no vertical relationships are involved. Consumers would be harmed by elimination of a bundled product that they prefer.

The consumer welfare effects²² of essential facilities cases depend on specific facts in each matter and details of the remedies applied.²³ This is not surprising given the variation in demand between industries and the variations in welfare effects believed to be associated with vertical restraints²⁴ that are common in essential facilities cases.

A benefit/cost analysis of access requirements from a consumer welfare and societal efficiency perspective must also include evaluation of the administrative and transactions costs of requiring access to transportation infrastructure, including those of alternative remedies. These costs could be substantial,

²⁰ Some U.S. commentators on the essential facilities doctrine have maintained that it pertains only to vertical bottleneck situations. For example, Phillip Areeda and Herbert Hovenkamp, *Antitrust Law* (1996), Vol. IIIA, par. 771.a, states: "It should be clear from the outset 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...with someone operating in an upstream or downstream market."

²¹ This is the fact pattern in the U.S. Supreme Court decisions in *Aspen Skiing Co v. Aspen Highlands Skiing Corp.* 472 U.S. 585, 602 (1985). Customers are likely to enjoy skiing on a variety of terrains and conditions and they may be uncertain about which terrains will be the most enjoyable under different weather conditions (these also vary). By buying a ski pass that bundles access to resorts belonging to more than one firm, customers improve the likelihood of having the best skiing experience given their differing personal tastes and abilities. *Associated Press*, 326 U.S. 1 (1945) also largely involved horizontal relationships, rather than vertical relationships. This case focused on a provision in the organisation's bylaws that allowed any existing newspaper member to veto an application, including an application of a rival newspaper entrant. See Abbott B. Lipsky Jr. and J. Gregory Sidak, "Essential Facilities," *Stanford Law Review* 51:5 (May 1999), pp. 1187-1248, at Section I.B.

²² Competition agencies have generally embraced consumer welfare as their primary objective. In some instances, however, producer or total welfare effects may conflict with consumer welfare effects. In examining welfare effects of transportation infrastructure access, it is important to keep this potential difference in mind and to be aware of potential tradeoffs between them. For a discussion of the use of a total welfare objective in antitrust merger analysis, see Margeret Sanderson, Bureau of Competition Policy, Canada, "Efficiency Analysis in Canadian Merger Cases: Remarks Prepared for the Federal Trade Commission Hearing on Global and Innovation-Based Competition," (2 November 1995), available at <http://www.ftc.gov/opp/global/sandersn.htm>.

²³ See, for example, Axel Gautier and Manipushpak Mitra, "Regulation of an Open Access Essential Facility," (August 2003), available at http://idei.fr/doc/conf/rai/papers_2003/maxel.pdf.

²⁴ Thomas R. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence*, Federal Trade Commission Staff Report (November 1983).

particularly where there are factual disputes and the owners of such facilities have incentives to continue to exclude all or some other users. Where the incentives to exclude other users are selective, regulators or courts are likely to face the added costs and uncertainty associated with detecting and documenting access discrimination between alternative potential users (including upstream or downstream affiliates of the owner of the facility). In factually contested matters, there are the additional costs to society of potential regulatory and judicial errors in essential facilities determinations and remedies. For example, a facility could be found to be essential when in fact there are close substitute facilities available or competition from other modes of transportation prevents exercise of market power by the owner of a particular facility. As mentioned earlier, the extension of the essential facilities doctrine to intellectual property matters is controversial in part because positions in product space that may appear to be “essential” can be subject to technical advances which create substitutes or which bypass that particular product position entirely (leap frog technical competition). More generally, any form of differentiation that is not subject to easy entry and product repositioning could be viewed as an essential “facility” by those who would like to use it in offering upstream or downstream services. Transportation infrastructure natural monopolies that stem from geographical features involve the most immutable obstacles to easy entry---the original and, arguably, the soundest source of essentiality.

The OECD held a roundtable on general application of the essential facilities doctrine in February 1996.²⁵ The background note focused on the different perspectives on essential facilities in the U.S., Europe and Australia. The differences reported in 1996 appear to have survived the intervening years, although changes may be in the offing in Europe. The 1996 background note (excerpted in Appendix A) described variations in efficiency and welfare effects of essential facilities situations based on the structure of upstream and downstream markets. For example, if there are many suppliers at one level of production, then denying access to any one of these suppliers may not have a material effect on competition at that level of production because there are enough remaining suppliers to maintain competitive conditions. Another important insight is that under some conditions, notably technology, which uses the monopolised unit in fixed proportions to other outputs and constant returns to scale, the monopolist can extract all of the available profit through pricing of the monopolised input, without vertically integrating. In other conditions the monopolist may benefit from restricting access to an essential facility. The background note also emphasised the importance of defining the product and geographic markets in order to assess whether a facility is essential. These elements of analysis remain significant.

Regarding implementation of access requirement, the paper emphasised the potential effects of granting access on incentives to invest in essential facilities. The roundtable discussion documented in the Aide-Mémoire added highlights from some of the cases described in the country contributions, identified some of the legitimate business justifications for refusing access that have arisen in U.S. cases, and emphasised the importance of economic integration among EU member states in the EU members’ policies that impose a general obligation to deal on firms with a dominant position.

2.2 *Distinctions between U.S., European and Australian Approaches to the Essential Facilities Doctrine*

The differences between the U.S. and European Community (EC) approaches to essential facilities issues have in the past been quite extensive. They originated from the widespread government ownership of essential facilities in Europe and from the consequent irrelevance of protecting the incentive to invest for government owned enterprises. In recent years, with the exception of the area of intellectual property where Europe continues to be more interventionist, the gap has been filled.

²⁵ The background paper, country submissions, and aide mémoire are available at <http://www.oecd.org/dataoecd/34/20/1920021.pdf>.

In the U.S., requiring access when conduct is not otherwise anticompetitive diverges from the general approach that courts have taken to the Sherman Act, particularly Section 1. U.S. antitrust agencies generally have not viewed the exercise of legally obtained and maintained market power to be a violation of the antitrust laws and refusals to deal are generally not a violation. That is why forcing access to an essential facility owned by a single firm is an exception to this general rule.²⁶ In contrast, agreements among competitors who jointly own or operate an essential facility to exclude competitors have often been dealt with as per se violations because they are collusive agreements in restraint of trade. There have been some recent cases, however, in which courts have applied a rule of reason approach to these circumstances as well.²⁷

Two other perspectives are important in understanding U.S. approaches to essential facilities situations. The first is that some U.S. courts and some commentators have become increasingly sceptical about claims that vertical restraints generally harm consumers.²⁸ When an essential facilities matter involves vertical aspects, the competitive concerns are likely to be better received if they involve raising rivals' costs²⁹ or the ability of incumbent firms to impose entry costs that they did not face themselves (entry barriers). The second perspective is that forcing access under an essential facilities theory is likely to change the incentives to invest in such facilities. On one hand, profit incentives to invest are lessened by being forced to grant access to competitors. On the other hand, if service quality is to be maintained, the optimal investment level may exceed that which the facility owner would make, based on its own use. For this reason, quality of service measurements and incentives to invest in essential facilities can be important policy issues in essential facilities cases.

In the U.S., to establish antitrust liability under the essential facilities doctrine, a party must prove four factors, in addition to addressing the process by which the mechanics of that access (price, etc.) would take place. The MCI Communications case (708 F. 2d at 1132-33) lists these as: "(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 to competitors."³⁰ The last of these elements means that if the monopolist has a legitimate business justification for denying access, the courts are less likely to mandate access.³¹ Conversely, when denial of

²⁶ Robert Pitofsky, Donna Patterson and Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), pp. 443-462, Section II.

²⁷ *Northwest Wholesale Stationers, Inc. v Pacific Stationary and Printing Company*, 105 S. Ct 2613 (1985).

²⁸ See William S. Comanor, F.M. Scherer, and Robert L. Steiner, "Vertical Antitrust Policy as a Problem of Inference The Response of the American Antitrust Institute," available at <http://www.antitrustinstitute.org/recent2/408.pdf>; James C. Cooper, Luke M. Froeb, Dan O'Brien and Michael G. Vita, "Vertical Antitrust Policy as a Problem of Inference," Federal Trade Commission, Bureau of Economics Working Paper (November 8, 2004, revised February 18, 2005) available at <http://www.ftc.gov/speeches/froeb/050218verticalecon.pdf>; John Woodbury, "Paper Trail: Working Papers and Recent Scholarship" (May 2005), available at <http://www.abanet.org/antitrust/source/05-05/may05-papertrail.pdf>; and Thomas R. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence*, Federal Trade Commission Staff Report (November 1983).

²⁹ A raising rivals' cost case usually involves a firm intentionally increasing its own costs (something it would not ordinarily do) only because doing so will increase its rivals' costs by a greater margin. In a raising rivals' costs case, access pricing constraints can be an important form of remedy if the source of the costs increase for rivals is control of an essential facility and if vertical unbundling is not applied as a remedy.

³⁰ Similar criteria are expressed elsewhere, for example, see Valerie Rabassa and Patrick Rey, "Facilite Essentielle et Sector Postal," IDEI (November 2000) available from the authors.

³¹ Robert Pitofsky, Donna Patterson and Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), pp. 443-462, at 450.

access to an essential facility is shown to stem from an intention to eliminate competition, courts have shown added confidence in ordering access.³²

In the past two decades there have been three notable developments in U.S. decisions and policy debates about essential facilities that are potentially pertinent to the transportation sector. First, in the *Aspen Ski* case³³ and the *Kodak* case³⁴, the Supreme Court's decisions appear to give greater weight to denial of access if access was terminated after having been granted in the past and if the denial harms consumers.³⁵ Secondly, in the *Trinko* decision,³⁶ the Supreme Court appears to have decided that when a regulatory obligation to deal is in place that is more binding than the likely obligation under antitrust trust law (essential facilities doctrine), there is no additional antitrust liability for discrimination or not dealing.³⁷ Thirdly, there is increased awareness that technical developments can alter how essential a facility is to the development of competition. The rapid expansion of cell phone technology that competes to a considerable degree with land line telephony is probably the driving force in this realisation.

In *European Union law*, the first two essential facilities cases both involved ferry service between Ireland and Great Britain at Holyhead Harbour, Wales. In the first case, the European Commission found that the harbour operator had a duty to provide access to the harbour on comparable terms for its own and the rival ferry service.³⁸ In the second decision, the Commission required the harbour operator to provide reasonable and non-discriminatory access to the harbour for a new ferry operator.³⁹ These two cases are discussed in more detail in Section II.

³² Robert Pitofsky, Donna Patterson and Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), pp. 443-462, at 450-451 and 455.

³³ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* 472 U.S. 585, 602 (1985) This case is also one among several that are primarily horizontal (involving one market) rather than vertical (potentially involving two markets). Also see Robert Pitofsky, Donna Patterson and Jonathan Hooks, "The Essential Facilities Doctrine under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), pp. 443-462, Section IV. More generally, see *Antitrust Law Journal* 73:1 (2005) for a number of articles addressing issues raised by this case.

³⁴ *Eastman Kodak Co. v. Image Tech Servs. Inc.* 504 U.S. 451, 465 (1992).

³⁵ See Jonathan Baker, "Promoting Innovation and Competition through the *Aspen/Kodak* Rule," *George Mason Law Review* 7 (1999), pp. 500-503. Baker argues that the commonalities between *Aspen* and *Kodak* are (1) the substantial exclusion of a rival, (2) the mechanism for doing so was disruption of a collaborative and complementary relationship and (3) the firm engaging in the conduct lacked a business justification. Also see Andrew I. Gavil, "Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance," *Antitrust Law Journal* 72:1 (2004), pp.3-81. Timothy J. Muris, then Chairman of the FTC, emphasised that the Supreme Court looked carefully at consumer harm in *Aspen* and concluded that the exclusionary conduct denied consumers a product (bundled ski tickets) they want (as shown by past demand for these tickets). Timothy J. Muris, "The FTC and the Law of Monopolisation," *Antitrust Law Journal* 67 (2000), pp. 693-723, at 711.

³⁶ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 682, (2004).

³⁷ For argumentation to this effect, see Brief for the United States and the Federal Trade Commission as Amici Curiae in the Supreme Court of the United States, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 682, (2004).

³⁸ *B&I/Sealink*, was decided on 11 June 1992: Case IV/34.174, [1992] 5 C.M.L.R. 225.

³⁹ *Sea Containers/Stena Sealink* was decided on 21 December 1993: Decision 94/19/EC, Case IV/34.689, 1994 OJ (L15) 8. In the U.S., access pricing constraints are often stated as "reasonable rates." One definition is the same rate that the monopolist charges its affiliates, effectively a non-discriminatory rate. Some observers claim that required access prices have been too low in some U.S. industries. The telephone industry is one, but here the rates are partially being determined by regulators and partially through court

The public profile of essential facilities cases arriving in EC courts has increased in recent years as the practice of dealing with IP essential facilities questions at the level of national courts has faded.⁴⁰ The criteria for requiring access in essential facilities cases were articulated in the *McGill* case. The required elements articulated in that case are (1) no actual or potential substitute; (2) no business justification for the exclusion; and (3) creation of a monopoly position in the secondary market as a result of the refusal to deal and, more importantly, a new product was not made available to consumers because of the refusal. In 2004, the ECJ's decision in the *IMS* case confirmed the criteria stated in *McGill* and sent back to the national courts determinations about the essentiality of IP and about consumer welfare effects of licensing the localised system of pharmaceutical sale and prescription data for Germany that IMS developed with the assistance of pharmaceutical companies.

In 1998, the Court of Justice issued its decision in *Bronner*,⁴¹ which was a catalyst for a major clarification on the EC approach in the treatment of essential facilities situations, eliminating most of the differences that were thought to exist with respect of the US. In particular in *Bronner*, the Court held that a refusal to deal is an abuse of a dominant position when it is "likely to eliminate all competition in the [...] market [...] and that [it is ...] incapable of being objectively justified, but also that the [refused] service [...] be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute". In that case the Court held that Oscar Bronner had not been able to demonstrate that the facility for which it requested access was indeed essential. *Bonner* restricted the scope of the essential facilities doctrine by limiting its application to situations in which the owner of the facility holds at least a dominant position. Secondly, it imposed the application of a forward-looking test that asks whether the refusal to deal will lead to monopolisation of a downstream market, therefore, transforming the concept of abuse of a dominant position detailed in Article 82 of the EC Treaty in a way that is similar to that of monopolisation embodied in Section 2 of the U.S. Sherman Act.⁴² Further modification to the European Union approach may arise in the near future following the release of a staff discussion paper on Article 82.⁴³

orders. There have been relatively few access cases in the U.S. other than telephony where courts have become deeply involved in ongoing access pricing issues.

⁴⁰ The *Magill* case, in which Irish television stations refused to license their copyrighted programme listings to Magill TV Guide (1995), was the first such case. The ECJ decision states, "Conduct of that type – characterised by preventing the production and marketing of a new product, for which there is a potential consumer demand, on the ancillary market of television magazines and thereby excluding all competition from that market solely in order to secure the applicant's monopoly – clearly goes beyond what is necessary to fulfil the essential function of the copyright as permitted in Community law." 1995 E.C.R. I-743 at para. 73 cited in James Turney, "Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: the Primacy of Securing Optimal Innovation," *Northwestern Journal of Technology and Intellectual Property* 3:2 (Spring 2005), Note 29, available at <http://www.law.northwestern.edu/journals/njtip/v3/n2/5/>.

⁴¹ Oscar Bronner GmbH & Co. K.G. v. Mediapring Zeitungs und Zeitschriftenverlag GmbH & Co. K.G., Case C-7/97, 1998 E.C. R. I-7791, [1999] 4 C.M.L.R. 112.

⁴² Sébastien J. Evard, "Essential Facilities in the European Union: Bronner and Beyond," *Columbia Journal of European Law* 10 (2004).

⁴³ DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses: Public consultation, Staff discussion paper, December 19 2005, available at <http://europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf>.

In *Australia*, consideration of essential facilities access has largely been transferred from the courts to an administrative process. This process includes a requirement that the affected commerce be economically important. Effectively, the provision limits applications to natural monopoly and public utility situations.⁴⁴

Box 1 highlights the administrative process for obtaining access to essential facilities. The operation and rationale for the Australian essential facilities approach is described in Appendix C.

Box 1. Administrative process for obtaining access to essential facilities

In 1995, the Commonwealth and State and Territory Governments agreed to implement a National Competition Policy package. The package contained a range of measures to increase competition across the economy and thereby enhancing economic performance [including] the national access regime for 'essential' infrastructure services. Under the regime, businesses can seek access to these services on 'reasonable' terms and conditions in cases where replicating the infrastructure concerned would not be economically feasible.

The Australian Productivity Commission has concluded that retention of a national access regime is warranted. However, some significant changes to the current arrangements are required. In particular, the regime needs to give greater emphasis to ensuring that there are appropriate incentives to invest in essential infrastructure.

The focus of the national access regime is on infrastructure facilities such as gas pipelines that occupy a strategic position in the service delivery chain. These are often referred to as 'essential' or 'bottleneck' facilities.

While neither Europe nor the U.S. has adopted a comparable "significance" restriction, it nonetheless appears that previous government involvement is often associated with the sectors in which the essential facilities doctrine has been applied. In intellectual property situations, the facility (the legal protection of IP), is usually a result of legal barriers. So, it is the government's own policies that give rise to the essentiality of the IP. In telephony and electric power, it was arguably the government's own policies that resulted in vertical integration and monopolisation. The reversal of these policies then resulted in opportunities for entry that required access to the related infrastructure. A similar historical association with government powers appears in many transportation essential facilities situations. Such facilities are generally physical structures or involve geographical features that governments have traditionally controlled or regulated. This involvement took the form of government ownership of geographical features such as lakes, streams and territorial waters; use of government powers of eminent domain or prior government ownership to obtain the site for the essential facility; or concurrent use of the facilities by government for national defence purposes. The argument is that because government powers or permissions were required to create the essential facility, the government should have the authority to prevent its private use to create market power, limit competition and harm the government and other consumers.

3. Potential Difficulties in Providing Competitive Access to Transportation Infrastructure

Policymakers considering competition policies for the transportation sector face a variety of challenges concerning access to transportation infrastructure. Five of these challenges are discussed in this section with the aid of examples: identifying the access problem; the structure of access; the terms of access; monitoring access and adjustments in access

3.1 Identifying the Access Problem

This paper's introduction identified circumstances in which access policy decisions are likely to be the most germane in the transportation sector:

⁴⁴ Paper by Australia and Aide Memoire for the 1996 OECD Roundtable on Essential Facilities. Available at <http://www.oecd.org/dataoecd/34/20/1920021.pdf>. In contrast, European courts do not explicitly have to find that there is a natural monopoly involved.

“The focus of this background paper is on access to transportation infrastructure that is (1) capacity constrained; (2) not subject to timely expansion and or entry; (3) not subject to compelling economies of vertical integration (efficiency or safety), scale, or scope; and (4) subject to feasible reallocation of existing infrastructure capacity to and among competing suppliers.”

This listing presupposes a prior determination that the transportation infrastructure in question does not have readily available close substitutes. From a consumer welfare perspective, access problems with respect to one technology are not a significant concern if all identifiable customer groups can readily turn to another technology with comparable costs that is not monopolised. In the case of transportation, the alternatives can include other modes of transportation or similar facilities nearby or in other areas. Bottom line: access issues in a particular mode and location should be evaluated in the contexts of consumer welfare and product differentiation. Access issues are most pertinent when transportation services provided by the infrastructure in question are substantially differentiated from other transportation services from the perspective of consumers. Sometimes the differentiation may be sufficient to view the different modes or different locations as separate markets.⁴⁵

Another significant problem in assessing a transportation infrastructure access problem is determining the reason for the lack of capacity available to serve entrants. At least in some transportation modes, constrained capacity can be an artefact of other policy decisions. For example, inland port facilities may be congested because inland waterway improvements are subsidised by the government. That is, demand is greater than it would be under competitive conditions because the service is subsidised. If so, policymakers should at least consider reducing subsidies rather than automatically accommodating new barge entrants by expanding facilities or assigning existing capacity to these firms. Similarly, inland port congestion could exist because competing modes of transportation are taxed or restricted more heavily by government policies. If so, a more efficient alternative to shifts in inland port access policies could be to reduce the tax or regulatory burden on the competing modes of transportation.

*The Example of Access to Rødby Harbour, Denmark: How to Make a Non-Essential Facility Essential*⁴⁶

The decision to identify a transportation infrastructure investment as an essential facility requires examination of both existing substitutes and entry conditions. In the Danish example described below, intermodal competition appeared to be insufficient to address access concerns. Instead, the decision focused on entry conditions and more specifically on government barriers to entry. The example illustrates the importance of taking the extra step to examine the ease of entry and not focusing simply on how entry could relieve the concern about access to a facility that is unique at the time of the inquiry.

In Denmark access to ferry terminals has been controlled by the Ministry of Transport. The state railroad, DSB, owned and operated the port at Elsinore, serving Sweden, and at Rødby, serving Germany. The ministry limited access to those ports to ferries run by the state railroads of Sweden and Germany. At the same time the Elsinore-Helsingborg connection was monopolised by a joint Danish-Swedish public company. The Commission approached the Danish Minister for Transport in 1993 to recommend opening harbour facilities to competitors. The Minister took no action, but the European Commission began a proceeding.

⁴⁵ The relevant market may be different before the facility is built than after its construction.

⁴⁶ The case description is taken from Sebastian J. Evard, “Essential Facilities in the European Union: Bronner and Beyond,” *Columbia Journal of European Law* 10 (2004), available at http://www.jonesday.com/files/tbl_s31Publications/FileUpload137/4528/Article%20essential%20facilities.pdf, Section II.G., and excerpts from a 1999 OECD submission from the Danish Competition Authority describing the case.

DSB was a Danish public company, which owned and operated the port of Rødby. DSB also operated the only ferry service between Rødby and the port of Puttgarden. *Stena*, another ferry company, intended to serve the same sailing route as DSB. The Danish Government refused *Stena* the right to use the port of Rødby on the grounds that doing otherwise would prevent companies already operating in the port from expanding their activities. It also refused *Stena* the right to build a new port in the same vicinity, saying that *Stena* had not demonstrated an unsatisfied demand for additional ferry service and that it was unlikely that such a demand would arise. In effect, the Ministry was preventing access to the existing infrastructure and creating a legal barrier to entry through construction of additional infrastructure.

The Commission considered the refusal to grant access to the port abusive and declared that the effects of this abuse were exacerbated by the refusal to authorise the construction of a new port. The EC held that:

“An undertaking that owns or manages an essential port facility from which it provides a maritime transport service may not, without objective justification, refuse to grant a ship owner wishing to operate on the same maritime route access to that facility without infringing article [82].”

In this case, there was no competition in the downstream market since DSB was the only operator. The refusal to grant access to the port could have been justified for technical reasons and also on the grounds that *Stena* could build its own infrastructure. Therefore, the port of Rødby was not indispensable for the activity on the downstream market. However, the refusal of the government to grant *Stena* access made any competition from *Stena* impossible. Thus, by denying *Stena* the right to build its own port facilities, the Danish government turned Rødby harbour from a non-essential facility into an essential facility.

After the decision, *Stena* was given permission to build its own facility at Elsinore, rather than to use the existing one. After more than two more years of litigation, access was granted to the existing terminal, and prices fell substantially.

3.2 *The Structure of Access*

A central theme of market-oriented economists is that incentives matter and that they matter a great deal. Infrastructure access issues are no exception. For economists considering essential facilities access policies in a context of small or non-existent economies of vertical integration, a key question (apart from natural monopoly concerns) is: Does the entity controlling the facility have incentives and the ability to discriminate against one or more potential customers in a way that harms consumers? If it does, what are the costs and benefits of reducing or eliminating these incentives through structural changes or through government policies against discrimination? In general, structural changes have the potential advantage of changing financial incentives. In particular, incentives to discriminate in offering access to essential transportation infrastructure can arise because the infrastructure owner also controls upstream or downstream assets that compete with independent customers. For example, if regulation constrains the market power of the essential facility, this firm could use discriminatory access to increase its profits in the unregulated upstream or downstream markets. This would allow the firm to evade regulatory restrictions on its profits in operating the essential facility.⁴⁷ Under some conditions, discrimination can increase the profits of the owner of the essential facility by reducing or foreclosing competition at upstream or downstream level, even if the essential facility is unregulated.⁴⁸

⁴⁷ For discussion see, Comment of the Federal Trade Commission before the United States of America Federal Energy Regulatory Commission, Docket Nos. PL04-6-000 and PL04-9-000 (July 14, 2004), Section III, available at <http://www.ftc.gov/os/comments/ferc/v040022.pdf>.

⁴⁸ A full treatment of tying and bundling issues is beyond the scope of this paper, but see David S. Evans, A. Jorge Padilla and Michael A. Salinger, “A Pragmatic Approach to Identifying and Analyzing Legitimate

There is a range of unbundling options from full divestiture--the most complete form of unbundling--to accounting separation. Full divestiture has the advantage of removing incentives to discriminate in providing access by eliminating any benefits of upstream or downstream market power on the profits of the essential facility owner.⁴⁹ Usually the essential facility continues to be regulated after such divestiture while regulation is replaced over time by competition in the upstream and downstream markets that were formerly regulated. An alternative or complement to unbundling is behavioural rules against discrimination. Behavioural rules can involve banning a practice that prevents comparable access for independent customers and affiliates of the owner and extend to requiring financial disclosures that can make discrimination easier to detect and document. A major disadvantage of behavioural rules is that they do not remove the incentives to discriminate. If access is required under behavioural rules without structural unbundling, concerns arise about compliance with the rules because they are contrary to the firm's profit incentives.

Electric Power Transmission Access in the U.S., circa 1996 to the present

Access requirements are a form of unbundling intended to result in unaffiliated users of a facility being treated comparably to affiliated users. Behavioural access rules, however, do not change the economic incentives of the facility's owner. Depending upon the technology involved and the nuances of comparable access, it may be costly and difficult to detect and document violations of behavioural access rules. For this reason, structural approaches that remove incentives to violate the behavioural rules can be more effective. The example traces the evolution of electric power transmission access policy in the U.S. that started with behavioural access rules and then moved toward structural unbundling because of enforcement difficulties with the behavioural rules. In contrast, the experience with behavioural access rules in the U.S. natural gas industry has generally been positive. The example underlines the importance of considering the difficulties of detecting, documenting, and remedying access discrimination.

In the Otter Tail Power case, the U.S. Supreme Court ordered a vertically integrated utility to provide transmission access to wholesale power customers (e.g., factories) that could not otherwise obtain power from other wholesale generators.⁵⁰ The decision relied upon antitrust monopolisation concerns to reach its decision. The initial regulatory follow up to this case consisted of requiring utilities that want to merge to provide non-discriminatory transmission access. Following the 1992 Energy Policy Act, the Federal Energy Regulatory Commission (FERC) developed a more general policy favouring open transmission access under Order 888. Order 888 was a behavioural regulation that banned transmission discrimination. While wholesale trading activity did expand dramatically under Order 888, complaints about transmission discrimination continued. Staff at the Federal Trade Commission (FTC) commented on the behavioural approach proposed by FERC. FTC staff expressed concern that behavioural rules would be insufficient to prevent transmission discrimination because the rules would not remove incentives to discriminate (to protect a vertically integrated utility's generation investments from competition by lower cost independent generators) and because transmission discrimination would be difficult to detect and document.⁵¹

Tying Cases" (August 2003), available at <http://homepages.ulb.ac.be/~plegros/documents/classes/iee/evans-tying.pdf>. For text discussions, see, for example, Dennis Carlton and Jeffrey Perloff, *Modern Industrial Organization* 3rd Ed (2000), Chapter 10, and F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance* 3rd Ed. (1990), Chapter 14.

⁴⁹ See OECD, "Restructuring Public Utilities for Competition," *Policy Brief* (February 2002).

⁵⁰ Otter Tail Power Co. v United States, 410 U.S. 366, 377-79 (1973).

⁵¹ Comment of the Staff of the Bureau of Economics of the Federal Trade Commission before the Federal Energy Regulatory Commission in the matter of Promoting Wholesale Competition through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Docket Nos. MR95-8-000 & RM94-7-001 (August 7, 1995), available at <http://www.ftc.gov/be/v950008.htm>.

Subsequently, FERC issued Order 2000 to foster the formation of independent transmission organisations that are operationally separated from transmission owners. The proposals that became Order 2000 contained extensive discussion of the difficulties of using behavioural rules to prevent transmission discrimination.⁵² To date, the process of creating independent regional transmission organisations is still a work in progress. Some regions readily accepted the approach and others strenuously resist it. FERC is also considering ways to strengthen the behavioural rules against transmission discrimination.⁵³

Box 2. Freight Railroad Infrastructure Access: “A Bridge too far”?

In the wake of open access reforms in other industries, some nations have implemented access regimes in the rail industry. Although many of these reform efforts are of relatively recent vintage, questions have arisen regarding the “fit” between infrastructure access and railroad technology, at least given present railroad technology.

As yet, the impact of mandating access to essential infrastructure in railways is unclear. Broadly, there are two main options for providing access. One is to regulate access to an integrated operators’ track and facilities. Another is to structurally separate the track and facilities infrastructure from the train operations and then regulate access.

More than half of the OECD countries have some experience with allowing independent train operators to provide services, while maintaining the incumbent operator vertically integrated. For example, Finland has fully separated train dispatching from an integrated train operator-infrastructure maintenance company and France has fully separated train operations from a train dispatching-infrastructure management company.

Structural separation may be desired because maintaining integrated rail operators can make entry by new train operators difficult. An integrated incumbent can discriminate to deter profitable entry by a newcomer in various ways that are difficult to regulate, including:

- Margin squeezes (final prices too low with respect to access charges for an equally efficient competitor to enter profitably)
- Refusal to supply (e.g. for last mile services where the incumbent has a monopoly)
- Offers to make track investment in regions/municipalities which order train operations from the incumbents.

In both access regimes to facilities of vertically integrated providers and vertical separated access regimes, there may be substantial vertical economies between train operation and rail ownership. In the case of access to a vertically integrated provider, these vertical economies may not be present for entrants, so that their operating costs or track costs will be higher than otherwise. In the case of vertical separation, vertical economies may then fail to be realised.

There may be good reasons to separate freight operations of an incumbent from its other operations in order to promote entry and competition among alternative suppliers. On the other hand it may be much more difficult to introduce competition in passenger services because, contrary to freight, passenger services are often provided through concessions rather than through multiple operators over the same route, particularly because many passenger services are subsidised.⁵⁴

3.3 *The Terms of Access*

If structural unbundling is not employed and behavioural rules are adopted instead, regulators must specify the terms of access or approve an access proposal from the owners of the essential facility. In some circumstances, access may be a simple “yes or no” proposition. For example, access to a non-toll roadway (1) that is never congested, (2) has no speed limits and (3) has ready access to services on parallel or intersecting routes that are always available could be such a relatively straightforward proposition. On the

⁵² See, Comment of the Staff of the Bureau of Economics of the Federal Trade Commission before the Federal Energy Regulatory Commission in the matter of Regional Transmission Organizations, Docket No. RM00-2-000 (August 16, 1999), available at <http://www.ftc.gov/be/v990011.pdf>.

⁵³ See, Comment of the Federal Trade Commission before the Federal Energy Regulatory Commission in the matter of Information Requirements for Available Transfer Capability, Docket No. MR05-17-000 (August 22, 2005), available at <http://www.ftc.gov/os/2005/08/050823availtranscapab.pdf>.

⁵⁴ This text is adapted from OECD, “Structural Reform in the Rail Industry,” Competition Policy Roundtable 55 (2005) and OECD, “Draft Report to the Council on Structural Separation,” Secretariat document (2005).

other hand, many transportation infrastructure access situations entail additional, more complex elements. Elements such as price, level and quality of service, safety and reliability are common to many access situations. And discrimination against independent customers on any of these dimensions would be of concern. Often, the benchmarks for access are simply stated as the same terms of use that the essential facility owner offers to its affiliates.

The terms of access can be every bit as important as access itself. For example, if access is granted, but at a high price,⁵⁵ there might be no practical effect of granting access because no firm could pay that price and make a profit. Similarly, if access is granted at a customary price, but the service is of low quality, the customer may find that it has to supplement the service at a prohibitively high cost or that the risk of damage from low quality service is too high to accept. Safety issues and service reliability could also be so inferior that the potential customer could not profitably use the access to the essential facility granted by its owner. Conversely, if the access price is set too low, excessive entry may be induced⁵⁶ and congestion may result that harms all users and their retail customers.

Potential quality of service, safety and reliability issues regarding access to an essential facility raises questions about access policy that can be at least as difficult to address as pricing issues. Pricing criteria applied to essential facilities are likely to be readily quantifiable, at least for standard services. The quantifiable nature of pricing rules should make them relatively easy to monitor. Quality, safety and reliability are less likely to be quantifiable without considerable effort to study them in detail and then to try to pick aspects that are more readily observable. Indeed, the potential difficulties of quantifying and monitoring these factors are one reason why some firms choose to vertically integrate.⁵⁷ In the scenarios that are focused on here, however, only one firm is able to vertically integrate and it may have incentives to increase access uncertainties rather than reduce them.

The following examples illustrate the difficulties that courts or regulators may face in identifying all of the aspects of access that may be important to independent customers. The examples illustrate that without careful attention to the details of comparable access, rules requiring comparable access may be ineffective. These difficulties and uncertainties of behavioural rules can contribute to additional consideration of structural remedies that reduce or eliminate the difficulties associated with enforcing behavioural rules.

Ferry Service Access to Holyhead Harbour, Circa Early 1990s

In the *B&I* case regarding Holyhead Harbour, the ferry operator (*B&I Line PLC*) complained that *Sealink*, both a ferry service operator and Holyhead Harbour owner, did not provide equal access to the port despite its obligation to do so. *B&I's* berth was located in the Harbour at a point where the water

⁵⁵ The issue of efficient access pricing is beyond the scope of this paper. For discussion, see for example, OECD, *Access Pricing in Telecommunications* (2004) available at <http://www.oecd.org/dataoecd/26/6/27767944.pdf>, Nicholas Economides and Lawrence J. White, "Access and Interconnection Pricing: How Efficient is the "Efficient Component Pricing Rule"?" *Antitrust Bulletin* XL:3 (Fall 1995), pp. 557-579, and M. Cave, P. Crowther, and L. Hancher, "Competition Aspects of Access Pricing - Report to the European Commission" (December 1995), Catalogue No: CM-94-96-582-EN-C, and the articles cited therein.

⁵⁶ See, Axel Gautier and Manipushpak Mitra, "Regulation of an Open Access Essential Facility," (August 2003), available at http://idei.fr/doc/conf/rai/papers_2003/maxel.pdf.

⁵⁷ See, for example, Dennis Carlton and Jeffrey Perloff, *Modern Industrial Organization* 3rd Ed (2000), Chapter 12. A leading early treatment of sources of uncertainty in market transactions is Oliver Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications, A Study in the Economics of Internal Organization* (1975)

channel was narrow. When a *Sealink* vessel passed on the way to or from its berth, the *B&I* ship would rock up and down so that the *B&I* ship would need to lift the ramp between the ship and the dock and cease loading and unloading. *Sealink* was found to have changed its sailing schedule in a manner that resulted in more frequent interruptions in *B&I*'s loading and unloadings. This was found to harm *B&I* and its customers.⁵⁸ The European Commission's decision found Holyhead Harbour to be a separate market because alternative harbours were significantly further away and it considered *Sealink* to be the dominant supplier because it controlled the harbour. It viewed the rescheduling of *Sealink*'s ferry's service to disrupt *B&I*'s loading and unloading as access on less favourable terms. It held that this practice infringes on Article 86, now Article 82, (a competitive disadvantage is imposed by a dominant firm on its competitor without objective justification). *Sealink* was required to revert to its previous schedule.

In the second case decided a year later, the European Commission found that *Sealink* was refusing to provide reasonable and non-discriminatory access to a new ferry service using high-speed catamarans. In this instance, the Commission ordered the dominant firm to provide access on terms that are as "economically or physically realistic as possible." The parties settled their differences after the decision, so no further Commission enforcement orders were required. The entrant eventually decided to operate from Liverpool instead of Holyhead Harbour, leaving some doubt about how essential Holyhead Harbour really was, at least with the higher speed technology.⁵⁹

One interpretation of these decisions is that if the holder of an essential facility is not constrained by price regulation, authorities are entitled to assume that it is charging the profit maximising price for use of the facility. Hence, if an independent downstream operator seeks access at the existing price, granting access would be in the interest of the facility operator because it would increase use of the essential facility at the presumably profitable monopoly price. Use of the essential facility would be increased because either the independent downstream firm is offering a differentiated product that will increase retail volume or the firm has lower costs than other downstream firms which will also increase demand for use of the essential facility (because the retail price will be lower if the downstream market is competitive). Consequently, refusals to deal are not generally justified from the business perspective of a firm whose only business is operating the essential facility. If such a firm refuses to deal, it may be because it gains from less competition in the downstream market.

The Commission decided a similar case in favour of a new entrant, this time *Irish Ferries*, which sought access to the port of Roscoff in Brittany, France. In this instance, the entrant claimed to have reached an access agreement with the operator of the port, CCI or Morlaix. However, the operator refused to acknowledge an agreement. The Commission held that Roscoff was an essential facility and that the port operator was a dominant firm. The Commission ordered that access be granted on reasonable terms.⁶⁰

⁵⁸ B&I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd. (1992) 5 CMLR 255 (Case IV/34.174) 11 June 1992.

⁵⁹ 94/19/EC: Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689 - Sea Containers v. Stena Sealink - Interim measures)

⁶⁰ Sebastian J. Eward, "Essential Facilities in the European Union: Bronner and Beyond," *Columbia Journal of European Law* 10 (2004), available at http://www.jonesday.com/files/tbl_s31Publications/FileUpload137/4528/Article%20essential%20facilities.pdf.

*Access to Ancillary Services in Maritime Waste Collection at Varna, Bulgaria, circa Mid-1990s.*⁶¹

Ships docking at a port often require catering services and waste disposal. One stage in the production of this service is the transportation of supplies to a vessel and removal of waste to a disposal site. International agreements require each country to have a system to collect and safely dispose of waste from ocean-going vessels at each port. The purpose is to avoid pollution of the oceans. In Varna, Bulgaria, a disposal facility exists and is owned by the Port of Varna, PLC.

In this case brought to the Bulgarian Commission for the Protection of Competition, a catering firm complained that although it had acquired all of the permits required from government agencies to cater and to collect and dispose of waste from maritime vessels, it was unable to operate because the Port of Varna refused to allow its trucks on port property and refused to dispose of waste brought by the caterer to the disposal facility. The catering company was able to bring provisions to vessels and take wastes away (transportation service), but this access was meaningless without access to the disposal facility. In this instance, access to the harbour alone was sufficient to offer the transportation service, but it was not sufficient to carry out the complementary services that the vessels desired and that the international agreement required.

The Competition agency found that because no other disposal facilities were available or likely to be available the Port of Varna had a dominant position in disposal of maritime waste in the area. The Port's position was that it had unilateral authority to vertically integrate and exclude competition in transportation of maritime waste to its facility and over roads that it owned. But the Port simultaneously held a seemingly inconsistent position that "if a captain of a ship through his agent explicitly asks for the waste disposal to be collected by a particular company, it should be allowed to enter the port." The Port of Varna did not apparently raise any issues of safety or security as explanations for its denial of access to the trucks of the catering firm.⁶²

Intermodal Access: Rapid Transit versus Automobile Access to San Francisco's Airport

Intermodal access can create tensions when those who control or influence one of the modes do not wish to provide good terms of connection, even when such connections would be socially beneficial. In 1990, the San Francisco Bay Area Rapid Transit District (BART) and the San Mateo County Transit District (SamTram) jointly proposed to extend the BART service from its Daly City station to the San Francisco International Airport (SFIA)⁶³. The purpose of the project was: "to provide a mass transit alternative for travellers along the San Francisco Peninsula, particularly northern San Mateo County, and to provide high-speed, efficient transit service between San Francisco, San Mateo County, and the growing SFIA."⁶⁴ The extension was proposed because the expected annual increase in air passengers,

⁶¹ Information regarding the Varna case was provided by the Bulgarian Commission for the Protection of Competition for the 1999 OECD conference in Vienna and was provided for this paper courtesy of Sally Van Siclen, OECD Secretariat.

⁶² The Competition agency decided to fine the Port of Varna for denying access, but found that it had not violated other statutes as claimed by the caterer because the caterer had not already been transporting waste at the time that the denial of access took place. There could be some ambiguity in this case about whether the government's obligations under the treaty included protecting the option of vessel's to select an independent waste removal firms that would transport the wastes to the disposal facility.

⁶³ San Mateo County Transit District San Carlos - California, Comprehensive Annual Financial Report (June 2004).

⁶⁴ San Francisco Bay Area Rapid Transit, Federal Transit Administration, U.S. Department of Transportation and SamTrans, "BART-San Francisco Airport Extension: Executive Summary Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement" (January 1995).

together with the already existent highway congestion, was projected to create major travel delays for airline passengers. Moreover, the introduction of this new transportation system was projected to significantly reduce air pollution⁶⁵ and “to boost SFIA's position as the U.S. airport with the highest percentage of travellers using public transportation”⁶⁶.

The first problem that the partnership encountered concerned the location of the station. Initially, BART wanted to place the station inside the terminal by building a tunnel. However, the airlines, represented by the lobbying group Air Transport Association, and the airport operator rejected this option. Instead, they advocated a slightly less expensive proposal of building a station further away from the terminal.⁶⁷ According to the airlines, this design would also allow them to freely carry out the airport's \$2.4 billion expansion project and the planned People Mover⁶⁸ project to take passengers directly from that station to the terminals.⁶⁹ Regional officials and BART accused the airlines of lobbying against the BART extension perhaps in order to protect parking lot revenues that paid for a substantial portion of airport operating expenses and, therefore, reduced the fees paid by airlines. Finally, BART agreed to build the station outside the terminal, although it was able to include in the design several features to reduce the inconvenience of using a more distant station.⁷⁰

The project was expected to be completed by 1999 but only in 1997 was the project authorised by the federal government. It was not until June 22, 2003, that the station was finally open. According to the users, the airport BART station is not as accessible as it was intended to be: “Plan on getting there [SFIA] several hours before your flight, to allow time to get off BART, wait for the train and then get to your gate. No luggage carts can be taken into the BART station so be prepared to struggle with all your baggage onto the air train and vice versa”⁷¹.

3.4 *Monitoring Access to Essential Infrastructure*

In situations in which a firm has incentives to break the behavioural rules applicable to its conduct, some form of conduct monitoring may be important for a successful access policy. Some monitoring can be conducted directly by the staff of the sector regulatory body. Regulators also rely on reports from the firms that are seeking access. But just as owners of essential facilities have incentives to under report their

⁶⁵ In particular, it was predicted a reduction of reactive hydrocarbon by 1.2 tons per day, nitrogen oxides by 1.7 tons per day and carbon monoxide by 17.0 tons per day. See Bay Area Rapid Transit /U.S. Department of Transportation and SamTrans, “BART-San Francisco Airport Extension: Executive Summary Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement” (January 1995)

⁶⁶ Benjamin Pimentel, “After a Long Struggle, SFO's BART Station Finally on Track”, *San Francisco Chronicle* (17 August 1997), available at <http://sfgate.com>. According to Pimentel, BART was expected to carry 20,000 passengers to the airport per day.

⁶⁷ Benjamin Pimentel, “BART-to-Airport Project Hits Another Roadblock”, *San Francisco Chronicle* (January 28, 1997), available at <http://sfgate.com>.

⁶⁸ The People Mover offers access between terminals, parking garages, rental car centre, and the SFO BART Station.

⁶⁹ A similar proposition was made for the airport expansion of the CalTrain, the commuter rail system that provides passenger service between San Jose and San Francisco. See Benjamin Pimentel, , “CalTrain Choices For SFO Stations Airport board to study 2 sites” (April 5, 1996) and, “CalTrain-Airport Link Put on Hold SFO Panel Won't Pick Site Until BART Finalizes Plan”, *San Francisco Chronicle* (June 27, 1996); available at <http://sfgate.com>].

⁷⁰ Benjamin Pimentel, , “BART Gives In, Approves Station Outside S.F. Airport Stop Would be 5-minute Hike from Gates”, *San Francisco Chronicle* (September 13, 1995), available at <http://sfgate.com>].

⁷¹ http://www.airlinequality.com/Airports/Airport_forum/sfo.htm.

own discriminatory behaviour, independent customers are likely to have incentives to overstate such conduct. In order to judge conflicting claims, the agency is likely to have to conduct its own investigation. Conflicting evidence also raises the potential for errors in evaluating claims of discrimination. Such errors could be detrimental to the investment climate for transportation infrastructure.

Access requirements sometimes give users an option of performing functions themselves or making their own independent arrangements for services. Where the user is dependent on the owner to perform services and the owner competes with the customer in upstream or downstream markets, the incentives of the owner to provide lesser services or to disrupt the operations of independent users of the facility can be strong and the results can involve subtle techniques to raise the costs or risks of the independent. The examples in this section illustrate the potential risks facing an independent user when it is dependent on a rival. In the first example, the rationale for the dependence was related to improving the facility, something that regulators generally seek to encourage. In the second example, a new technology promising major efficiency gains was involved--again something that regulators generally seek to encourage.

Bus Station Services for Rival Bus Operators in Tallinn, Estonia, Circa 1997

A matter requiring detailed investigation was presented by the Estonian Competition Board at the OECD Vienna seminar in 1998.⁷² In April 1997, the Department of Competition received a complaint about access to services at the bus station in Tallin, Estonia. The complaint was from the second largest user of the station, *JSC Sebe* (*Sebe*). The Tallin bus station had been built and operated by the state enterprise, *Motor*. The largest user of the station, *JSC Eesti Buss* (*Eesti*), won the bidding to own and operate the bus station. But the privatisation agreement required the new owner to continue to provide services to other bus companies. *Eesti* holds a 61% interest in the station and the government retains the balance.

The focus of the complaint was that *Eesti* coerced *Sebe* into an agreement to discontinue its own sale of bus tickets at the station in favour of relying on the *Eesti* ticket office. The *Sebe* ticket office also sold tickets for travel on *Eesti* buses. The coercion reportedly consisted of a threat to discontinue providing services at the station to *Sebe*. *Sebe* contended that *Eesti* violated provisions of the Law on Competition, most prominently, paragraph 17.5, which forbids a firm from “dictating to the other market participants such contractual terms which allow [it] to receive unjustified profits, which the other party would not agree [to] given a free choice.”

On the surface, it does not appear that *Eesti* was making an unreasonable demand on *Sebe* because *Eesti* had plans to refurbish the bus station with a new layout, information system and an upgraded single ticketing facility. *Sebe*'s separate ticketing office could be viewed as inconsistent with the refurbishing plans. *Sebe*'s insistence on retaining its own ticketing booth could be viewed as an impediment to infrastructure investment.

What makes the case much more ambiguous is the actual practices of *Eesti*'s ticketing operations. It was habitually in arrears in forwarding revenues from ticket sales to the other bus companies. By so doing it both disrupted the cash flow of its rivals and improved its own cash flow. This uncertainty in cash flows from ticket sales imposed risks on *Eesti*'s rivals, which derived from its position as the station operator. *Eesti* also transferred to itself from its rivals the interest or interest equivalent from holding these funds (value of the float). *Sebe*'s desire to retain its own ticketing office is, from this perspective, an effort to protect itself from the raising rivals' cost activities of *Eesti*.

⁷² Available from Sally Van Sclen, OECD Secretariat.

The Estonia competition agency decided not to pursue an enforcement action in this matter in part because the issues became moot once *Eesti* and *Sebe* reached a new contract agreement. Nonetheless, the matter does highlight the importance of monitoring the characteristics of the services provided even if the essential facility owner is granting access and not charging prohibitively high prices for its services.

Because the process of monitoring can be a complex, time consuming and a long-term proposition, courts are sometimes reluctant to assume these responsibilities. In some major matters, however, the courts have taken on this responsibility. A prime example is the U.S. *AT&T* settlement. In that case, the judge took on the compliance role directly for more than a decade.⁷³ The court's interest in taking on this responsibility may have arisen because one of the premises of the government's case was that regulation of *AT&T's* behaviour had proved to be inadequate to prevent systematic discrimination. In contrast, the Australian government decided to remove essential facilities issues from the courts and make them primarily the responsibility of the competition agency.⁷⁴

Equal Treatment of Competitors in U.S. Airline Reservation Systems

With increased competition between airlines, prices and flights change more frequently than under regulation. As a result, finding the best available routes and fares has become more challenging, but also potentially more rewarding because significant fare discounts are available from time to time. The Internet and associated computer sorting of fare and flight information is potentially an ideal tool for both consumers and travel agents. Sequentially contacting several airlines, however, is not an efficient means to find and compare flights and fares, even with the aid of a computer.⁷⁵ Several airlines responded to this issue by developing computerised reservation systems that allow consumers and travel agents to compare fares and schedules across airlines.⁷⁶ These systems have become popular with both consumers and travel agents.

Concerns have arisen about bias in these reservation systems. These concerns are heightened by reports that lack of access to reservations systems contributed to the exit of several new airlines during the 1980s.⁷⁷ On this basis, it can be argued that unbiased access to computerised reservations systems was essential for large-scale airline entry at least during that period. (How essential unbiased computer reservation systems are at this point in time less clear as more consumers are using online travel services to find comparative information on prices and flights.) Forms of discrimination in airline reservations systems may include "screen bias" (unfavourable listing of competitor's flights), discrimination in prices, discrimination in the quality of service and refusal to deal. Depending on the relative bargaining strength,

⁷³ Abbott B. Lipsky Jr. and J. Gregory Sidak, "Essential Facilities," *Stanford Law Review* 51:5 (May 1999), pp. 1187-1248, at 1198.

⁷⁴ Contribution of Australia for the OECD 1996 essential facilities roundtable.

⁷⁵ Substantial productivity gains are associated with multi-airline computer reservation systems. One study reported a 42% productivity improvement for travel agents using such systems. William E. O'Connor, *An Introduction to Airline Economics* (2001), p. 121.

⁷⁶ By 1990, the flights of every major passenger airline were listed on every computer reservation system. The single exception continues to be Southwest Airlines, the largest discount airline, which does not participate and maintains its own reservation system. William E. O'Connor, *An Introduction to Airline Economics* (2001), pp. 120-121.

⁷⁷ William E. O'Connor, *An Introduction to Airline Economics* (2001), Chapter III.

airlines could also discriminate between computerised reservation system providers (buyer power/monopsony).⁷⁸

In 1984, the Civil Aeronautics Board--the U.S. airline industry regulator at the time--investigated claims about bias in computerised reservation systems. It issued rules requiring non-discriminatory listing of flight information, non-discriminatory pricing of services to airlines by reservation systems, abolition of sole-source requirements for travel agents and limitations on the length of contracts with travel agents.⁷⁹ In 1989, the EU adopted similar requirements.⁸⁰ The presence of these rules, coupled with more sophisticated computer programmes for monitoring bias appear to have reduced discrimination complaints.

Since that time, concerns continue to be expressed about the potential for bias in reservation systems because the behavioural rules leave in place incentives for airlines that own reservations systems to favour their own flights.⁸¹ Several of the reservation systems, however, have been divested voluntarily by their founding airline owners.⁸²

In addition to the competition argument about access to essential reservation systems, a consumer deception argument can also be made. At one level, the question is whether consumers expect comparative flight and fare information to be unbiased. If enough consumers have this expectation and systems are in fact biased without disclosing this bias, a deception case could be made. Consumers would be paying higher prices and selecting less convenient flights because of the bias. At another level, there might actually be an enforceable fiduciary duty on the part of travel agents to provide unbiased advice when a consumer is paying the travel agent.⁸³ This would create an obligation for travel agents to use unbiased flight reservation systems or compensate for the biases.

3.5 *Mandated Adjustments in Access*

Once some determination is reached that the existing access allocations should be altered, a variety of additional decisions remain. The context for these decisions can be significantly different. For example, if access merely means opening up excess capacity to new entrants, there is no need to displace existing uses of the essential facility. If so, granting access could be relatively simple and non-disruptive. In contrast, granting access, at least in the short run, when there is no excess capacity may require displacing existing uses, imposing congestion costs on some or all users, or both. Existing uses may command consumer loyalty or political influence that is difficult to address through compensation or other approaches. In some cases, displaced uses may face considerable costs because customers have made their own sunk and unrecoverable investments that are dependent on existing access to the essential facility. When access

⁷⁷ Comment of the American Antitrust Institute before the U.S. Department of Transportation Regarding Computer Reservation System Regulation, Docket OST-97-2881 et al (March 16, 2003), available at <http://www.antitrustinstitute.org/recent2/239.pdf>.

⁷⁹ William E. O'Connor, *An Introduction to Airline Economics* (2001), p. 121.

⁸⁰ William E. O'Connor, *An Introduction to Airline Economics* (2001), p. 122.

⁸¹ See, for example, Comment of the American Antitrust Institute before the U.S. Department of Transportation Regarding Computer Reservation System Regulation, Docket OST-97-2881 et al (March 16, 2003), available at <http://www.antitrustinstitute.org/recent2/239.pdf>.

⁸² Comment of the American Antitrust Institute before the U.S. Department of Transportation Regarding Computer Reservation System Regulation, Docket OST-97-2881 et al (March 16, 2003), available at <http://www.antitrustinstitute.org/recent2/239.pdf>, Section II.

⁸³ Comment of the American Antitrust Institute before the U.S. Department of Transportation Regarding Computer Reservation System Regulation, Docket OST-97-2881 et al (March 16, 2003), available at <http://www.antitrustinstitute.org/recent2/239.pdf>.

results in increased congestion, decisions also may have to be made about acceptable levels of service deterioration or safety risks.

The example illustrates the distinction between opening up access to excess capacity and opening up access to facilities currently occupied by established users. It emphasises the need for greater regulatory oversight when access requires changes in existing access.

*Airport Terminal Access in Australia, Circa 1990*⁸⁴

In 1987, the Australian government announced its intention to open interstate domestic air travel to competition in 1990⁸⁵. At the time, Australia's major airports were all owned and operated by the national government. But the government also indicated its intention to corporatise its airport holdings through a government owned Federal Airports Corp (FAC)⁸⁶. Also at the time, interstate domestic travel was structured due to regulatory restrictions on entry as a duopoly with one government-owned airline (*Australian Airlines*) and one private operator (*Ansett*). In particular, the government protection of the sector included a restriction that made it difficult for a potential competitor to import suitable aircraft and an airline exemption from the fair competition requirements of the Trade Practices Act⁸⁷. Thus, with two virtually identical competitors, competition in the industry became marginal and the airlines settled into "a quiet life duopoly"⁸⁸.

One of the best-positioned potential entrants (*Compass Airlines*) was an established intrastate airline that also served passengers travelling between Sydney and Melbourne through the expedient of a brief touchdown between the two major cities. This allowed it to avoid the regulatory restrictions on direct flights. Compass "was prepared for entry well before November 1990" and "its Chairman had an extensive knowledge of the two major incumbent operators"⁸⁹.

Nominally, *Compass* should have been able to secure access at all of the major airports because the long term leases to *Australian* and *Ansett* included provisions requiring that terminal space be made available to a new entrant⁹⁰. More precisely, the Federal Government required the incumbents to provide two gates each at Sydney and Melbourne, one gate each at Adelaide, Perth and Coolangatta and one gate at

⁸⁴ The discussion of Australian airport access is derived primarily from conversation with John White, OECD (October 2005), who was active in the government's reform activities regarding airports and airlines during that period.

⁸⁵ National Contribution from Australia, (1998), "Competition Policy and International Airport Services," *DAFFE/CLP(98)3*.

⁸⁶ Paul Hooper, Robert Cain, Sandy White, (2000), "The privatisation of Australia's airports", *Transportation Research Part E 36 (2000) 181±204*.

⁸⁷ John Quiggin, "Aussie Airlines' Dog Fight," *Australian Financial Review* (9 October 1997).

⁸⁸ Kirby, M., (1987), "Private and Public Ownership and Australia's Two Airline Policy" in Abelson, P. (ed.) *Privatisation: An Australian Perspective*, Australian Professional Publications, Sydney, 146-153.

⁸⁹ Nyathi M., Hooper P. and Hensher D., (1993), "Compass Airlines 1 December 1990 to 20 December 1991. What went wrong?", *Transport Reviews* 13 (2), 119±149 and 13 (3), 185±206.

⁹⁰ These provisions were established in 1987 through renegotiations with the airlines, since before that date there was no provision for access to terminal facilities by new entrants. See National Contribution from Australia (1998), and "Competition Policy and International Airport Services", *DAFFE/CLP(98)3*.

Launceston by *Ansett* only. Finally, the FAC undertook the accommodation provision at Brisbane and Hobart⁹¹.

The reality facing the entrant varied considerably between airports, even though they were all owned by the government. In Brisbane, for example, in addition to the fact that the terminal had been purposefully constructed with extra capacity to accommodate an entrant, the trend with new airline facilities was “the development of common user facilities rather than dedicated airline terminals”⁹². The entrant was able to enter with relatively few problems in Brisbane. In Sydney, however, there was no terminal space already set aside for entrants. Consequently, the incumbent airlines were forced to make room for the entrant by contracting their own terminal space. *Compass* “chose” to be a sub-lessee of *Australian* for terminal access, and the same happened at Melbourne and Adelaide airports. However, the space made available to the entrant was not randomly selected. Instead, *Compass* passengers had to carry baggage upstairs to check-in counters whereas the *Australian* ground level check-in counters were 20 meters from the street. The direction of the lone escalator near the *Compass* check-in counter was determined by whether most passengers were arriving at the terminal or departing. Passengers had to walk through a narrow passage into the holding lounge and, when two *Compass* aircraft were boarding simultaneously, only about half the passengers could be seated in the lounge. Similar circumstances arose at the Melbourne airport, where the leased terminal had inadequate information (dearth of signs) for the passengers, long walking distances to the most remote gates and inefficient baggage handling.

Access negotiations were not always successful. At Perth they were unsuccessful because *Australian Airlines* conditioned access on *Compass* changing its timetables. To avoid this requirement, *Compass* used the international terminal, but it was less convenient—one kilometre away from the domestic terminal.⁹³

Gate availability and location were not the only problems related to terminal access; baggage handling was also a problem. Ground handling services were historically performed by the two major airlines⁹⁴. The minister for tourism acknowledged that “among other problems, *Compass* will have some difficulties landing in central Australia because of handling facilities.”⁹⁵

Subsequently, *Compass* failed within two years of its founding.⁹⁶ It is unknown whether demand for the entrant’s services was significantly curtailed by its treatment at the two largest airports⁹⁷ or whether the

⁹¹ See Nyathi M., Hooper P. and Hensher D. (1993), “Compass Airlines 1 December 1990 to 20 December 1991. What went wrong?”, *Transport Reviews* 13 (2), 119±149 and 13 (3), 185±206.

⁹² National Contribution from Australia, (1998), “Competition Policy and International Airport Services”, *DAFFE/CLP(98)3*.

⁹³ For the specific terminal arrangements, see Nyathi M., Hooper P. and Hensher D. (1993), “Compass Airlines 1 December 1990 to 20 December 1991. What Went Wrong?”, *Transport Reviews* 13 (2), 119±149 and 13 (3), 185±206.

⁹⁴ See National Contribution from Australia, (1998) “Competition Policy and International Airport Services”, *DAFFE/CLP(98)3*.

⁹⁵ Notes from a Parliament Record of the Sixth Assembly of the Northern Territory of Australia Legislative Assembly, 10 October 1991, available at <http://notes.nt.gov.au/lant/hansard/HANSARD6.NSF/0/125074017bd8e178692565bb001e97f4?OpenDocument>

⁹⁶ See National Contribution from Australia (1998), “Competition Policy and International Airport Services”, *DAFFE/CLP(98)3*

⁹⁷ The aircraft lease payments were the largest direct operating cost (31%) and constituted "a serious drain on *Compass*' cash as they were paid on a monthly basis". See Nyathi M., Hooper P. and Hensher D., (1993),

costs of trying to construct its own terminal space contributed to its demise. Although, both the Trade Practice Commission and the Australian Bureau of Transport Communication Economics concluded that the entrant failed because of a bad strategy, they acknowledged that an inadequate access to the facilities may have played a role in putting the firm at a disadvantage⁹⁸. Once airport capacity was released by the initial entrant's failure, other entrants arose. By then some airport expansions⁹⁹ and the use of larger aircraft did much to alleviate the capacity constraints at the largest airports.

4. Competitive Access Approaches

Without underestimating the difficulties associated with effective competitive access or the considerable public debates about competitive access policies, this section seeks to present several less widely publicised approaches to access that have developed in the transportation sector. The intent in doing so is to encourage competition authorities, sector regulators, and other policy makers to consider the alternative access approaches. Even if a particular approach does not seem to fit the circumstances of a pending access situation, it can be worthwhile to consider why these less well known approaches appeared to work; where they did and how insights from these approaches might be modified to create a good fit in other circumstances.

Box 3. Can Competition for the Market Be Employed to Secure Open Access to Transportation Infrastructure?

One widely implemented approach aimed at improving efficiency in the operation of essential facilities is to create "competition for the market" when competition in the market is not feasible. The evidence on the success of this approach in improving efficiency is mixed.¹⁰⁰ Nonetheless, it is widely pursued. A Demsetz auction,¹⁰¹ for example, occurs when the government awards a franchise to operate an essential facility, or a natural monopoly more broadly, on a competitive basis. In these auctions, the winning bid may be the one that offers to provide the service at the lowest price to customers. The implicit assumption in this model is that the price paid by customers is the only measure of performance that is of concern. But for at least some essential facilities, discriminatory access may also be a policy concern. If so, the criteria used to pick the winning bid could be changed to include a bidder's approach to reduce its own incentives and ability to discriminate in providing access to firms that might be rivals at the same or other stages of production. Doing so could make the evaluation of bids more complex and less readily quantifiable. At the same time, it would unleash the creativity of the market and the forces of competition to address the discriminatory access issue. There are numerous issues about auction design, bidding, and enforcing contracts that are beyond the scope of this paper.

"Compass Airlines 1 December 1990 to 20 December 1991. What went wrong?", *Transport Reviews* 13 (2), 119±149 and 13 (3), 185±206.

⁹⁸ See National Contribution from Australia (1998), "Competition Policy and International Airport Services", *DAFFE/CLP(98)3*.

⁹⁹ After the exit of Compass, the Federal Government agreed to spend \$130 million on new airport terminal assets in order to avoid fledgling carriers being forced to operate from Ansett or Australian Airline's terminals (AFR, 10/02/92). These new facilities were planned to be common-user terminals and were intended to start at Sydney and Melbourne airports. See Nyathi M., Hooper P. and Hensher D., "Compass Airlines 1 December 1990 to 20 December 1991. What Went Wrong?", *Transport Reviews* 13 (2) (1993), 119±149 and 13 (3), 185±206.

¹⁰⁰ A recent analysis of analysis of French water concessions is Eschien Chong, Freddy Huet, and Stephane Sausser, "Auctions, Ex Post Competition and Prices: The Efficiency of Public-Private Partnerships," University of Paris (1 September 2005) available at

http://atom.univ-paris1.fr/documents/CHONG_HUET_SAUSSIER_SEPT2005.pdf.

¹⁰¹ Harold Demsetz, "Why Regulate Utilities?" *Journal of Law and Economics* 11 (April 1968), pp. 55-65. For a text discussion, see, for example, W. Kip Viscusi, John M. Vernon, and Joseph E. Harrington, Jr., *Economics of Regulation and Antitrust* 3rd Ed. (2000), Chapter 13.

4.1 *Straw-in-the-Pipe: Split Control of Natural Gas Pipelines in the U.S.*

In 1993, the Federal Energy Regulatory Commission issued Order 636. It radically changed access to interstate natural gas pipelines by requiring open access and allowing customers with firm contracts for use of part of the capacity of a pipeline to resell capacity rights to other potential customers (which might include owners of competing pipelines). This is termed “capacity release.”¹⁰² Prior to Order 636, pipelines were under no obligation to provide service under the same terms and conditions it provides to itself. After Order 636, pipelines did have this obligation and a private standard setting organisation, the Gas Industry Standards Board (GISB), developed and promulgated standards for business conduct. These standards were generally adopted by market participants and made evasion of the provisions of Order 636 easier to detect. Also prior to Order 636, “capacity held under a contract between a shipper and a pipeline company could not be assigned or sold to any other shipper.” After Order 636, shippers could release and transfer capacity to another firm or firms. Capacity release creates a “straw-in-the-pipe” that can create competition to serve customers in a local area even if there is only one pipeline that can physically deliver natural gas to the area. Arguably, reforms in the natural gas industry have been more complete and effective than in either electricity or telephony.¹⁰³ Contributing factors are likely to include the enforcement improvements following the work of GISB, the existing vertical separation of pipelines from production and retail marketing, and the self-contained authority of the federal regulator to authorise capacity expansions.¹⁰⁴

The effects of Order 636 on investment in the pipeline industry are in some ways counterintuitive. One might expect that requiring access to unused capacity would undermine investment incentives because the pipeline firm would face competition even when it owned the sole pipeline serving a local distribution

¹⁰² U.S. Department of Energy, Energy Information Administration, *Natural Gas 1998: Issues and Trends* (1998), Appendix D, available at http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/natural_gas_1998_issues_trends/pdf/Appd.pdf#search='natural%20gas%20and%20release%20capacity%20and%20Order%20636.

¹⁰³ For a discussion of the history of natural gas reform in the U.S. and its success to date relative to the electric power and telephony industries, see Diana Moss, “Natural Gas Pipelines: Can Merger Enforcement Preserve the Gains from Restructuring?” American Antitrust Institute Working, Paper No. 05-08 (September 2005), available at <http://www.antitrustinstitute.org/recent2/439.pdf>. For description of the U.S. natural gas industry, see FERC, Office of Market Oversight and Investigations, *State of the Markets Report* (January 2004), pp. 77-101.

¹⁰⁴ Diana Moss, “Natural Gas Pipelines: Can Merger Enforcement Preserve the Gains from Restructuring?” American Antitrust Institute Working, Paper No. 05-08 (September 2005), available at <http://www.antitrustinstitute.org/recent2/439.pdf>. In contrast, individual states retained the ability to block siting of interstate electric power transmission lines until the passage of the Energy Policy Act of 2005. Under that act, the Department of Energy is authorised to designate National Interest Electric Transmission Bottleneck corridors and FERC is granted authority to instigate transmission investment within these corridors if states are not willing to do so. Also see, Margaret Jess, “Restructuring Energy Industries: Lessons from Natural Gas,” *National Gas Monthly, Special Report* (May 1997), available at ftp://ftp.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/1997/restructuring_energy_industries_lessons/pdf/peg.pdf. Note that when a pipeline is first proposed, the builder may hold an open season to invite additional potential users to express interest and to sign contracts that will facilitate financing the project. See, Peter Frost, “Original and Expansion Capacity: What Volumes, When, on What Terms and at What Price,” testimony before the Alaska Legislative and Budget Audit Committee, Stranded Gas Hearings (28 July 2004), available at <http://lba.legis.state.ak.us/sga/0407281045.htm>. The pipeline builder may be interested in additional users because of economies of scale in pipeline capacity (cost is based largely on the circumference of the pipe, but capacity of the pipelines is largely a function of the area of the cross section, hence doubling the circumference of the pipe, more than doubles the capacity of the pipeline).

system and its customers.¹⁰⁵ In practice, however, Order 636 appears to have encouraged pipeline investment, at least within the context of other regulations surrounding pipeline investments. Pipelines are subject to substantial economies of scale because the capacity of a pipeline generally increases with the square of the radius (area of the cross section—pi times the square of the radius) while the costs generally increase in proportion to the diameter of the pipe (two times pi times the radius). Before Order 636, a pipeline investor would announce the planned project, based on the pipeline transportation customers it was able to attract, and then it would invite others to invest in increasing the capacity of the pipeline. Other investors often were reluctant to invest, however, because the rules turned the investment into an unrecoverable cost. As a result, pipelines were likely to be inefficiently small. Order 636 made independent investments in the pipelines recoverable (selling the capacity right to other potential users) and, therefore, less risky. Effectively, Order 636 increased access and competition, but countered the potential investment disincentives with reduced investment risk.

In a 2001 merger case involving the proposed acquisition of the Detroit, Michigan, natural gas utility by the local electric power distribution utility,¹⁰⁶ the Federal Trade Commission applied the straw-in-the-pipe concept to a local natural gas distribution system. The terms of this settlement reflect the myriad concerns of the entrant (buyer of the easement) about discrimination in operating and expanding the system. Among the most critical is the right to quickly expand system capacity at reasonable costs in order to serve the entrant's new customers. The entrant regarded these provisions as essential because it could only attract customers if enough capacity would be available to serve the customer. If the incumbent firm could either block or delay system expansions, the entrant would not be able to attract customers. The entrant also wanted to make sure that it would be treated at least as well as the incumbent's retail customers with regard to the charges for system expansion. Thus, most system expansions would be paid for by the incumbent because the purchase price and fixed fees paid by the entrant are treated as substitutes for the stream of expected payments from new retail customers that compensate for system improvements initiated by the incumbent. Some specific other system improvements, such as extensions to reach a specific customer of the entrant, are paid by the entrant either to the incumbent or to a contractor that works on the system with approval by the incumbent. Note that the issue of investments that primarily contribute to system reliability rather than service to particular customers are more limited in natural gas distribution than in electricity, for example. Allocating investment costs based on reliability and network effects can be significant, but are generally less so in transportation than in electricity and telecommunications. The actual elements of the DTE settlement are described in Appendix D. The FTC was concerned about the loss of actual and potential competition between electric power and natural gas distribution in the area. It viewed this as convergence merger; a merger between participants in markets that are becoming closer substitutes for each other from the perspective of some customers.¹⁰⁷ Competition was already evident from extensive discounting activity conducted by the two firms against each other to attract customers with energy demand that could economically be supplied by either electricity or natural

¹⁰⁵ The profit advantage of being the only pipeline serving a local distribution system and its customers is not unfettered, however, because the sector regulator can impose cost-based pricing if it believes that market-based pricing would result in exercise of market power by the pipeline owner.

¹⁰⁶ Detroit Edison (DTE Energy Company)—the electric power distribution utility in the Detroit, Michigan, area—sought to acquire Consolidated Gas (MCN Energy Group Incorporated or MichCon)—the natural gas distribution utility in the same area. The new entrant was Exelon, a utility that had not previously operated in the Detroit area.

¹⁰⁷ For an overview of convergence activity between natural gas and electricity industry participants, see Kyung-Hwan Toh, "The Impact of Convergence of the Gas and Electricity Industries: Trends and Policy Implications," International Energy Agency Working Paper (2003) available at <http://www.iea.org/textbase/paper/2003/toh.pdf>. For further discussion of the DTE/MCN merger case, see John C. Hilke, "Convergence Mergers: A New Competitive Model from Detroit," *Electricity Journal*, 14:8 (October 2001), pp. 13-18.

gas.¹⁰⁸ The firms' documents also projected that this form of competition would grow substantially as technologies for on-site generation of electricity mature. One major customer in this position already was the City of Detroit's municipal electric distribution system that primarily serves major city-owned facilities. This customer could either buy electricity or generate its own using natural gas and both firms were courting this customer. After the merger, this competition would disappear unless access to the natural gas distribution system was provided to a new entrant. The remedy thus sought to guarantee reasonable access and capacity expansion to a new gas distributing entrant by requiring the opening of existing natural gas transport facilities of the merged gas-electricity company, the prompt maintenance of such facilities and the potential construction of new facilities.

4.2 Club Ownership

Although the Terminal Railroad case is well known as the first major application of the essential facilities doctrine in the U.S., there is another aspect of the case that is worth noting, that is, the critical infrastructure (railroad bridges over the Missouri River at St. Louis) was not owned by a single firm, but rather was owned by a group of firms that apparently were managing use of the bridges among themselves on a mutually agreeable basis, despite the fact that they were rival railroads.¹⁰⁹ Another major U.S. club ownership case with essential facility elements is the *Associated Press* case.¹¹⁰ Associated press was a joint venture of hundreds of newspapers that required members to share their news reports in return for authority to use the reports of other members. In *Associated Press*, the Supreme Court ruled that a provision in the association's rules that allowed a member to veto specific membership applications, such as those of actual or potential competitors, constituted collusive behaviour and, therefore, must be eliminated. Factually, the case presented difficulties as an essential facilities case because there were other news gathering associations and because the existing newspaper members of the Associated Press only competed with each other to a limited extent. Hence, it was unclear how essential membership in Associated Press was essential to new newspapers and it was unclear how competition would be harmed by leaving the provision in place. The court decision sidestepped these issues under the essential facilities doctrine by focusing on the per se ban on collusive behaviour that generally applies in the U.S.¹¹¹

In the public finance literature, club ownership is regarded as an efficient economic arrangement for some imperfect public goods. Pure public goods are characterised by non-rival consumption and non-excludability. One form of imperfect public goods entails non-rival consumption and excludability. These are termed club goods. One efficiency concern regarding club goods is that private for-profit firms will find it possible to enter because non-payers can be excluded. But for-profit firms will have incentives to charge a price higher than the marginal cost, which can be zero or close to it. Club ownership provides an alternative to government ownership or regulation or access requirements in which per use charges are zero and investment costs are paid from club dues (read lump sum access charges). The equivalent to a club in the corporate context is a joint venture that supplies its owners with services at efficient prices and covers its fixed costs with lump sum subsidies (dues) from its owners. Protection against discrimination within the group can be an issue, but at least for voluntary organisations, firms have incentives to assure that the

¹⁰⁸ For discussion of on-site generation technologies and policy issues, see, The Consumer Energy Council of America, *Distributed Energy: Towards a 21st Century Infrastructure* (July 2001).

¹⁰⁹ The case did not apparently yield evidence of internal discontent about operating and pricing decisions of the association. See David Reiffen and Andrew Kleit, "Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly?" Federal Trade Commission, Bureau of Economics Working Paper 172 (April 1989).

¹¹⁰ 326 U.S. 1 (1945).

¹¹¹ Abbott B. Lipsky Jr. and J. Gregory Sidak, "Essential Facilities," *Stanford Law Review* 51:5 (May 1999), pp. 1187-1248, at 1198-1201.

governing structure and operating rules preclude discrimination.¹¹² More generally, club ownership simply indicates joint ownership and control of an essential facility by its users.¹¹³

Club ownership has not been adopted on a large scale in the transportation industry, aside from airport slotting decisions in Europe. “Almost every European country with a fully co-ordinated airport has chosen a form of club ownership for the slot co-ordination body – the slot co-ordination body is usually owned by a group of airlines (France, Netherlands and the UK) or a group of airlines and airports (Denmark, Italy) or a group of airlines and government (Sweden and Norway). Only in Germany is the slot co-ordinator’s role not partially financed by the industry. In every case, the owner airlines (the members of the "club") are only domestic airlines – raising questions of access by foreign airlines to domestic airports. In Finland and Greece the slot co-ordinator is owned and staffed by the incumbent airline. Those European countries which do not have fully co-ordinated airports, have generally not chosen to separate slot control from the incumbent airline. There are real dangers in allowing integration between the incumbent airline and the slot coordination role. In Italy prior to 1996 the slot co-ordination role was carried out by *Alitalia*. *Alitalia* used this position to restrict competition. An intervention by the Italian Antitrust Authority led to the establishment of a more neutral co-ordinator.”¹¹⁴

Club ownership has also been considered in depth by New Zealand as an option for organising investment in its air traffic control system¹¹⁵ and its highway system. Ultimately, New Zealand opted not to use a club model in either case. In the matter of the air traffic control system, decision makers were concerned that with only two major industry participants, a club organisation would likely be dominated by these two firms and that their interests would coalesce around impeding entry.¹¹⁶ This concern about the air traffic control club excluding airline entrants in New Zealand points to a more general concern that necessary coordination to operate the essential facility will extend into coordination in other aspects of business that should be competitive and not coordinated such as, pricing, innovation, and product quality.

A common example of club ownership is private roads within gated communities. The roads within these residential areas generally are maintained by an association of residents through association dues and without use charges. Another related example is cooperation among users of branch railroad lines in the U.S. to organise new rail companies to maintain rail branch lines that the major railroads are unwilling to maintain. As part of its efforts to prepare *Conrail* for privatisation, the government’s U.S. Railway Association authorised *Conrail* to abandon many local branch lines serving few users, which were

¹¹² A related issue arises in securities law when one shareholder acquires a controlling interest. A stockholder in this position can have incentives to expropriate the value of minority holdings. This risk may be at least partially address by requiring a supermajority for major decisions, requiring the majority owner to buy back the shares of minority holders on the open market, and regulations governing equal treatment of minority shareholders.

¹¹³ See, OECD, *Restructuring Public Utilities for Competition: Competition and Regulatory Reform* (2001), p. 13-14, available at <http://www.oecd.org/dataoecd/6/60/19635977.pdf>.

¹¹⁴ OECD, *Restructuring Public Utilities for Competition: Competition and Regulatory Reform* (2001), pp. 30-31, available at <http://www.oecd.org/dataoecd/6/60/19635977.pdf>.

¹¹⁵ Doug Andrew, Director of Economic Regulation Group, CAA, “Corporatisation of the New Zealand Air Traffic Control System,” memorandum to the Parliament of the United Kingdom, House of Commons, Committee on Environment, Transport and Regional Affairs (January 1998) available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmenvtra/360-e/36037.htm>.

¹¹⁶ Doug Andrew, Director of Economic Regulation Group, CAA, “Corporatisation of the New Zealand Air Traffic Control System,” memorandum to the Parliament of the United Kingdom, House of Commons, Committee on Environment, Transport and Regional Affairs (January 1998), fn. 6, available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmenvtra/360-e/36037.htm>.

unprofitable for a large railroad to operate. The government invited local communities or groups to obtain the right to operate these branch lines.¹¹⁷ When a small community accepts the challenge to maintain a branch line in order to support local rail customers or to facilitate the organisation of a short line railroad,¹¹⁸ it can resemble a form of club ownership. Another variant on club ownership is a stakeholder governance process in which groups of users are represented on a governing board.

Anecdotal evidence from major applications of the club ownership/stakeholder approach to infrastructure access in the electric power industry suggests some limitations on this approach to essential facilities ownership and management. One example was the early ownership structure for UK electric power grid. For the first few years, the UK transmission system was owned jointly by the thirteen local electric power distribution firms. This ownership structure was intended to separate generation from the regulated stages of production and promote management of the grid that would be responsive to customers. The UK shifted away from this form of governance in favour of an independent and unaffiliated grid owner/operator amid concerns about National Grid distorting its decisions if it owned any generation.¹¹⁹ Another example is the stakeholder governing board of the California Independent System Operator (*Cal ISO*). *Cal ISO* operates the transmission grid in California. It was originally organised with a governing board that had members from specific groups interested in grid operations. These groups included distribution utilities, independent generators and consumers.¹²⁰ Critics contend that disagreements among members of the *Cal ISO* governing board resulted in deadlock on important issues that contributed to the California energy crisis.¹²¹ Important issues were not resolved; took too long to work out; or were decided in dubious ways as a result of intense disagreements.

In general, the evidence suggests that club ownership is more likely to be a useful approach to essential facilities problems when operating issues are not divisive, there are enough significant

¹¹⁷ The provisions for abandonment of rail lines and the provisions to encourage continuation of service by non-railroad acquirers are described in Office of Public Services, Surface Transportation Board, "Overview: Abandonments & Alternatives to Abandonments" (April, 1997) available at <http://www.stb.dot.gov/stb/docs/Abandonments%20and%20Alternatives.pdf#search=railroad%20abandonment>.

¹¹⁸ Fred D. Baldwin, "Short Line Railroads: Local Lifelines for Business," *Appalachia Magazine* (August 2001), available at <http://www.arc.gov/index.do?nodeId=876> and "Shortline Railroads Doing Well in Northwest," *UTU Daily News Digest* (4 March 1999), pp. 1-3, available at <http://www.utu.org/DEPTS/PR-DEPT/NEWS/ndigest/1999/March99/ND03-04.HTM>.

¹¹⁹ Initially National Grid held pump storage generation capacity and the Regional Electric Company's (its initial owners) were permitted to own up to 15% of the capacity needed to meet the load in their respective regions. Energy Information Administration, Department of Energy, "Electricity Reform Abroad and U.S. Investment: The Structure of UK Electricity Prior to Privatization," available at <http://www.eia.doe.gov/emeu/pgem/electric/ch211.html>.

¹²⁰ "Until January 2001, the California ISO was governed by a Board representing various stakeholders participating in the electric utility industry. Virtually all of the Company's transactions were executed with organizations that were represented on the Company's Board, including the three California investor owned utilities." Steven Bird, "RTO Governance, A Comparison of ISO Governance Structures in the U.S." (3 April 2002) available at <http://www.ksg.harvard.edu/hepg/Papers/Bird%20ISO%20gov%20comparison%20matrix%20App%20A.pdf>.

¹²¹ "Commission Orders Overhaul of California ISO," *Energy Users News* (28 August 2002), available at http://www.energyusernews.com/CDA/ArticleInformation/features/BNP_Features_Item/0,2584,82960,0_0.html. The Federal Energy Regulatory Commission stated "The Ca-ISO governing board, as presently constituted, is not representative of all stakeholders, effectively limiting its ability to truly represent and appropriately balance the interests of all parties, threatening its ability to treat out-of-state transmission users fairly and undermining efforts for broader regional cooperation in Western markets."

participants to avoid domination by a subgroup of firms and membership is not so diffuse that members become disengaged in the decision making processes of the club.

More generally, the issue of sharing a facility among incumbents, which can work reasonably well through a club organisation, appears to be an easier problem than making decisions to accept new members and to increase capacity to accommodate them. The latter can have more contentious decisions because the interests of club members are more likely to diverge on these issues. New members and expansion of facilities are likely to impact club members differently, particularly when members are differentiated in product or geographic space. One potential solution to the membership and capacity issues can be implemented when the club is formed. That is to hold an open period for membership and for identifying present and future capacity needs of individual members.¹²² The former could result in enough initial members that subsequent denial of access would be less likely to harm competition. The latter could result in a planned path of expansion that would help to maintain effective competition between club members. Adding a system for tradable rights could help assure that capacity is allocated to the highest value use over time.

4.3 *Vertical Integration by Users of an Essential Facility*

In some circumstances, the owner of an essential facility may restrict the number of firms allowed to perform services for customers of the facility and favour affiliated firms in its selection of service firms. A potential option for increasing competition under these circumstances can be allowing customers of the essential facility to vertically integrate by performing these services for themselves. For example, airlines could be permitted to perform their own catering and baggage handling services. At a minimum, the potential for vertical integration can serve to limit exercise of market power by existing suppliers of these services. Vertical integration in this situation is a form of potential entry and can reduce prices even if the entry does not actually take place. In making decisions about whether to vertically integrate, customers of the essential facility are likely to consider potential economies of vertical integration compared to potential loss of economies of scale in performing these services. Governments may be anxious about such vertical integration if it raises security concerns. Vertical integration by customers also may cause other concerns such as underutilisation of the existing workforce of the essential facility and unanticipated congestion in using the facility during peak demand periods.

Restrictions on vertical integration are a common feature in airport operations where restrictions on competition from independent ground service providers are also common.¹²³ Despite the passage of the

¹²² Prior to 2002, the U.S. Federal Energy Regulatory Commission held an open season for firms desiring access to liquid natural gas onshore terminals. Applicants would submit bids indicating the terms that they would accept in order to gain access. This practice was abandoned because of concerns that the compulsory open season was deterring investment in LNG terminals. Kevin D. Keenan, Philip R. Weems and Lisa M. Tonery, "Fundamentals of the Global LNG Industry 2004: Regulations Set to Boost Imports," (2004) available at <http://www.akingump.com/docs/publication/759.pdf>.

¹²³ In France, for example, the number of suppliers can be limited by a ministerial decision at the request of the airport manager under "justified" reasons such as the lack of available space or for security reasons. This mechanism can create incentives to exclude rivals when the airport manager is a provider of these services, as in the case of Aéroports de Paris (ADP). In the situations where the number of providers is limited, the airport manager is selected automatically as one of the few providers. The other suppliers are selected by the government after consultation with the Airport Users' Committee, formed by all of the airlines using the airport. Yet, their votes are weighted by their traffic handled at the terminal, criterion that gives sometimes an absolute majority to Air France. The tender process in Terminal 1 of Charles de Gaulle airport had some unexpected results. In the first phase of tendering, ADP was automatically selected, leaving one other provider to be selected. Air France was among the providers seeking a license at terminal 1. Despite the fact that it had no flights at Terminal 1 and the Airport Users' Committee for Terminal 1

Council Directive 96/67/EC in 1996, problems still persisted in a number of European airports by 2002, though there is no reason to believe that problems existed only in Europe. By 2001, the Directive required freedom of self-handling, but permitted Member States to “reserve the right to self-handle to no fewer than two airport users at airports with more than 1 million passenger movements or 25,000 tonnes of freight per annum” for baggage handling, ramp handling, freight and mail handling and fuel and oil handling.¹²⁴ Similarly, freedom of third party handling was established, but for airports with more than 2 million passengers or 50,000 tonnes of freight per annum, “Member States may limit the number of suppliers to no fewer than two for each category. However, at least one of the authorised suppliers must not be directly or indirectly controlled by (i.e. it must be independent of) the managing body of the airport” and “any airport user that has carried more than 25% of passengers or freight” during the year preceding the award of contracts. In practice, a number of governments have established maximum numbers of service providers that apply the minimum levels established by the Directive or exceed the minimum levels only slightly.

Both limits on the number of providers for certain services and the process of selecting providers have given rise to complaints by some airport users. “There have been general concerns expressed by users and independent handlers about the process of opening up the market and the different rates of adoption of legislation in the Member States.”¹²⁵ “There are weaknesses in the tender process and selection criteria, particularly where the issue of conflict of interest of the selecting bodies arises.”¹²⁶ “Some airlines expressed the view that the requirement for a minimum of only one handler independent of the major airline suppressed the competitive pressure on that independent handler.”¹²⁷

Given the other restrictions on competition among third parties to provide ground services, vertical integration may be an appealing approach to increase competition. This will only be possible, however, if restrictions on vertical integration are modified or withdrawn.

Box 5. European Commission Proposed Directive on Port Access Allowing Vertical Integration into Port Services by Shippers

During the 1990s, the European Commission issued a number of decisions related to port access.¹²⁸ In 1997 the European Commission released a Green Book on Ports and Maritime Infrastructure. This fed into policy discussions

stated a preference for two other licensees over Air France, Air France was awarded the second license in Terminal 1. Only in a second phase of awards was a further license given to a third-party handler preferred by the airlines. In Terminal 2 of Charles de Gaulle Airport, where Air France and its alliance partners accounted for 75% of traffic, ADP and Air France were awarded the first two licenses. A third license was given to Europe Handling, which is the principal sub-contractor of Air France. Decisions that restrict market participants can substantially lessen competitive pressures, particularly when one firm plays a role in selecting its competitor. See SH&E Limited, “Study on the quality and efficiency of ground handling services at EU airports as a result of the implementation of Council Directive 96/67/EC: Report to the European Commission, Appendices” 7 October, 2002, p. 20. See, also, OECD, “Regulatory Reform in the Civil Aviation Sector”, OECD Reviews of Regulatory Reform, Regulatory Reform in France (2004).

¹²⁴ SH&E Limited, “Study on the quality and efficiency of ground handling services at EU airports as a result of the implementation of Council Directive 96/67/EC: Report to the European Commission” 7 October, 2002.

¹²⁵ Id, p. 51.

¹²⁶ Id, p. 51.

¹²⁷ Id, p. 53.

¹²⁸ Rødby, OJ L 55, 26.2.1994; B&I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd. (1992) 5 CMLR 255 (Case IV/34.174) 11 June 1992.; 94/19/EC: Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689 - Sea Containers v. Stena Sealink - Interim

concerning efficiency, competition, and the integration of ports into a broad European transport network. The Green Book suggested that regulation at a European level would help to ensure a liberalisation of services in major ports with international traffic. In 2000, the European Commission proposed a Directive on access to the market of port services and in 2004 a revised Directive was proposed.

According to the European Commission, "The objective of the proposal for a directive is to ensure freedom to provide port services or carry out "self-handling" at "sea ports" for EU providers of port services, subject to certain objective and relevant considerations such as:

- Space or capacity available at the ports;
- The development policy of the port;
- Maritime traffic security or safety requirements at certain ports;
- Protection of the environment:
- "Public service requirements" etc"

The Directive would apply to ports meeting a minimum threshold of size. In terms of self-handling, it would permit self-handling using land-based personnel of the self-handler who are employed "in full compliance with the applicable national and Community rules dealing with employment and social issues, following the same general rules and conditions set for all other personnel involved in cargo handling."

"Under the directive, ships providing an "authorised regular shipping service" in the context of short sea shipping or operating on motorways of the sea may, in addition to using land-based personnel, carry out self-handling using the ship's regular seafaring crew."

The directive would require an authorisation for self-handling. "The criteria for granting such authorisations must be the same as those applying to providers of the same of a comparable port service, provided those are relevant. Competent authorities must grant such authorisations to self-handlers in an efficient and expedient manner."¹²⁹

The 2001 Commission proposal of a Directive on access to the market of port services was not adopted due to serious concerns of Member States. In October 2004 the Commission provided an updated proposal, which has not yet been approved by the European Parliament.

4.4 *Auctions and Other Market Mechanisms*

Even if the general problem of access to an essential facility has been addressed, there remains a question concerning which potential users will be accommodated if the facility is congested or near capacity. Administrative approaches are commonly used, but they tend not to allocate capacity efficiently to the highest value use. Market mechanisms for allocating access can provide a more efficient use of resources if they are well designed and administered. One of the most common access allocation situations arises at airports during peak take off and landing periods.¹³⁰

measures); 97/745/EC: Commission Decision of 21 October 1997 relating to a proceeding pursuant to Article 90 (3) of the EC Treaty regarding the tariffs for piloting in the Port of Genoa *Official Journal L 301*, 05/11/1997 P. 0027 – 0035.

¹²⁹ See <http://europa.eu.int/scadplus/leg/en/lvb/l24272.htm>.

¹³⁰ Most airports do not face direct competition from other airports because there are economies of scale and efficiencies for interconnecting flights that result in a single facility paired with a metropolitan area. This could have resulted in a single air carrier owning the airport and providing all flights to and from that facility. Abbott B. Lipsky Jr. and J. Gregory Sidak, "Essential Facilities," *Stanford Law Review* 51:5 (May 1999), pp. 1187-1248, at 1203-1204. This has not generally happened because even though most airport facilities have natural monopoly aspects, airlines have not undertaken such investments themselves and use

The most significant access issues arise when airport capacity in a region is at or near capacity and new entrants seek access or an existing carrier wants to expand. Increasing the intensity of use under such circumstances is likely to impose delays (congestion) and increase safety concerns. As a result, airports or air traffic control operators set limits on the number of flights per time period. The capacity constraint creates a policy question about which flights and which airlines obtain landing slots during peak periods.

A variety of approaches are possible including allocation based on past use, random assignment; negotiated agreements, various pricing mechanisms and trading or resale among initial rights holders.

In other sectors, a common response to congestion is to consider extra charges during peak demand periods.¹³¹ Some airports have established higher prices for landing during peak periods and these practices have been shown to increase passenger flows. For example, such practices encourage planes with one or two passengers to use other airports or postpone their arrivals to off-peak periods.¹³² This allows more planes with many passengers to land during peak periods. Large revenues from peak load pricing of this type also can provide signals for investment to expand capacity.

Since 1993, the most common approaches in Europe have been to use the IATA scheduling system and Council Regulation No. 95/93. “The common rules and the IATA scheduling system share several features. They include the right of air carriers to freely exchange slots and a requirement to use a slot at a level of 80% (or more) to retain it in a succeeding season. Both regimes also have a preference for new entrants for up to 50% of new or unused slots.”¹³³ Discussions of policies for allocation of slotting allowances continue in Europe. For example, proposals for slot exchanges in order to reduce congestion and increase passenger flows have been proposed by the Frankfurt airport authority.¹³⁴ If concerns about hoarding of slots arise, stronger “use-or-loose” requirements could be attached to slot ownership.¹³⁵

of airport capacity can be divided up between competing airlines apparently without severe loss of economies of scale or scope. International standardization of ground services may also contribute to diminishing concerns about loss of economies of scope in these services when multiple airlines use the same facility. See, OECD, “Competition Policy and International Airport Services (1998). Gates, landing slots and ticketing/check-in space are all routinely allocated between airlines using the airport. Much of the work of serving passengers is carried out in vertically integrated, parallel operations of individual airlines. In this sense, airports have a long tradition of providing access to multiple downstream rivals.

¹³¹ For example, technological advances have allowed development of automatic metering devices for automobiles that assess a charge when an automobile travels to city center during rush hour traffic. Adam M Zaretsky, “Rush-Hour Horrors: How Economics Tackles Congestion,” *Regional Economist* (April 1997), pp. 10-11, available at <http://stlouisfed.org/publications/assets/pdf/re/1997/b/re1997b4.pdf>. Also see BBC, “Norway’s Road Toll Success,” (17 February 2003), available at:

<http://news.bbc.co.uk/1/hi/world/europe/2765895.stm>.

¹³² Several early instances of peak load pricing of airport landing charges are discussed in Jon Ogur et al, *The Deregulated Airline Industry: A Review of the Evidence*, FTC Bureau of Economics Economic Issues Paper (January 1988), pp. 37-47. The UK also has had a long record of buying and selling take off and landing slots.

¹³³ OECD, “Liberalization of Air Cargo Transport” (2 May 2002), paragraph 82 (p. 40), available at <http://www.oecd.org/dataoecd/44/2/2086192.pdf>.

¹³⁴ Christian Fritton, “Slot Policy for Fraport,” presentation to Imprint-Europe, seminar 3, Brussels (October 2002) available at http://www.imprint-eu.org/public/Presentations/imprint3_Fraport_Fritton.ppt.

¹³⁵ Christian Fritton, “Slot Policy for Fraport,” presentation to Imprint-Europe, seminar 3, Brussels (October 2002) available at http://www.imprint-eu.org/public/Presentations/imprint3_Fraport_Fritton.ppt. Also see Airports Council International, “Traffic Rights, Airport Capacity and Airport Slots: The Airport Operators’ View,” presentation to the Worldwide Air Transport Conference, Montreal (March 2003), available at

In the U.S., buying and selling slots has been authorised for many years and many such trades have been recorded.¹³⁶ The U.S. has generally rejected the coordinated scheduling approach used in Europe because of concerns about subsequent anticompetitive coordination among participants. At the most congested U.S. airports, another technique – allocating landing slots through auctions – has also been employed.¹³⁷ An auction process may present some transaction efficiencies, but it can present significant difficulties for airline scheduling and operations as well.¹³⁸ The U.S. auction system is described in the 2002 OECD publication on liberalising the air cargo industry:¹³⁹

“At a National level, one of the oldest national regulations on slot allocation is the high density airport rule of the United States Federal Aviation Administration (FAA) which was introduced to meet an airport and air traffic capacity problem in 1968. In 1999, the high density rule applied to two international airports, namely Chicago O’Hare and New York-JFK (both of which are also fully coordinated under the IATA scheduling system), and two airports designated as domestic (New York-La Guardia and Washington Reagan). Over the years the rule has evolved, but it retains some features which it shares with the IATA and the European systems, such as air carriers being able to continue to use seasonal slots which have been used in a previous similar season for international services, allowing air carriers to exchange slots on a one-for-one basis, and a preference for new entrants. However, unlike the IATA and the EU systems, slot allocation at high density airports in the U.S. is directly operated by the aeronautical authorities. The high density rule is considerably more complex than either the IATA or the EU system, largely because it creates separate limits for different categories of users within an overall hourly or half hourly limit on take-offs or landings and because it permits the purchase, sale or lease of slots for certain domestic air services. The high density rule also contains a reciprocity provision similar to that of the EU, permitting its suspension of an air carrier or commuter operator from a country that provides slots to United States air carriers and commuter operators on a more restrictive basis than the United States rule. Following a comprehensive and detailed study conducted by the United States Department of Transportation (DOT) in 1995,¹⁴⁰ legislative changes were introduced in April 2000 to phase out the high density rule at three of the

http://www.icao.int/icao/en/atb/atconf5/docs/ATConf5_wp091_en.pdf. Also see U.K. Department of Transport, “Consultation on the Introduction of a Sanction for Misuse of Airport Slots” (July 2005), available at

http://www.dft.gov.uk/stellent/groups/dft_aviation/documents/pdf/dft_aviation_pdf_039056.pdf.

¹³⁶ Comment of the U.S. Department of Justice before the Federal Aviation Administration, Department of Transportation, in the matter of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of Lottery Allocation, Docket No. FAA-2001-9854 (June 20, 2002).

¹³⁷ Jon Ogur et al, *The Deregulated Airline Industry: A Review of the Evidence*, FTC Bureau of Economics Economic Issues Paper (January 1988), pp. 42-43.

¹³⁸ Interview with John White, OECD (October 2005) who was a member of the Australian Department of Transport’s senior management group and active in the government’s reform activities regarding airports and airlines at that time. For example, if an airline wins a slot at one airport, but does not win at the other end of the city pair, the planned service cannot be initiated. In contrast, if airlines are allowed to buy and sell slots, an airline can make its offer for the slot in one city contingent upon its success in obtaining a slot at the other city. It can go forward realizing that if it obtains one, but not the other, it can resell the orphan slot that it did obtain (this reduces the risk of sunk costs).

¹³⁹ OECD, “Liberalization of Air Cargo Transport” (02 May 2002), paragraph 83, available at <http://www.oecd.org/dataoecd/44/2/2086192.pdf>.

¹⁴⁰ A principle motivation for dropping the high density rule was the perception that the number of slots available had not been adjusted to reflect improved air traffic control capabilities. Subsequent events suggest that slots were still a scarce resource, just not as scarce as they had been when the high density rule was put in place.

four airports (i.e. Chicago O'Hare from 1 July 2002, New York-JFK and La Guardia from 1 January 2007) with exemptions being used during the transition period [to authorize additional flights].¹⁴¹

New grants of access to La Guardia increased by more than 20% following the new legislation and this then resulted in major increases in delays. Restrictions were again placed on landing slots, but an administrative process was used to allocate the slots.¹⁴² As the U.S. Department of Justice commented,¹⁴³ “allowing unfettered access to a valuable public resource like landing and take-off slots at La Guardia created delays because each user of slots ignored the effect that congestion had on other users of the common airspace. The comment went on to recommend a market-based solution such as auction open to both entrants and incumbent airlines or congestion pricing. It concluded that congestion pricing would be less desirable because the FAA would have difficulty determining the efficient congestion price for each time period. An auction mechanism does not have to predetermine the access price.”

¹⁴¹ The actual change is to increase the number of slots available due to airport improvements and technological advances relative to the levels set in the mid 1980s. Department of Transportation, “DOT Expands Access to Slot-Controlled Airports for Smaller Communities, New-Entrant Carriers,” (14 April 2004), available at <http://www.dot.gov/affairs/2000/dot7900.htm>.

¹⁴² For a comparative analysis of slot allocation approaches, see, Ian Jones, et al, “Study to Assess the Effects of Different Slot Allocation Schemes, A Final Report for the European Commission,” NERA (January 2004).

¹⁴³ Comment of the U.S. Department of Justice before the Federal Aviation Administration, Department of Transportation in the matter of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of Lottery Allocation, Docket No. FAA-2001-9854 (June 20, 2002).

APPENDIX A. WELFARE EFFECTS AND ACCESS TO ESSENTIAL FACILITIES

The following discussion of welfare effects of vertical integration and access to essential facilities excerpted from the 1996 OECD Essential Facilities Roundtable Background Note by Sally Van Siclen, OECD Secretariat.

Economics

Various factors affect the welfare analysis of a refusal to deal in particular industries. One factor is the nature of regulation, especially where available for relief, and the nature of subsidies. Another factor is whether the technology is fixed proportions, i.e., whether a given quantity of the upstream product goes into each unit of the downstream product. A final important factor is the prospects for enhanced competition. (Werden, p. 473)¹⁴⁴

The following diagrams illustrate some market structures where an essential facilities assertion might be made.

Vertical integration downstream by an unregulated monopolist

Diagram 1 shows two unregulated markets: Firm A is a monopolist in the upstream market and A and B are duopolists in the downstream market. B buys an input, which it can get nowhere else, from A. If A does not supply B, but rather vertically integrates downstream, then this action may affect consumer welfare, positively or negatively.

Diagram 1. Upstream monopoly, downstream duopoly



In a world of complete information and no uncertainty, where the upstream firm has an uncontested and unregulated monopoly sells to identical downstream buyers who use the input in fixed proportions and employ a constant returns to scale production technology, then there is no effect on welfare if the monopolist integrates downstream. The monopolist can appropriate all the monopoly profits in either

¹⁴⁴ Gregory Werden, "The Law and Economics of the Essential Facilities Doctrine," *St Louis University Law Journal*, 32:2 (1987), pp. 433-480.

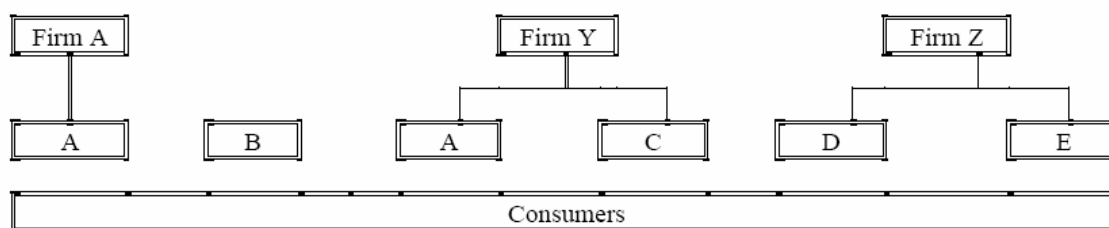
scenario. (Ordover and Saloner, p. 564)¹⁴⁵ If any of these conditions is not met, then it may be profitable for the upstream firm to downstream integrate. This may or may not decrease welfare. For 11 example, if all the other conditions are met and if the input is not used in fixed proportions and if the price of the input is not at marginal cost (which is likely given the upstream monopoly position), then vertical integration (which presumably would result in an internal transfer price equal to marginal cost) would increase welfare. If downstream firms are not identical, perhaps facing differing demands, then vertical integration may make price discrimination possible, which has an ambiguous effect on welfare. If the downstream firm is a monopoly or a monopsony, then vertical integration increases the quantity of the input sold and downstream output, raising welfare. If there is uncertainty or incomplete information, then vertical integration presumably diminishes contracting costs and losses due to agency problems. ("Presumably" because the relative efficiency of a market mechanism and an internal corporate control mechanism is an empirical issue.) Vertical integration may raise entry barriers -- through increasing risk of capital and necessary managerial skills -- but the effect on welfare of raising entry barriers is minimal when the essential facility is a natural monopoly. (Werden, pp. 467-8)

Should the essential facilities doctrine (EFD) be limited to natural monopolies? Werden argues yes, even though a natural duopoly or triopoly would raise similar issues, and even though a natural monopoly does not necessarily have downstream market power, because the rule would be simple. (Werden, p. 476) In discussing "putting the rival at a disadvantage" as a less extreme form of foreclosure of an essential input, two economists posit three conditions that must be met for a firm to find it feasible and profitable to place its rivals at such a disadvantage. Firstly, the value of the exclusion must be greater to the excluding firm than to the rival. Secondly, the rivals must not be able to find substitute suppliers which would restore their competitiveness. Third, the excluding firm must have some market power. (Ordover and Saloner, p. 566)

Competition in unregulated upstream market

Diagram 2 shows another possible scenario: there is competition among Firms A, Y and Z in the upstream market and among Firms A, B, C, D and E in the downstream market.

Diagram 2. Upstream competition



- Whether Firm B can acquire the needed input and compete may have little effect on consumer welfare: Competition among A-A (input from Firm A combined with distribution or transformation by A), Y-A, Y-C, Z-D and Z-E may be sufficient so that the absence of B has little effect.

¹⁴⁵ Janusz A. Ordover and Garth Saloner, "Predation, Monopolization and Antitrust," in *Handbook of Industrial Organization*, Richard Schmalensee and Robert Willig, Eds., (1988).

Market definition

These two examples illustrate the important role played by market definition in assessing the static welfare effects of mandating access. The role of market definition is clear in the first element of the MCI formulation; that the firm be a monopolist because that status can occur only in a market. The second element seems to refer to a degree of non-substitution even greater than that used in defining the boundaries of a market; that the facility be impractical and unreasonable to duplicate, as compared with, in the U.S. Merger Guidelines, not substitutable with a small but significant non-transitory price increase.

The European Court of Justice decisions on the broad duty to supply refer to dominant firms, which implies a defined market. However, the Commission decision in *Sealink* refers to an "undertaking which occupies a dominant position in the provision of an essential facility [emphasis added]." Whether this implies that an essential facility is, by definition, a market, it is not clear. Finally, the formulation offered in the Hilmer Report refers to facilities, rather than markets. The relatively obscure role market definition plays in some EFDs may reflect the contexts in which the EFDs operate. In the Australian example, essential facilities are limited to natural monopolies and "almost all cases of essential facilities identified...were in the public sector" (Hilmer, p. 239). Here, the safeguard to an overly broad finding of a duty to deal is provided, rather than by a market test, but by a cost structure test -- natural monopoly -- and a "significance test" which explicitly excludes "products, production processes or most other commercial facilities."

Mandating access and private investment

The above dealt only with static situations. A key issue in formulating an efficiency-enhancing EFD, however, is the effect of mandating access on dynamic efficiency. Imagine a purely private, unregulated, non-aided firm contemplating a sunk investment,¹⁴⁶ such as a port. Assume that the future demand for that port is unknown until after it is built. Then the firm may face three possible outcomes: a negative return on investment in the port in any case (low demand); a negative return if access is mandated but positive if it can exclude competitors (medium demand); and a positive return even when access is mandated (high demand). It may be the case that if the firm expects access to be mandated, then it would not build the port, but if it expects access not to be mandated, then it would build the port. (The [example] below explains this point in greater detail.) Hence, a duty to provide access can deter initial investment in such a facility.

Dynamic effects of mandating access example

Assume that the port costs 7 currency units to build and the decision to build must be made before the quantity of demand is known. Assume that demand can be high, medium or low, that the corresponding revenues are as shown, and that the probability of each of these outcomes is 33%. For example, assume that if demand is "high" then the port would have revenues of 8 if access were mandated and revenues of 10 if access were not mandated. In this example, the port would be built if demand were known in advance to be "high" whether or not access is mandated. The port would not be built if demand were known in advance to be "low." In this example, the expected profits from building the port if access is mandated is $-1 = (0.33 \times 1 - 0.33 \times 1 - 0.33 \times 3)$ and expected profits if access is not mandated is $+1$. Therefore, assuming

¹⁴⁶

This discussion from the earlier roundtable does not anticipate the distinction between sunk cost and unrecoverable sunk costs. From the perspective of an investor, the financial risk of interest is unrecoverable sunk costs. These are costs that not only have no use outside the market, but also have no buyers for further use within the market. If there is demand for use of the assets within the market, there is less risk because the investor can recover some its investment by selling the investment to other incumbent market participants or to entrants.

risk neutrality, the firm will build the port if it expects not to be forced to provide access but will not build the port if it expects to be forced to provide access.

Demand	Probability	Access Mandated		Access Not Mandated	
		Revenues	Profits	Revenues	Profits
High	1/3	8	1	10	3
Medium	1/3	6	-1	8	1
Low	1/3	4	-3	6	-1

Regulation and aid

When firms are or have been recipients of State aid or economic regulation, then the public policy towards them may take account of these features.

The regulation of an upstream monopolist affects the analysis of its vertical integration in four ways. (Werden, pp. 466-467) Regulation of price in the downstream market may diminish or eliminate any price-enhancing effects from vertical integration. Secondly, integration when there is price regulation in the monopoly market creates monopoly where there was none before, with the usual welfare effects. Thirdly, upstream vertical integration by a regulated monopolist may enable it to evade profit regulation by charging itself an inflated price for the input. Fourthly, if vertical integration by a regulated monopolist leads to more extensive regulation, then the resulting administrative costs and inefficiencies are a welfare cost.

On the other hand,

[R]equiring firms to deal may permit a reduction in the scope of regulation. Deregulation may appear to be an attractive proposition, at least superficially, but it is not clear that regulation of the facility alone is particularly advantageous. Unfortunately, this solution would not solve the most difficult problems of...regulation [allocating joint and common costs]." (Werden, p. 471)

The deterrence effect of mandating access on investment in "facilities" is also affected by economic regulation and state aid. In particular, if firms are state-owned and not subject to a hard budget constraint or if they are regulated according to a cost-plus scheme, then the negative dynamic effect of mandating access as noted in [the example above] is diminished: a negative return on investment may be recoupable elsewhere.

Finally, economic regulation of the essential facility may imply that the mechanism for setting access conditions pre-exists, thereby reducing the regulatory costs of mandating access.

To reinterpret the results above, if the upstream regulated monopolist is of one "nationality" and downstream firms are of another and if competition officials maximise "national welfare," then downstream integration by the monopolist reduces national welfare in the downstream market. If, instead, price is regulated in the downstream market, then downstream national welfare is reduced by the amount of the former downstream profits.

Venit and Kallaugher (p. 343)¹⁴⁷ explicitly recommend a different EFD for different types of property, and point out the relationship between deregulation and an EFD:

¹⁴⁷ James S. Venit and John J. Kallaugher, "Essential Facilities: A Comparative Law Approach" in *Fordham Corporate Law Institute*, pp. 315-344.

"Ultimately, the area where an essential facility analysis may prove to be of greater value concerns cases under Article 86. As a practical matter, many facilities in Europe that are at least arguably "essential" are either controlled by the state or state-owned undertakings or are operated subject to regulation by the state. As a result, many of the general points made above regarding the application of the essential facility doctrine may have direct application in Article 86 cases, particularly in respect of telecommunications or transport infrastructure. Moreover, in the case of state-owned monopolies, application of the essential facilities doctrine to deregulate and open up markets may prove less controversial than application of that doctrine to private company conduct."

This section has examined the economic analyses underlying an essential facilities doctrine. Note that the conditions ensuring, in general, no welfare effect of vertical integration are quite specific --no price regulation (either through formal economic regulation or a prohibition of "excessive prices"), constant returns to scale technology downstream, fixed proportions use of the input, and some limits on the information environment. Note, too, how the existence of price regulation affects the welfare results. These are all issues that would bear further research.

APPENDIX B. EXCERPT FROM PAPER “AN ECONOMIC APPROACH TO ARTICLE 82”

The following discussion of refusal to deal issues from an economic perspective is excerpted from the Economic Advisory Group for Competition Policy issued in July 2005 and titled “An Economic Approach to Article 82.”

Section 4: Refusal to Deal

Refusal to deal may take several forms. The dominant firm may simply refuse to supply the essential good, or it may charge a prohibitively high price. It may make the bottleneck good incompatible with the products offered by its competitors, or it may tie the essential good to some other good, thus making it unattractive for competing firms to buy the bundle. Or it may sign an exclusive dealing contract with one particular firm, thus excluding others from the market.

1. Potential anticompetitive effects

Refusal to deal is a typical form of exclusion in vertically related markets when a dominant firm controls an input that is essential for production by competing firms in a downstream (or upstream) market. By refusing access to the input good the dominant firm extends its monopoly from the market for the essential input to the potentially competitive downstream market. However, the monopolisation of a downstream market need not have anticompetitive effects per se. After all, there is only one final market and only one monopoly profit to be reaped. If the dominant firm is able to capture the monopoly profit of the final market even if there is downstream competition, then monopolisation of the downstream market cannot have anticompetitive effects because there is no competition anyway. In this case a refusal to deal with downstream firms is likely to be motivated by efficiency arguments.

The dominant firm may also be a group of firms or an industry association refusing access to a jointly owned facility. In this case a competitor is excluded on the same or on a horizontally adjacent market. Famous examples include Associated Press (1945) and Aspen (1985). In the latter case, where a three-mountain ski resort refused to make lift tickets available to a competing one-mountain ski resort.¹⁴⁸

2. Pro-competitive effects and efficiency considerations

Upstream firms may be worried that their reputation will suffer if their product is offered by inferior downstream firms. If the upstream firm cannot effectively monitor and control the downstream firms, excluding them from the market may be the only possible way to increase consumer surplus and industry profits. Similarly, for technological reasons, it may be necessary to closely monitor downstream production by the upstream supplier. This may only be feasible in a vertically integrated firm. Or downstream firms may free-ride on the marketing expenses of the upstream firm. In order to recoup this investment, the dominant firm may have to exclude downstream competition.¹⁴⁹

¹⁴⁸ See e.g. Ahern, P. (1994), Refusal to Deal after Aspen, *Antitrust Law Journal*, 63: 153 ff: 44.

¹⁴⁹ For a more detailed discussion of efficiency defenses for vertical foreclosure, see Patrick Rey, and Jean. Tirole (2003), “A Primer on Foreclosure,” forthcoming in *Handbook of Industrial Organization Vol. 3*, M. Armstrong and R.Porter, eds., Elsevier:Amsterdam).

But even if a refusal to deal harms consumers in the short-run, it may be socially beneficial in the long-run. If the bottleneck is the result of investment or innovation activities of the dominant firm then forcing the firm to give its competitors access to the bottleneck is an expropriation of the returns of the firm's efforts. This may discourage this and other firms from investing in the future and it may reduce the incentives to innovate. Tolerating (temporary) monopoly may be the best way to promote investment and innovation incentives and thus dynamic efficiency.

If the bottleneck is due to an intellectual property right, the competition authorities should be particularly reluctant to interfere. Intellectual property rights have been granted by the state in order to create market power and to give innovators a reward for their efforts. Thus, it is inconsistent if the state interferes with these rights *ex post* and takes market power away. Indeed the mere prospect of interference affects the parties bargaining powers in negotiating a voluntary agreement. To the extent that the rival firm obtains favourable terms by threatening to sue in order to impose a duty to deal, the bottleneck owner obtains a lower return on his investment. Because there is no active intervention, the effect is not visible, but nonetheless it reduces the incentive to innovate.

3. Implementation: an example

Refusal to deal increases the market power of a dominant firm only if it was unable to fully exploit its monopoly power over the bottleneck good beforehand. For example, this is the case if the dominant firm has a problem committing to charging all the downstream firms the monopoly price. The reason is that once the monopolist has contracted with one downstream firm on the supply of the essential good, he has an incentive to supply the other firms at more favourable conditions in order to further increase his profits at the expense of the first downstream firm, which then has to compete with the other firms on the downstream market. However, the downstream firms anticipate such opportunistic behaviour by the upstream firm and will buy the essential good only at a discount. This reduces the profits of the monopolist. He may restore his monopoly power only if he manages to eliminate competition on the downstream market altogether. In such a case, refusal to deal could have anticompetitive effects.

If the competition authority suspects that such a mechanism is at work, it should proceed as follows:

- First it has to establish that there are anticompetitive effects. Suppose that the dominant firm sold the essential good to downstream firms in the past, but that it now refuses to deal with them. If the price for the final good remains unchanged and if the stock price of the downstream firms is not affected, then it is unlikely that the refusal to supply has increased the dominant firm's market power and reduced social welfare. If the dominant firm can come up with a convincing efficiency defence for the refusal to deal, the case should be dismissed. On the other hand, if the dominant firm found it difficult to commit to the monopoly price when there was downstream competition and if it manages to raise the final price paid by consumers by monopolising the downstream market, then this is an indication of anticompetitive effects.
- What is the source of the bottleneck? If the bottleneck is mainly due to the investment and innovation efforts of the dominant firm, the returns of this investment should not be expropriated and the competition authority should not interfere even at the cost of a static inefficiency (a temporary monopoly). The competition authority should be particularly reluctant to interfere when the source of the bottleneck is an intellectual property right. However, if the bottleneck stems from historical legacy, economies of scale or scope, or network externalities, an intervention may be justified.
- Is the intervention likely to be effective without impairing efficiency? Enforcement may be difficult and costly. Moreover, the competition authority is likely to be drawn into the process of

determining the terms on which the dealing must take place, i.e. prices, conditions and technical specifications. The authority is not really qualified to set such terms, so its intervention may cause substantial inefficiencies. Thus, the competition authority should be aware of the harm that it may cause, and intervene cautiously, refraining from active involvement in the dealing terms.¹⁵⁰ Structural remedies, such as divestitures and line-of-business restrictions, often involve substantial transaction costs and should be considered only as a last resort.

The competition authority should also be aware that its approach to refusal-to-deal cases affects outcomes even when firms reach a voluntary agreement so; in fact, there is no refusal to deal. The possibility that the bottleneck owner may be sued affects the participants bargaining positions. If the rival firm can threaten to sue in order to impose a deal, it is in a much stronger position than if the owner of the bottleneck can refuse to deal. As long as these cases are not contested in legal proceedings, these effects are not visible. Nevertheless, they raise the same concerns as the authority's handling of refusal-to-deal cases itself: If the anticipation of strict policy intervention leads to a voluntary agreement at low access prices, this reduces the returns to the bottleneck owner's investments; if the anticipation of weak policy intervention leads to a voluntary agreement at high access prices, this restrains the rival's ability to compete downstream. To avoid competitive harm from these effects of anticipations, the competition authority should have clear guidelines for the assessment of refusal-to-deal cases, providing well-specified standards by which to compare exclusionary concerns and concerns about returns on investments.

¹⁵⁰

In this context, it is noteworthy that in the United States court interventions under the "essential facilities" doctrine have usually left the determination of terms of dealing to the parties.

APPENDIX C. AUSTRALIAN INFRASTRUCTURE ACCESS

The description of the rationale for and operation of the Australian system for infrastructure access is excerpted from Report No. 17 of the Australian Productivity Commission (28 September 2001) available at www.pc.gov.au/inquiry/access/finalreport/access.pdf.

Key features of Australia's infrastructure access arrangements

The arrangements for firms to gain access to essential infrastructure services are complex. They involve the generic national regime — commonly referred to as Part IIIA — and a host of industry regimes. Many of these industry regimes are governed by State and Territory legislation. There are also Commonwealth regimes applying in sectors such as telecommunications and airports, as well as an access code for the national electricity market. Some of the industry regimes operate under the Part IIIA umbrella, while others are outside it.

The focus of the national access regime is on infrastructure services that are essential inputs to services provided in other (upstream or downstream) markets and which involve a 'natural monopoly' technology. The latter characteristic means that it is unlikely to be profitable or efficient for more than one firm to provide the service.

The national regime provides three access routes:

. Having a service declared: To be declared, a service must satisfy a number of criteria, including that: access would promote competition in another market; it would be uneconomic to develop another facility to provide the service; the facility is nationally significant; and the service is not already covered by an effective access regime. Declaration gives the access seeker the right to negotiate with the service provider, with provision for arbitration if those negotiations are unsuccessful;

. Seeking access through an effective access regime: Part IIIA provides for the 'certification' of existing regimes as effective. Clause 6 of the Competition Principles Agreement sets out principles for an effective State or Territory access regime. A service covered by a certified regime cannot be declared; and

. Seeking access under the provisions of an undertaking from the service provider, which has been accepted and registered by the Australian Competition and Consumer Commission (ACCC), undertakings can apply either to an individual service, or provide the basis for an industry access code. Services covered by undertakings cannot be declared.

There are several decision makers:

The National Competition Council (NCC) is responsible for assessing declaration and certification applications. Final responsibility for declaring services resides with the State Premier/Chief Minister, or the Commonwealth Treasurer — depending on the ownership of the infrastructure. The Commonwealth Treasurer is also responsible for certifying existing access regimes as effective. As well as assessing proposed undertakings, the ACCC is involved in arbitrating disputes for declared services. Part IIIA provides appeal rights for most steps in the process, mainly involving the Australian Competition Tribunal.

Various State and Territory regulators and the ACCC are responsible for administering industry access regimes operating under the Part IIIA umbrella.

Overview

The regime is not intended to replace commercial negotiations between facility owners and access seekers. Rather, it seeks to enhance the incentives for negotiation and provide a means of access on reasonable terms and conditions if negotiations fail.

To date, there have been few access arrangements arising directly from the Part IIIA declaration and undertaking provisions. Use of the certification mechanism has been somewhat more widespread. So far, 9 regimes have been certified as effective. While most of these have been gas regimes, developed under the Gas Code, two rail regimes and a regime covering Victorian shipping channels have also been certified.

However, the influence of the national access regime cannot be judged simply by reference to the number of determinations made: The threat of declaration under Part IIIA has helped to shape State and Territory access regimes, even where certification has not been sought. Access agreements have been negotiated for a number of rail services which were the subject of unsuccessful declaration applications. Not surprisingly, therefore, the inquiry generated considerable interest. While there was widespread support for a national access regime, there were also substantial concerns about aspects of the current arrangements

What is the rationale for access regulation?

In most circumstances, competition between suppliers of goods and services will result in lower prices, a wider range of products and better service for consumers. However, the transmission and distribution networks involved in the delivery of some infrastructure services use 'natural monopoly' technologies. This means that one firm can meet total demand for this type of service more cheaply than two or more firms. In an unregulated situation, and in the absence of competition from substitute services, an incumbent provider might thus enjoy substantial and enduring market power.

Apart from lower prices and increased use of services, the provision of access can be an important stimulus to innovation and other so-called 'dynamic efficiency' gains. The explosion of product offerings in the telecommunications market in recent years highlights the role that new entrants can play in this regard.

What are the potential costs?

At the same time, access regulation can intrude significantly on property rights and give rise to a range of costs that must be set against its benefits. These include:

- Administrative costs for government and compliance costs for business;
- Constraints on the scope for access providers to deliver and price their services efficiently;
- Reduced incentives to invest in facilities to provide new essential services or to maintain existing facilities;
- Inefficient investment in downstream markets; and
- Wasteful strategic behaviour by both service providers and access seekers.

The potential ‘chilling’ effect of access regulation on investment in essential infrastructure services is the main concern. Investment may be deterred for two reasons.

Potential exposure to access regulation is likely to increase the general level of risk attached to investment in essential facilities. The inevitable regulatory discretion involved in the implementation of such regulation, and perceptions that regulatory decisions are likely to be biased in favour of service users, are among the factors that contribute to regulatory risk. These sorts of risks attach to investment in any regulated activity. However, the scale of investment in essential infrastructure, and the fact that, once in place, the assets are ‘sunk’ with few alternative uses, mean that regulatory risk can be a more critical factor in the investment decision and may sometimes deter projects.

Investments in essential infrastructure will also be deterred if regulated terms and conditions are not expected to provide a sufficient return. A particular problem here is that the possibility of earning higher than normal profits if a project proves to be very successful may be required to balance the possibility that the project will fail. However, once a facility is operating, it will generally be impossible for regulators to delineate any upside returns from genuine monopoly rent — that is, returns in excess of those necessary to justify the investment. Regulatory pricing arrangements that (inadvertently) appropriate upside returns (so called ‘regulatory truncation’) can be a significant source of inefficiency arising from access regulation.

Third party access and the resulting benefits to service users are only possible over the longer term if there is continuing investment in the essential infrastructure services themselves. On the other hand, while denial or monopoly pricing of access imposes costs on the community, such behaviour cannot threaten the continued availability of the services concerned. This asymmetry in potential outcomes highlights the priority that access regulation must give to ensuring that there are appropriate incentives for efficient investment.

APPENDIX D. EXTRACT FROM ANALYSIS OF CONSENT ORDER AND DRAFT COMPLAINT REGARDING THE SHARING OF A NATURAL GAS LOCAL DISTRIBUTION SYSTEM WITH AN ENTRANT

The “Terms of the DTE/MCN Agreement to Share the Detroit Area Natural Gas Local Distribution System with an Entrant” are taken from the “Analysis of the Proposed Consent Order and Draft Complaint to Aid Public Comment” (March 2001) available at: www.ftc.gov/os/2001/03/dteanalysis.htm.¹⁵¹

The proposed consent order is designed to remedy the Commission's [Federal Trade Commission's] competitive concerns about the proposed merger. Under Paragraph II of the proposed consent order, the proposed Respondents must divest certain assets (the "Divested Assets") to Exelon Energy Company ("Exelon") pursuant to and in accordance with the terms of a Divestiture Agreement between MichCon and Exelon, no later than five (5) days after the proposed merger is consummated. The Divestiture Agreement consists of two separate agreements: (1) an "Easement Agreement" entered into between MichCon and Exelon, and (2) an "Auditor Agreement" entered into between MichCon, Exelon, and a third party that serves an oversight function with respect to the Easement Agreement between MichCon and Exelon.

The Easement Agreement has been approved by the Michigan Public Service Commission as a special contract between MichCon and Exelon. *See* Order Approving Special Contract, In the Matter of the Joint Application of Michigan Consolidated Gas Company and Exelon Energy Company for *Ex Parte* Approval of a Special Contract for Certain Transportation and Storage Rights, Case No. U-12825, February 14, 2001.

The Easement Agreement conveys to Exelon an easement over MichCon's local natural gas distribution system that will allow Exelon to engage in the distribution and storage of natural gas in the Overlap Area. Pursuant to the Easement Agreement, Exelon is entitled to the use of five billion cubic feet ("Bcf") of annual transportation capacity ("Initial Capacity") to serve any end use customers within the Overlap Area. Exelon is then entitled to an additional 15 Bcf of annual transportation capacity ("Supplemental Capacity"), in increments of 1 Bcf, which must serve at least 50% Electric Displacement Load. (Electric Displacement Load, or "EDL," includes on-site electric power generation such as co-generation, municipal generation, emerging forms of distributed generation (such as fuel cells and microturbines), and other gas-fired electric displacement equipment.) If Exelon uses all of the Initial Capacity and Supplemental Capacity (a total of 20 Bcf, of which 7.5 Bcf must be used for EDL), then Exelon is entitled to additional transportation capacity ("Growth Capacity") for use in serving on-site generation customers within the Overlap Area. Exelon also is entitled to storage capacity equal to 10% of its Initial Capacity and Supplemental Capacity. Charges for the Initial Capacity, Supplemental Capacity, and Growth Capacity are set at levels designed to allow Exelon to compete with MichCon in the Overlap Area, and to provide Exelon with incentives to distribute natural gas for EDL applications.

The Easement Agreement contains a number of provisions designed to ensure Exelon's ability to be a viable competitor. In particular, the agreement requires the parties to appoint an independent third-party

¹⁵¹ The final order, In the Matter of DTE Energy Company and MCN Energy Group Inc., FTC Docket No. C-4008 (May 15, 2001) is available at <http://www.ftc.gov/os/2001/05/dtemchdo.pdf>. The text of the Easement Agreement is available at <http://www.ftc.gov/os/2001/03/dteappa.pdf>.

auditor with knowledge of the natural gas industry to oversee the Easement Agreement and to perform such services as are necessary to effectuate the agreement, including arbitration of disputes and other duties and responsibilities designed to ensure that MichCon cannot unreasonably discriminate against Exelon. (Easement Agreement ¶ D-17.) In addition, the Easement Agreement requires MichCon to repair and replace all components of the distribution system necessary for the proper operation thereof, and allows the Auditor to make repairs or replacements, at MichCon's cost, if MichCon fails to do so. (Easement Agreement ¶ 7.) Further, the agreement allows Exelon to expand the system if necessary, either at MichCon's expense or with the assistance of an expansion allowance paid for by MichCon. (Easement Agreement ¶ D-5.) Moreover, the Agreement requires that MichCon give Exelon and the Auditor advance notice of important operational events that may impact the distribution system, such as scheduled maintenance, outages, changes in operating standards, planned new receipt points, proposed modifications to nomination or measurement practices or quality specifications, and any other events that may affect Exelon or Exelon's ability to service its customers, and empowers the Auditor to revise or modify any such events if necessary to prevent an adverse impact on Exelon. (Easement Agreement ¶ D-6.)

The proposed consent order also contains other provisions designed to ensure the continuation of a viable and competitive alternative supplier of natural gas distribution services to Electric Displacement Load customers in the Overlap Area. For example, Paragraph II.B.1 of the proposed consent order requires that proposed Respondents maintain, repair, and replace all components and other aspects of the MCN Distribution System (1) necessary for the proper or safe operation of that system; and (2) in full compliance with all rules and regulations of any federal or state agency, or any other governmental entity, having jurisdiction over any aspect of the MCN Distribution System. Paragraph II.B.2 of the proposed consent order requires that proposed Respondents operate the MCN Distribution System in a reasonable and non-discriminatory manner, and in full compliance with all rules and regulations of any federal or state agency, or any other governmental entity, having jurisdiction over any aspect of the MCN Distribution System.

Paragraph II.B.3 deals with the Auditor, and provides that the Auditor shall have the power to take all actions as in the Auditor's judgment are necessary and appropriate to effectuate the purposes of the Divestiture Agreement, including the right to propose changes to the Divestiture Agreement necessary to ensure the competitive viability of the Acquirer, and shall have free access to all of proposed Respondents' books, records, information, systems, and facilities as deemed reasonably necessary by the Auditor to monitor proposed Respondents' performance under the Divestiture Agreement. In obtaining and utilising proprietary information, the Auditor is required to observe confidentiality restrictions designed to prevent the unauthorised disclosure of such information.

Pursuant to Paragraph II.B.4, Respondents are required to provide Exelon with a list of all customers to which MCN transports natural gas in the Overlap Area, including the name, address, and rate classification for each such customer, and a statement indicating whether each such customer utilises natural gas for Electric Displacement Load. In addition, under Paragraph II.B.5, Respondents must provide to the Auditor the results of a study conducted by MCN of Electric Displacement Load opportunities in the Overlap Area. Respondents must send a letter to each customer in the study advising the customer that gas distribution services may be purchased from Exelon and asking if the customer wishes the Auditor to provide the customer's study information to Exelon.

Paragraph II.B.6 provides that, for two years after the date the Order becomes final, respondents shall promptly comply with any request of any customer in the Overlap Area to terminate its transportation or distribution contracts with MCN, without cost or penalty to such customer, to enable such customer to purchase gas distribution or transportation services provided by Exelon.

The proposed consent order also contains provisions dealing with the appointment of an alternative acquirer if Exelon terminates the Divestiture Agreement, as well as trustee provisions dealing with the responsibilities of any trustee appointed to accomplish any divestiture required by the order.

The proposed Respondents are required to provide to the Commission a report of compliance with the proposed consent order within sixty days following the date on which the order becomes final, every sixty days thereafter until the divestitures are completed, and annually for a period of twenty years.

The Auditor Agreement, executed by MichCon, Exelon and the Auditor, defines the duties, powers and obligations of the Independent Auditor required by Paragraph II.B.3 and Paragraph D-17 of the Easement Agreement. The Auditor has the ability to take all actions necessary and appropriate to effectuate the purposes of the Easement Agreement, including the right to assess consequential damages against MichCon if MichCon operates the distribution system in a manner that is prejudicial to Exelon. (Auditor Agreement ¶ 2.) The Auditor also is responsible for arbitrating disputes between the parties, as well as for performing other necessary duties and responsibilities under the Easement Agreement, such as verification of Exelon's Electric Displacement Load volume, system repair and maintenance if MichCon fails to do so, designation of applications that qualify as Electric Displacement Loads, resolution of complaints by Exelon, modification of operational changes that may adversely impact Exelon, and related duties and responsibilities. (Auditor Agreement Sch. A; Easement Agreement ¶¶ 3, 7, D-1(j), D-2, D-4, D-6.)

The proposed buyer of the Divested Assets, Exelon Energy, is one of the largest unregulated suppliers of electricity and natural gas in the nation. It is a unit of Exelon Corporation, which was formed from the merger of Unicom Corporation and PECO Energy Company. The parent company has operations engaged in the generation, transmission, distribution and sale of electricity, the supply of natural gas and natural gas transportation services, the sale of distributed generation products, and related businesses. The company is extremely knowledgeable about the utility business and the distribution of electricity and natural gas. It currently markets natural gas to buyers in Michigan (as well as in other states), and has an affiliate that is engaged in the distribution of micro turbines and distributed generation equipment.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed buyer must not itself present competitive problems. Exelon is a major energy company with substantial experience in natural gas, electricity, and the operation of utilities. The Commission believes that *Exelon* is well qualified to operate the divested assets and that divestiture to Exelon will not be anticompetitive.

NOTE DE RÉFÉRENCE¹

1. Introduction et résumé

1.1 *Vue d'ensemble et organisation*

Dans le secteur des transports, certains stades de la production nécessitent l'utilisation d'installations à forte intensité de capital implantées sur des sites sans équivalent ailleurs et qu'il serait difficile et long de développer pour répondre à l'augmentation de la demande. Il s'agit, entre autres, de ports, de pipelines, d'aéroports et de réseaux ferrés et électriques. Permettre à de multiples fournisseurs d'accéder à ces infrastructures peut être un moyen de première importance de promouvoir la concurrence et le bien-être des consommateurs quand la concurrence d'autres modes de transport est limitée. Au moins pendant un temps, ces installations peuvent être en fait des monopoles naturels². Des questions peuvent donc se poser sur le traitement à réserver à ces monopoles naturels transitoires³. Bien que la réglementation d'un monopole concédé soit une formule fréquemment utilisée, il est des circonstances dans lesquelles permettre à des entreprises indépendantes situées en amont ou en aval d'accéder à ces infrastructures de transport peut, en stimulant la concurrence, profiter aux consommateurs. Dans d'autres cas de figure, des économies d'intégration verticale substantielles peuvent rendre problématique l'accès de fournisseurs indépendants ou désavantager les consommateurs à long terme en dissuadant tout investissement efficient dans l'infrastructure.

La présente étude dresse les constats suivants : (1) les problèmes d'accès peuvent être particulièrement aigus dans des branches de services connexes apparemment mineures pour lesquelles il n'est pas prévu de droit d'accès universel. Ainsi, un port peut laisser accéder à ses quais de déchargement un navire qui ne l'utilise pas comme prestataire de services, puis refuser l'accès aux

¹ John Hilke est l'auteur de cette note de référence.

² Il y a formation d'un monopole naturel quand une entreprise peut produire les quantités socialement optimales à un coût inférieur à celui qu'obtiendraient deux ou plusieurs entreprises. Un monopole naturel peut être viable ou ne pas l'être. Un monopole naturel viable a généralement des coûts moyens qui décroissent avec le niveau de production. Un monopole naturel n'est pas viable quand ses coûts moyens augmentent pour une partie du niveau de production socialement optimal. Il est alors vulnérable à l'entrée d'une entreprise capable de fournir le niveau de production auquel les coûts moyens sont réduits au minimum. Toutefois, ce niveau est inférieur au niveau socialement optimal. Les pouvoirs publics peuvent devoir restreindre l'entrée pour protéger un monopole naturel non viable. OCDE, « Monopole naturel et entrée sur le marché », annexe 2, Note de référence, Table ronde sur les obligations de service non commercial et leur libéralisation (octobre 2003), p. 99-103, disponible à l'adresse www.oecd.org/dataoecd/43/35/33691140.pdf et John C. Hilke et Michael G. Vita : "Statement of FTC Staff" dans *Monopoly Theory Inquiry*, Docket No. RM89-4, Washington, D.C.: U.S. Postal Rate Commission, novembre 1989, p. 357-390.

³ Quand un monopole naturel est susceptible d'être transitoire, il peut ne pas être réalisable ou intéressant d'introduire des mesures réglementaires pour résoudre les problèmes de pouvoir de marché, et ce même si le préjudice causé par le monopole naturel non réglementé est substantiel. En revanche, il est possible d'obtenir un avantage net pour les consommateurs grâce à une intervention moins coûteuse et plus rapide, par exemple en assurant l'accès au monopole naturel à un tarif inférieur au prix maximisant les bénéfices du monopoleur. Une telle intervention peut également favoriser l'innovation et l'amélioration de la qualité sur les marchés en amont et en aval, ce qui ne se produirait peut-être pas si les consommateurs ne pouvaient bénéficier d'un tel tarif pour l'accès au stade de production donnant lieu à un monopole naturel.

incinérateurs qui, aux termes de la réglementation, doivent être utilisés pour l'élimination des déchets du navire ; (2) quelquefois, les investissements sont retardés ou différés en raison de la politique d'accès, notamment du fait de l'incertitude quant aux futures obligations d'accès. Certaines installations peuvent être construites dans le cadre d'un contrat de fourniture de quantités fixes à long terme (terminaux de gaz de pétrole liquéfié, par exemple) sans qu'aucune capacité excédentaire utilisable par des tiers ne soit prévue, à moins que les tiers en question n'aient participé au financement initial et à la construction. Par conséquent, les responsables doivent veiller à ce que l'on puisse connaître avec une relative certitude les obligations futures qui seront imposées en matière d'accès, de façon à ne pas dissuader des investissements bénéfiques. Dans la mesure où garantir l'accès à son installation induit des coûts additionnels pour le propriétaire, il ne devrait pas à avoir à les supporter seul ; enfin (3) il faudrait soigneusement veiller à renforcer la concurrence quand les entreprises en place, telles que les compagnies aériennes dans de nombreux aéroports, ont la possibilité de s'opposer à ce que des travaux d'extension (éventuellement financés par un investisseur ou un nouvel entrant) soient réalisés pour améliorer l'accès des concurrents à l'installation.

Le présent document de référence est essentiellement axé sur les aspects pratiques à considérer pour obliger un propriétaire à garantir aux concurrents l'accès à son infrastructure de transport essentielle quand :

- la capacité de l'installation est limitée ;
- l'installation n'est pas susceptible d'être agrandie ou ouverte à la concurrence à brève échéance ;
- l'utilisation de l'installation ne donne pas lieu à des économies d'intégration verticale (efficacité ou sécurité), d'échelle ou de gamme incontestables ;
- il est possible de redistribuer l'utilisation de l'installation entre les fournisseurs concurrents en amont et en aval.

Ces situations, en particulier les trois dernières, sont celles dans lesquelles l'obligation de garantir l'accès à l'infrastructure de transport peut avoir les effets les plus bénéfiques. Quand la capacité est limitée, le problème de la garantie de l'accès devient plus complexe à résoudre.

Dans le cadre de la présente étude, le terme « infrastructure de transport essentielle » implique qu'il est singulièrement plus difficile de fournir un service de transport sans avoir accès à cette infrastructure et qu'il serait rentable pour le détenteur de l'infrastructure (le monopoleur) d'autoriser l'accès à son infrastructure en contrepartie d'une majoration légère mais significative de son tarif (au-dessus du niveau de concurrence). En d'autres termes, l'entreprise propriétaire de l'infrastructure doit exercer un pouvoir de marché substantiel pour que l'installation soit considérée comme « essentielle ». Si l'entreprise en question est également présente sur les marchés amont et aval, elle se retrouve en concurrence avec ses propres clients pour l'utilisation de son infrastructure. Ceci pourrait donc inciter le propriétaire à pratiquer une discrimination à l'encontre de ses clients pour favoriser les entreprises qui lui sont affiliées en amont et en aval dans le cas où il ne parviendrait pas à maximiser ses bénéfices uniquement en facturant l'accès à son infrastructure.

Les quatre conditions citées plus haut coïncident avec les conditions dans lesquelles la théorie des installations essentielles et les mesures correctrices qui en découlent sont le plus susceptibles de se justifier sur le plan économique et risquent le moins d'entrer en conflit avec d'autres objectifs de la politique

économique⁴. Ce document de référence laissera généralement de côté les secteurs dans lesquels une situation de monopole naturel persiste à chaque stade de production ou dans lesquels une intégration verticale complète procure des avantages indéniables en termes d'efficacité et de sécurité. Ne seront pas non plus traités les arbitrages complexes qu'il faut opérer quand il existe des externalités importantes de réseau⁵ ou des droits de propriété intellectuelle. Certains exemples d'industries de réseau ou d'activités impliquant des droits de propriété intellectuelle pourront toutefois servir à illustrer des points plus généraux⁶. Nous nous intéresserons ici aux exploitants d'infrastructures de transport obligés par voie réglementaire ou contractuelle de garantir l'accès à des fournisseurs qui ne leur sont pas affiliés, et plus particulièrement aux problèmes et aux solutions d'accès qui n'ont pas été traités de manière approfondie lors des tables rondes précédentes. Nous ne nous attarderons pas sur les situations dans lesquelles une séparation verticale totale a été considérée comme l'unique solution possible. Les exemples étudiés dans le

⁴ Au sujet de la théorie des installations essentielles en général, voir, par exemple, Robert Pitofsky, Donna Patterson et Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), p. 443-462 ; Abbott B. Lipsky Jr. et J. Gregory Sidak, "Essential Facilities," *Stanford Law Review* 51:5 (mai 1999), p. 1187-1248, et sections droit antitrust, propriété intellectuelle et droit international et pratique de l'American Bar Association, "Comments on the Report of the Study Group on the Antimonopoly Act of Japan" (30 janvier 2004), disponible à l'adresse www.abanet.org/intelprop/Advocacy/joint_comments.pdf et citations incluses.

⁵ Voir Paul L. Joskow et Roger G. Noll, "The Bell Doctrine: Applications in Telecommunications, Electricity, and other Network Industries," *Stanford Law Review* 51:5 (1999), et Joseph Farrell et Philip J. Weiser, "Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age," Competition Policy Center, University of California, Berkeley, CPC02035 (2003), disponible à l'adresse <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1033&context=iber/cpc>. Pour une analyse critique des politiques destinées à garantir l'accès (y compris la théorie des installations essentielles), à partir d'exemples de branches d'activité à économies de réseau, voir Adam Thierer et Clyde Wayne Crews, Jr., *What's Yours Is Mine: Open Access and the Rise of Infrastructure Socialism*, Cato Institute (2003).

⁶ Des divergences sont perceptibles depuis peu dans le traitement des affaires d'installations essentielles européennes où il est question de propriété intellectuelle ; à ce sujet, voir Valentine Korah, "The Interface between Intellectual Property and Antitrust: The European Experience," *Antitrust Law Journal* 69:3 (2002), p. 801-839, et Latham et Watkins, LLP, "Essential Facilities: A Doctrine Clearly in Need of Limiting Principles," Bulletin No. 470 (5 août 2005), disponible à l'adresse www.lw.com/resources/Publications/ClientAlerts/clientAlert.asp?pid=1325. Plus généralement, voir aussi Abbott B. Lipsky Jr. et J. Gregory Sidak, "Essential Facilities," *Stanford Law Review* 51:5 (mai 1999), p. 1187-1248, sections II.E. et III. Élaborées par le ministère de la Justice américain et la Commission fédérale du commerce, les directives antitrust relatives aux licences de propriété intellectuelle (1995, reproduites dans 4 Trade Reg. Rep. (CCH) para. 13.132) stipulent que les agences appliquent les mêmes principes antitrust généraux aux pratiques relatives à la propriété intellectuelle qu'à celles concernant tout bien matériel ou immatériel. Il est à noter que, si la théorie des installations essentielles a d'abord été conçue pour le secteur ferroviaire (U.S. v Terminal Railroad Association of St. Louis, 224 U.S. 383 (1912), et David Reifen et Andrew Kleit, "Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly," FTC, Bureau of Economics working paper #172 (1989)), c'est son application à d'autres secteurs, dans lesquels les effets de réseau et les droits de propriété intellectuelle sont des éléments importants, qui a le plus été médiatisée ces dernières années. Voir Robert Pitofsky, Donna Patterson et Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), p. 443-462, Section III, et James Turney, "Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: the Primacy of Securing Optimal Innovation," *Northwestern Journal of Technology and Intellectual Property* 3:2 (printemps 2005), disponible à l'adresse www.law.northwestern.edu/journals/njtip/v3/n2/5/. On ne peut raisonnablement exclure que l'opposition à l'application de cette théorie aux affaires concernant des industries de réseau ou des droits de propriété intellectuelle débouche sur une opposition plus globale à la théorie elle-même. La publication de Thierer et Crews (2003) citée plus haut illustre ce risque de généralisation.

présent document de référence ont trait à différentes branches du secteur des transports : transports aérien et maritime, pipelines, autoroutes, chemins de fer et autocars/autobus. Un contentieux au sujet des installations essentielles peut survenir quand ces installations sont privatisées, car les nouveaux propriétaires sont incités à en refuser l'accès ou à l'accorder de manière discriminatoire, deux problèmes qui se posaient rarement auparavant car les anciens propriétaires (l'État ou une entreprise publique) étaient tenus de ne pratiquer aucune discrimination⁷.

Le présent document passe en revue la littérature consacrée à la notion d'installations essentielles (section II) car il s'agit du principal instrument utilisé pour imposer l'accès aux infrastructures de transport. Suivent une discussion et des exemples montrant en quoi il est difficile d'offrir un accès concurrentiel aux infrastructures de transport (section III) et visant surtout à identifier les problèmes d'accès liés aux installations essentielles, les incitations à n'autoriser qu'un accès discriminatoire aux infrastructures de transport essentielles, la complexité éventuelle des accords régissant le droit d'accès, les problèmes que pose la surveillance du respect des accords ou des obligations d'accès, et les difficultés qui peuvent surgir lorsqu'il s'agit d'adapter l'accès pour les entreprises concurrentes. La dernière section (section IV) présente des exemples d'approches visant à garantir un accès concurrentiel qui ont été appliquées, semble-t-il, avec un certain succès.

1.2 *Synthèse des principales conclusions :*

On récapitulera ci-après les principales conclusions qui ressortent du document de référence.

- Du point de vue de la politique de la concurrence, l'obligation de garantir l'accès aux concurrents est particulièrement pertinente dans le secteur des transports lorsque :
 1. l'impossibilité d'accéder à une installation se traduirait par un handicap financier significatif pour tout fournisseur du marché ;
 2. l'impossibilité, pour un ou plusieurs fournisseurs, d'accéder à l'installation risque d'être préjudiciable aux consommateurs ;
 3. la capacité est limitée ;
 4. l'installation n'est pas susceptible d'être développée à brève échéance et l'entrée sur le marché (ou le repositionnement des produits) est difficile ;
 5. l'accès à l'installation ne donne pas lieu à des économies d'intégration verticale (efficacité ou sécurité), d'échelle ou de gamme incontestables ;
 6. une redistribution de la capacité existante aux fournisseurs indépendants et entre fournisseurs indépendants est envisageable et serait favorable aux consommateurs.
- En l'absence de telles conditions, aucun problème d'accès susceptible de léser les consommateurs ne se pose généralement ou, dans le cas contraire, c'est garantir l'accès qui

⁷ Voir, par exemple, le communiqué de presse de John Anderson (Premier ministre par intérim), "Anderson Guarantees No Trickery on Regional Airline Access to Sydney Airport in Peak Periods", (11 janvier 2001), disponible à l'adresse www.ministers.dotars.gov.au/ja/releases/2001/january/a7_2001.htm et James Turney, "Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: the Primacy of Securing Optimal Innovation," *Northwestern Journal of Technology and Intellectual Property* 3:2 (printemps 2005), disponible à l'adresse www.law.northwestern.edu/journals/njtip/v3/n2/5/. En vertu de l'article 86 du Traité CE, les entreprises d'utilité publique ont un devoir d'impartialité.

porterait préjudice aux consommateurs. Quand ces conditions sont réunies, rendre l'accès obligatoire en s'appuyant sur la théorie des installations essentielles peut être une solution plus intéressante que de réglementer un monopole concédé et intégré verticalement, car les mesures correctrices en termes d'accès peuvent tirer parti des effets de la concurrence en termes de baisse des prix, d'amélioration de la qualité et d'innovation sur les marchés amont et aval.

- Quand une entreprise contrôlant une installation essentielle fournit des services complémentaires liés à cette installation, un régime d'accès à l'installation peut se substituer à d'autres mesures. Même dans les cas de figure assez peu nombreux cités ci-dessus, il peut être préférable d'opter pour la réglementation ou la restructuration si elles sont mieux à même de préserver les incitations à investir ou si leur coût administratif est moins élevé. Par exemple, la séparation verticale supprime les incitations à agir de manière discriminatoire à l'encontre des entreprises indépendantes opérant en amont ou en aval et peut sans doute prévenir la discrimination plus efficacement que des règles d'accès. La séparation est vraisemblablement plus facile à réaliser avant une privatisation qu'après. Un cadre d'analyse coûts-avantages permet de déterminer si des mesures correctrices pourraient présenter des avantages nets en termes de bien-être des consommateurs et d'efficience.
- Dans la conception des régimes d'accès ou des mesures pouvant s'y substituer, il faut avant tout préserver les incitations à investir dans les infrastructures essentielles. Il faut prendre garde tout particulièrement aux obligations faites aux propriétaires privés d'installations essentielles de garantir l'accès ou d'investir qui peuvent les conduire à cesser leur activité ou se révéler de piètres incitations à investir. L'un des moyens de préserver l'incitation à investir est d'obliger les utilisateurs indépendants à financer les investissements dans l'installation dont ils se servent. En règle générale, l'obligation faite au propriétaire d'une infrastructure de transport essentielle de garantir l'accès aux entreprises en amont et en aval ne devrait pas se traduire par une obligation d'investir pour desservir ces clients qui ne soit pas assortie d'une compensation.
- Les cas qui justifient le plus d'imposer des règles d'accès ou d'autres mesures correctrices sont ceux dans lesquels le refus d'accès serait très préjudiciable aux consommateurs et ceux dans lesquels l'État a financé, facilité, approuvé ou créé l'installation en situation de monopole naturel ou les conditions d'un tel monopole.
- Une obligation contractuelle d'assurer à tous le même accès à une infrastructure de transport essentielle pourrait être insuffisante pour garantir l'égalité d'accès à des conditions raisonnables si le propriétaire de l'installation est incité à pratiquer des discriminations ou à refuser indirectement l'accès et en a la capacité. Les autorités de la concurrence et autres autorités compétentes devront fréquemment s'assurer que les obligations sont respectées et faire en sorte qu'elles le soient dans les meilleurs délais.
- Pour que les mesures concernant l'accès à une infrastructure essentielle soient efficaces, il faut bien distinguer les demandes d'accès qui sont valables et les autres ; identifier les incitations et la capacité à refuser l'accès ou à l'offrir sur une base discriminatoire ; définir des modalités d'accès efficaces ; surveiller le respect des obligations d'accès et mettre au point des méthodes efficaces pour redistribuer l'accès entre les fournisseurs intéressés et développer les installations essentielles.
- Les solutions potentiellement intéressantes mais moins courantes sont les contrats de partage de droits d'exploitation et d'expansion, la détention conjointe, l'attribution aux enchères ou

le négoce des droits d'accès et l'intégration verticale par des clients. Quand des problèmes concernant l'accès à une installation de transport essentielle se posent, les responsables devraient identifier ces différentes solutions et étudier leurs avantages et leurs coûts respectifs pour les consommateurs. Des problèmes sont plus particulièrement susceptibles de se poser pour l'accès à de nouvelles installations de transport essentielles lorsqu'une branche des transports est restructurée par transformation en société commerciale ou privatisation.

2. Contexte de la théorie des installations essentielles et évolutions récentes

La théorie des installations essentielles est l'instrument le plus utilisé pour imposer l'accès à une infrastructure de transport privée. Initialement élaborée il y a près d'un siècle pour les infrastructures de transport, elle suscite toujours des polémiques chez les économistes et les responsables politiques. Pendant la dernière décennie, son application aux industries de réseau et aux questions de propriété intellectuelle a fait l'objet d'un vif débat. Les controverses auxquelles elle a donné lieu font qu'elle continue d'évoluer, tout comme ses modalités d'application. La présente section revient sur l'historique de cette théorie et actualise la table ronde de 1996 en présentant, entre autres, une série d'affaires jugées aux États-Unis et en Europe. L'approche administrative de l'Australie en matière d'installations essentielles sera également examinée.

2.1 Cadre général

Les définitions du concept d'« installation essentielle » varient selon les publications économiques ou juridiques considérées⁸. Pour certains, une installation essentielle est une ressource rare sans laquelle les concurrents ne peuvent pas survivre⁹. La définition utilisée ici est quelque peu différente. Une installation est dite essentielle s'il est nettement plus coûteux de satisfaire à la demande du marché quand elle n'est pas accessible¹⁰ et s'il serait rentable pour l'unique détenteur de l'installation en situation de monopole de permettre l'accès à son infrastructure en contrepartie d'une majoration faible mais significative et non transitoire de son tarif au-dessus du niveau de concurrence. Cette seconde définition diffère de la première sur deux points importants. Premièrement, il faut que l'accès à l'installation soit indispensable à une entreprise pour être présente sur un marché et pas simplement sur un segment. Par conséquent, si la concurrence intermodale est intense, une installation qui est essentielle pour un des modes ne l'est pas pour desservir le marché. On peut s'interroger sur le cas d'une installation qui est indispensable pour assurer une concurrence localisée sur un marché sans être essentielle à la satisfaction de la demande globale du marché. Ce problème rappelle celui de la perte localisée de concurrence (pouvoir de marché localisé) qui se produit en cas de fusion horizontale entre concurrents immédiats sur un marché de produits différenciés. Deuxièmement, il n'est pas nécessaire que l'impossibilité d'accéder à l'installation soit fatale aux

⁸ Robert Pitofsky, Donna Patterson et Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), p. 443-462, note de bas de page n° 1 citant Phillip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," *Antitrust Law Journal*, 58 (1989), p. 841 et 852.

⁹ Dennis W. Carlton et Jeffrey M. Perloff, *Modern Industrial Organization*, 3e édition (2000), p. 634.

¹⁰ Pour une définition similaire, voir *Hecht*, 570 F.2d p. 992-93, cité dans Robert Pitofsky, Donna Patterson et Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), note de bas de page n° 24 : "To be essential, a facility need not be indispensable, it is sufficient if duplication of the facility would be economically infeasible and if denial of it use inflicts a severe handicap on potential market entrants." [Pour être essentielle, une installation n'a pas besoin d'être indispensable ; il suffit qu'il ne soit pas économiquement faisable de la dupliquer et que le refus d'en autoriser l'accès constitue un handicap sérieux pour les candidats à l'entrée sur le marché] Voir aussi Abbott B. Lipsky Jr. et J. Gregory Sidak, "Essential Facilities," *Stanford Law Review* 51:5 (mai 1999), p. 1187-1248, citation p. 1203-1205.

concurrents. Il suffit qu'elle se traduise par des coûts sensiblement plus élevés ou une qualité de service sensiblement moindre. Le second élément permet d'éviter des incohérences dans l'identification des installations essentielles. Par exemple, si l'accès à l'infrastructure procure un avantage de coût de 40 % et que le critère retenu est celui de la survie, l'infrastructure serait réputée essentielle si son propriétaire facturait un prix moins de 40 % supérieur au coût des concurrents. En revanche, l'installation n'est pas essentielle s'il pratique un prix plus de 40 % supérieur au coût des concurrents, car, dans ce cas, certains concurrents privés d'accès pourraient survivre. En revanche, la définition utilisée ici n'indique pas de manière précise le seuil au-delà duquel il y a « handicap de coût substantiel ».

Les affaires ayant trait à des installations essentielles sont considérées par certains économistes comme un sous-ensemble des affaires de refus de vente verticaux¹¹. Dans ce cas, une ou plusieurs parties refusent de traiter avec une ou plusieurs parties (malgré le désir qu'en ont ces dernières), ou les premières n'acceptent qu'à des conditions équivalant à un refus de commercer. Par exemple, le prix d'accès à l'infrastructure essentielle peut être fixé à un niveau supérieur au prix de maximisation du profit sur ce marché. Toutefois, dans le cadre de marchés multiples, ce prix pourrait en fait correspondre au prix de maximisation des bénéfices du détenteur de l'installation essentielle car il empêche le développement de la concurrence sur les autres marchés.

D'autres économistes considèrent que l'obligation de garantir l'accès est un substitut à la réglementation d'un monopole naturel ou à des solutions structurelles, principalement le dégroupage, lorsqu'un monopole naturel est verticalement intégré et englobe des stades de production potentiellement concurrentiels. Dans le contexte d'un monopole naturel, le coût social est minimal quand une seule entreprise fournit le bien ou le service demandé et que cette entreprise est efficiente. Dans certains cas, qui nous intéressent spécialement ici, c'est l'infrastructure elle-même qui constitue un monopole naturel, pas son utilisation. Élargir l'accès à cette infrastructure peut être plus efficace que d'en réglementer l'utilisation si la concurrence entre les utilisateurs est telle qu'elle empêche l'exercice d'un pouvoir de marché. En revanche, le libre accès peut être une moins bonne solution que la réglementation de l'utilisation de l'infrastructure car son propriétaire peut être en mesure d'exercer un pouvoir de marché en relevant le prix d'accès au-dessus du niveau de concurrence. De même, un régime d'accès peut se substituer à la cession complète par le fournisseur intégré verticalement d'une installation constituant un monopole naturel. En l'occurrence, l'accès donne la possibilité à des entreprises en aval (ou en amont) d'entrer sur le marché. Le pouvoir de marché de l'entreprise intégrée verticalement peut disparaître si la concurrence sur les marchés potentiellement concurrentiels en aval (ou en amont) érode le pouvoir de marché lié à la détention de l'infrastructure (par exemple, l'accès des opérateurs de réseaux mobiles aux réseaux filaires peut affaiblir le pouvoir de marché du réseau filaire) ou si les tarifs d'accès à l'infrastructure sont plafonnés à un niveau inférieur au prix de maximisation du profit. Les contrats à long terme ou la réglementation font partie des instruments qui peuvent donner ce résultat.

¹¹ Dennis W. Carlton et Jeffrey M. Perloff, *Modern Industrial Organization* 3e édition (2000), p. 633-635.

Certains commentateurs critiquent cette façon d'appréhender la théorie des installations essentielles¹². Pourtant, on peut citer des affaires importantes dans le cadre desquels il est difficile d'envisager cette théorie autrement. Ainsi, l'affaire *Terminal Railroad*¹³, la première où il ait été question d'installations essentielles, offrait aux tribunaux l'occasion de démanteler les fusions à l'origine du problème d'accès ; mais ils ont choisi d'imposer une obligation de garantir l'accès¹⁴. Dans l'affaire *Otter Tail Power*¹⁵, le tribunal savait que les autorités compétentes pouvaient imposer une obligation réglementaire d'accès, mais a préféré exiger une garantie d'accès pour éviter tout effet anticoncurrentiel. Dans l'affaire *AT&T*¹⁶, le ministère américain de la Justice a considéré que réglementer l'accès ne suffirait pas à empêcher la discrimination et a donc opté pour la solution structurelle, la séparation. Il n'a pas insisté pour que les tribunaux imposent une obligation de garantir l'accès¹⁷. Dans l'affaire *Trinko*¹⁸, le tribunal a jugé que, dans la mesure où les autorités réglementaires traitaient le problème d'accès, aucune autre obligation au titre du droit de la législation antitrust ne devrait être imposée.

Cependant, d'autres observateurs voient dans certaines affaires concernant des installations essentielles un substitut au contentieux fondé sur les théories de la tromperie ou de la rupture d'un contrat implicite. Par exemple, dans l'affaire *Kodak*, l'entreprise refusait de continuer à fournir des pièces à ses concurrents en aval qui réparaient et entretenaient des photocopieurs et des imprimantes de sa marque. Néanmoins, le préjudice pour les consommateurs ne résultait pas de cette décision proprement dite, mais des effets de « hold-up » ou de « verrouillage » qui en résultaient : la concurrence dans le segment du service après-vente a disparu après que de nombreux clients eurent acheté des appareils Kodak en pensant que cette concurrence continuerait¹⁹. Il est raisonnable de supposer — et l'on pourrait le vérifier empiriquement — que, si Kodak avait fait savoir qu'il n'y aurait plus de concurrence sur le créneau de l'après-vente, de nombreux clients se seraient tout simplement abstenus d'acheter des appareils Kodak et

¹² Voir, par exemple, Dennis Carlton, "A General Analysis of Exclusionary Conduct and Refusal to Deal — Why *Aspen* and *Kodak* Are Misguided," *Antitrust Law Journal* 68:3 (2001), p. 659-683. Carlton considère en l'occurrence que la théorie antitrust des installations essentielles ne devrait pas être considérée comme un substitut valable à la réglementation des monopoles naturels. Tout en reconnaissant également que les modèles dynamiques récents montrent comment, dans certaines circonstances, un monopole à un stade de production peut créer ou protéger un pouvoir de marché supplémentaire en amont ou en aval, il conclut qu'il est extrêmement difficile de distinguer ces cas d'autres situations de refus de vente qu'il estime généralement bénéfiques pour les consommateurs. Pour une vision positive de la théorie des installations essentielles, envisagée notamment comme un remède aux monopoles naturels, voir Robert Pitofsky, Donna Patterson et Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), p. 443-462.

¹³ *United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912).

¹⁴ David Reiffen et Andrew Kleit, "Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly?" Federal Trade Commission, Bureau of Economics Working Paper 172 (avril 1989).

¹⁵ *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-79 (1973).

¹⁶ *United States v. Western Electric*, 569 F. Supp 990 (D.D.C. 1983).

¹⁷ Paul L. Joskow et Roger G. Noll, "The Bell Doctrine: Applications in Telecommunications, Electricity, and other Network Industries," *Stanford Law Review* 51:5 (1999), et William F. Baxter, "Conditions Creating Antitrust Concerns with Vertical Integration in Regulated Industries---'For Whom the Bell Doctrine Tolls'", *Antitrust Law Journal* 52 (1983), p. 243-247.

¹⁸ *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 682, (2004).

¹⁹ Les plaignants ont qualifié leur théorie de monopolisation d'« opportunisme lié à la base de clientèle installée ». Les aspects économiques de l'affaire Kodak sont traités dans Steven C. Salop, "The First Principles Approach to Antitrust, *Kodak*, and Antitrust at the Millennium" *Antitrust Law Journal* 68:1 (2000), p. 187-202.

en auraient préféré d'autres à coûts de maintenance présumés moindres. Il est à noter que, pour ne pas avoir annoncé que ce risque existait, Kodak pouvait être considéré comme ayant implicitement assuré les consommateurs qu'il continuerait à accepter la concurrence sur le segment du service après-vente. On remarquera également que les propriétaires d'appareils Kodak pouvaient difficilement les revendre sans subir de perte financière, car les acheteurs d'appareils d'occasion savaient que les nouveaux prix du service après-vente seraient plus élevés et que s'occuper soi-même de la maintenance risquait de ne plus être aussi efficace et passerait nécessairement par l'achat de pièces de rechange à Kodak. La poursuite de la concurrence sur le marché primaire (appareils neufs et d'occasion) ne pouvait suffire à protéger les consommateurs du marché secondaire déjà propriétaires d'un appareil Kodak.

Toutes les installations essentielles n'impliquent pas l'existence d'un goulet d'étranglement à un stade donné de la production qui crée un pouvoir de marché à d'autres stades²⁰. Ainsi, lorsque les produits sont différenciés et que les consommateurs ont des goûts différents ou peuvent choisir entre différents produits, ils peuvent préférer acheter un ensemble de produits proposé par un fournisseur qui comporte des produits d'entreprises concurrentes²¹. En l'occurrence, être capable d'offrir ces produits liés peut être très important, sinon essentiel, pour la survie d'une ou plusieurs entreprises du marché. Néanmoins, un concurrent moins vulnérable peut cesser de proposer ses produits dans le cadre de ces offres groupées, même si cela se révèle rentable. Sur le plan stratégique, l'entreprise a intérêt à mettre fin à cette forme d'association avec des concurrents si elle estime qu'elle réduira ainsi la concurrence future en affaiblissant ses concurrents, voire en les évinçant. Dans ce scénario impliquant des installations essentielles, aucune relation verticale n'intervient. Les consommateurs seraient pénalisés par l'élimination de produits liés ayant leur préférence.

Dans les affaires concernant des installations essentielles, les conséquences pour le bien-être des consommateurs²² varient selon le cas d'espèce et les modalités des mesures correctrices²³. Cela n'est pas

²⁰ Certains commentateurs américains de la théorie des installations essentielles ont fait valoir qu'elle ne s'applique qu'aux situations de goulets d'étranglement verticaux. Phillip Areeda et Herbert Hovenkamp, par exemple, dans *Antitrust Law* (1996), Vol. IIIA, para. 771.a, s'expriment ainsi : Il devrait être clair dès le départ que la théorie des installations essentielles a trait à l'intégration verticale, en particulier au devoir d'un monopoleur intégré verticalement de partager certains intrants [...] avec quelqu'un qui opère sur un marché en amont ou en aval.

²¹ C'est le substrat factuel sur lequel s'appuient les décisions de la Cour suprême dans l'affaire *Aspen Skiing Co v. Aspen Highlands Skiing Corp.* 472 U.S. 585, 602 (1985). Il est probable que les clients apprécient de skier sur des domaines différents et dans des conditions différentes, et ils ne peuvent pas savoir avec certitude quels seront les meilleurs domaines en fonction des conditions météorologiques (qui varient également). En achetant un forfait qui leur donne accès à des stations détenues par des entreprises différentes, les clients augmentent leurs chances d'optimiser leur séjour compte tenu de leurs goûts et de leurs aptitudes. Dans une large mesure, l'affaire *Associated Press*, 326 U.S. 1 (1945) portait elle aussi sur des relations horizontales plutôt que verticales. Le cœur du problème était une disposition des statuts de l'agence de presse qui autorisait n'importe quel journal membre à refuser une candidature, y compris quand elle émanait d'un nouveau titre concurrent. Voir Abbott B. Lipsky Jr. et J. Gregory Sidak, "Essential Facilities," *Stanford Law Review* 51:5 (mai 1999), p. 1187-1248, Section I.B.

²² Les autorités de la concurrence font généralement du bien-être des consommateurs leur objectif premier. Or, il arrive parfois que les effets sur le bien-être du producteur ou le bien-être total soient incompatibles avec le bien-être des consommateurs. Lors de l'examen des effets de l'accès à une infrastructure de transport, il faut tenir compte de cette éventuelle contradiction et avoir à l'esprit les différents arbitrages possibles. Au sujet de l'objectif de bien-être total, utilisé pour analyser les effets anticoncurrentiels des fusions, voir Margeret Sanderson, Bureau of Competition Policy, Canada, "Efficiency Analysis in Canadian Merger Cases: Remarks Prepared for the Federal Trade Commission Hearing on Global and Innovation-Based Competition," (2 novembre 1995), disponible à l'adresse <http://www.ftc.gov/opp/global/sandersn.htm>.

surprenant car la demande varie selon les secteurs, et les effets que les restrictions verticales²⁴ — courantes dans les affaires concernant des installations essentielles — sont réputées avoir sur le bien-être fluctuent également.

Pour analyser les coûts et les avantages d'une obligation de garantir l'accès à une infrastructure de transport, du point de vue du bien-être des consommateurs et en termes d'efficacité sociale, il faut aussi évaluer les coûts administratifs et les coûts de transaction d'une telle solution et ceux qu'induirait d'autres solutions. Ces coûts peuvent être substantiels, en particulier quand il existe des points de fait litigieux et quand les propriétaires des installations sont incités à exclure tous les autres utilisateurs ou certains d'entre eux. Lorsque les incitations à exclure sont sélectives, les autorités de régulation ou les tribunaux risquent de faire face à des surcoûts et des incertitudes qui sont inévitables quand on doit identifier et prouver des pratiques discriminatoires vis-à-vis d'utilisateurs potentiels (y compris de filiales de l'exploitant de l'installation opérant en amont ou en aval). Dans les affaires où les faits sont contestés, la collectivité doit aussi supporter le coût éventuel de décisions réglementaires ou judiciaires erronées concernant le statut d'installation essentielle ou les mesures correctrices. Par exemple, une installation peut être jugée essentielle alors que d'autres installations constituant de bons substituts sont disponibles ou que la concurrence exercée par d'autres modes de transport empêche le propriétaire d'une installation donnée d'exercer un pouvoir de marché. Comme il a déjà été indiqué, l'extension de la théorie des installations essentielles aux affaires de propriété intellectuelle est contestée, notamment parce qu'aucun positionnement dans l'espace des produits pouvant paraître « essentiel » n'est à l'abri de progrès technologiques susceptibles de déboucher sur des substituts ou de court-circuiter la position acquise (concurrence par raccourci technologique). Plus généralement, toute forme de différenciation ne permettant pas facilement l'entrée ou un repositionnement de produits pourrait être considérée comme une « installation » essentielle par ceux qui souhaiteraient l'utiliser pour offrir des services en amont ou en aval. Dans le secteur des infrastructures de transport, il existe des monopoles naturels découlant de particularités géographiques qui constituent les obstacles les plus inamovibles qui soient à l'entrée de concurrents. Ils sont d'ailleurs à l'origine même du concept de « caractère essentiel » et peuvent être considérés comme les plus authentiques.

En février 1996, l'OCDE a organisé une table ronde sur l'application générale de la théorie des installations essentielles²⁵. La note de référence revenait sur les différentes conceptions en vigueur aux États-Unis, en Europe et en Australie. Les divergences signalées en 1996 semblent avoir persisté, bien que des changements soient en vue en Europe. La note de référence de 1996 (reprise en partie à l'annexe A) décrivait comment les affaires concernant des installations essentielles avaient des répercussions différentes en termes d'efficacité et de bien-être des consommateurs selon la structure des marchés situés en amont et en aval. Par exemple, en présence de plusieurs fournisseurs à un certain stade de production, refuser l'accès à n'importe lequel d'entre eux n'a pas forcément d'effet notable sur la concurrence à ce stade parce qu'il reste alors suffisamment d'autres fournisseurs pour préserver un environnement concurrentiel. Une autre donnée primordiale est que, dans certaines conditions, notamment la présence d'une technologie qui utilise l'élément de production monopolisé dans des proportions fixes par rapport à d'autres éléments et la présence de rendements d'échelle constants, le monopoleur peut s'approprier tout le profit possible via le prix qu'il fixe pour l'intrant monopolisé, sans avoir besoin de recourir à l'intégration verticale. Dans d'autres conditions, le monopoleur peut tirer avantage de

²³ Voir, par exemple, Axel Gautier et Manipushpak Mitra, "Regulation of an Open Access Essential Facility," (août 2003), disponible à l'adresse http://idei.fr/doc/conf/rai/papers_2003/maxel.pdf.

²⁴ Thomas R. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence*, Federal Trade Commission Staff Report (novembre 1983).

²⁵ La note de référence, les contributions nationales et l'aide-mémoire sont disponibles à l'adresse <http://www.oecd.org/dataoecd/34/20/1920021.pdf>.

restrictions d'accès. La note de référence soulignait aussi toute l'importance de la définition du marché de produits et du marché géographique pour déterminer si une installation est essentielle. Ces éléments d'analyse demeurent très pertinents.

En ce qui concerne la mise en oeuvre de l'obligation de garantir l'accès à une installation essentielle, le document soulignait les effets que cette obligation pouvait avoir sur les incitations à investir dans une telle installation. L'aide-mémoire de la table ronde exposait quelques faits saillants tirés de certaines affaires présentées dans les contributions nationales, identifiait certains des arguments économiques légitimes utilisés dans les affaires américaines pour justifier un refus d'accès et mettait en lumière l'importance de l'intégration économique des États membres européens dans les politiques des États membres visant à imposer aux entreprises dominantes une obligation générale de traiter avec leurs concurrents.

2.2 *Théorie des installations essentielles : différences de conception entre les États-Unis, l'Europe et l'Australie*

Dans le passé, les États-Unis et la Communauté européenne avaient des conceptions assez radicalement différentes de la théorie des installations essentielles, ce qui s'expliquait par le fait que, dans les pays européens, l'État était très souvent propriétaire d'un grand nombre d'installations essentielles et qu'il n'y avait donc pas lieu de veiller à ce que les entreprises publiques soient incitées à investir. Ces dernières années, si l'on fait exception du domaine de la propriété intellectuelle, dans lequel l'Europe continue d'être plus interventionniste que les États-Unis, le fossé s'est comblé.

Aux États-Unis, obliger une entreprise dont le comportement n'est par ailleurs pas anticoncurrentiel à rendre son installation accessible à tous ne correspond généralement pas à l'interprétation que font les tribunaux du *Sherman Act*, en particulier de son article 1. Les autorités antitrust américaines considèrent rarement qu'il est contraire à la législation antitrust d'exercer et de protéger un pouvoir de marché obtenu par des moyens légaux ou de refuser de traiter avec une autre entreprise. Par conséquent, contraindre le propriétaire d'une installation essentielle à rendre son installation accessible à tous constitue une exception à la règle²⁶. En revanche, les accords que des sociétés concurrentes possédant ou exploitant conjointement une installation essentielle passent entre elles pour exclure d'autres concurrents ont souvent été considérés comme illicites en soi car il s'agit de collusions qui restreignent le commerce. Certaines affaires récentes montrent néanmoins que, même dans ce cas de figure, les tribunaux peuvent appliquer la règle de raison²⁷.

Deux autres paramètres sont importants pour comprendre la manière dont les États-Unis appréhendent les affaires d'installations essentielles. Premièrement, certains tribunaux et commentateurs américains sont de plus en plus sceptiques quant au fait que les restrictions verticales seraient généralement préjudiciables au bien-être des consommateurs²⁸. Lorsqu'il est question de restrictions verticales dans une affaire

²⁶ Robert Pitofsky, Donna Patterson et Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), p. 443-462, Section II.

²⁷ *Northwest Wholesale Stationers, Inc. v Pacific Stationary and Printing Company*, 105 S. Ct 2613 (1985).

²⁸ Voir William S. Comanor, F.M. Scherer et Robert L. Steiner, "Vertical Antitrust Policy as a Problem of Inference The Response of the American Antitrust Institute," disponible à l'adresse <http://www.antitrustinstitute.org/recent2/408.pdf>; James C. Cooper, Luke M. Froeb, Dan O'Brien et Michael G. Vita, "Vertical Antitrust Policy as a Problem of Inference," Federal Trade Commission, Bureau of Economics Working Paper (8 novembre 2004, révisé le 18 février 2005), disponible à l'adresse <http://www.ftc.gov/speeches/froeb/050218verticalecon.pdf>; John Woodbury, "Paper Trail: Working Papers and Recent Scholarship" (mai 2005), disponible à l'adresse <http://www.abanet.org/antitrust/source/05-05/may05-papertrail.pdf> et Thomas R. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence*, Federal Trade Commission Staff Report (novembre 1983).

impliquant une installation essentielle, les arguments relatifs à des effets anticoncurrentiels ont plus de chances d'être entendus par le juge si un alourdissement des coûts des concurrents n'est pas exclu²⁹ ou si les entreprises en place ont la possibilité d'imposer des coûts à l'entrée qu'elles n'ont pas elles-mêmes supportés (barrières à l'entrée). Deuxièmement, l'obligation de garantir l'accès à une installation en vertu de la théorie des installations essentielles peut modifier les incitations à investir dans cette installation. Les incitations financières à investir sont moindres quand il y a obligation de garantir l'accès aux concurrents. En même temps, pour que le niveau de qualité soit maintenu, l'investissement optimal peut être supérieur à celui que le propriétaire de l'installation consentirait s'il était seul à l'utiliser. Pour cette raison, le niveau de qualité du service et les incitations à investir doivent être pris en considération dans ces affaires.

Aux États-Unis, pour établir une infraction à la législation antitrust sur le fondement la théorie des installations essentielles, il faut prouver quatre éléments, tout en s'interrogeant sur les modalités d'accès (tarifs, etc.) qui pourraient être mises en place. L'affaire *MCI Communications* (708 F 2d, p. 1132-33) reprend ces quatre éléments : (1) l'installation essentielle est sous le contrôle d'un monopoleur ; (2) il est techniquement ou raisonnablement impossible au concurrent de dupliquer l'installation essentielle ; (3) le concurrent se voit refuser l'accès à l'installation et (4) autoriser l'accès des concurrents à l'installation est faisable³⁰. Le dernier de ces éléments signifie que les tribunaux sont moins susceptibles d'obliger un monopoleur à garantir l'accès à son installation s'il existe une justification économique légitime à son refus³¹. À l'inverse, quand il s'avère que le refus d'accès à une installation essentielle procède d'une intention d'éliminer la concurrence, les tribunaux hésitent d'autant moins à contraindre le propriétaire à accorder l'accès à son installation³².

Au cours des deux dernières décennies, les décisions rendues aux États-Unis et les débats sur la question des installations essentielles ont reflété trois évolutions notables, potentiellement pertinentes pour le secteur du transport. Premièrement, dans l'affaire *Aspen Ski*³³ et l'affaire *Kodak*³⁴, les arrêts de la Cour suprême ont donné plus d'importance au refus d'accès quand l'accès à une installation avait été accordé avant d'être refusé et quand les consommateurs étaient pénalisés³⁵. Deuxièmement, dans l'affaire *Trinko*³⁶,

²⁹ Il y a alourdissement des coûts des concurrents quand une entreprise augmente délibérément ses propres coûts (ce qu'elle ne ferait pas en temps normal) uniquement pour accroître les coûts de ses concurrents dans des proportions significatives. Dans ce type d'affaire, limiter la marge de manœuvre du propriétaire pour les tarifs d'accès peut constituer une mesure correctrice efficace si la source de majoration des coûts de la concurrence est le contrôle d'une installation essentielle et si la solution de la séparation verticale n'est pas retenue.

³⁰ Des critères similaires sont mentionnés ailleurs, notamment dans Valérie Rabassa et Patrick Rey, "Facilite Essentielle et Sector Postal," IDEI (novembre 2000), disponible auprès des auteurs.

³¹ Robert Pitofsky, Donna Patterson et Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), p. 443-462, page 450.

³² Robert Pitofsky, Donna Patterson et Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), p. 443-462, pages 450-451 et 455.

³³ *Aspen Skiing Co v. Aspen Highlands Skiing Corp.* 472 U.S. 585, 602 (1985). Cette affaire fait partie des quelques-unes qui sont davantage horizontales (portant sur un marché) que verticales (portant potentiellement sur deux marchés). Voir aussi Robert Pitofsky, Donna Patterson et Jonathan Hooks, "The Essential Facilities Doctrine under U.S. Antitrust Law," *Antitrust Law Journal* 70:2 (2002), p. 443-462, Section IV. Plus généralement, voir dans *Antitrust Law Journal* 73:1 (2005) un certain nombre d'articles traitant des questions soulevées par cette affaire.

³⁴ *Eastman Kodak Co. v Image Tech Servs. Inc.* 504 U.S. 451, 465 (1992).

³⁵ Voir Jonathan Baker, "Promoting Innovation and Competition through the *Aspen/Kodak Rule*," *George Mason Law Review* 7 (1999), p. 500-503. Pour Baker, les points communs entre les affaires *Aspen et Kodak* sont (1) l'exclusion quasi totale d'un concurrent, (2) le mécanisme mis en œuvre pour y parvenir,

la Cour suprême semble avoir jugé que, lorsqu'une obligation de traiter avec la concurrence a été imposée par voie réglementaire et qu'elle est plus contraignante que l'obligation qui serait probablement imposée en vertu de la législation antitrust (théorie des installations essentielles), il n'y a pas d'obligation additionnelle pour discrimination ou refus de traiter en vertu des règles antitrust³⁷. Troisièmement, il apparaît de plus en plus clairement que le caractère essentiel d'une installation pour le développement de la concurrence peut varier en fonction du progrès technique. Le développement rapide de la téléphonie mobile, qui concurrence très fortement la téléphonie fixe, a sans doute été le déclencheur de cette prise de conscience.

Dans le *droit de l'Union européenne*, les deux premières affaires concernant des installations essentielles portaient sur le service de transbordeurs du port de Holyhead (pays de Galles) qui assurait le transport entre l'Irlande et la Grande-Bretagne. Dans la première, la Commission européenne a considéré que l'exploitant du port était tenu d'en autoriser l'accès aux transbordeurs concurrents, aux mêmes conditions que celles dont bénéficiaient ses propres navires³⁸. Dans la seconde affaire, la Commission a ordonné à l'exploitant de permettre à une nouvelle compagnie de transbordeurs d'accéder au port à des conditions raisonnables et non discriminatoires³⁹. Ces deux affaires sont examinées plus en détail à la section II.

Ces dernières années, les affaires concernant des installations essentielles portées devant la Cour de justice des Communautés européennes (CJCE) ont gagné en visibilité auprès de l'opinion publique car les questions de propriété industrielle liées à des installations essentielles ont été de moins en moins soumises à des juridictions nationales⁴⁰. Les critères justifiant l'obligation pour le propriétaire d'une installation

à savoir la rupture d'une relation de collaboration et de complémentarité et (3) l'absence de justification économique du comportement. Voir également Andrew I. Gavil, "Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance," *Antitrust Law Journal* 72:1 (2004), p 3-81. Le président de la FTC de l'époque, Timothy J. Muris, a souligné que, dans l'affaire Aspen, la Cour suprême avait soigneusement étudié la question du préjudice causé aux consommateurs et jugé que le comportement d'exclusion empêchait les consommateurs d'acheter un produit (forfait de ski) qu'ils recherchaient (comme en attestait la demande de forfaits avant que la vente en soit arrêtée). Timothy J. Muris, "The FTC and the Law of Monopolisation," *Antitrust Law Journal* 67 (2000), p. 693-723, page 711.

³⁶ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 682, (2004).

³⁷ Au sujet de cet effet, voir le mémoire à titre d'amici curiae adressé par les États-Unis et la Commission fédérale du commerce à la Cour suprême des États-Unis, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 682, (2004).

³⁸ *B&I/Sealink*, décision du 11 juin 1992 : affaire IV/34.174, [1992] 5 C.M.L.R. 225.

³⁹ Le jugement dans l'affaire *Sea Containers/Stena Sealink* a été rendu le 21 décembre 1993 : Décision 94/19/CE, affaire IV/34.689, 1994, JO L 15, page 8. Aux États-Unis, la notion de "tarifs raisonnables" est souvent utilisée pour les obligations en matière de tarification de l'accès. On peut entendre par « tarif raisonnable » un tarif identique à celui que le monopoleur facture à ses filiales, qui est en fait non discriminatoire. D'après certains observateurs, les prix imposés par l'autorité de la concurrence ont parfois été trop bas dans certains secteurs d'activité américains. C'est le cas pour le secteur de la téléphonie mais, en l'occurrence, les tarifs sont déterminés à la fois par l'autorité de régulation et par des décisions de justice. Aux États-Unis, en dehors des affaires concernant des services de téléphonie, les tribunaux se sont assez peu immiscés dans les questions relatives aux tarifs d'accès à une infrastructure.

⁴⁰ La première de ces affaires était l'affaire *Magill* (1995), dans laquelle des chaînes de télévision irlandaises refusaient d'autoriser Magill TV Guide à reproduire leurs listes de programme. La Cour de justice des Communautés européennes a considéré que ce type de comportement — consistant à faire obstacle à l'apparition et la commercialisation, sur le marché secondaire des guides des programmes de télévision, d'un produit nouveau pour lequel il existait une demande potentielle de la part des consommateurs, et donc à éliminer toute concurrence uniquement pour préserver son monopole — allait clairement au-delà de ce

essentielle d'accorder l'accès à son installation ont été énoncés dans l'affaire *McGill*. En l'espèce, les éléments nécessaires étaient les suivants : (1) aucun substitut réel ou potentiel ; (2) aucune justification économique à l'exclusion du concurrent et (3) refus de traiter aboutissant à la création d'une position monopolistique sur le marché secondaire mais, plus grave encore, à l'impossibilité de proposer un nouveau produit aux consommateurs. En 2004, l'arrêt de la CJCE dans l'affaire *IMS* a confirmé les critères énoncés dans l'affaire *McGill* et a renvoyé aux juridictions nationales le soin de se prononcer sur le caractère essentiel de la propriété intellectuelle et sur les effets qu'aurait sur le bien-être des consommateurs l'utilisation sous licence, dans toute l'Allemagne, d'un système mis au point par IMS et des laboratoires pharmaceutiques pour fournir des données sur les ventes de produits pharmaceutiques en officine et sur les prescriptions médicales.

En 1998, l'arrêt rendu par la Cour de justice dans l'affaire *Bronner*⁴¹ a été le catalyseur d'un effort majeur de clarification de l'approche communautaire en matière d'installations essentielles ; il a notamment gommé la majorité des divergences réputées exister entre les conceptions européenne et américaine. Dans l'affaire *Bronner*, en particulier, la Cour a jugé qu'un refus de traiter constituait un abus de position dominante quand il était « *de nature à éliminer toute concurrence sur le marché [...] et ne [pouvait] être objectivement justifié [...], mais également [quand] le service [refusé] en lui-même [était] indispensable à l'exercice de l'activité [du demandeur du service] en ce sens qu'il [n'existait] aucun substitut réel ou potentiel* ». En l'espèce, la Cour a jugé qu'Oscar Bronner n'avait pas pu démontrer que l'installation à laquelle il demandait d'accéder était réellement essentielle. L'arrêt *Bronner* a restreint la portée de la théorie des installations essentielles en limitant son application aux situations dans lesquelles le propriétaire de l'installation détient au moins une position dominante. En outre, la Cour a imposé un test prospectif pour savoir si le refus de traiter conduirait à une monopolisation d'un marché en aval, transformant ainsi le concept d'abus de position dominante détaillé à l'article 82 du traité CE en un concept similaire à celui de monopolisation figurant à l'article 2 du *Sherman Act*⁴². Dans un proche avenir, la conception européenne pourrait encore évoluer suite à la publication d'un document pour discussion sur l'article 82⁴³.

En *Australie*, l'examen des questions d'accès aux installations essentielles n'est généralement plus confié aux tribunaux, mais relève d'une procédure administrative qui ne peut être engagée que si le volume d'échanges commerciaux concerné est économiquement significatif. Cette restriction a pour effet que seules les situations de monopole naturel ou les affaires ayant trait à des services d'intérêt public sont prises en compte⁴⁴.

que le droit communautaire juge nécessaire pour remplir la fonction essentielle des droits de reproduction. 1995 E.C.R I-743, para. 73 cité dans James Turney, "Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: the Primacy of Securing Optimal Innovation," *Northwestern Journal of Technology and Intellectual Property* 3:2 (printemps 2005), note 29, disponible à l'adresse <http://www.law.northwestern.edu/journals/njtip/v3/n2/5/>.

⁴¹ Oscar Bronner GmbH & Co. K.G. v. Mediapring Zeitungs und Zeitschriftenverlag GmbH & Co. K.G., affaire C-7/97, 1998 E.C. R. I-7791, [1999] 4 C.M.L.R. 112.

⁴² Sébastien J. Evard, "Essential Facilities in the European Union: Bronner and Beyond," *Columbia Journal of European Law* 10 (2004).

⁴³ Document de discussion de la DG Concurrence sur l'application de l'article 82 du traité aux comportements d'exclusion abusifs : Public consultation, Staff discussion paper, 19 décembre 2005, disponible à l'adresse <http://europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf>.

⁴⁴ Contribution de l'Australie et aide-mémoire de la Table ronde organisée par l'OCDE en 1996 sur le concept d'installations essentielles. Disponible à l'adresse <http://www.oecd.org/dataoecd/34/20/1920021.pdf>. En revanche, les tribunaux européens ne sont pas explicitement tenus de constater l'existence d'un monopole naturel.

L'encadré 1 ci-dessous décrit la procédure administrative à suivre pour obtenir l'accès à des installations essentielles. Le fonctionnement du système australien concernant l'accès aux installations essentielles et ses motivations sont commentés à l'annexe C.

Encadré 1. Procédure administrative pour obtenir l'accès à une installation essentielle

En 1995, les États et Territoires du Commonwealth sont convenus de mettre en œuvre un programme national en faveur de la concurrence, afin de renforcer la concurrence dans toute l'économie et, ainsi, d'améliorer les résultats économiques, notamment grâce à un régime national d'accès aux services d'infrastructure essentiels. En vertu de ce régime, les entreprises peuvent demander à accéder à ces infrastructures à des « *conditions raisonnables* » lorsque la duplication de l'infrastructure concernée est économiquement irréalisable.

La Commission australienne de la productivité a conclu que le maintien d'un régime d'accès national se justifiait. Toutefois, le dispositif devrait être modifié sur certains points. En particulier, il faut davantage veiller à encourager l'investissement dans les installations essentielles.

Le régime actuel concerne surtout les infrastructures telles que les gazoducs, qui occupent une position stratégique dans la chaîne logistique. Ces infrastructures sont couramment considérées comme des installations essentielles ou des « goulets d'étranglement ».

Bien que ni l'Europe ni les États-Unis n'aient adopté une restriction comparable, lié au « *caractère économiquement significatif* », il apparaît que les interventions des États ont souvent concerné des secteurs auxquels est appliquée la théorie des installations essentielles. Dans les affaires de propriété intellectuelle, le dispositif (protection juridique de la propriété intellectuelle) résulte habituellement d'obstacles juridiques. Ainsi, ce sont les politiques gouvernementales elles-mêmes qui confèrent à la propriété intellectuelle son caractère essentiel. Dans les secteurs de la téléphonie et de l'électricité, on peut raisonnablement considérer que ce sont les mesures prises par les pouvoirs publics qui ont débouché sur une intégration verticale et une monopolisation. L'inversion de ces politiques a donc offert des possibilités d'entrée et créé des besoins d'accès aux infrastructures en cause. Un même lien historique avec les prérogatives de l'État peut être observé pour de nombreuses installations essentielles de transport. Celles-ci sont généralement des structures matérielles ou des sites dotés de certaines particularités géographiques, que l'État contrôlait ou réglementait. L'État jouait un rôle parce qu'il était propriétaire de sites (lacs, cours d'eau, eaux territoriales, etc.), parce que son droit d'expropriation ou son titre de propriété avait servi à obtenir le site d'implantation de l'installation essentielle ou parce que les installations étaient parallèlement utilisées pour la défense nationale. L'argument est que, dans la mesure où la création de l'installation essentielle a été subordonnée à une décision ou une autorisation de l'État, ce dernier devrait pouvoir empêcher qu'elle soit utilisée par une entreprise privée en vue d'acquérir un pouvoir de marché, de limiter la concurrence et de léser l'État et les autres consommateurs.

3. Les problèmes qui peuvent se poser lorsqu'il s'agit d'accorder un accès concurrentiel aux infrastructures de transport

Les responsables qui réfléchissent à des mesures proconcurrentielles dans le secteur des transports doivent résoudre une série de problèmes pour l'accès aux infrastructures. Cinq de ces problèmes sont examinés ici et illustrés au moyen d'exemples : identification du problème d'accès, structure de l'accès, conditions d'accès, surveillance de l'accès et adaptation du régime d'accès.

3.1 Identifier le problème d'accès

Dans son introduction, le présent document identifiait les cas dans lesquels les mesures concernant l'accès à une installation étaient le plus susceptibles d'être pertinentes dans le secteur des transports :

Infrastructures de transport (1) dont la capacité est limitée ; (2) qui ne sont pas susceptibles d'être développées ou ouvertes à la concurrence à brève échéance ; (3) dont l'utilisation ne donne pas lieu à des économies d'intégration verticale (efficacité ou sécurité), d'échelle ou de gamme et

(4) dont la capacité peut être redistribuée à des fournisseurs concurrents et entre fournisseurs concurrents.

Cette liste suppose qu'on ait préalablement établi qu'il serait difficile de trouver des substituts satisfaisants à l'infrastructure de transport en question. Du point de vue du bien-être des consommateurs, les problèmes d'accès ne concernant qu'une seule technologie ne sont pas préoccupants si tous les groupes de consommateurs identifiables peuvent facilement se tourner vers une autre technologie qui est accessible à un tarif comparable et n'est pas contrôlée par un monopole. Dans le cas des transports, il peut s'agir d'autres modes de transport ou d'installations similaires proches ou situées dans une autre zone. La règle de base est que les problèmes d'accès à un mode ou à un site particulier devraient être évalués en tenant compte du bien-être des consommateurs et de la différenciation des produits. Les questions d'accès sont pertinentes surtout quand les services de transport assurés grâce à l'infrastructure sont fondamentalement différents des autres services de transport du point de vue des clients. Quelquefois, la différenciation est telle qu'elle justifie de considérer les différents modes ou les différents sites comme des marchés distincts⁴⁵.

Pour évaluer un problème d'accès à une infrastructure de transport, il importe aussi de déterminer la raison pour laquelle la capacité existante ne permet pas de répondre aux besoins de nouveaux entrants. Au moins dans le cas de certains modes de transport, une capacité limitée peut être le résultat de décisions prises par ailleurs. Par exemple, des installations portuaires intérieures peuvent être saturées en raison d'améliorations apportées à des voies d'eau intérieures et subventionnées par l'État. La demande est alors supérieure à ce qu'elle serait dans un cadre concurrentiel car le service est subventionné. En pareil cas, les responsables devraient au moins envisager de réduire les subventions plutôt que de développer la capacité pour satisfaire les besoins de nouveaux entrants ou leur redistribuer une partie de la capacité existante. De même, un port intérieur peut être encombré parce que les autres modes de transport sont soumis à une fiscalité plus lourde ou une réglementation plus restrictive. Le cas échéant, au lieu de modifier les conditions d'accès, il peut se révéler plus efficace d'alléger la fiscalité ou la réglementation auxquelles les modes de transport concurrents sont assujettis.

*L'exemple de l'accès au port de Rødby (Danemark) ou comment rendre essentielle une installation qui ne l'était pas*⁴⁶

Avant de qualifier une infrastructure de transport d'installation essentielle, il faut examiner les conditions d'accès et les substituts existants. Dans cet exemple danois, la concurrence entre les différents modes de transport semblait insuffisante pour remédier aux problèmes d'accès. La décision s'est donc concentrée sur les conditions d'entrée et, plus spécifiquement, sur les obstacles à l'entrée imposés par les pouvoirs publics. Cet exemple montre qu'il est important de prendre la précaution supplémentaire d'évaluer la facilité d'entrée et de ne pas se concentrer uniquement sur la manière dont l'entrée pourrait contribuer à résoudre le problème d'accès à une installation qui est unique au moment de l'enquête.

Au Danemark, l'accès aux terminaux de ferry est contrôlé par le ministère des Transports. La compagnie nationale de chemins de fer DSB était propriétaire et exploitant du port d'Elsinore, qui dessert la Suède, et du port de Rødby, qui dessert l'Allemagne. Le ministère réservait l'accès à ces ports aux

⁴⁵ Avant et après la construction, le marché en cause peut ne plus être le même.

⁴⁶ La présentation de cette affaire est tirée de Sebastian J. Evard, "Essential Facilities in the European Union: Bronner and Beyond," *Columbia Journal of European Law* 10 (2004), disponible à l'adresse http://www.jonesday.com/files/tbl_s31Publications/FileUpload137/4528/Article%20essential%20facilities.pdf, section II.G., et d'extraits d'un document présenté à l'OCDE en 1999 par l'autorité danoise de la concurrence.

transbordeurs gérés par les compagnies nationales de chemins de fer suédoise et allemande. Parallèlement, la liaison Elsinore-Helsingborg était exploitée de façon monopolistique par une coentreprise publique suédo-danoise. En 1993, la Commission européenne a pris contact avec le ministère danois des Transports pour préconiser l'accès des concurrents à ces installations portuaires. Face à l'absence de réaction du ministère, la Commission européenne a engagé une action.

DSB, entreprise publique danoise, était à la fois le propriétaire et l'exploitant du port de Rødby. DSB exploitait également l'unique service de ferry entre Rødby et le port de Puttgarden. *Stena*, une autre compagnie de ferry, se proposait de desservir les mêmes ports que DSB. L'État danois a refusé à *Stena* le droit d'utiliser le port de Rødby au motif que, dans le cas contraire, les compagnies y travaillant déjà risqueraient de ne pas pouvoir développer leur activité. Il a également refusé à *Stena* le droit d'aménager un autre port à proximité, considérant que *Stena* n'avait pas apporté la preuve qu'il existait une demande de services de ferry insatisfaite et jugeant très faible la probabilité qu'une telle demande se fasse jour. De la part du ministère, cela revenait à interdire l'accès à l'infrastructure existante et à créer un obstacle juridique à l'entrée sur le marché via la construction d'une nouvelle infrastructure.

La Commission a estimé que le refus d'accorder l'accès au port procédait d'un comportement abusif, dont les effets étaient en outre aggravés par le refus d'autoriser la construction d'un nouveau port. Elle a considéré que :

« Une entreprise qui possède ou gère une installation essentielle portuaire à partir de laquelle elle assure un service de transport maritime ne peut, sauf à enfreindre l'article [82], refuser sans justification objective l'accès à cette installation à un armateur désirant opérer sur la même liaison maritime. »

En l'espèce, il n'y avait aucune concurrence sur le marché aval puisque DSB était l'unique exploitant. Le refus d'autoriser l'accès au port aurait pu se justifier techniquement, mais aussi par le fait que *Stena* avait la possibilité de construire sa propre infrastructure. Par conséquent, le port de Rødby n'était pas indispensable à l'exercice d'une activité sur le marché aval. En revanche, le refus de l'État d'autoriser *Stena* à accéder à un autre port rendait impossible toute concurrence de sa part. Ainsi, en refusant à *Stena* le droit de construire son propre port, l'État danois a fait du port de Rødby une installation essentielle, ce qu'il n'était pas intrinsèquement.

Après cette décision, *Stena* a obtenu le droit de construire sa propre installation à Elsinore au lieu de pouvoir utiliser le port existant. Au terme de plus de deux autres années de contentieux, l'accès au terminal existant a été accordé et les prix ont notablement baissé.

3.2 *Structure de l'accès*

Les économistes de marché mettent fortement l'accent sur les facteurs d'incitation qui, à leur avis, jouent un rôle très important. L'accès aux infrastructures ne fait pas exception. Pour les économistes qui étudient les politiques d'accès aux installations essentielles dans les situations où l'intégration verticale ne permet que des économies faibles ou nulles, l'une des grandes questions qui se posent (mise à part celle du monopole naturel) est la suivante : l'entité qui contrôle l'installation est-elle incitée à agir de façon discriminatoire à l'égard d'un ou de plusieurs clients potentiels, ce qui peut nuire aux consommateurs, et dispose-t-elle des capacités pour ce faire ? Dans l'affirmative, quels sont les coûts et avantages pouvant résulter de la réduction ou de l'élimination de ces incitations au moyen de changements structurels ou bien de mesures interdisant les pratiques discriminatoires ? Les changements structurels présentent en général l'avantage de modifier les incitations financières existantes. Il peut y avoir incitation à discriminer au niveau de l'offre d'accès aux infrastructures de transport essentielles, notamment lorsque le propriétaire d'une infrastructure contrôle aussi en amont et en aval des actifs en concurrence avec des clients indépendants. Si la réglementation limite le pouvoir de marché de l'installation essentielle, par exemple,

l'entreprise en cause peut pratiquer des discriminations au niveau de l'accès afin d'accroître ses bénéfices sur les marchés non réglementés en amont et en aval. Ceci peut lui permettre d'échapper aux restrictions réglementaires qui limitent ses bénéfices pour l'exploitation de l'installation essentielle⁴⁷. Dans certaines conditions, la discrimination est un moyen pour le détenteur de l'installation essentielle d'accroître ses bénéfices en réduisant ou en éliminant la concurrence en amont et en aval, y compris lorsque l'installation essentielle n'est pas soumise à régulation⁴⁸.

Il existe toute une gamme d'options de dégroupage allant du désinvestissement total — la forme la plus complète de dégroupage — à la séparation comptable. Le désinvestissement total a l'avantage de supprimer l'incitation à discriminer au niveau de l'accès en éliminant la part des bénéfices du détenteur de l'installation essentielle qui est liée au pouvoir de marché supplémentaire en amont ou en aval⁴⁹. L'installation continue généralement à être réglementée après le désinvestissement, tandis que, sur les marchés en amont et en aval qui étaient auparavant réglementés, la réglementation cède progressivement la place à la concurrence. Des règles de conduite anti-discrimination peuvent aussi se substituer au dégroupage ou le compléter. Ces règles peuvent interdire les pratiques qui empêchent aux clients indépendants d'obtenir un accès comparable à celui dont bénéficient les filiales du détenteur de l'installation et exiger même la divulgation de certaines données financières pouvant faciliter la détection et la démonstration des pratiques discriminatoires. Le grave inconvénient des règles de conduite est qu'elles ne permettent pas d'éliminer les facteurs qui incitent à la discrimination. Lorsque l'accès est soumis uniquement à des règles de conduite, sans dégroupage structurel, la question se pose de savoir comment obtenir l'application effective de ces règles, dans la mesure où celles-ci vont à l'encontre des exigences de profit de l'entreprise.

L'accès aux installations de transport de l'électricité aux États-Unis de 1996 à aujourd'hui

L'obligation d'accès constitue une forme de dégroupage visant à assurer que les clients non affiliés d'une installation bénéficient d'un traitement comparable aux clients affiliés. Cependant, les règles de conduite s'appliquant à l'accès sont sans effet sur les incitations économiques du détenteur de l'installation. Les technologies utilisées et certains écarts minimes entre des modalités d'accès comparables font qu'il est parfois coûteux et difficile de détecter et de prouver les infractions aux règles de conduite. C'est pourquoi les approches structurelles, en supprimant les incitations à enfreindre ces règles, peuvent être plus efficaces. L'exemple retenu ici est celui de l'évolution de la politique d'accès aux installations de transport de l'électricité aux États-Unis qui, dans un premier temps, a pris la forme de règles de conduite s'appliquant à l'accès, puis s'est orientée vers le dégroupage structurel devant les difficultés rencontrées pour faire respecter les règles de conduite. Dans le secteur du gaz naturel, par contre, l'application des règles de conduite en matière d'accès s'est généralement déroulée de manière positive. Notre exemple montre combien il importe de tenir compte des difficultés que posent la détection, la démonstration et la correction des pratiques discriminatoires au niveau de l'accès.

⁴⁷ Sur ce point, voir *Comment of the Federal Trade Commissions before the United States of America Federal Energy Regulatory Commission*, Docket n° PL04-6-000 et PL04-9-000 (14 juillet 2004), Section III, disponible à l'adresse <http://www.ftc.gov/os/comments/ferc/v040022.pdf>.

⁴⁸ Il n'est pas possible, dans les limites de ce document, d'aborder en détail les pratiques de subordination de vente (achats par lot et ventes liées) ; on pourra consulter à ce propos David S. Evans, A. Jorge Padilla et Michael A. Salinger, « A Pragmatic Approach to Identifying and Analyzing Legitimate Tying Cases » (août 2003), disponible à l'adresse <http://homepages.ulb.ac.be/~plegros/documents/classes/iee/evans-tying.pdf>. Pour une discussion plus approfondie, voir par exemple Dennis Carlton et Jeffrey Perloff, *Modern Industrial Organization*, 3e édition (2000), chap. 10 et F.M. Scherer et David Ross, *Industrial Market Structure and Economic Performance*, 3e édition (1990), chap. 14.

⁴⁹ Voir OCDE, « Concurrence et restructuration des services publics », *Synthèses* (février 2002).

Dans l'affaire *Otter Tail Power*, la Cour Suprême des États-Unis a ordonné à un opérateur verticalement intégré d'accorder l'accès aux installations de transport à des consommateurs d'électricité en gros (notamment des usines) qui ne pouvaient obtenir de l'électricité d'autres distributeurs en gros⁵⁰. La Cour a fondé sa décision sur les critères de monopolisation énoncés dans la législation antitrust. Les suites réglementaires données à cette affaire ont consisté, dans un premier temps, à exiger des installations souhaitant fusionner qu'elles assurent un accès non discriminatoire aux installations de transport. Après l'adoption de la loi de 1992 sur la politique énergétique (*Energy Policy Act*), la Commission fédérale de réglementation du secteur de l'énergie (*Federal Energy Regulatory Commission, FERC*) a défini une politique à caractère plus général favorisant l'accès ouvert aux installations de transport, en vertu du règlement 888. Ce texte était une règle de conduite interdisant la discrimination au niveau des installations de transport. Bien que l'activité de négoce en gros ait très fortement augmenté sous l'effet de cette ordonnance, des plaintes ont continué à être déposées pour discrimination dans l'accès aux installations de transport. La Commission fédérale du commerce (*Federal Trade Commission, FTC*) a alors examiné l'approche comportementale proposée par la FERC. Il lui est apparu que l'introduction de règles de conduite était insuffisante pour empêcher les pratiques discriminatoires pour l'accès aux installations de transport, car ces règles ne supprimaient pas les facteurs incitant à discriminer (pour protéger les investissements en production d'un opérateur verticalement intégré de la concurrence d'opérateurs indépendants produisant à un coût moindre) et aussi parce que les cas de discrimination dans l'accès aux installations de transport étaient difficiles à détecter et à prouver⁵¹. Par la suite, la FERC a adopté le règlement 2000 afin de favoriser la constitution d'entités indépendantes, distinctes au point de vue opérationnel des propriétaires des installations de transport. Les propositions qui ont abouti au règlement 2000 analysaient en détail les difficultés que pose l'application des règles de conduite comme moyen de prévention de la discrimination dans l'accès aux installations de transport de l'électricité⁵². Le processus de création d'entités régionales indépendantes se poursuit actuellement. Certaines régions ont accepté sans difficulté cette approche, tandis que d'autres s'opposent vigoureusement à sa mise en œuvre. La FERC examine aussi les moyens de renforcer les règles de conduite pour prévenir la discrimination dans l'accès aux installations de transport⁵³.

Encadré 2. L'accès aux infrastructures de fret ferroviaire

A la suite des réformes visant à ouvrir l'accès dans un certain nombre de secteurs d'activité, plusieurs pays ont introduit des régimes d'accès dans le secteur ferroviaire. Bien que ces tentatives de réforme soient pour la plupart encore assez récentes, diverses questions se sont posées en ce qui concerne l'adéquation entre l'accès à l'infrastructure et la technologie ferroviaire, tout au moins dans son état actuel.

On ignore encore quel a été l'impact effectif de l'ouverture de l'accès aux infrastructures essentielles du secteur ferroviaire. Il existe en gros deux options principales pour assurer l'accès dans ce secteur. La première consiste à réglementer l'accès aux voies et aux équipements ferroviaires des opérateurs intégrés. Avec la seconde, on établit d'abord, avant de réglementer l'accès, une séparation structurelle entre l'infrastructure des voies et équipements ferroviaires, d'une part, et l'exploitation des trains, d'autre part.

⁵⁰ *Otter Tail Power Co. v United States*, 410 U.S. 366, 377-79 (1973).

⁵¹ *Comment of the Staff of the Bureau of Economics of the Federal Trade Commission before the Federal Energy Regulatory Commission in the matter of Promoting Wholesale Competition through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Docket n° MR95-8-000 et RM94-7-001 (7 août 1995), disponible à l'adresse <http://www.ftc.gov/be/v950008.htm>.

⁵² Voir *Comment of the Staff of the Bureau of Economics of the Federal Trade Commission before the Federal Energy Regulatory Commission in the matter of Regional Transmission Organizations*, Docket n° RM00-2-000 (16 août 1999), disponible à l'adresse <http://www.ftc.gov/be/v990011.pdf>.

⁵³ Voir *Comment of the Federal Trade Commission before the Federal Energy Regulatory Commission in the matter of Information Requirements for Available Transfer Capability*, Docket n° MR05-17-000 (22 août 2005), disponible à l'adresse <http://www.ftc.gov/os/2005/08/050823availtranscapab.pdf>.

Plus de la moitié des pays de l'OCDE autorisent depuis déjà un certain temps les opérateurs ferroviaires indépendants, tout en maintenant l'intégration verticale de l'opérateur historique. En Finlande, par exemple, l'entreprise qui gère le trafic ferroviaire est entièrement distincte de l'opérateur intégré d'exploitation des trains et de maintenance de l'infrastructure et, en France, l'exploitation des trains est entièrement séparée du contrôle du trafic ferroviaire et de la gestion de l'infrastructure.

La séparation structurelle peut apparaître souhaitable lorsque le maintien d'opérateurs ferroviaires intégrés rend difficile l'entrée de nouveaux opérateurs. L'opérateur intégré en place dispose de plusieurs moyens pour dissuader les nouveaux opérateurs d'accéder à un marché rentable ; ces pratiques discriminatoires peuvent prendre différentes formes qui sont difficiles à régler, en particulier :

- le resserrement des marges (en fixant les prix à un niveau insuffisant par rapport aux tarifs d'accès pour permettre à un concurrent d'avoir accès aux installations dans des conditions de rentabilité) ;
- le refus de vente (en particulier pour les services du dernier kilomètre pour lesquels l'opérateur en place est en situation de monopole) ;
- l'offre d'investir d'abord dans les régions/communes qui utilisent les services ferroviaires des opérateurs en place.

Dans les régimes d'accès aux installations des opérateurs intégrés verticalement comme dans les régimes d'accès fondés sur une séparation verticale, d'importantes économies verticales peuvent être réalisées entre l'exploitation des trains et la propriété du réseau. Cependant, dans le cas de l'accès à un système verticalement intégré, de telles économies peuvent être hors de portée de l'entrant, contribuant ainsi à accroître ses dépenses d'exploitation ou ses investissements initiaux. D'autre part, en cas de séparation verticale, les économies verticales peuvent ne pas se matérialiser.

De bonnes raisons peuvent justifier de séparer les activités de transport de fret des autres activités de l'opérateur en place, notamment afin de promouvoir l'entrée d'autres fournisseurs et le développement de la concurrence entre eux. Cependant, il peut être beaucoup plus difficile d'introduire la concurrence dans les services voyageurs car, contrairement au transport de fret, ces services font en général l'objet d'une concession, une même ligne ne pouvant être exploitée par plusieurs opérateurs, notamment parce que nombre de services voyageurs sont subventionnés⁵⁴.

3.3 Conditions d'accès

Si, au lieu de recourir au dégroupage structurel, il est décidé d'introduire des règles de conduite, l'instance de régulation doit définir les conditions d'accès ou approuver la proposition d'accès formulée par le détenteur de l'installation essentielle. Dans certains cas, la question se résout à un simple « oui ou non ». Par exemple, l'accès à une route sans péage 1) qui n'est jamais encombrée, 2) sur laquelle il n'y a pas de limite de vitesse et 3) à partir de laquelle il est facile d'accéder à des services disponibles en permanence sur des routes parallèles ou transversales peut constituer une proposition simple de ce genre. Cependant, dans nombre de cas, l'accès à une infrastructure de transport comporte des aspects plus complexes. Les questions de tarification, de niveau et de qualité du service, de sécurité et de fiabilité doivent être prises en compte dans beaucoup de situations en matière d'accès. La discrimination sur l'un ou l'autre de ces éléments à l'égard des clients indépendants peut poser des problèmes. Souvent, les critères d'accès prennent simplement la forme de conditions d'utilisation identiques à celles que le détenteur de l'installation offre à ses filiales.

Les conditions d'accès peuvent être tout aussi importantes que l'accès lui-même. Par exemple, si l'accès est accordé à un prix élevé⁵⁵, l'ouverture de l'accès pourra demeurer sans effet puisqu'il sera

⁵⁴ Ce texte est adapté de : OCDE, « La réforme structurelle dans le secteur ferroviaire », les tables rondes sur la politique de la concurrence 55 (2005), et OCDE, « Projet de rapport au Conseil sur la séparation structurelle », document du Secrétariat (2005).

⁵⁵ La question de la tarification efficiente de l'accès ne peut être traitée dans les limites de ce document. A ce propos, voir par exemple OCDE, *La tarification de l'accès dans le secteur des télécommunications* (2004), disponible à l'adresse <http://www.oecd.org/dataoecd/26/6/27767944.pdf> ; Nicholas Economides et Lawrence J. White, « Access and Interconnection Pricing : How Efficient is the *Efficient Component Pricing Rule* ? », *Antitrust Bulletin* XL:3 (automne 1995), p. 557-579 ; M. Cave, P. Crowther et L. Hancker, « *Competition Aspects of Access Pricing - Report to the European Commission* » [Aspects concurrentiels de la tarification de l'accès - Rapport à la Commission européenne] (décembre 1995), n° CM-94-96-582-EN-C, ainsi que les articles cités dans ce document.

impossible à une entreprise de réaliser un bénéfice en payant le prix demandé. De la même façon, si l'accès est accordé à un prix abordable, mais avec un service de qualité faible, le client risque de se trouver obligé de compléter ce service à un coût prohibitif pour lui-même ou bien d'en conclure que la faible qualité des services l'expose à un risque excessif. Les normes de sécurité et de fiabilité des services peuvent aussi être d'un niveau par trop insuffisant pour que le client potentiel puisse espérer rentabiliser l'accès à l'installation essentielle. Par contre, si le prix de l'accès est fixé à un niveau trop bas, il peut en résulter un nombre excessif d'entrants⁵⁶ et un encombrement néfaste pour tous les utilisateurs et leurs clients de détail.

Du point de vue des politiques d'accès, la qualité probable des services et les considérations de sécurité et de fiabilité dans l'accès à une installation essentielle soulèvent des problèmes parfois aussi difficiles à résoudre que les questions de tarification. Les critères de tarification s'appliquant aux installations essentielles sont le plus souvent facilement quantifiables, au moins pour ce qui concerne les services standards. En raison de leur caractère quantifiable, les règles de tarification devraient être relativement faciles à contrôler. La qualité, la sécurité et la fiabilité sont probablement moins directement quantifiables et une analyse approfondie est nécessaire pour identifier les aspects qui se prêtent le plus facilement à un contrôle. En effet, les difficultés rencontrées pour quantifier et contrôler ces facteurs est l'une des raisons pour lesquelles certaines entreprises optent pour l'intégration verticale.⁵⁷ Cependant, dans les scénarios examinés ici, seule une entreprise peut envisager l'intégration verticale et elle peut donc être incitée à renforcer et non à réduire les incertitudes qui s'attachent à l'accès.

Les exemples qui suivent illustrent les difficultés auxquelles se heurtent les tribunaux ou les instances de régulation pour identifier tous les aspects de l'accès qui peuvent être importants pour un client indépendant. Ils montrent que, si l'on ne prête pas une attention minutieuse aux détails des conditions d'accès, la réglementation imposant l'accès à des conditions comparables peut être sans efficacité. Ces difficultés et les incertitudes associées aux règles de conduite peuvent amener à rechercher des remèdes structurels afin d'atténuer ou de supprimer les problèmes que pose l'application des règles de conduite.

Accès d'un transbordeur au port de Holyhead au début des années 90

Dans l'affaire *B&I* concernant le port de Holyhead, un transbordeur (B&I Line PLC) s'est plaint que *Sealink*, à la fois exploitant d'un service de ferry-boats et propriétaire du port de Holyhead, refusait de lui fournir un accès identique aux installations portuaires malgré l'obligation à laquelle il était soumis. Le mouillage attribué à B&I se trouvait à un endroit du port où le chenal de navigation était assez étroit. Lorsqu'un navire de la compagnie Sealink passait dans le chenal en entrant ou en sortant du port, le ferry de B&I qui était à l'amarrage était soumis à de fortes secousses, ce qui l'obligeait à relever la rampe le reliant au quai et à interrompre le chargement ou le déchargement en cours. Sealink avait modifié les horaires de ses bateaux et le chargement et le déchargement des ferry-boats de B&I se trouvait fréquemment interrompu, au détriment de B&I et de ses clients⁵⁸. Dans sa décision, la Commission européenne a jugé que le port de Holyhead constituait un marché spécifique puisque les autres ports de la région étaient éloignés et que Sealink était en position dominante en tant que fournisseur contrôlant le port. Elle a considéré que la modification des horaires du service de ferry de Sealink, qui perturbait le chargement et le déchargement des navires de B&I, revenait à accorder l'accès à des conditions moins

⁵⁶ Voir Axel Gautier et Manipushpak Mitra, « Regulation of an Open Access Essential Facility » (août 2003), disponible à l'adresse http://idei.fr/doc/conf/rai/papers_2003/maxel.pdf.

⁵⁷ Voir, par exemple, Dennis Carlton et Jeffrey Perloff, *Modern Industrial Organization*, 3ème édition (2000), chap. 12. Le livre d'Oliver Williamson, *Markets and Hierarchies : Analysis and Antitrust Implications, A Study in the Economics of Internal Organization* (1975) est l'une des premières études de référence des facteurs d'incertitude dans les transactions de marché.

⁵⁸ *B&I Line plc contre Sealink Harbours Ltd et Sealink Stena Ltd* (1992) 5 CMLR 255 (affaire IV/34.174), 11 juin 1992.

favorables. Pour la Commission, cette pratique était contraire à l'article 86, aujourd'hui article 82 (imposition, sans raison objective, par une entreprise en position dominante d'un désavantage concurrentiel) et a demandé à Sealink de revenir à ses horaires précédents.

Dans la seconde affaire, sur laquelle elle s'est prononcée un an plus tard, la Commission européenne a considéré que Sealink refusait d'accorder l'accès à des conditions raisonnables et non discriminatoires à un nouveau service de catamarans à grande vitesse. Dans ce cas, la Commission a ordonné à l'entreprise dominante d'assurer l'accès dans des conditions « aussi réalistes que possible d'un point de vue économique et matériel ». Les parties étant parvenues à un accord après la décision, la Commission n'a pas eu à prendre de nouvelle décision exécutoire. Par la suite, l'entrant a décidé d'opérer à partir du port de Liverpool, ce qui pose la question du caractère essentiel du port de Holyhead, tout au moins dans le cas des technologies à grande vitesse⁵⁹.

Ces décisions peuvent être interprétées en ce sens que, lorsque le détenteur d'une infrastructure essentielle n'est pas soumis à une réglementation tarifaire, les autorités sont en droit de supposer que le prix qu'il exige est un prix lui permettant de maximiser le bénéfice qu'il tire de l'exploitation de l'installation en question. Par conséquent, si un opérateur indépendant en aval cherche à obtenir l'accès au tarif en vigueur, l'opérateur de l'installation a tout intérêt à lui accorder l'accès car cela permet d'intensifier l'utilisation de l'installation essentielle au prix de monopole présumé rentable. L'utilisation de l'installation essentielle sera intensifiée soit parce que l'entreprise indépendante en aval offre un produit différencié qui permet d'augmenter le volume de vente au détail, soit parce que cette entreprise opère à un coût moindre que d'autres entreprises en aval, ce qui aura aussi pour effet d'accroître la demande d'utilisation de l'installation essentielle (le prix de détail sera plus faible si le marché en aval est un marché concurrentiel). Le refus d'accorder l'accès n'est donc pas généralement justifié du point de vue de l'intérêt commercial d'une entreprise dont la seule activité est l'exploitation de l'installation essentielle. Si une telle entreprise refuse de traiter, ce peut être parce qu'elle tire avantage d'une moindre concurrence sur le marché en aval.

Dans une affaire comparable, la Commission s'est prononcée en faveur d'un nouvel entrant – il s'agissait cette fois de *Irish Ferries* – qui cherchait à obtenir l'accès au port de Roscoff en Bretagne (France). L'entrant affirmait être parvenu à un accord avec l'opérateur du port, la CCI de Morlaix. Cependant, l'opérateur refusait de reconnaître l'existence d'un accord. La Commission a considéré que le port de Roscoff constituait une infrastructure essentielle et que l'entreprise exploitant le port était une entreprise en position dominante. La Commission a ordonné l'ouverture de l'accès à des conditions raisonnables⁶⁰.

*Accès aux services auxiliaires de collecte des déchets dans le port de Varna (Bulgarie) au milieu des années 90*⁶¹

Les navires faisant escale dans un port ont généralement besoin de services de restauration et de collecte des déchets. L'approvisionnement du bateau, puis la collecte des déchets et leur acheminement sur

⁵⁹ Décision 94/19/CE de la Commission du 21 décembre 1993 relative à une procédure d'application de l'article 86 du traité CE (IV/34.689 - Sea Containers contre Stena Sealink - Mesures provisoires).

⁶⁰ Sebastian J. Evard, « Essential Facilities in the European Union : Bronner and Beyond », *Columbia Journal of European Law* 10 (2004), disponible à l'adresse http://www.jonesday.com/files/tbl_s31Publications/FileUpload137/4528/Article%20essential%20facilities.pdf.

⁶¹ Les informations concernant l'affaire du port de Varna ont été présentées par la Commission bulgare de protection de la concurrence en vue de la conférence de l'OCDE organisée en 1999 à Vienne et communiquées à l'auteur par Sally Van Siclen, Secrétariat de l'OCDE.

un lieu de traitement sont un aspect de ces services. Les accords internationaux exigent de tous les pays la mise en place dans chaque port d'un système de collecte et de traitement fiable des déchets des navires de haute mer, ceci afin d'éviter la pollution des océans. A Varna (Bulgarie), il existe un incinérateur dont le *Port de Varna*, société anonyme est propriétaire.

Dans cette affaire portée devant la Commission bulgare de protection de la concurrence, une entreprise de restauration s'est plainte que, bien qu'ayant obtenu tous les permis exigés par les organismes publics pour fournir des services de restauration et pour collecter et transporter les déchets des navires de haute mer, elle ne pouvait opérer dans le port de Varna car le propriétaire du port refusait à ses camions l'accès aux terrains appartenant au port et refusait de recevoir ses déchets à l'incinérateur du port. L'entreprise de restauration pouvait approvisionner les bateaux et collecter les déchets (service de transport), mais cet accès lui était inutile sans la possibilité d'accéder aussi à l'installation de traitement des déchets. Dans ce cas, le seul accès au port était suffisant pour assurer le service de transport, mais ne permettait pas d'assurer les services complémentaires que demandaient les navires et que prévoient les accords internationaux.

La Commission de la concurrence a considéré que, en l'absence d'un autre incinérateur et de la possibilité de créer une installation équivalente, le port de Varna occupait de fait une position dominante pour le traitement des déchets maritimes dans la région. Le port défendait le point de vue selon lequel il pouvait décider unilatéralement l'intégration verticale afin d'exclure la concurrence du transport des déchets maritimes jusqu'à l'installation de traitement, notamment en interdisant l'accès aux voies lui appartenant. Cependant, le port admettait aussi, de façon quelque peu illogique, que « si le capitaine d'un navire demande explicitement, par l'intermédiaire de son agent, que la collecte des déchets soit assurée par une entreprise particulière, celle-ci doit être autorisée à pénétrer dans le port ». Il ne semble pas que le port de Varna ait invoqué des critères de sûreté ou de sécurité pour justifier son refus d'accorder l'accès aux camions de l'entreprise de restauration⁶².

Accès intermodal : accès par train rapide contre accès automobile à l'aéroport de San Francisco

Dans les situations d'accès intermodal, des tensions peuvent apparaître si les acteurs qui contrôlent ou exercent une influence déterminante sur l'un des modes de transport refusent d'accorder des conditions de connexion satisfaisantes, en particulier lorsqu'une connexion présente des avantages sur le plan social. En 1990, le *Bay Area Rapid Transit District* (BART) de San Francisco et le *San Mateo County Transit District* (SamTram) ont proposé conjointement d'étendre la desserte du réseau BART depuis la gare de Daly City jusqu'à l'aéroport international de San Francisco (SFIA)⁶³. Ce projet avait pour but « d'offrir une option de transport en commun aux voyageurs le long de la péninsule de San Francisco, en particulier depuis le nord de San Mateo County, et de créer un service de transport à grande vitesse efficace reliant San Francisco, San Mateo County et le SFIA en plein développement »⁶⁴. Il était proposé d'étendre le réseau existant car l'augmentation annuelle prévue du nombre de passagers aériens, compte tenu du niveau

⁶² La Commission bulgare de la concurrence a imposé une amende au port de Varna pour refus d'accès, mais a considéré que le port n'avait pas enfreint d'autres règles, comme l'affirmait l'entreprise de restauration, car celle-ci n'avait pas encore commencé le transport de déchets au moment du refus d'accès. Il subsiste dans cette affaire une certaine ambiguïté quant au point de savoir si l'État bulgare était tenu au titre du traité international de protéger le droit du navire de désigner une entreprise indépendante de collecte de déchets pour transporter les déchets jusqu'à l'incinérateur du port.

⁶³ San Mateo County Transit District San Carlos (Californie), Comprehensive Annual Financial Report (juin 2004).

⁶⁴ San Francisco Bay Area Rapid Transit, Federal Transit Administration, U.S. Department of Transportation et SamTrans, « BART-San Francisco Airport Extension : Executive Summary Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement » (janvier 1995).

d'encombrement déjà atteint sur le réseau autoroutier, risquait d'entraîner des retards très importants pour les passagers. L'introduction de ce nouveau système de transport, en outre, devait permettre de réduire sensiblement la pollution atmosphérique⁶⁵ et le SFIA serait ainsi l'aéroport américain au taux le plus élevé de voyageurs empruntant les transports publics »⁶⁶.

Le premier problème auquel se sont heurtés les deux partenaires a été celui de l'emplacement de la gare. A l'origine, BART souhaitait la localiser à l'intérieur du terminal en construisant un tunnel, mais les compagnies aériennes, représentées par le lobby de l'Air Transport Association, et l'opérateur de l'aéroport ont rejeté cette option en mettant en avant une proposition légèrement moins coûteuse prévoyant la construction d'une gare à quelque distance du terminal⁶⁷. Les compagnies aériennes affirmaient que cette solution leur permettrait de mener à bien le projet d'extension de l'aéroport, d'un montant de \$2,4 milliards, et le projet People Mover⁶⁸ visant à acheminer directement les passagers de la gare aux terminaux⁶⁹. Les officiels régionaux et BART ont alors accusé les compagnies aériennes de multiplier les pressions contre l'extension du réseau BART, sans doute pour protéger les recettes du parking de l'aéroport qui couvraient une part importante des frais d'exploitation de l'aéroport et contribuaient, par conséquent, à abaisser les redevances versées par les compagnies aériennes. Finalement, BART a accepté de construire la gare en dehors du terminal, tout en parvenant à inclure dans la conception du projet plusieurs éléments visant à réduire les inconvénients d'un emplacement plus éloigné⁷⁰.

Le projet, qui devait être achevé en 1999, n'a reçu l'aval du gouvernement fédéral qu'en 1997. La gare a finalement ouvert ses portes le 22 juin 2003. Selon les usagers, la gare BART de l'aéroport n'est pas d'un accès aussi facile que prévu : « Prévoyez d'arriver à l'aéroport plusieurs heures avant votre vol, afin d'avoir le temps de descendre du BART, d'attendre le train et de vous rendre à votre porte d'embarquement. Comme il n'est pas possible d'emmener de chariots à bagage dans la gare BART, soyez prêt à porter vous-mêmes tous vos bagages depuis le train jusqu'à l'aéroport et inversement »⁷¹.

⁶⁵ Il était prévu, en particulier, une réduction des émissions d'hydrocarbures réactifs de 1.2 tonne par jour, d'oxyde d'azote de 1.7 tonne par jour et de monoxyde de carbone de 17 tonnes par jour ; voir Bay Area Rapid Transit /U.S. Department of Transportation and SamTrans, « BART-San Francisco Airport Extension : Executive Summary Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement » (janvier 1995).

⁶⁶ Benjamin Pimentel, « After a Long Struggle, SFO's BART Station Finally on Track », *San Francisco Chronicle* (17 août 1997), disponible à l'adresse <http://sfgate.com>. Selon Pimentel, le réseau BART devait acheminer à l'aéroport 20 000 passagers par jour.

⁶⁷ Benjamin Pimentel, « BART-to-Airport Project Hits Another Roadblock », *San Francisco Chronicle* (28 janvier 1997), disponible à l'adresse <http://sfgate.com>.

⁶⁸ Le projet People Mover assure l'accès entre les terminaux, les parkings, le centre de location de voitures et la gare SFO BART.

⁶⁹ Une proposition semblable a été avancée pour l'extension jusqu'à l'aéroport de la desserte de CalTrain, le système ferroviaire assurant le transport des voyageurs entre San Jose et San Francisco ; voir Benjamin Pimentel, « CalTrain Choices For SFO Stations Airport board to study 2 sites » (5 avril 1996) et « CalTrain-Airport Link Put on Hold SFO Panel Won't Pick Site Until BART Finalizes Plan », *San Francisco Chronicle* (27 juin 1996), disponibles à l'adresse <http://sfgate.com>.

⁷⁰ Benjamin Pimentel, « BART Gives In, Approves Station Outside S.F. Airport Stop Would be 5-minute Hike from Gates », *San Francisco Chronicle* (13 septembre 1995), disponible à l'adresse <http://sfgate.com>.

⁷¹ http://www.airlinequality.com/Airports/Airport_forum/sfo.htm.

3.4 *Surveillance de l'accès aux infrastructures essentielles*

Lorsque les entreprises peuvent être incitées à enfreindre les règles de conduite qui leur sont applicables, une certaine forme de surveillance peut être nécessaire pour assurer la réussite de la politique d'accès. Cette surveillance peut être exercée en partie directement par le personnel de l'instance de régulation sectorielle. Celle-ci peut s'appuyer aussi sur les informations qui lui sont fournies par les entreprises cherchant à obtenir l'accès. Cependant, de même que les propriétaires d'infrastructures essentielles ont intérêt à laisser dans l'ombre leurs pratiques discriminatoires, les entreprises indépendantes peuvent aussi avoir de bonnes raisons d'exagérer ces pratiques. L'instance de régulation doit donc souvent mener sa propre enquête pour se prononcer sur les allégations contradictoires des parties. L'existence de données conflictuelles soulève la question du risque d'erreur dans l'évaluation des plaintes pour discrimination. De telles erreurs peuvent en effet nuire à l'investissement dans les infrastructures de transport.

Les obligations d'accès donnent parfois aux utilisateurs la possibilité d'accomplir certaines fonctions eux-mêmes ou bien d'organiser eux-mêmes la fourniture de certains services. Lorsque l'utilisateur dépend du propriétaire pour la prestation de certains services et que le propriétaire est en concurrence avec lui sur des marchés amont et aval, le propriétaire peut être fortement incité à restreindre son offre de services ou à perturber l'activité des utilisateurs indépendants de l'installation, notamment par des techniques raffinées d'augmentation des coûts ou des risques. Les exemples présentés dans cette section illustrent les risques auxquels s'expose un utilisateur dépendant d'un concurrent. Dans le premier exemple, la dépendance était justifiée par les besoins d'amélioration de l'installation, que le régulateur cherche généralement à encourager. Le second exemple faisait intervenir une nouvelle technologie promettant des gains importants d'efficacité, résultat que là encore, le régulateur cherche généralement à encourager.

Accès de réseaux de bus concurrents aux services de la gare routière de Tallinn (Estonie) vers 1997

Lors du séminaire organisé par l'OCDE à Vienne en 1998, la Commission estonienne de la concurrence a présenté une affaire qui a exigé de plus amples investigations⁷². En avril 1997, le Département de la concurrence a reçu une plainte à propos de l'accès aux services de la gare routière de Tallinn (Estonie). L'auteur de la plainte était le deuxième usager principal de la gare, *JSC Sebe* (Sebe). La gare routière de Tallinn avait été construite et était gérée par l'entreprise d'État Motor. Son principal usager, *JSC Eesti Buss* (Eesti), ayant remporté l'appel d'offres, était devenu le propriétaire et le gestionnaire de la gare. Le contrat de privatisation exigeait cependant du nouveau propriétaire qu'il continue à fournir des services aux autres entreprises de transport. Eesti détenait 61% du capital, le reste étant entre les mains de l'État.

La plainte portait principalement sur le fait qu'Eesti avait contraint l'opérateur Sebe à cesser d'assurer lui-même la vente de ses billets à la gare routière, en les vendant uniquement par l'intermédiaire du bureau de vente d'Eesti. Auparavant, le bureau de vente de Sebe vendait aussi des billets pour les lignes de bus d'Eesti. Selon Sebe, Eesti l'aurait menacé d'interrompre la fourniture de services à la gare. Sebe affirmait qu'Eesti avait enfreint les dispositions de la loi sur la concurrence et tout particulièrement de l'article 17.5 de cette loi, qui interdit à une entreprise d'« imposer à un autre acteur du marché des dispositions contractuelles lui permettant d'obtenir un avantage injustifié et auxquelles l'autre partie ne consentirait pas si elle pouvait en décider librement ».

À première vue, la demande d'Eesti ne paraissait pas déraisonnable, car cette entreprise prévoyait un réaménagement de la gare routière et la création d'un système d'information et d'une installation moderne unique de vente des billets. Le maintien du bureau de vente de Sebe pouvait être considéré comme

⁷² Les informations à ce propos ont été communiquées par Sally Van Sclen, Secrétariat de l'OCDE.

incompatible avec le plan de réaménagement et l'insistance de Sebe à conserver son propre guichet pouvait être interprétée comme un obstacle à un investissement infrastructurel.

Les pratiques d'Eesti pour la billetterie compliquaient toutefois quelque peu le tableau. Cette entreprise, en effet, ne transmettait généralement qu'avec un certain retard la recette des ventes de billets aux autres compagnies de transport. Elle perturbait ainsi la trésorerie de ses concurrents tout en améliorant la sienne. L'incertitude qui en résultait créait un risque pour les concurrents d'Eesti et ce risque était dû uniquement à la position d'exploitant de la gare routière qu'occupait cette entreprise. Eesti s'attribuait aussi les intérêts correspondant au temps de détention de ces fonds. La volonté de conserver son bureau de vente répondait donc pour Sebe au souci de se prémunir contre les pratiques d'Eesti visant à accroître les coûts de ses concurrents.

La Commission estonienne de la concurrence a décidé de ne pas agir dans cette affaire, notamment parce que la question est devenue sans objet lorsque Eesti et Sebe sont parvenus à un nouvel accord. Néanmoins, cette affaire souligne combien il est important de bien surveiller les caractéristiques des services fournis, y compris lorsque le détenteur de l'installation essentielle accorde l'accès et n'impose pas des tarifs d'un niveau prohibitif.

Le processus de surveillance pouvant être lent, complexe et de longue durée, les tribunaux sont parfois réticents à assumer cette tâche. Dans quelques grandes affaires, cependant, ils n'ont pas hésité à le faire. La décision relative à *ATT* aux États-Unis en est un très bon exemple. Dans cette affaire, le juge a assumé directement la fonction de surveillance pendant plus d'une décennie⁷³. La raison pour laquelle le tribunal a été conduit à endosser cette responsabilité tient sans doute à ce que, dans cette affaire, l'un des arguments essentiels avancés par le gouvernement était que la réglementation s'était révélée inefficace pour empêcher certaines pratiques de discrimination systématique de la part d'ATT. En Australie, par contre, le gouvernement a décidé de soustraire les questions touchant aux installations essentielles de la compétence des tribunaux en les confiant principalement à l'autorité de protection de la concurrence⁷⁴.

Égalité d'accès des compagnies aériennes aux systèmes de réservation informatisés aux États-Unis

Sous l'effet de la concurrence accrue entre les compagnies aériennes, les tarifs et les vols sont modifiés plus fréquemment qu'à l'époque de la réglementation. Le consommateur doit faire de plus grands efforts pour identifier les vols et les tarifs les plus avantageux, mais les gains potentiels sont aussi plus importants pour lui, car il peut bénéficier de temps à autre de remises non négligeables. L'Internet et les systèmes informatiques associés de sélection de l'information sur les tarifs et les vols constituent potentiellement des outils idéaux tant pour le consommateur que pour les agents de voyage. Contacter plusieurs compagnies aériennes l'une après l'autre, cependant, n'est pas le meilleur moyen de trouver et de comparer les vols et les tarifs et ceci même avec un ordinateur⁷⁵. C'est pourquoi plusieurs compagnies aériennes ont mis en place des systèmes de réservation informatisés permettant aux consommateurs et aux

⁷³ Abbott B. Lipsky Jr. et J. Gregory Sidak, « Essential Facilities », *Stanford Law Review* 51:5 (mai 1999), 1187-1248 (p. 1198).

⁷⁴ Voir la contribution de l'Australie à la table ronde de l'OCDE sur les installations essentielles (1996).

⁷⁵ On attribue aux systèmes de réservation informatisés couvrant les vols de plusieurs compagnies aériennes des gains de productivité importants. Une étude fait même état d'un gain de productivité de 42% chez les agents de voyage utilisant de tels systèmes ; voir William E. O'Connor, *An Introduction to Airline Economics* (2001), p. 121.

agents de voyage de comparer les tarifs et les horaires offerts par différentes compagnies⁷⁶. Ces systèmes ont rencontré un grand succès auprès des consommateurs et des agents de voyage.

Cependant, des problèmes se sont posés quant à l'impartialité de ces systèmes de réservation. Les informations selon lesquelles le nonaccès aux systèmes de réservation aurait joué un rôle dans l'échec de plusieurs compagnies aériennes nouvelles pendant les années 80 les ont encore aggravés⁷⁷. On peut donc considérer que l'égalité d'accès aux systèmes de réservation informatisés constituait une condition essentielle d'entrée sur le marché pour un opérateur aérien de grande envergure, au moins pendant cette période (le rôle des systèmes de réservation informatisés est plus difficile à évaluer aujourd'hui, car un plus grand nombre de consommateurs se servent des services de voyage en ligne pour comparer les vols et les tarifs). Avec ces systèmes de réservation informatisés, la discrimination pouvait prendre les formes suivantes : « partialité à l'écran » (placement défavorable des vols d'un concurrent), discrimination au niveau des tarifs, discrimination dans la qualité du service et refus de vente. Les compagnies aériennes pouvaient aussi discriminer entre les fournisseurs de systèmes de réservation informatisés en fonction du pouvoir de négociation de chacun d'eux (pouvoir de l'acheteur/monopsonne)⁷⁸.

En 1984, la Commission de l'aviation civile (*Civil Aeronautics Board*), qui était à l'époque l'instance de réglementation du transport aérien aux États-Unis, a enquêté sur les allégations de partialité des systèmes de réservation informatisés. Elle a adopté des règles exigeant l'affichage non discriminatoire de l'information sur les vols, la tarification non discriminatoire des services fournis aux compagnies aériennes par les systèmes de réservation, la suppression des obligations de source unique imposées aux agents de voyage et la limitation de la durée des contrats conclus avec les agents de voyage⁷⁹. Des règles semblables ont été adoptées par l'UE en 1989⁸⁰. L'introduction de ces règles et la mise en place de programmes informatiques plus sophistiqués pour identifier les cas de partialité semblent avoir diminué le nombre des plaintes pour discrimination.

Cependant, le risque de partialité des systèmes de réservation subsiste. Les règles adoptées, en effet, ont laissé en place certains éléments pouvant inciter les compagnies aériennes qui détiennent un système de réservation à favoriser leurs propres vols⁸¹. Mais plusieurs compagnies aériennes se sont volontairement dessaisies des systèmes de réservation qu'elles avaient créés⁸².

⁷⁶ Depuis 1990, les vols de la totalité des grandes compagnies aériennes de transport de passagers apparaissent sur tous les systèmes de réservation informatisés. La seule exception est *Southwest Airlines*, la plus importante compagnie offrant des vols à prix réduits, qui ne participe pas à ces systèmes et dispose de son propre système de réservation ; voir William E. O'Connor, *An Introduction to Airline Economics* (2001), p. 120-121.

⁷⁷ William E. O'Connor, *An Introduction to Airline Economics* (2001), chap. III.

⁷⁸ *Comment of the American Antitrust Institute before the U.S. Department of Transportation Regarding Computer Reservation System Regulation*, Docket OST-97-2881 et al. (16 mars 2003), disponible à l'adresse <http://www.antitrustinstitute.org/recent2/239.pdf>.

⁷⁹ William E. O'Connor, *An Introduction to Airline Economics* (2001), p. 121.

⁸⁰ William E. O'Connor, *An Introduction to Airline Economics* (2001), p. 122.

⁸¹ Voir, par exemple, *Comment of the American Antitrust Institute before the U.S. Department of Transportation Regarding Computer Reservation System Regulation*, Docket OST-97-2881 et al. (16 mars 2003), disponible à l'adresse <http://www.antitrustinstitute.org/recent2/239.pdf>.

⁸² *Comment of the American Antitrust Institute before the U.S. Department of Transportation Regarding Computer Reservation System Regulation*, Docket OST-97-2881 et al. (16 mars 2003), disponible à l'adresse <http://www.antitrustinstitute.org/recent2/239.pdf>, section II.

L'accès aux systèmes de réservation essentiels ne soulève pas seulement un problème de concurrence ; il pose aussi la question de la tromperie éventuelle du consommateur. A un premier niveau, la question est de savoir si le consommateur s'attend à obtenir une information impartiale sur les vols et les tarifs. Dès lors qu'un nombre suffisant de consommateurs expriment cette attente, si un système est effectivement partial, mais ne l'affiche pas clairement, on peut faire valoir qu'il y a tromperie du consommateur, celui-ci pouvant être amené à payer un prix plus élevé et à choisir des vols moins adaptés à ses besoins. A un second niveau, il est probable qu'en droit l'agent de voyages a l'obligation fiduciaire de fournir une information impartiale au consommateur qui le paie⁸³. Si tel est le cas, l'agent de voyages est dans l'obligation d'utiliser des systèmes de réservation impartiaux ou de bien de compenser la partialité de ces systèmes.

3.5 Réaménagements imposés de l'accès

Une fois établi que les modalités d'accès doivent être modifiées, plusieurs autres décisions restent à prendre. Le contexte dans lequel ces décisions doivent être prises est très variable. Par exemple, lorsqu'il s'agit uniquement de permettre l'accès de nouveaux entrants à une capacité excédentaire, il n'est pas nécessaire de modifier les utilisations de l'installation essentielle. Dans ce cas, l'ouverture de l'accès peut être relativement simple et ne pas créer de problèmes particuliers. Par contre, en l'absence de capacité excédentaire, l'ouverture de l'accès peut exiger, au moins à court terme, de réorganiser les utilisations en place et de répercuter les coûts d'encombrement sur certains et/ou la totalité des utilisateurs. Les utilisations existantes peuvent aussi se prévaloir d'une fidélité du consommateur ou d'un soutien politique et les mesures d'indemnisation ou d'autres solutions ne permettent pas toujours de répondre efficacement à ce type de situations. Dans certains cas, la réorganisation des modalités d'utilisation de l'installation se heurte à des coûts très élevés, les clients ayant eux-mêmes effectué un investissement irrécupérable directement lié aux modalités existantes d'accès à l'installation essentielle. Et lorsque l'ouverture de l'accès risque d'accroître l'encombrement de l'installation, il faut établir jusqu'où la dégradation des services ou l'augmentation des risques de sécurité peut être considérée comme acceptable.

L'exemple qui suit montre bien la différence entre l'ouverture de l'accès à une capacité excédentaire et l'ouverture de l'accès à une installation exploitée par des opérateurs établis. Il souligne le besoin d'un contrôle réglementaire accru lorsque l'ouverture de l'accès nécessite un réaménagement des conditions d'accès.

Accès aux terminaux des aéroports australiens au début des années 90⁸⁴

En 1987, le gouvernement australien a annoncé son intention d'ouvrir à la concurrence le marché intérieur du transport aérien à partir de 1990⁸⁵. L'État fédéral était alors le propriétaire et l'exploitant des principaux aéroports australiens. Le gouvernement a aussi indiqué son intention de regrouper au sein d'une nouvelle entreprise appartenant à l'État (*Federal Airports Corp*, FAC) l'ensemble de ces aéroports⁸⁶.

⁸³ *Comment of the American Antitrust Institute before the U.S. Department of Transportation Regarding Computer Reservation System Regulation*, Docket OST-97-2881 et al. (16 mars 2003), disponible à l'adresse <http://www.antitrustinstitute.org/recent2/239.pdf>.

⁸⁴ Cette section sur l'ouverture de l'accès aux aéroports australiens s'appuie principalement sur un entretien avec John White de l'OCDE (octobre 2005), qui a participé aux réformes engagées à l'époque par le gouvernement australien dans le secteur des aéroports et du transport aérien.

⁸⁵ *National Contribution from Australia*, (1998), « Competition Policy and International Airport Services », DAF/CLP(98)3.

⁸⁶ Paul Hooper, Robert Cain, Sandy White (2000), « The privatisation of Australia's airports », *Transportation Research Part E* 36 (2000) 181±204.

À l'époque, l'entrée sur le marché intérieur passagers était soumise à des restrictions du fait d'un duopole comprenant une compagnie aérienne publique (*Australian Airlines*) et un opérateur privé (*Ansett*). La protection de ce secteur par l'État s'appuyait notamment sur une disposition rendant difficile l'importation par un concurrent d'avions conformes aux normes ; les compagnies aériennes étaient en outre exemptées des règles de concurrence énoncées dans la législation sur les pratiques commerciales (*Trade Practices Act*)⁸⁷. Par conséquent, avec deux concurrents pratiquement identiques, la concurrence dans cette branche d'activité était réduite au minimum et les compagnies aériennes s'étaient habituées à « la vie tranquille d'un duopole »⁸⁸.

L'un des entrants potentiels le mieux placé (*Compass Airlines*) était une compagnie déjà bien établie sur le marché d'un État australien et assurant aussi une liaison passagers entre Sydney et Melbourne avec une brève escale entre les deux villes afin d'échapper aux restrictions réglementaires sur les vols directs entre États. Compass « était prête à entrer sur le marché bien avant novembre 1990 » et « son président avait une connaissance approfondie des deux grands opérateurs en place »⁸⁹.

Théoriquement, Compass aurait dû pouvoir obtenir l'accès à tous les grands aéroports australiens car les baux de longue durée accordés à *Australian Airlines* et à *Ansett* contenaient une clause exigeant l'ouverture de l'accès à un nouvel entrant⁹⁰. Plus exactement, le gouvernement fédéral demandait aux opérateurs en place de fournir au nouvel entrant deux portes d'embarquement aux aéroports de Sydney et de Melbourne, une porte aux aéroports d'Adélaïde, Perth et Coolangatta et, à *Ansett* seulement, une porte à l'aéroport de Launceston. Enfin, aux aéroports de Brisbane et de Hobart, la FAC était chargée d'appliquer la clause d'accès⁹¹.

La situation de l'entrant variait énormément d'un aéroport à l'autre, bien que l'État fédéral ait été le propriétaire dans tous les cas. A Brisbane, par exemple, outre le fait que le terminal avait été intentionnellement construit avec une capacité excédentaire afin de pouvoir accueillir un entrant, la tendance était au « développement d'installations communes à tous les utilisateurs plutôt que de terminaux affectés à une seule compagnie aérienne »⁹². L'accès posait donc relativement peu de problèmes à Brisbane. A Sydney, par contre, aucune partie de terminal n'était affectée aux entrants. Les opérateurs en place, par conséquent, ont dû faire de la place à l'entrant en réduisant leur surface d'utilisation des terminaux. Compass a « choisi » de sous-louer à *Australian Airlines* un accès au terminal et la même situation s'est reproduite aux aéroports de Melbourne et d'Adélaïde. Cependant, l'espace mis à la disposition de l'entrant n'était pas choisi au hasard. Les passagers de Compass, en effet, étaient obligés de porter leurs bagages jusqu'aux guichets d'enregistrement de l'étage supérieur alors que les guichets d'*Australian* se trouvaient au rez-de-chaussée, à 20 mètres de la rue. Le sens de la marche du seul escalier

⁸⁷ John Quiggin, « Aussie Airlines' Dog Fight », *Australian Financial Review* (9 octobre 1997).

⁸⁸ Kirby M. (1987), « Private and Public Ownership and Australia's Two Airline Policy », in Abelson P. (dir. pub.), *Privatisation : An Australian Perspective*, *Australian Professional Publications*, Sydney, p. 146-153.

⁸⁹ Nyathi M., Hooper P. et Hensher D. (1993), « Compass Airlines 1 December 1990 to 20 December 1991. What went wrong ? », *Transport Reviews* 13 (2), 119±149, et 13 (3), 185±206.

⁹⁰ Cette clause avait été introduite en 1987 à l'issue d'une renégociation avec les compagnies aériennes ; auparavant, les baux en question ne contenaient aucune disposition prévoyant l'accès d'un nouvel entrant aux installations des terminaux aéroportuaires ; voir *National Contribution from Australia* (1998) et « Competition Policy and International Airport Services », *DAFFE/CLP(98)3*.

⁹¹ Voir Nyathi M., Hooper P. et Hensher D. (1993), « Compass Airlines 1 December 1990 to 20 December 1991. What went wrong ? », *Transport Reviews* 13 (2), 119±149, et 13 (3), 185±206.

⁹² *National Contribution from Australia* (1998), « Competition Policy and International Airport Services », *DAFFE/CLP(98)3*.

mécanique situé près des guichets de Compass changeait en fonction du nombre de passagers arrivant ou sortant du terminal. Les passagers devaient traverser un couloir étroit pour atteindre la salle d'embarquement et, lorsque deux avions de Compass devaient embarquer en même temps, seule la moitié environ des passagers pouvaient s'asseoir dans la salle d'embarquement. La situation était la même à l'aéroport de Melbourne où, dans le terminal loué par Compass, la signalisation était insuffisante pour les passagers, qui devaient parcourir de longues distances à pied pour atteindre les portes d'embarquement les plus éloignées, et le traitement des bagages était inefficace.

Les négociations concernant l'accès n'ont pas pu aboutir dans tous les cas. À Perth notamment, elles ont échoué parce que Australian Airlines exigeait que Compass modifie ses horaires. Pour ne pas avoir à le faire, Compass a décidé d'utiliser le terminal international, moins pratique cependant puisque situé à un kilomètre du terminal intérieur⁹³.

La disponibilité et l'emplacement des portes d'embarquement n'étaient pas les seuls problèmes ; le traitement des bagages soulevait lui aussi des difficultés. Les services de manutention au sol avaient jusqu'alors été pris en charge par les deux grandes compagnies aériennes⁹⁴. Le ministre du tourisme admettait d'ailleurs que « entre autres problèmes, Compass aura du mal à atterrir dans le centre de l'Australie à cause des installations de traitement des bagages »⁹⁵.

Deux ans après sa création, Compass a été contrainte de cesser son activité⁹⁶. Il est difficile de savoir dans quelle mesure les conditions faites à l'entrant dans les deux aéroports les plus importants du pays⁹⁷ ont influé sur la demande pour ses vols, ou bien si le coût du projet de construction de terminaux indépendants a contribué à son échec. Bien qu'ils soient parvenus à la conclusion que l'échec de l'entrant était dû à une mauvaise stratégie, la Commission des pratiques commerciales (*Trade Practice Commission*) et le Bureau australien de l'économie du transport et de la communication (*Australian Bureau of Transport Communication Economics*) ont reconnu que l'accès inadéquat aux installations avait peut-être concouru à placer l'entreprise en situation de désavantage⁹⁸. Après la libération des capacités qu'occupait l'entrant initial dans les aéroports, de nouveaux entrants sont apparus. Dans l'intervalle, les travaux d'extension

⁹³ Pour les dispositions spécifiques d'accès au terminal, voir Nyathi M., Hooper P. et Hensher D. (1993), « Compass Airlines 1 December 1990 to 20 December 1991. What Went Wrong ? », *Transport Reviews* 13 (2), 119±149, et 13 (3), 185±206.

⁹⁴ Voir National Contribution from Australia, (1998) « Competition Policy and International Airport Services », *DAFFE/CLP(98)3*.

⁹⁵ *Notes from a Parliament Record of the Sixth Assembly of the Northern Territory of Australia Legislative Assembly*, 10 octobre 1991, disponible à l'adresse <http://notes.nt.gov.au/lant/hansard/HANSARD6.NSF/0/125074017bd8e178692565bb001e97f4?OpenDocument>

⁹⁶ Voir National Contribution from Australia (1998), « Competition Policy and International Airport Services », *DAFFE/CLP(98)3*.

⁹⁷ « Le coût de location des avions, qui était le coût direct d'exploitation le plus important (31 %), pesait fortement sur la trésorerie de Compass car il était réglé sur une base mensuelle » ; voir Nyathi M., Hooper P. et Hensher D. (1993), « Compass Airlines 1 December 1990 to 20 December 1991. What went wrong ? », *Transport Reviews* 13 (2), 119±149, et 13 (3), 185±206.

⁹⁸ Voir National Contribution from Australia (1998), « Competition Policy and International Airport Services », *DAFFE/CLP(98)3*.

réalisés dans les aéroports⁹⁹ et l'utilisation d'avions de plus grande taille avaient permis de réduire fortement les contraintes de capacité dans les aéroports australiens les plus importants.

4. Approches concurrentielles de l'accès

Sans vouloir sous-estimer les difficultés que soulève la mise en place effective de l'accès concurrentiel, ni ignorer le large débat public en cours sur les politiques d'accès concurrentiel, nous présentons maintenant plusieurs approches moins répandues qui se sont développées dans le secteur des transports. Il s'agit ainsi d'inviter les autorités de la concurrence, les autorités de régulation sectorielle et les autres décideurs à prendre en compte d'autres approches possibles des questions d'accès. Même si elles ne paraissent pas s'adapter spécifiquement à tel ou tel problème d'accès, il n'est pas inutile d'examiner pourquoi ces approches moins bien connues semblent fonctionner, dans quel contexte elles se sont révélées efficaces et de quelle façon leurs principes essentiels pourraient être adaptés à d'autres situations.

Encadré 3. La « concurrence pour le marché » peut-elle servir à assurer l'ouverture de l'accès aux infrastructures de transport ?

Une approche très répandue pour accroître l'efficacité opérationnelle des installations essentielles consiste à introduire une « concurrence pour le marché » lorsque la « concurrence sur le marché » n'est pas faisable. Les données recueillies jusqu'ici quant à l'intérêt de cette approche comme moyen de renforcer l'efficacité sont ambiguës¹⁰⁰. Elle n'en est pas moins largement utilisée. L'adjudication dite de Demsetz¹⁰¹, par exemple, s'applique aux situations dans lesquelles l'État attribue une concession d'exploitation d'une installation essentielle ou, plus généralement, un monopole naturel, sur une base concurrentielle. L'entreprise gagnante dans ce cas est celle qui offre de fournir le service au prix le moins cher pour le consommateur. Ce modèle repose sur le présupposé implicite que le prix à payer par le consommateur est le seul indicateur de performance dont il faut tenir compte. Cependant, au moins dans le cas de certaines installations essentielles, la question de la discrimination au niveau de l'accès doit aussi être prise en compte. Les critères de sélection de l'entreprise gagnante peuvent dès lors être modifiés afin de tenir compte des mesures adoptées par les soumissionnaires pour minimiser l'intérêt et les possibilités qu'ils ont à exercer une discrimination au niveau de l'accès à l'égard d'entreprises concurrentes à un stade identique ou à d'autres stades de la production. Une telle option compliquerait l'évaluation des offres car celles-ci seraient plus difficiles à quantifier. D'un autre côté, il y aurait là moyen de libérer la créativité du marché et les forces de la concurrence pour résoudre le problème de la discrimination au niveau de l'accès. Cette option, cependant, soulève de nombreux problèmes qui débordent le cadre de ce document, notamment à propos de la conception des appels d'offres, de la procédure de soumission et de l'exécution des contrats.

4.1 Libération de capacité : ouverture de l'accès aux gazoducs aux États-Unis

En 1993, la Commission fédérale américaine de régulation du secteur de l'énergie a adopté son règlement 636, qui a modifié radicalement les conditions d'accès aux conduites de gaz naturel entre États en exigeant l'ouverture de l'accès et en autorisant les titulaires de contrats fermes d'utilisation d'une partie de la capacité d'un gazoduc à revendre des droits de capacité à d'autres clients (y compris les détenteurs de

⁹⁹ Après l'échec de Compass, le gouvernement fédéral a décidé d'investir 130 millions de dollars dans la construction de nouveaux terminaux, afin d'éviter que les transporteurs cherchant à entrer sur le marché ne soient obligés d'opérer à partir des terminaux d'Ansett et d'Australian Airlines (AFR, 10 février 92). Ces nouvelles installations, conçues sous la forme de terminaux à utilisateurs multiples, devaient être créées d'abord aux aéroports de Sydney et de Melbourne ; voir Nyathi M., Hooper P. et Hensher D., « Compass Airlines 1 December 1990 to 20 December 1991. What Went Wrong ? », *Transport Reviews* 13 (2) (1993), 119-149, et 13 (3), 185-206.

¹⁰⁰ Pour une analyse récente des concessions attribuées dans le secteur de la distribution de l'eau en France, voir Eschien Chong, Freddy Huet et Stephane Sausser, « Auctions, Ex Post Competition and Prices: The Efficiency of Public-Private Partnerships », Université Paris-1 (1er septembre 2005) disponible à l'adresse http://atom.univ-paris1.fr/documents/CHONG_HUET_SAUSSIER_SEPT2005.pdf.

¹⁰¹ Harold Demsetz, « Why Regulate Utilities ? », *Journal of Law and Economics* 11 (avril 1968), p. 55-65 ; pour une discussion plus approfondie, voir par exemple W. Kip Viscusi, John M. Vernon et Joseph E. Harrington, Jr., *Economics of Regulation and Antitrust* 3ème éd. (2000), chap. 13.

gazoducs concurrents). C'est ce qu'on a appelé une « libération de capacité »¹⁰². Avant le règlement 636, les opérateurs de gazoducs n'étaient pas tenus de fournir un service à des conditions et selon des modalités identiques à celles qu'ils s'assuraient eux-mêmes. Depuis le règlement 636, ils sont effectivement soumis à cette obligation ; un organisme réglementaire privé, le *Gas Industry Standards Board* (GISB), a été créé et a promulgué des règles de conduite pour les entreprises. Ces règles, qui ont généralement été adoptées par les acteurs du marché, ont facilité la détection des pratiques contraires au règlement 636. Avant ce règlement, également, « la capacité détenue au titre d'un contrat entre un chargeur et un opérateur de gazoduc ne pouvait en aucun cas être transférée ou vendue à un autre chargeur ». Depuis le règlement 636, les chargeurs ont la possibilité de libérer et de transférer certaines capacités à une ou plusieurs entreprises. La libération de capacité ouvre la voie à la concurrence au niveau local, même lorsqu'un seul gazoduc achemine matériellement le gaz naturel jusqu'à la zone à desservir. On peut considérer que les réformes menées dans le secteur du gaz naturel ont été plus complètes et plus efficaces que celles engagées dans le secteur de l'électricité ou de la téléphonie¹⁰³. Parmi les facteurs ayant contribué à cette évolution, il faut sans doute citer le renforcement de l'application des règles en vigueur grâce au travail du GISB, la séparation verticale des gazoducs par rapport aux activités de production et de vente au détail et la détermination du régulateur fédéral à autoriser le développement des capacités¹⁰⁴.

Les effets du règlement 636 sur l'investissement dans le secteur des gazoducs ont été par certains aspects contraires à ce qu'on pouvait attendre. On aurait pu penser, par exemple, qu'exiger l'ouverture de l'accès à la capacité non utilisée aurait une incidence négative sur l'investissement, les propriétaires du

¹⁰² U.S. Department of Energy, Energy Information Administration, *Natural Gas 1998 : Issues and Trends* (1998), annexe D, disponible à l'adresse http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/natural_gas_1998_issues_trends/pdf/Appd.pdf#search='natural%20gas%20and%20release%20capacity%20and%20Order%20636.

¹⁰³ Pour un historique de la réforme du secteur du gaz naturel aux États-Unis et une analyse de la réussite de cette réforme par rapport à celle engagée dans les secteurs de l'électricité et de la téléphonie, voir Diana Moss, « Natural Gas Pipelines: Can Merger Enforcement Preserve the Gains from Restructuring? », American Antitrust Institute Working Paper n° 05-08 (septembre 2005), disponible à l'adresse <http://www.antitrustinstitute.org/recent2/439.pdf>. Pour une vue d'ensemble du secteur du gaz naturel aux États-Unis, voir FERC, Office of Market Oversight and Investigations, *State of the Markets Report* (janvier 2004), p. 77-101.

¹⁰⁴ Diana Moss, « Natural Gas Pipelines: Can Merger Enforcement Preserve the Gains from Restructuring ? », American Antitrust Institute Working Paper n° 05-08 (septembre 2005), disponible à l'adresse <http://www.antitrustinstitute.org/recent2/439.pdf>. Chaque État, par contre, a conservé le droit de s'opposer à l'installation de lignes électriques à haute tension reliant plusieurs États jusqu'à l'adoption de la loi sur la politique énergétique de 2005. Depuis cette loi, le Département de l'énergie peut désigner des « couloirs de transport électrique d'intérêt national » et la FERC est autorisée à intervenir pour soutenir l'investissement en faveur des installations de transport dans ces couloirs si les États se refusent à le faire ; voir également Margaret Jess, « Restructuring Energy Industries: Lessons from Natural Gas », *National Gas Monthly, Special Report* (mai 1997), disponible à l'adresse ftp://ftp.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/1997/restructuring_energy_industries_lessons/pdf/peg.pdf. On notera que, dès qu'il propose la construction d'un nouveau gazoduc, le promoteur peut inviter d'autres usagers potentiels à exprimer un intérêt pour le projet et à signer un contrat pour faciliter le financement du projet ; voir Peter Frost, « Original and Expansion Capacity: What Volumes, When, on What Terms and at What Price », témoignage devant une commission parlementaire de l'Alaska (*Alaska Legislative and Budget Audit Committee, Stranded Gas Hearings*, 28 juillet 2004, disponible à l'adresse <http://lba.legis.state.ak.us/sga/0407281045.htm>). Le constructeur du gazoduc peut avoir intérêt à trouver des utilisateurs supplémentaires en raison des économies d'échelle liées à la capacité du gazoduc (le coût d'un gazoduc dépend pour l'essentiel de la circonférence du conduit, mais sa capacité est largement fonction de l'aire de section ; si l'on double la circonférence du conduit, la capacité du gazoduc augmente dans une proportion supérieure à deux).

gazoduc se trouvant exposés à la concurrence même lorsqu'ils contrôlaient le seul gazoduc alimentant un système local de distribution et ses clients¹⁰⁵. En pratique, cependant, il semble que le règlement 636 ait encouragé l'investissement dans le secteur des gazoducs, tout au moins en relation avec les autres réglementations qui s'appliquent à l'investissement dans ce secteur. Les gazoducs permettent d'importantes économies d'échelle car la capacité d'un gazoduc est généralement fonction du carré du rayon du conduit (aire de section— π multiplié par le carré du rayon), tandis que son coût s'accroît normalement en proportion du diamètre du conduit (deux multiplié par π multiplié par le rayon). Avant le règlement 636, un investisseur annonçait un projet conçu en fonction des clients qu'il était parvenu à attirer et invitait ensuite d'autres acteurs à investir pour accroître la capacité du gazoduc. Toutefois, il était souvent difficile de convaincre d'autres investisseurs de participer au projet car la réglementation en vigueur faisait de l'investissement un coût irrécupérable. La conséquence en était que les gazoducs étaient souvent de trop petite taille. Le règlement 636 a rendu récupérable et par conséquent moins risqué l'investissement indépendant dans la construction de gazoducs (en autorisant la vente de droits de capacité à d'autres usagers potentiels). En fait, le règlement 636 a ouvert l'accès et renforcé la concurrence, mais il a aussi neutralisé les facteurs qui auraient pu nuire à l'investissement en réduisant le risque pour les investisseurs.

En 2001, à l'occasion d'un projet de fusion impliquant l'acquisition d'une entreprise de distribution de gaz naturel de Detroit (Michigan) par une entreprise locale de distribution d'électricité¹⁰⁶, la Commission fédérale du commerce a appliqué la notion de « libération de capacité » à un système local de distribution de gaz naturel. Les conditions de l'accord mis en place à cette occasion tiennent compte des préoccupations de l'entrant (acqureur de la servitude) quant aux risques de discrimination au niveau de l'exploitation et du développement du système. L'un des aspects les plus importants de cet accord est le droit de l'entrant d'obtenir une extension rapide de la capacité du système à un coût raisonnable pour pouvoir servir ses nouveaux clients. Il s'agissait là d'une disposition essentielle pour l'entrant, celui-ci ne pouvant attirer des clients qu'à la condition de disposer d'une capacité suffisante pour les servir. Si l'opérateur en place conservait la possibilité de bloquer ou de retarder l'extension du système, l'entrant ne pouvait attirer de nouveaux clients. L'entrant voulait également s'assurer qu'il bénéficierait d'un traitement aussi favorable que celui accordé aux clients de détail de l'opérateur en place pour ce qui est du coût de l'extension du système. L'accord prévoit, par conséquent, que la plupart des extensions du système seront à la charge de l'opérateur en place, le prix d'achat et les redevances fixes payés par l'entrant étant considérés comme équivalant aux paiements attendus des nouveaux clients de détail pour amortir les améliorations du système décidées par l'opérateur en place. Certaines autres améliorations spécifiques du système comme les extensions décidées pour permettre l'accès d'un client particulier de l'entrant sont payées par l'entrant soit directement à l'opérateur du réseau, soit à un exploitant agréé par l'opérateur du réseau. On notera que les investissements nécessaires pour assurer la fiabilité du système plutôt que pour servir un client particulier sont moins importants dans un réseau de distribution du gaz naturel que dans un réseau électrique, par exemple. Le coût de l'investissement nécessaire pour assurer la fiabilité et respecter les normes de réseau peut être élevé, mais est généralement moindre dans le secteur du transport que dans celui de l'électricité ou des télécommunications (le contenu de l'accord DTE est présenté plus en détail à l'annexe D). La FTC, qui s'inquiétait d'une réduction de la concurrence réelle et potentielle entre les systèmes de distribution de gaz naturel et d'électricité de la région, a considéré qu'il s'agissait là d'une fusion de convergence, c'est-à-dire une fusion entre des acteurs du marché de plus en plus capables de se

¹⁰⁵ L'avantage d'être le seul gazoduc alimentant un système local de distribution et ses clients n'est toutefois pas absolu, l'instance de régulation du secteur pouvant imposer une tarification basée sur les coûts si elle juge qu'une tarification basée sur le marché favoriserait le pouvoir de marché du détenteur du gazoduc.

¹⁰⁶ *Detroit Edison* (DTE Energy Company), l'entreprise de distribution électrique de la région de Detroit (Michigan), voulait acquérir *Consolidated Gas* (MCN Energy Group Incorporated ou MichCon), l'entreprise de distribution de gaz naturel de la région. Le nouvel entrant était *Exelon*, une entreprise qui n'était pas présente auparavant dans la région de Detroit.

substituer l'un à l'autre du point de vue de certains clients¹⁰⁷. La concurrence apparaissait déjà clairement dans les fortes remises qu'offraient les deux entreprises afin d'attirer certains clients dont la demande d'énergie pouvait être satisfaite à bon marché soit par l'électricité, soit par le gaz naturel¹⁰⁸. Les études de marché des entreprises prévoient aussi une nette intensification de ce type de concurrence sous l'effet du progrès des technologies de production décentralisée d'électricité. Le système de distribution électrique de la ville de Detroit, client important servant principalement les grands équipements municipaux, était déjà dans ce cas. Ce client, en effet, avait le choix entre acheter de l'électricité ou produire lui-même de l'électricité à partir de gaz naturel et, avant la fusion, les deux entreprises rivalisaient d'offres à son égard. Après la fusion, pour que cette concurrence ne disparaisse pas, il fallait accorder l'accès au système de distribution de gaz naturel à un nouvel entrant. La solution retenue vise donc à assurer l'accès dans des conditions raisonnables et garantir l'extension des capacités à un nouvel entrant sur le marché de distribution du gaz, en exigeant l'ouverture des installations de transport de gaz naturel dont disposait l'entreprise mixte gaz-électricité résultant de la fusion, le bon entretien de ces installations et la construction éventuelle de nouvelles installations.

4.2 Copropriété

L'affaire *Terminal Railroad* est connue comme la première application importante de la théorie des installations essentielles aux Etats-Unis ; cependant, un aspect particulier de cette affaire mérite d'être noté : le fait que l'infrastructure essentielle (des ponts de chemin de fer sur le Missouri à St-Louis) n'était pas détenue par une seule, mais par plusieurs entreprises qui géraient apparemment l'utilisation des ponts entre elles sur la base de l'intérêt mutuel, alors qu'il s'agissait d'entreprises ferroviaires concurrentes¹⁰⁹. L'affaire *Associated Press* a aussi été un exemple très important de copropriété avec certains éléments d'installation essentielle¹¹⁰. *Associated Press* était une opération conjointe regroupant plusieurs centaines de journaux qui exigeait de ses membres qu'ils partagent leurs dépêches d'information en échange du droit d'utiliser les dépêches des autres membres. Dans sa décision concernant cette affaire, la Cour suprême a considéré que la clause du règlement de l'association autorisant un membre à user de son droit de veto pour bloquer une demande d'adhésion, par exemple celle d'un concurrent effectif ou potentiel, constituait une collusion et devait par conséquent être supprimée. Il était difficile, sur le plan factuel, d'interpréter cette affaire en termes d'installation essentielle car il existait d'autres agences de presse de même type et la concurrence entre les journaux membres d'*Associated Press* était en fait limitée. On voyait mal, par conséquent, comment l'application à *Associated Press* pouvait être considérée comme essentielle à de nouveaux journaux et comment la concurrence entre journaux pouvait être affectée par le maintien de la clause du règlement de l'association. Dans sa décision, la Cour suprême a ignoré les questions soulevées par l'application de la théorie des installations essentielles dans cette affaire et s'est concentrée uniquement

¹⁰⁷ Pour un aperçu des phénomènes de convergence entre les entreprises des secteurs du gaz naturel et de l'électricité, voir Kyung-Hwan Toh, « The Impact of Convergence of the Gas and Electricity Industries : Trends and Policy Implications », International Energy Agency Working Paper (2003), disponible à l'adresse <http://www.iea.org/textbase/paper/2003/toh.pdf>. Pour une analyse plus détaillée de la fusion DTE/MCN, voir John C. Hilke, « Convergence Mergers : A New Competitive Model from Detroit », *Electricity Journal*, 14:8 (octobre 2001), p. 13-18.

¹⁰⁸ Pour une analyse des technologies de production décentralisée et des politiques correspondantes, voir The Consumer Energy Council of America, *Distributed Energy : Towards a 21st Century Infrastructure* (juillet 2001).

¹⁰⁹ Cette affaire ne semble pas avoir permis d'établir s'il existait ou non des dissensions internes au sujet du fonctionnement de l'association et de ses décisions de tarification ; voir David Reiffen et Andrew Kleit, « Terminal Railroad Revisited : Foreclosure of an Essential Facility or Simple Horizontal Monopoly ? », Federal Trade Commission, Bureau of Economics Working Paper 172 (avril 1989).

¹¹⁰ 326 U.S. 1 (1945).

sur l'interdiction automatique des pratiques de collusion, telle qu'elle s'applique généralement sur le territoire des Etats-Unis¹¹¹.

Dans les ouvrages consacrés aux finances publiques, la copropriété est considérée comme un mode d'organisation économique efficace pour certains biens publics imparfaits. Les biens publics purs ont deux propriétés : leur non-rivalité au niveau de leur consommation et leur non-exclusivité. Cependant, il existe un certain type de biens publics qui se caractérisent par leur consommation non rivale et par leur exclusivité : c'est ce qu'on appelle les « biens conjoints » (ou biens de club). La question que posent les biens conjoints en termes d'efficacité est la suivante : les entreprises privées à but lucratif peuvent pénétrer dans ce secteur puisque les non-payeurs peuvent être exclus ; cependant, les entreprises à but lucratif seront incitées à demander un prix supérieur au coût marginal, qui peut être nul ou proche de zéro. La copropriété offre une alternative au contrôle direct par l'État ou à la réglementation, ainsi qu'aux conditions d'accès ne comportant aucune redevance pour l'utilisation des services, les coûts d'investissement étant couverts par des cotisations d'accès forfaitaires. L'équivalent de la copropriété dans le contexte des entreprises est une coentreprise fournissant à ses propriétaires des services à un prix efficace et couvrant ses frais fixes à l'aide des apports forfaitaires de ses détenteurs. La question de la protection contre la discrimination à l'intérieur du groupe peut se poser mais, dans les associations volontaires tout au moins, les entreprises ont de bonnes raisons de veiller à ce que la structure de gestion et les règles de fonctionnement excluent toute discrimination¹¹². De manière plus générale, la copropriété désigne simplement la détention et le contrôle conjoints d'une installation essentielle par ses utilisateurs¹¹³.

Le modèle de la copropriété n'a pas été généralement adopté dans le secteur des transports, sauf pour la coordination des créneaux horaires dans les aéroports en Europe. « Presque tous les pays européens dans lesquels il existe un aéroport avec services entièrement coordonnés ont choisi une forme de détention conjointe pour le responsable de la coordination des créneaux horaires – celui-ci est généralement détenu par un groupe de compagnies aériennes (France, Pays-Bas et Royaume-Uni), un groupe de compagnies aériennes et d'aéroports (Danemark, Italie) ou un groupe de compagnies aériennes et l'État (Suède et Norvège). C'est seulement en Allemagne que le secteur ne participe pas au financement du responsable de coordination des créneaux horaires. Dans tous les cas, les compagnies aériennes propriétaires (dans le cas d'une détention conjointe) sont uniquement des compagnies nationales – ce qui soulève le problème de l'accès des compagnies aériennes étrangères aux aéroports nationaux. En Finlande et en Grèce, l'entité assurant la coordination des créneaux horaires est détenue par la compagnie aérienne en place. Les pays européens ne disposant pas d'aéroports totalement coordonnés n'ont, en règle générale, pas opté pour une séparation entre le contrôle des créneaux horaires et l'entreprise en place. Il existe un danger réel à autoriser une intégration entre la compagnie aérienne en place et l'instance de coordination des créneaux horaires. En Italie, avant 1996, la coordination des créneaux horaires était confiée à *Alitalia*. Celle-ci avait profité de sa position pour restreindre la concurrence. Une intervention des autorités italiennes de la concurrence s'est révélée nécessaire pour confier cette mission à un coordinateur plus neutre »¹¹⁴.

¹¹¹ Abbott B., Lipsky Jr. et J. Gregory Sidak, « Essential Facilities », *Stanford Law Review* 51:5 (mai 1999), p. 1187-1248 et 1198-1201.

¹¹² Un problème comparable se pose en droit financier lorsqu'un actionnaire acquiert une participation de contrôle. Dans cette situation, en effet, l'actionnaire peut avoir intérêt à "exproprier" la minorité. Ce risque peut être en partie évité en exigeant une majorité qualifiée pour les décisions importantes, en obligeant l'actionnaire majoritaire à racheter les parts des actionnaires minoritaires sur le marché libre et en garantissant par voie de réglementation l'égalité de traitement des actionnaires minoritaires.

¹¹³ Voir OCDE, *Concurrence et restructuration des services publics : Concurrence et réforme réglementaire* (2001), p. 14-15, disponible à l'adresse <http://www.oecd.org/dataoecd/6/60/19635977.pdf>.

¹¹⁴ OCDE, *Concurrence et restructuration des services publics : Concurrence et réforme réglementaire* (2001), p. 34, disponible à l'adresse <http://www.oecd.org/dataoecd/6/60/19635977.pdf>.

La copropriété a aussi été examinée de manière approfondie en Nouvelle-Zélande comme moyen d'organiser l'investissement dans le système de contrôle aérien¹¹⁵ et dans le système autoroutier du pays. Toutefois, ce modèle n'a été retenu ni dans l'un, ni dans l'autre cas. Dans le secteur du contrôle aérien, qui ne comprenait que deux participants principaux, les décideurs ont reculé devant la probabilité qu'une organisation de type conjoint soit dominée par les deux entreprises, qui auraient eu un intérêt commun à empêcher l'accès de nouveaux entrants¹¹⁶. Le risque d'exclusion de nouvelles compagnies aériennes d'un système de contrôle détenu conjointement signale un problème plus général, à savoir que la coordination nécessaire au bon fonctionnement de l'installation essentielle finit généralement par s'étendre à d'autres aspects commerciaux qui doivent demeurer concurrentiels et non coordonnés comme la tarification, l'innovation et la qualité du produit.

Les voies privées à l'intérieur des ensembles résidentiels d'accès protégé sont un exemple assez courant de copropriété. Dans ces zones résidentielles, la voirie est généralement entretenue par une association de résidents financée par des charges, sans que les résidents aient à verser de droits d'utilisation. Un autre exemple est celui de la coopération entre les usagers de chemins de fer locaux aux États-Unis, qui créent de nouvelles entreprises pour maintenir en activité des lignes que les grandes compagnies ferroviaires abandonnent. Avant sa privatisation, l'organisation fédérale des chemins de fer a autorisé *Conrail* à abandonner de nombreuses lignes locales peu utilisées et dont l'exploitation n'était pas rentable pour une grande compagnie ferroviaire. Le gouvernement a invité les collectivités ou associations locales à demander le droit d'exploitation de ces lignes de chemin de fer¹¹⁷. Lorsqu'une petite collectivité accepte de prendre en charge une ligne afin de desservir les usagers locaux ou de faciliter la gestion d'une petite ligne locale¹¹⁸, le mode d'organisation retenu se rapproche parfois de la copropriété. Les systèmes de gestion fondés sur la participation des acteurs et dans lesquels, par exemple, certaines catégories d'usagers sont représentées au sein du conseil d'administration, sont aussi une forme de copropriété.

Les données tirées de quelques grands cas d'application du modèle de copropriété à l'accès aux infrastructures dans le secteur de l'électricité montrent les limites de cette approche pour ce qui concerne la détention et la gestion des installations essentielles. La structure initiale de propriété du réseau électrique au Royaume-Uni en est un exemple. Pendant les premières années, le système de transport de l'électricité était détenu conjointement par treize entreprises locales de distribution d'électricité. Ce mode de détention

¹¹⁵ Doug Andrew, Directeur, Economic Regulation Group, CAA, « Corporatisation of the New Zealand Air Traffic Control System », Mémoire au Parlement du Royaume-Uni, Chambre des Communes, Commission de l'environnement, du transport et des affaires régionales (janvier 1998), disponible à l'adresse <http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmenvtra/360-e/36037.htm>.

¹¹⁶ Doug Andrew, Directeur, Economic Regulation Group, CAA, « Corporatisation of the New Zealand Air Traffic Control System », Mémoire au Parlement du Royaume-Uni, Chambre des Communes, Commission de l'environnement, du transport et des affaires régionales (janvier 1998), fn. 6, disponible à l'adresse <http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmenvtra/360-e/36037.htm>.

¹¹⁷ Les dispositions relatives à l'abandon de lignes de chemin de fer et les mesures visant à encourager la reprise du service par des acquéreurs indépendants des compagnies ferroviaires sont présentées dans : Office of Public Services, Surface Transportation Board, « Overview : Abandonments and Alternatives to Abandonments » (avril 1997), disponible à l'adresse <http://www.stb.dot.gov/stb/docs/Abandonments%20and%20Alternatives.pdf#search='railroad%20abandonment'>.

¹¹⁸ Fred D. Baldwin, « Short Line Railroads: Local Lifelines for Business », *Appalachia Magazine* (août 2001), disponible à l'adresse <http://www.arc.gov/index.do?nodeId=876> et « Shortline Railroads Doing Well in Northwest », *UTU Daily News Digest* (4 mars 1999), p. 1-3, disponible à l'adresse <http://www.utu.org/DEPTS/PR-DEPT/NEWS/ndigest/1999/March99/ND03-04.HTM>.

visait à séparer la production de l'électricité des stades de production soumis à régulation et à favoriser une gestion du réseau mieux adaptée à la demande. Par la suite, le Royaume-Uni a abandonné cette forme de gestion au profit d'un opérateur/détenteur entièrement indépendant afin de résoudre le problème de l'influence que peuvent exercer sur les décisions du réseau national les opérateurs détenant aussi des installations de production¹¹⁹. On peut citer aussi l'exemple du conseil d'administration de l'opérateur indépendant de Californie (*Cal ISO*) où étaient représentées au départ certaines parties prenantes ; Cal ISO gère le réseau californien de transport de l'électricité. A l'origine, cet opérateur comprenait un conseil d'administration au sein duquel étaient représentées plusieurs catégories d'acteurs intéressés au fonctionnement du réseau : entreprises de distribution, producteurs indépendants et consommateurs notamment¹²⁰. Selon certains observateurs, les désaccords entre membres du conseil d'administration de Cal ISO, à l'origine de blocages sur certaines questions importantes, ont contribué à la crise de l'énergie en Californie¹²¹. Les problèmes importants n'étaient pas résolus, n'étaient traités qu'après un délai très long ou bien étaient réglés de façon insatisfaisante du fait des graves désaccords au sein du conseil d'administration.

L'expérience semble indiquer qu'en général la copropriété est plus efficace pour traiter les problèmes liés aux installations essentielles lorsque les modalités opérationnelles ne sont pas source de division entre les acteurs, lorsque le nombre de participants est suffisant pour éviter la domination d'un sous-groupe d'entreprises et lorsque les membres de l'entité conjointe (le « club de propriétaires ») ne sont pas trop dispersés, ceci afin d'éviter qu'ils se désintéressent des processus de décision.

Plus généralement, le partage d'une installation entre les opérateurs en place, qui peut fonctionner raisonnablement bien avec une organisation de type conjoint, semble moins problématique que l'admission de nouveaux membres et l'augmentation des capacités à cette fin. Ces questions, en effet, donnent lieu plus souvent à des décisions plus litigieuses, car des divergences d'intérêt apparaissent fréquemment entre membres de l'entité conjointe à ce propos. L'introduction de nouveaux membres et l'extension des installations affecteront diversement les participants, et ce d'autant plus qu'ils se différencient en termes de produit ou d'implantation géographique. Le problème peut être résolu lors de la constitution de l'entité conjointe en organisant un appel à candidatures et en identifiant des besoins de capacité actuels et futurs de chacun des membres¹²². Le premier de ces moyens permet d'assurer à la nouvelle entité conjointe

¹¹⁹ Initialement, le Réseau national détenait des capacités de pompage-turbinage et de stockage ; chacune des compagnies régionales d'électricité (les propriétaires initiaux) pouvait détenir jusqu'à 15 % de la capacité nécessaire pour répondre aux besoins de sa région ; voir Energy Information Administration, Department of Energy, « Electricity Reform Abroad and U.S. Investment : The Structure of UK Electricity Prior to Privatization », disponible à l'adresse <http://www.eia.doe.gov/emeu/pgem/electric/ch211.html>.

¹²⁰ « Jusqu'en janvier 2001, Cal ISO était géré par un conseil d'administration au sein duquel étaient représentés les divers acteurs du secteur de l'électricité. Elle réalisait pratiquement toutes les opérations avec les organisations représentées au sein de son conseil d'administration, notamment les trois sociétés d'utilité publique californiennes à capitaux privés. » Steven Bird, « RTO Governance, A Comparison of ISO Governance Structures in the U.S. » (3 avril 2002), disponible à l'adresse <http://www.ksg.harvard.edu/hepg/Papers/Bird%20ISO%20gov%20comparison%20matrix%20App%20A.pdf>.

¹²¹ « Commission Orders Overhaul of California ISO », Energy Users News (28 août 2002), disponible à l'adresse http://www.energyusernews.com/CDA/ArticleInformation/features/BNP_Features_Item/0,2584,82960,00.html. La Commission fédérale de réglementation du secteur de l'énergie a déclaré : « Le conseil d'administration de Cal-ISO, dans sa composition actuelle, n'est pas représentatif de la totalité des acteurs, ce qui réduit en fait sa capacité à prendre en compte de manière adéquate les intérêts de toutes les parties, l'empêche de traiter équitablement les utilisateurs extérieurs à l'État et s'oppose au développement de la coopération régionale sur les marchés de l'Ouest. »

¹²² Avant 2002, la Commission fédérale de réglementation du secteur de l'énergie lançait un appel à candidature à l'intention des entreprises désireuses d'accéder aux terminaux de GNL. Les soumissionnaires

suffisamment de participants initiaux pour qu'un éventuel refus d'accès ultérieur soit moins susceptible de nuire à la concurrence. Le second rend possible une planification de l'extension des capacités en contribuant à préserver une véritable concurrence entre les membres du « club ». D'autre part, l'introduction d'un système de droits négociables peut contribuer à une meilleure exploitation des capacités.

4.3 *Intégration verticale des utilisateurs d'une installation essentielle*

Il arrive que le détenteur de l'infrastructure essentielle restreigne parfois le nombre d'entreprises autorisées à fournir des services aux clients de l'installation et favorise ses filiales lors de la sélection des prestataires de services. Pour renforcer la concurrence en pareil cas, une option consiste à autoriser les clients de l'installation essentielle à pratiquer l'intégration verticale et à assurer eux-mêmes la fourniture des services en question, par exemple en laissant les compagnies aériennes organiser leurs propres services de restauration et de traitement des bagages. L'intégration verticale peut servir au minimum à restreindre le pouvoir de marché des prestataires de services. Dans cette situation, l'intégration verticale est une forme d'entrée potentielle et peut favoriser la baisse des tarifs, même si l'entrée n'a pas effectivement lieu. Lorsqu'ils envisagent une intégration verticale, les clients de l'installation essentielle mettront probablement en regard les économies pouvant résulter de cette intégration et la perte éventuelle d'économies d'échelle dans la fourniture des services. Les pouvoirs publics, cependant, pourront s'inquiéter des conséquences de cette intégration en termes de sécurité. L'intégration verticale des clients peut aussi susciter d'autres inquiétudes, notamment à propos de la sous-utilisation des effectifs de l'installation essentielle et des risques d'encombrement imprévu de l'installation en période de pointe.

Les restrictions à l'intégration verticale sont fréquentes pour les installations aéroportuaires, de même que les restrictions à la concurrence de la part des prestataires indépendants de services au sol¹²³. En dépit

devaient présenter une offre indiquant les conditions qu'ils étaient prêts à accepter pour obtenir l'accès. Cette pratique a été abandonnée parce qu'on craignait que l'appel à candidatures obligatoire freine l'investissement dans les terminaux de GNL ; voir Kevin D. Keenan, Philip R. Weems et Lisa M. Toney, « Fundamentals of the Global LNG Industry 2004 : Regulations Set to Boost Imports » (2004), disponible à l'adresse <http://www.akingump.com/docs/publication/759.pdf>.

¹²³

En France, par exemple, le nombre de prestataires peut être limité sur décision ministérielle à la demande de l'opérateur de l'aéroport pour des raisons « justifiées » comme le manque de place ou pour des raisons de sécurité. Cette disposition peut constituer une incitation à exclure la concurrence lorsque l'opérateur de l'aéroport est lui-même prestataire de services, comme cela est le cas d'*Aéroports de Paris* (ADP). Lorsque le nombre de prestataires est limité, l'opérateur de l'aéroport en fait automatiquement partie. Les autres prestataires sont sélectionnés par l'État après consultation du Comité des usagers de l'aéroport, qui regroupe l'ensemble des compagnies aériennes utilisant l'aéroport. Cependant, la voix de chaque compagnie est pondérée sur la base du trafic qu'elle traite dans le terminal concerné, critère qui assure parfois la majorité absolue à *Air France*. C'est ainsi que la procédure d'adjudication concernant le terminal 1 de l'aéroport Charles de Gaulle a donné des résultats inattendus. ADP ayant été automatiquement retenu pendant la première phase, il ne restait donc plus qu'un prestataire à sélectionner. *Air France* faisait partie des candidats à une licence pour le terminal 1. Bien qu'aucun de ses vols n'utilise le terminal 1 et que le Comité des usagers du terminal 1 ait exprimé sa préférence pour deux autres prestataires, la deuxième licence du terminal 1 a été attribuée à *Air France*. Ce n'est que lors de la deuxième phase de la procédure qu'une nouvelle licence a été attribuée à l'un des tiers ayant la préférence des compagnies aériennes. Au terminal 2 de l'aéroport Charles de Gaulle, où *Air France* et ses partenaires représentent 75 % du trafic, ADP et *Air France* ont obtenu les deux premières licences. Une troisième licence a été attribuée à *Europe Handling*, le principal sous-traitant d'*Air France*. Les clauses restreignant le nombre de participants au marché peuvent réduire très sensiblement les pressions concurrentielles, notamment lorsqu'une entreprise participe à la sélection de son concurrent. Voir SH&E Limited, *Study on the quality and efficiency of ground handling services at EU airports as a result of the implementation of Council Directive 96/67/EC : Report to the European Commission, Appendices* [Étude sur la qualité et

de l'adoption de la directive 96/67/CE en 1996, les problèmes persistaient en 2002 dans un certain nombre d'aéroports européens, mais il n'y a aucune raison de penser que ces problèmes soient particuliers à l'Europe. La directive européenne exigeait la liberté d'auto-assistance à partir de 2001 mais permettait aux États membres de « réserver l'exercice de l'auto-assistance au moins à deux usagers », dans les « aéroports dont le trafic annuel est supérieur ou égal à 1 million de mouvements de passagers ou 25 000 tonnes de fret », en particulier l'assistance « bagages », l'assistance « opérations en piste », l'assistance « fret et poste » et l'assistance « carburant et huile »¹²⁴. La liberté d'assistance par des tiers a été également établie, mais seulement dans les aéroports avec un trafic annuel supérieur ou égal à 2 millions de mouvements de passagers ou 50 000 tonnes de fret, où « les États membres ne peuvent limiter le nombre de prestataires à moins de deux, pour chaque catégorie de service ». Toutefois, « l'un au moins de ces prestataires autorisés ne peut être contrôlé directement ou indirectement, ni par l'entité gestionnaire de l'aéroport, ni par un usager ayant transporté plus de 25 % des passagers ou du fret enregistré dans l'aéroport » au cours de l'année précédant l'attribution des contrats (c'est-à-dire qu'il doit être complètement indépendant de cette entité et de cet usager). En pratique, un certain nombre de pays ont limité le nombre de prestataires de services à un niveau conforme ou légèrement supérieur au seuil fixé par la directive.

Les restrictions concernant le nombre de prestataires de certains services et la procédure de sélection des prestataires ont suscité des plaintes de la part d'usagers des aéroports. « Les usagers et les prestataires de services indépendants ont exprimé leurs préoccupations au sujet de l'ouverture du marché et des différents rythmes auxquels les États membres ont transposé la directive »¹²⁵. « Le processus d'adjudication et les critères de sélection présentent certaines insuffisances, en particulier en cas de conflit d'intérêts mettant en jeu les organes de sélection »¹²⁶. « Certaines compagnies aériennes ont exprimé l'avis que l'obligation qu'au moins un prestataire soit indépendant de la compagnie aérienne la plus importante se traduit en fait par la disparition de toute pression concurrentielle sur le prestataire en question »¹²⁷.

Étant donné les autres restrictions à la concurrence entre tiers dans la prestation des services d'escale, l'intégration verticale peut apparaître comme un moyen attrayant d'intensifier la concurrence. Mais ce ne sera possible que si les restrictions à l'intégration verticale sont modifiées ou supprimées.

Encadré 4. Proposition de directive de la Commission européenne sur l'accès aux équipements portuaires autorisant l'intégration verticale des services portuaires et des transporteurs maritimes

Pendant les années 90, la Commission européenne a adopté un certain nombre de décisions à propos de l'accès aux équipements portuaires¹²⁸. En 1997, elle a rendu public un *Livre vert relatif aux ports et aux infrastructures maritimes*, qui a contribué aux

l'efficacité des services au sol dans les aéroports européens suite à l'application de la directive 96/67/CE du Conseil : Rapport à la Commission européenne, annexes], 7 octobre 2002, p. 20 ; voir aussi OCDE, « La réforme de la réglementation dans le secteur de l'aviation civile », Examens de l'OCDE de la réforme de la réglementation : la réforme de la réglementation en France (2004).

¹²⁴ *SH&E Limited, Study on the quality and efficiency of ground handling services at EU airports as a result of the implementation of Council Directive 96/67/EC : Report to the European Commission* [Étude sur la qualité et l'efficacité des services d'escale dans les aéroports européens suite à l'application de la Directive 96/67/CE du Conseil : Rapport à la Commission européenne], 7 octobre 2002.

¹²⁵ id., p. 51.

¹²⁶ id., p. 51.

¹²⁷ id., p. 53.

¹²⁸ Rødby, OJ L 55, 26.2.1994 ; *B&I Line plc contre Sealink Harbours Ltd et Sealink Stena Ltd* (1992) 5 CMLR 255 (affaire IV/34.174) 11 juin 1992 ; Décision 94/19/CE de la Commission du 21 décembre 1993 relative à une procédure d'application de l'article 86 du traité CE (IV/34.689 - Sea Containers contre Stena Sealink - Mesures provisoires) ; Décision 97/745/CE de la Commission du 21 octobre 1997 au titre

discussions de fond sur l'efficacité, la concurrence et l'intégration des ports dans le grand réseau des transports européens. Le livre vert indiquait qu'une réglementation au niveau européen contribuerait à assurer la libéralisation des services dans les grands ports internationaux. En 2000, la Commission européenne a proposé une directive sur l'accès au marché des services portuaires, puis en 2004 une directive révisée.

Selon la Commission européenne, la proposition de directive vise à garantir la liberté des prestataires de services de l'UE de fournir des services portuaires ou d'effectuer « l'auto-assistance » dans les « ports maritimes », sous réserve de certaines considérations objectives pertinentes telles que :

- l'espace ou la capacité disponible ;
- la politique de développement du port ;
- la sécurité du trafic maritime ou les normes de sécurité de certains ports ;
- la protection de l'environnement ;
- les « obligations de service public ».

La directive s'appliquerait aux ports dépassant un certain seuil de trafic. Elle autoriserait l'auto-assistance à l'aide du personnel au sol de l'opérateur concerné, sous réserve que les conditions de travail de ce personnel soient pleinement conformes aux dispositions nationales et communautaires en vigueur en matière d'emploi et de protection sociale et respectent les règles et conditions générales s'appliquant à toute autre catégorie de personnel de manutention des marchandises.

Avec cette directive, les navires assurant un service régulier de transport maritime agréé offert dans le cadre de services à courte distance ou d'autoroutes de la mer pourraient, outre l'utilisation de personnel à terre, effectuer les tâches d'auto-assistance à l'aide de leur personnel navigant régulier.

La directive exigerait l'obtention d'une autorisation pour l'auto-assistance. Les critères d'attribution seraient identiques aux critères s'appliquant aux prestataires de services d'escale, dans la mesure où ils sont pertinents. Les autorités compétentes seraient tenues d'accorder cette autorisation aux opérateurs qui en font la demande avec efficacité et rapidité¹²⁹.

La proposition de directive de 2001 de la Commission sur l'accès au marché des services portuaires n'a pas été adoptée en raison des graves inquiétudes exprimées par certains États membres. En octobre 2004, la Commission a proposé une proposition révisée de directive, qui n'a pas encore été approuvée par le Parlement européen.

4.4 *Adjudications et autres mécanismes de marché*

Même une fois résolu le problème général de l'accès à une installation essentielle, la question reste de savoir quels usagers potentiels seront acceptés en cas d'encombrement de l'installation ou de quasi-saturation de ses capacités. Il est fréquent qu'on recoure à une solution administrative dans ce type de situation, mais ceci ne permet pas en général l'allocation efficace et la plus rentable des capacités. L'emploi des mécanismes de marché pour répartir l'accès permet de mieux tirer parti de ressources, à condition que ces mécanismes soient bien conçus et gérés. L'un des problèmes les plus courants d'allocation de l'accès est celui qui se pose dans les aéroports en période de pointe pour le décollage et l'atterrissage¹³⁰.

de l'article 90 paragraphe 3 du traité CE relative aux tarifs de pilotage dans le port de Gênes, *Journal officiel* L 301, 05/11/1997, p. 0027-0035.

¹²⁹ Voir <http://europa.eu.int/scadplus/leg/en/lvb/l24272.htm>.

¹³⁰ La plupart des aéroports ne sont pas en concurrence directe avec d'autres aéroports car les économies d'échelle et les normes d'efficacité pour l'interconnexion des vols justifient une installation unique dans chaque zone métropolitaine. Chaque aéroport aurait donc pu être détenu par un seul transporteur aérien assurant la totalité des vols à l'arrivée et au départ de l'installation (Abbott B. Lipsky Jr. et J. Gregory Sidak, « Essential Facilities », *Stanford Law Review* 51:5, mai 1999, p. 1187-1248, 1203-1204).

Le problème d'accès le plus important apparaît lorsque les capacités aéroportuaires d'une région sont saturées ou presque et que de nouveaux entrants cherchent à obtenir l'accès ou bien qu'un transporteur en place souhaite développer ses opérations. En pareil cas, intensifier l'exploitation de l'installation risque d'entraîner des retards (encombrement) et d'aggraver les problèmes de sécurité. C'est pourquoi les aéroports ou les opérateurs du contrôle aérien fixent une limite au nombre de vols autorisés dans chaque créneau horaire. Les contraintes de capacité exigent de déterminer à quels vols et à quelles compagnies aériennes sera attribué un créneau d'atterrissage en période de pointe.

Diverses solutions peuvent être envisagées : l'affectation sur la base de l'utilisation antérieure, l'affectation aléatoire des créneaux, les accords négociés, ainsi que divers systèmes de tarification et la vente ou la revente des droits entre les détenteurs initiaux.

Dans d'autres secteurs, on pratique fréquemment, pour répondre à l'encombrement, le système de redevance majorée en période de pointe¹³¹. Certains aéroports ont introduit des tarifs d'atterrissage plus élevés en période de pointe et on a pu montrer que cela augmente le flux de passagers, par exemple en incitant les avions à un ou deux passagers à utiliser un autre aéroport ou à reporter leur heure d'arrivée à une période creuse¹³². Ceci permet d'accroître le nombre de gros avions qui atterrissent en période de pointe. Les recettes importantes qui résultent de cette tarification spéciale en période de pointe peuvent aussi inciter à investir pour accroître les capacités.

Depuis 1993, les solutions les plus courantes en Europe s'appuient sur les règles de coordination des horaires de l'Association du transport aérien international (IATA) et, au niveau de l'UE, sur le règlement du Conseil n° 95/93. Les règles communautaires et le système IATA ont en commun plusieurs caractéristiques, notamment le droit des transporteurs aériens d'échanger librement leurs créneaux, ainsi que l'obligation d'utiliser un créneau à hauteur de 80% pour le conserver la saison suivante. Les deux régimes privilégient également les nouveaux entrants, qui se voient attribuer jusqu'à 50% des nouveaux

Pourtant, tel n'est pas généralement le cas car, même si la plupart des installations aéroportuaires présentent des aspects de monopole naturel, l'investissement correspondant n'a pas été le fait des compagnies aériennes et l'utilisation des capacités de l'aéroport peut donc être répartie entre plusieurs compagnies concurrentes, apparemment sans qu'il en résulte une forte déperdition d'économies d'échelle ou de capacité. La standardisation internationale des services d'escale contribue aussi à réduire le risque d'une perte d'économies de gamme dans ces services, puisqu'une même installation peut servir à plusieurs compagnies aériennes (voir OCDE, « Competition Policy and International Airport Services », 1998). Les portes d'embarquement, les créneaux d'atterrissage et les espaces de vente de billets et d'enregistrement des passagers sont normalement répartis entre les compagnies aériennes qui utilisent l'aéroport. Une grande partie des services pour passagers sont pris en charge par des opérateurs parallèles, verticalement intégrés, de chaque compagnie aérienne. A cet égard, les aéroports assurent depuis longtemps l'accès à de nombreux concurrents en aval.

¹³¹ Les progrès technologiques, par exemple, ont permis le développement d'appareils calculant automatiquement le montant du péage pour chaque voiture pénétrant en centre-ville à une heure de pointe ; voir Adam M Zaretsky, « Rush-Hour Horrors : How Economics Tackles Congestion », *Regional Economist* (avril 1997), p. 10-11, disponible à l'adresse <http://stlouisfed.org/publications/assets/pdf/re/1997/b/re1997b4.pdf>. Voir aussi BBC, « Norway's Road Toll Success », (17 février 2003), disponible à l'adresse <http://news.bbc.co.uk/1/hi/world/europe/2765895.stm>.

¹³² Plusieurs exemples anciens de tarification spéciale de l'atterrissage en période de pointe sont évoqués dans : Jon Ogur et al., *The Deregulated Airline Industry : A Review of the Evidence*, FTC Bureau of Economics Economic Issues Paper (janvier 1988), p. 37-47. L'achat et la vente de créneaux horaires existent aussi depuis longtemps au Royaume-Uni.

créneaux ou des créneaux inutilisés ». ¹³³ Le débat se poursuit en Europe sur la politique d'allocation des créneaux horaires. Un modèle d'échange de créneaux horaires pour réduire l'encombrement et accroître le flux de passagers a été proposé notamment par l'autorité de l'aéroport de Francfort ¹³⁴. Pour éviter le risque d'accaparement de certains créneaux horaires, des conditions plus strictes (retrait en cas de non-utilisation) pourraient être attachées à la détention d'un créneau ¹³⁵.

Aux États-Unis, l'achat et la vente de créneaux horaires sont autorisés depuis de nombreuses années et on a enregistré un grand nombre de transactions de ce type ¹³⁶. Les États-Unis ont rejeté en général l'approche coordonnée de gestion des créneaux adoptée en Europe en raison du risque de collusion anticoncurrentielle entre les participants. Dans les aéroports américains les plus encombrés, une autre méthode – la mise aux enchères des créneaux d'atterrissage – a aussi été utilisée ¹³⁷. La procédure d'enchères contribue à l'efficacité des transactions, mais peut aussi être source d'importantes difficultés dans le planning et la gestion des compagnies aériennes ¹³⁸. Le système adopté aux États-Unis est présenté dans une publication de 2002 de l'OCDE sur la libéralisation du secteur du fret aérien ¹³⁹ :

« Au plan national, l'une des plus anciennes réglementations nationales sur l'attribution des créneaux est la règle de la *Federal Aviation Administration* (FAA) des États-Unis concernant les aéroports à forte densité, qui a été adoptée en 1968 pour résoudre un problème de capacité des aéroports et d'écoulement du trafic aérien. En 1999, la règle de haute densité s'appliquait à deux aéroports internationaux, l'aéroport O'Hare de Chicago et l'aéroport JFK de New York (qui sont

¹³³ OCDE, « Libéralisation du fret aérien » (2 mai 2002), paragraphe 82 (p. 43-44), disponible à l'adresse <http://www.oecd.org/dataoecd/44/2/2086192.pdf>.

¹³⁴ Christian Fritton, « Slot Policy for Fraport », exposé à Imprint-Europe, séminaire 3, Bruxelles (octobre 2002) disponible à l'adresse http://www.imprint-eu.org/public/Presentations/imprint3_Fraport_Fritton.ppt.

¹³⁵ Christian Fritton, « Slot Policy for Fraport », exposé à Imprint-Europe, séminaire 3, Bruxelles (octobre 2002) disponible à l'adresse http://www.imprint-eu.org/public/Presentations/imprint3_Fraport_Fritton.ppt. Voir aussi : Airports Council International, « Traffic Rights, Airport Capacity and Airport Slots : The Airport Operators' View », exposé à la Conférence sur le transport aérien mondial, Montréal (mars 2003), disponible à l'adresse http://www.icao.int/icao/en/atb/atconf5/docs/ATConf5_wp091_en.pdf ; U.K. Department of Transport, « Consultation on the Introduction of a Sanction for Misuse of Airport Slots » (juillet 2005), disponible à l'adresse http://www.dft.gov.uk/stellent/groups/dft_aviation/documents/pdf/dft_aviation_pdf_039056.pdf.

¹³⁶ Comment of the U.S. Department of Justice before the Federal Aviation Administration, Department of Transportation, in the matter of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of Lottery Allocation, Docket No. FAA-2001-9854 (20 juin 2002).

¹³⁷ Jon Ogur et al., *The Deregulated Airline Industry : A Review of the Evidence*, FTC Bureau of Economics Economic Issues Paper (janvier 1988), p. 42-43.

¹³⁸ Entretien avec John White (OCDE, octobre 2005), qui était membre du Groupe directeur de gestion du Ministère australien des transports et a participé à l'époque aux réformes du secteur du transport aérien. Si une compagnie aérienne obtient, par exemple, un créneau horaire dans l'aéroport d'une ville mais non dans l'aéroport de l'autre ville avec laquelle elle souhaite assurer une liaison, la ligne prévue ne peut être mise en place. Par contre, si l'on autorise les compagnies aériennes à acheter et à vendre des créneaux horaires, une compagnie aérienne peut déposer une offre pour un créneau dans une ville dans l'attente de l'obtention du créneau correspondant dans l'autre ville. Elle peut donc s'engager en sachant que si elle obtient seulement un des créneaux recherchés, elle pourra revendre celui qu'elle a effectivement obtenu (ce qui réduit pour elle l'éventualité de coûts irrécupérables).

¹³⁹ OCDE, « Libéralisation du fret aérien » (2 mai 2002), paragraphe 83, disponible à l'adresse <http://www.oecd.org/dataoecd/44/2/2086192.pdf>.

tous deux aussi pleinement coordonnés dans le cadre du système d'établissement des horaires de l'IATA) et à deux aéroports désignés comme intérieurs (La Guardia à New York et Reagan à Washington). Cette règle, bien qu'ayant évolué avec le temps, conserve certains aspects communs avec le système de l'IATA et le système européen, par exemple la possibilité pour les transporteurs aériens de continuer à utiliser les créneaux saisonniers utilisés au cours d'une saison antérieure identique pour des services internationaux, l'autorisation donnée aux transporteurs aériens d'échanger des créneaux horaires un à un et la préférence donnée aux nouveaux entrants. Cependant, contrairement au système de l'IATA et au système européen, l'allocation des créneaux dans les aéroports à forte densité aux États-Unis est directement gérée par les autorités du secteur de l'aviation. La règle de haute densité est beaucoup plus complexe que le système de l'IATA et le système de l'UE, essentiellement parce qu'elle prévoit des seuils différents pour chaque catégorie d'utilisateurs dans le cadre d'une limitation globale, toutes les heures ou les demi-heures, du nombre de décollages et d'atterrissage et parce qu'elle permet l'achat, la vente ou la location de créneaux horaires à certains services intérieurs. La règle de haute densité contient aussi une clause de réciprocité semblable à celle de l'UE qui permet d'en suspendre l'application à l'égard des transporteurs aériens et des opérateurs de troisième niveau d'autres pays où les créneaux horaires sont alloués aux transporteurs aériens et aux opérateurs de troisième niveau américains selon des critères plus restrictifs. A la suite d'une étude complète et détaillée réalisée par le Département américain des transports (DOT) en 1995¹⁴⁰, des changements législatifs ont été introduits en avril 2000 pour mettre fin progressivement à l'application de la règle de haute densité dans trois des quatre aéroports (aéroport O'Hare à Chicago à partir du 1er juillet 2002, aéroports JFK et La Guardia à New York à partir du 1er janvier 2007), certaines exemptions [autorisations de vols supplémentaires] étant prévues pendant la période de transition¹⁴¹.

Les allocations d'accès nouvelles à La Guardia ont augmenté de plus de 20 % à la suite de la nouvelle réglementation, ce qui a entraîné une forte augmentation des retards. Des restrictions ont alors été de nouveau instaurées pour les créneaux d'atterrissage mais leur allocation s'est faite par la voie administrative¹⁴². Comme l'a indiqué le Département de la Justice¹⁴³, « l'ouverture sans restrictions de l'accès à une précieuse ressource publique comme les créneaux horaires de décollage et d'atterrissage à l'aéroport de La Guardia a été à l'origine de retards, car chaque utilisateur de ces créneaux ignorait les effets de l'encombrement sur les autres usagers de l'espace aérien commun ». Dans son analyse, le Département de la Justice recommandait une solution basée sur le marché, telle qu'une procédure d'adjudication ouverte à la fois aux entrants et aux compagnies aériennes en place, ou bien l'introduction d'une tarification spéciale en

¹⁴⁰ Le constat que le nombre de créneaux disponibles est resté le même malgré l'amélioration des capacités de contrôle aérien a été l'une des raisons principales de l'abandon de la règle de haute densité. Par la suite, les créneaux horaires sont restés une ressource rare, mais pas aussi rare qu'à l'époque où était appliquée la règle de haute densité.

¹⁴¹ Le changement a consisté en fait à augmenter le nombre de créneaux horaires disponibles par rapport aux seuils fixés au milieu des années 80, ceci grâce à la modernisation des aéroports et aux progrès technologiques ; voir Department of Transportation, « DOT Expands Access to Slot-Controlled Airports for Smaller Communities, New-Entrant Carriers », (14 avril 2004), disponible à l'adresse <http://www.dot.gov/affairs/2000/dot7900.htm>.

¹⁴² Pour une analyse comparée des différents systèmes d'allocation des créneaux horaires, voir Ian Jones et al., « Study to Assess the Effects of Different Slot Allocation Schemes, A Final Report for the European Commission », NERA (janvier 2004).

¹⁴³ Comment of the U.S. Department of Justice before the Federal Aviation Administration, Department of Transportation in the matter of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of Lottery Allocation, Docket No. FAA-2001-9854 (20 juin 2002).

période de pointe. Toutefois, il indiquait en conclusion qu'une telle tarification était peu souhaitable car il serait difficile à la FAA de déterminer le tarif efficient pour chaque période, alors qu'avec un système d'adjudication, le tarif d'accès ne serait pas préétabli. »

ANNEXE A. ACCÈS AUX INSTALLATIONS ESSENTIELLES ET INCIDENCE SUR LE BIEN-ÊTRE

L'analyse ci-dessous de l'incidence sur le bien-être de l'intégration verticale et de l'accès aux installations essentielles est tirée d'une Note de référence de Sally Van Sichen, Secrétariat de l'OCDE, présentée lors d'une Table ronde sur le concept d'installation essentielle organisée par l'OCDE en 1996.

Aspects économiques

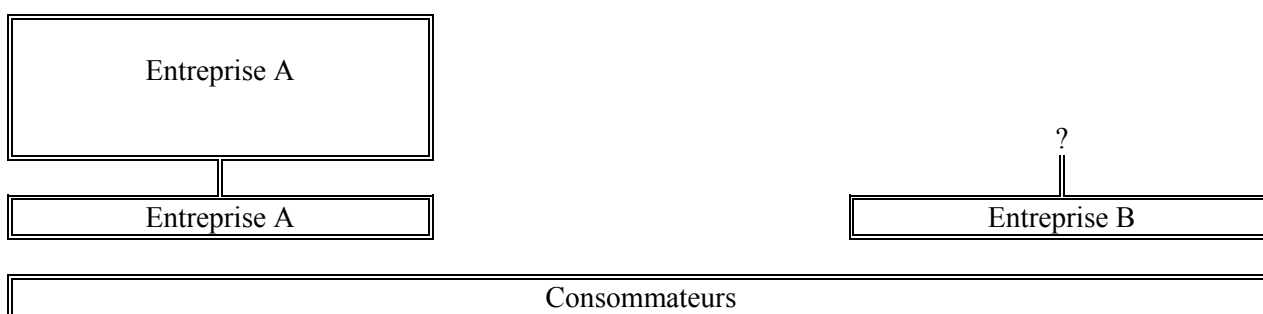
Divers paramètres jouent dans l'analyse en termes de bien-être d'un refus de traiter dans certaines branches d'activité. L'un de ces paramètres est la nature de la réglementation, en particulier lorsqu'elle comporte des mesures correctrices, ainsi que la nature des subventions. Autre paramètre : la question est de savoir si la technologie est à proportion fixe, c'est-à-dire si une quantité donnée du produit en amont entre dans la production de chaque unité du produit en aval. Enfin, les possibilités d'améliorer la concurrence jouent un grand rôle (Werden, p. 473)¹⁴⁴.

Les diagrammes ci-après illustrent certaines structures du marché dans lesquelles on pourrait faire intervenir la notion d'installation essentielle.

Intégration verticale en aval par un monopoleur non soumis à réglementation

Le diagramme 1 illustre deux marchés non réglementés : l'entreprise A est une entreprise monopolistique qui opère sur le marché en amont, A et B opérant en duopole sur le marché en aval. B achète à A un facteur de production qu'il ne peut obtenir nulle part ailleurs. Si au lieu d'approvisionner B, A procède à une intégration verticale en aval, cette intégration peut avoir des effets positifs ou négatifs sur le bien-être des consommateurs.

Diagramme 1. Monopole en amont, duopole en aval



Dans des conditions d'information complète où il n'existe aucune incertitude, lorsque l'entreprise en amont détient un monopole non contesté et non réglementé, et vend à des acheteurs identiques situés en aval qui utilisent le facteur de production dans des proportions fixes et qui mettent en œuvre une technique

¹⁴⁴ Gregory Werden, « The Law and Economics of the Essential Facilities Doctrine », *St Louis University Law Journal*, 32:2 (1987), p. 433-480.

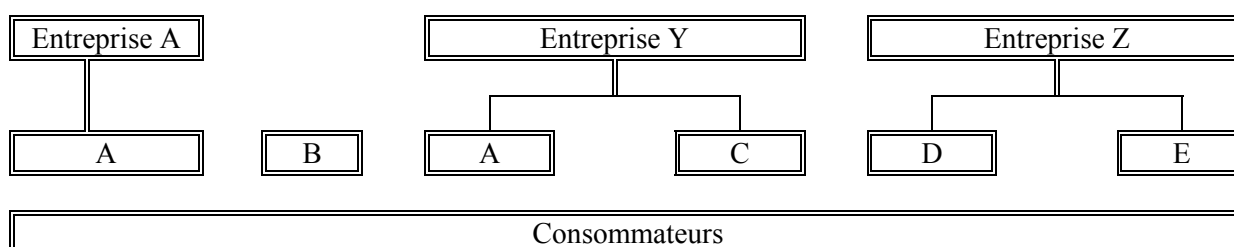
de production à rendement d'échelle constant, l'intégration du monopoleur en aval n'aura pas d'effet sur le bien-être. Le monopoleur peut dans l'un et l'autre scénarios s'approprier tous les profits de monopole (Ordover et Saloner, p. 564)¹⁴⁵. Si l'une de ces conditions n'est pas remplie, il peut alors être rentable pour l'entreprise en amont de procéder à une intégration en aval. Cette intégration ne va pas nécessairement diminuer le bien-être. Par exemple, si toutes les autres conditions sont remplies et si le facteur de production n'est pas utilisé en proportion fixe et si son prix n'est pas égal au coût marginal (ce qui est probable étant donné la situation de monopole en amont), l'intégration verticale (qui entraînerait vraisemblablement un prix de transfert interne égal au coût marginal) augmentera le bien-être. Si les entreprises en aval ne sont pas identiques, peut-être parce qu'elles sont confrontées à des demandes différentes, l'intégration verticale peut alors susciter une discrimination par les prix, ce qui a un effet ambigu sur le bien-être. Si l'entreprise en aval est un monopole ou un monopsonne, l'intégration verticale accroît la quantité du facteur de production vendue ainsi que la production en aval, ce qui augmente le bien-être. En cas d'incertitude ou d'information incomplète, l'intégration verticale diminuera alors vraisemblablement les coûts contractuels ainsi que les pertes liées aux problèmes d'agence (« vraisemblablement » car l'efficacité relative d'un des mécanismes du marché et d'un mécanisme interne de contrôle de la société est un problème empirique). L'intégration verticale peut créer des barrières à l'entrée — parce que le risque capitalistique s'accroît et certaines capacités de gestion sont indispensables — mais les effets sur le bien-être sont minimes lorsque l'installation essentielle est un monopole naturel (Werden, p. 467-8).

Faut-il limiter la théorie des installations essentielles aux monopoles naturels ? Pour Werden, la réponse est oui, bien qu'un duopole ou un triopole naturel soulève les mêmes problèmes, et même si un monopole naturel ne détient pas nécessairement un pouvoir de marché en aval, car la règle serait simple (Werden, p. 476). Deux économistes pour lesquels mettre un concurrent en position désavantageuse constitue la forme la moins extrême d'interdiction d'accès à un facteur de production essentiel, posent en principe trois conditions qui doivent être réunies pour qu'une entreprise estime possible et rentable de recourir à ce type d'action. En premier lieu, l'intérêt de l'exclusion doit être plus important pour l'entreprise qui y procède que pour le concurrent exclu. En second lieu, les concurrents ne doivent pas être en mesure de trouver des fournisseurs de remplacement qui leur permettraient de rétablir leur compétitivité. En troisième lieu, l'entreprise qui procède à l'exclusion doit détenir un certain pouvoir de marché (Ordover et Saloner, p. 566).

Concurrence sur un marché en amont non réglementé

Le diagramme 2 présente un autre scénario possible : sont en concurrence les entreprises A, Y et Z sur le marché en amont et les entreprises A, B, C, D et E sur le marché en aval.

Diagramme 2. Concurrence en amont



¹⁴⁵ Janusz A. Ordover et Garth Saloner, « Predation, Monopolization and Antitrust », in *Handbook of Industrial Organization*, Richard Schmalensee et Robert Willig (dir. pub.) (1988).

La question de savoir si l'entreprise B peut acheter le facteur de production dont elle a besoin et si elle peut soutenir la concurrence n'a pas grand effet sur le bien-être des consommateurs. La concurrence entre A-A (facteur de production provenant de l'entreprise A associé à la distribution ou à la transformation par A), Y-A, Y-C, Z-D et Z-E peut être suffisante, de sorte que l'absence de B a peu d'incidence.

Définition du marché

Ces deux exemples illustrent le rôle de la définition du marché dans l'évaluation des effets statiques sur le bien-être qu'entraîne l'obligation d'accès. Ce rôle apparaît clairement dans le premier élément de la formulation MCI — à savoir que l'entreprise doit être un monopole — car cette situation ne peut se produire que sur un marché. Le second élément paraît viser un certain degré de non-substitution plus élevé même que celui utilisé pour définir les limites d'un marché — à savoir qu'il est peu commode et déraisonnable de reproduire l'installation, à comparer avec les dispositions des Lignes directrices américaines sur les fusions (l'installation ne peut être remplacée moyennant une légère mais sensible augmentation des prix pendant une période durable).

Les décisions de la Cour européenne de Justice sur l'obligation de vendre visent des entreprises dominantes, ce qui implique un marché défini. Toutefois, la décision de la Commission dans l'affaire *Sealink* concerne « une entreprise en situation de position dominante pour la mise à disposition d'une installation essentielle ». La question est de savoir si cela veut dire que l'installation essentielle est par définition un marché. Enfin, dans le rapport Hilmer, il est question d'installations plutôt que de marchés. La façon assez imprécise dont certaines théories des installations essentielles définissent le rôle du marché peut s'expliquer par les contextes dans lesquels elles s'appliquent. Dans l'exemple australien, les installations essentielles sont limitées aux monopoles naturels et « la presque totalité des cas d'installations essentielles identifiées se situait dans le secteur public » (Hilmer, p. 239). Là, la limite à une définition trop large de l'obligation de vendre est fixée non par le critère du marché, mais par un critère fondé sur la structure des coûts — monopole naturel — et un critère d'importance qui exclut expressément « les produits, les procédés de production ou la plupart des autres installations commerciales ».

Obligation d'accès et investissement privé

Jusqu'à présent, l'analyse n'a porté que sur des situations statiques. Mais l'un des problèmes fondamentaux lorsque l'on veut élaborer une théorie sur les installations essentielles de nature à accroître l'efficacité est de déterminer l'effet de l'obligation d'accès sur l'efficacité dynamique. Imaginons une entreprise purement privée, non réglementée et non subventionnée, qui envisage de réaliser un investissement irrécupérable¹⁴⁶, par exemple un port. Supposons que l'on ignore, jusqu'à sa construction, la demande future dont ce port fera l'objet. L'entreprise peut alors se trouver devant trois résultats éventuels : un rendement négatif des investissements réalisés dans le port dans tous les cas (demande faible), un rendement, négatif si l'accès est obligatoire, mais positif si l'entreprise peut écarter les concurrents (demande moyenne), un rendement positif même si l'accès est obligatoire (demande forte). Il se peut que l'entreprise ne construise pas le port si elle s'attend à ce que l'accès soit rendu obligatoire, mais elle le construira si elle s'attend à ce que l'accès ne soit pas rendu obligatoire (ce point est expliqué plus en détail à propos de l'exemple ci-après). De ce fait, l'obligation d'assurer l'accès peut dissuader l'investissement initial dans une installation de ce genre.

¹⁴⁶ L'analyse présentée à l'occasion de la table ronde précédente ne tient pas compte de la distinction entre investissement initial et investissement initial irrécupérable. Pour un investisseur, le risque financier se situe au niveau de l'investissement initial irrécupérable. En effet, il s'agit d'un coût qui non seulement n'a aucune utilité hors du marché, mais ne pourra non plus intéresser un acheteur aux fins d'une nouvelle utilisation sur le marché. Le risque est moindre pour l'investisseur s'il peut récupérer une partie de son investissement en le revendant à un opérateur en place ou à un entrant.

Exemple des effets dynamiques de l'obligation d'assurer l'accès

Supposons que la construction du port soit évaluée à 7 unités monétaires et que la décision de le construire soit prise avant que l'on connaisse l'importance de la demande. Supposons que la demande puisse être forte, moyenne ou faible, que les recettes correspondantes atteignent le montant indiqué ci-après, et que l'on évalue à 33 % la probabilité de chacun de ces résultats. Par exemple, supposons que, la demande étant « forte », le port réalise des recettes de 8 si l'accès était obligatoire et de 10 dans le cas contraire. Dans cet exemple, le port serait construit si l'on sait par avance que la demande serait « forte », que l'accès en soit ou non obligatoire. Le port ne serait pas construit si l'on savait par avance que la demande serait « faible ». Dans cet exemple, le bénéfice attendu de la construction du port est $-1=(0.33 \times 1 - 0.33 \times 1 - 0.33 \times 3)$ et $+1$ si l'accès n'est pas rendu obligatoire. Par conséquent, dans l'hypothèse de neutralité au risque, l'entreprise construira le port si elle espère ne pas être obligée d'en assurer l'accès, mais elle ne le construira pas si elle pense être contrainte d'en assurer l'accès.

Demande	Probabilité	Accès obligatoire		Accès non obligatoire	
		Recettes	Bénéfices	Recettes	Bénéfices
Forte	1/3	8	1	10	3
Moyenne	1/3	6	-1	8	1
Faible	1/3	4	-3	6	-1

Réglementation et aide

Lorsque les entreprises sont ou ont été bénéficiaires d'une aide publique ou d'une réglementation économique, la politique des pouvoirs publics à leur égard peut alors tenir compte de ces caractéristiques.

La réglementation visant un monopoleur en amont influe de quatre façons sur l'analyse de son intégration verticale (Werden, p. 466-467). Premièrement, la réglementation des prix sur le marché en aval peut réduire ou supprimer tous les effets de hausse des prix que pourrait avoir l'intégration verticale. Deuxièmement, l'intégration, lorsque les prix sont réglementés sur le marché monopolistique, crée un monopole là où il n'en existait pas auparavant, avec les effets habituels qui en résultent pour le bien-être. Troisièmement, lorsqu'une entreprise monopolistique réglementée procède à une intégration verticale en amont, elle peut alors échapper à la réglementation des bénéfices en se facturant un prix majoré pour le facteur de production. Quatrièmement, si l'intégration verticale à laquelle procède une entreprise monopolistique réglementée entraîne une réglementation plus rigoureuse, les coûts administratifs et les inefficiences qui en résultent sont alors préjudiciables pour le bien-être.

En revanche,

« obliger les entreprises à vendre peut permettre de réduire le champ d'application de la réglementation. La déréglementation peut, tout au moins à première vue, paraître constituer une solution attrayante, mais il n'est pas sûr que la réglementation de la seule installation soit particulièrement avantageuse... Malheureusement, cette solution ne résoudrait pas les problèmes les plus difficiles de réglementation [répartition des coûts conjoints et communs]. » (Werden, p. 471)

L'effet de dissuasion résultant de l'obligation d'accès aux investissements réalisés dans les « installations » dépend lui aussi de la réglementation économique et des aides publiques. En particulier, s'il s'agit d'entreprises publiques qui ne sont pas soumises à une contrainte budgétaire rigoureuse, ou s'il s'agit d'entreprises réglementées selon la méthode du coût majoré, l'effet dynamique négatif de l'obligation

d'accès, tel qu'on l'a noté dans l'exemple ci-dessus, diminue : un rendement négatif de l'investissement peut être récupérable ailleurs.

Enfin, la réglementation économique de l'installation essentielle peut signifier que le mécanisme de fixation des conditions d'accès est préexistant, ce qui réduit les coûts liés à la réglementation de l'accès obligatoire.

Pour réinterpréter les résultats ci-dessus, si l'entreprise monopolistique réglementée en amont est ressortissante d'un pays donné, si les entreprises en aval le sont d'un autre pays, et si d'autre part les responsables chargés de la concurrence maximisent le bien-être national, l'intégration à laquelle procède le monopoleur en aval réduit le bien-être national sur le marché situé en aval. Si, au contraire, les prix sont réglementés sur le marché en aval, le bien-être national en aval est réduit du montant des bénéfices réalisés précédemment en aval.

Venit et Kallaugher (p. 343)¹⁴⁷ préconisent expressément, pour les différents types de biens, une théorie différente des installations essentielles et insistent sur la relation existant entre la déréglementation et ces théories :

« En définitive, le domaine dans lequel l'analyse des infrastructures de base peut s'avérer la plus utile est celui des affaires relevant de l'article 86. Concrètement, bon nombre d'installations en Europe dont on peut dire à tout le moins qu'elles sont « essentielles » sont soit contrôlées par l'État ou des entreprises publiques, soit exploitées en application de réglementations édictées par l'État. De ce fait, bon nombre des observations générales formulées ci-dessus à propos de l'application de la théorie des installations essentielles peuvent s'appliquer directement dans les affaires relevant de l'article 86, surtout lorsqu'il s'agit des télécommunications ou des infrastructures de transport. En outre, pour les monopoles publics, l'application de cette théorie pour déréglementer ou ouvrir des marchés peut s'avérer moins controversée que lorsque l'on applique cette même théorie au comportement des entreprises privées. »

On a examiné dans cette section les analyses économiques sur lesquelles reposent les théories des installations essentielles. On notera que les conditions garantissant, en général, que l'intégration verticale n'ait pas d'effet sur le bien-être sont très précises -- pas de réglementation des prix (que ce soit par le biais d'une réglementation économique officielle ou par l'interdiction de « prix excessifs »), une technologie en aval à rendement d'échelle constant, une utilisation de facteurs de production en proportion fixe et certaines limites enfin en ce qui concerne les conditions d'information. On notera également la façon dont la réglementation des prix affecte les résultats en termes de bien-être. Toutes ces questions pourraient faire l'objet de travaux plus approfondis.

¹⁴⁷ James S. Venit et John J. Kallaugher, « Essential Facilities : A Comparative Law Approach », in *Fordham Corporate Law Institute*, p. 315-344.

ANNEXE B. EXTRAIT DU DOCUMENT « UNE APPROCHE ÉCONOMIQUE DE L'ARTICLE 82 »

L'analyse économique du refus de vendre présentée ci-dessous est reprise d'un texte du Groupe économique consultatif sur la politique de la concurrence publié en juillet 2005 et intitulé « Une approche économique de l'article 82 ».

Section 4 : Le refus de vendre

Le refus de vendre peut prendre plusieurs formes. L'entreprise dominante peut simplement refuser de fournir le bien essentiel ou bien en demander un prix prohibitif. Elle peut aussi faire en sorte que le bien occupe une position de blocage et soit incompatible avec les produits offerts par ses concurrents. Elle peut aussi lier un bien essentiel à un autre bien, rendant l'acquisition du lot peu attrayante pour les entreprises concurrentes, ou encore signer un accord exclusif de vente avec une entreprise déterminée, de façon à exclure les autres entreprises du marché.

4. Effets potentiellement nuisibles à la concurrence

Le refus de vendre est une forme typique d'exclusion sur les marchés verticalement intégrés où une entreprise dominante contrôle un facteur de production indispensable aux entreprises concurrentes sur un marché en aval (ou en amont). En refusant l'accès à ce facteur de production, l'entreprise dominante étend son monopole du marché du bien essentiel au marché potentiellement concurrentiel en aval. Toutefois, la monopolisation d'un marché en aval n'a pas nécessairement des effets anticoncurrentiels. Après tout, il n'existe qu'un marché final et un seul profit de monopole. Si l'entreprise dominante parvient à obtenir le profit de monopole du marché final même dans une situation de concurrence en aval, la monopolisation du marché en aval ne peut avoir des effets anticoncurrentiels puisque, de toute façon, il n'y a plus de concurrence. Le refus de vendre aux entreprises en aval sera probablement motivé dans ce cas par des critères d'efficacité.

L'entreprise dominante peut aussi être un groupe d'entreprises ou une association sectorielle qui refuse d'accorder l'accès à une installation détenue conjointement. Dans ce cas, une entreprise concurrente peut se trouver exclue du marché ou d'un marché horizontalement adjacent. On citera à ce propos les exemples bien connus d'*Associated Press* (1945) et d'*Aspen Ski* (1985). Dans le second de ces exemples, une entreprise gérant les pistes de trois domaines skiables refusait qu'une entreprise concurrente gérant un seul domaine puisse vendre des tickets de remontée-pente¹⁴⁸.

5. Effets favorables à la concurrence et facteurs d'efficacité

Une entreprise en amont peut s'inquiéter des conséquences que pourrait avoir pour sa réputation la vente de son produit par des entreprises de qualité inférieure en aval. Si l'entreprise en amont n'est pas en mesure de superviser et de contrôler effectivement les entreprises en aval, leur exclusion du marché peut être le seul moyen d'accroître le surplus du consommateur et les bénéfices du secteur. Il peut aussi être nécessaire, pour le fournisseur en amont, pour des raisons technologiques, de superviser de près la

¹⁴⁸ Voir notamment Ahern P. (1994), « Refusal to Deal after Aspen », *Antitrust Law Journal*, 63:153, 44.

production en aval. Dans certains cas, cet objectif ne pourra être atteint que dans une entreprise verticalement intégrée. Il peut arriver aussi qu'une entreprise en aval tire profit gratuitement des dépenses de marketing de l'entreprise en amont. Pour récupérer son investissement, l'entreprise dominante pourra décider d'exclure la concurrence en aval¹⁴⁹.

Le refus de vendre, même lorsqu'il a des effets négatifs à court terme pour le consommateur, peut être, à long terme, spécialement bénéfique pour la société. Lorsque le goulet d'étranglement est dû à un investissement ou à des activités d'innovation de l'entreprise dominante, contraindre celle-ci à accorder l'accès à ses concurrents revient à la dessaisir du produit de ses efforts. Ceci peut dissuader cette entreprise et d'autres d'investir à l'avenir et réduire l'incitation à innover. Tolérer un monopole (temporaire) peut être le meilleur moyen de promouvoir l'investissement et de stimuler l'innovation et, par voie de conséquence, l'efficacité dynamique.

L'autorité de la concurrence doit être particulièrement réticente à intervenir dans les situations où le goulet d'étranglement résulte d'un droit de propriété intellectuelle. En effet, si le droit de propriété intellectuelle est reconnu par l'État, c'est afin de créer un pouvoir de marché et de récompenser l'innovation. Il serait donc illogique pour les pouvoirs publics de supprimer après coup ce droit en éliminant le pouvoir de marché des acteurs concernés. D'ailleurs, la simple éventualité d'une intervention de l'État aurait des effets sur le pouvoir de négociation des parties lors de la négociation d'un accord volontaire. L'opérateur concurrent pourrait obtenir des conditions favorables en menaçant d'engager des poursuites pour imposer une obligation de vendre et le rendement de l'investissement engagé par l'opérateur en position de blocage en pâtirait. L'intervention n'étant pas explicite, ses effets ne seront pas immédiatement visibles, mais elle aura une incidence négative en termes d'innovation.

6. Exemple d'application

Le refus de vendre accroît le pouvoir de marché d'une entreprise dominante seulement lorsque celle-ci n'a pas su exploiter pleinement son pouvoir de monopole sur le goulet d'étranglement. Tel est le cas, par exemple, lorsque l'entreprise dominante n'est pas en mesure d'imposer le prix de monopole à toutes les entreprises en aval. En effet, une fois qu'il a contracté avec une entreprise en aval pour la fourniture du bien essentiel, le détenteur du monopole a intérêt à fournir les autres entreprises à des conditions plus favorables afin d'accroître ses bénéfices aux dépens de la première entreprise, qui doit alors faire face à la concurrence d'autres entreprises sur le marché en aval. Cependant, les entreprises en aval, anticipant le comportement opportuniste de l'entreprise en amont, s'efforceront aussi d'acquérir le bien essentiel uniquement au prix inférieur, réduisant ainsi les bénéfices du monopoleur. Ce dernier ne pourra rétablir son pouvoir de monopole que s'il parvient à éliminer complètement la concurrence sur le marché en aval. En pareil cas, le refus de vendre peut avoir des effets anticoncurrentiels.

Lorsqu'elle soupçonne un tel scénario, l'autorité de la concurrence devrait procéder comme suit :

- Établir dans un premier temps s'il y a ou non des effets anticoncurrentiels. Supposons qu'une entreprise dominante, qui a vendu le bien essentiel dans le passé à des entreprises en aval, refuse maintenant de vendre. Si le prix du produit final ne change pas et si le cours de l'action des entreprises en aval n'est pas affecté, il est peu probable que le refus de vendre ait accru le pouvoir de marché de l'entreprise dominante et réduit le bien-être social. Si l'entreprise dominante peut justifier de manière convaincante, sur la base de critères d'efficacité, son refus de vendre, il n'y a pas lieu d'aller plus loin. Par contre, si l'entreprise

¹⁴⁹

Pour une analyse plus détaillée des critères d'efficacité pouvant justifier une interdiction d'accès, voir Patrick Rey et Jean. Tirole (2003), « A Primer on Foreclosure », à paraître dans *Handbook of Industrial Organization* vol. 3, M. Armstrong et R.Porter (dir. pub.), Elsevier, Amsterdam.

dominante n'a pas pu imposer le prix de monopole devant la concurrence en aval et si elle est parvenue à augmenter le prix payé par le consommateur en monopolisant le marché en aval, on se trouve alors en présence d'effets anticoncurrentiels.

- Quelle est l'origine du goulet d'étranglement ? S'il est dû principalement à l'investissement et aux efforts d'innovation de l'entreprise dominante, celle-ci ne doit pas être dessaisie du rendement de cet investissement et l'autorité de la concurrence ne doit pas intervenir, même au prix d'une inefficience statique (monopole temporaire). L'autorité de la concurrence doit être particulièrement réticente à intervenir lorsque le goulet d'étranglement résulte d'un droit de propriété intellectuelle. Cependant, si le goulet d'étranglement est le produit d'une situation historique, d'économies d'échelle ou de gamme, ou encore d'externalités de réseau, une intervention peut être justifiée.
- L'intervention peut-elle être efficace sans porter atteinte à l'efficacité ? La mise en oeuvre peut se révéler difficile et coûteuse. En outre, le risque existe que l'autorité de la concurrence soit amenée à s'immiscer dans la définition des conditions de vente : tarifs, conditions et spécifications techniques. Comme elle n'est pas vraiment qualifiée pour ce faire, son intervention risque de nuire fortement à l'efficacité. L'autorité de la concurrence doit donc être consciente des effets nuisibles qui peuvent résulter de son action et intervenir avec prudence, en s'abstenant de s'immiscer directement dans la mise au point des conditions contractuelles¹⁵⁰. Les mesures correctrices structurelles comme le désinvestissement et les restrictions au champ d'activité donnent fréquemment lieu à des coûts de transaction élevés et ne doivent donc être envisagés qu'en dernier ressort.

L'autorité de la concurrence doit savoir que l'approche qu'elle adopte dans les affaires de refus de vente en affectera le résultat, y compris lorsque les entreprises parviennent à un accord volontaire et qu'il n'y a plus en fait refus de vendre. La possibilité de poursuivre l'opérateur en position de blocage influe sur le pouvoir de négociation des participants. Si elle peut menacer d'engager des poursuites pour imposer un accord, l'entreprise concurrente est dans une position beaucoup plus forte que si l'opérateur en position de blocage peut refuser de vendre. Tant que de telles situations ne donnent pas lieu à une action en justice, ces effets ne sont guère visibles. Néanmoins, les problèmes qu'elles soulèvent sont identiques à ceux que pose le traitement des affaires de refus de vente par l'autorité de la concurrence : si l'anticipation d'une intervention vigoureuse du régulateur conduit à un accord volontaire à un tarif d'accès peu élevé, le rendement de l'investissement de l'opérateur du goulet d'étranglement diminuera ; si l'anticipation d'une intervention peu énergique du régulateur conduit à un accord volontaire à un tarif d'accès élevé, la capacité de l'entreprise rivale à livrer concurrence en aval sera moindre. Pour éviter que de telles anticipations ne nuisent à la concurrence, l'autorité de la concurrence doit disposer, pour l'évaluation des affaires de refus de vente, de lignes directrices claires énonçant des critères précis pour mettre en balance l'exclusion du marché et l'aspect rendement de l'investissement.

¹⁵⁰

On notera à ce propos qu'aux États-Unis les décisions des tribunaux invoquant le concept d'installation essentielle laissent généralement aux parties le soin de déterminer les conditions de vente.

ANNEXE C. L'ACCÈS AUX INFRASTRUCTURES EN AUSTRALIE

La présentation ci-dessous des principes et du fonctionnement du système australien d'accès aux infrastructures est tirée du rapport n° 17 de la Commission australienne de la productivité (*Australian Productivity Commission*, 28 septembre 2001), disponible à l'adresse www.pc.gov.au/inquiry/access/finalreport/access.pdf.

Caractéristiques essentielles des modalités d'accès aux infrastructures en Australie

Les modalités régissant l'accès des entreprises aux services d'infrastructure essentiels en Australie sont complexes. Elles découlent d'un régime générique national, appelé couramment « *Part IIIA* », et de toute une série de régimes sectoriels. Un grand nombre de régimes sectoriels sont soumis à la législation de l'État ou du Territoire concerné. Il existe aussi des régimes fédéraux s'appliquant notamment aux secteurs des télécommunications et des aéroports, ainsi qu'un code réglementant l'accès au marché national de l'électricité. Certains régimes sectoriels opèrent dans le cadre du système national, tandis que d'autres y échappent.

Les normes nationales d'accès couvrent avant tout les services infrastructurels qui constituent des facteurs essentiels de la production de services en amont ou en aval et qui font appel à une technologie donnant lieu à un « monopole naturel » parce qu'il ne serait ni profitable, ni efficace que la fourniture du service soit assurée par plus d'un opérateur.

Le régime national prévoit trois types possibles d'accès :

Faire déclarer un service : pour être déclaré, un service doit répondre à un certain nombre de critères, en particulier : l'accès doit promouvoir la concurrence sur un autre marché ; il ne serait pas rentable de créer une autre installation pour fournir le service ; l'installation a une importance nationale ; le service n'est pas encore couvert par un régime d'accès efficace. La déclaration donne au demandeur d'accès le droit de négocier avec le prestataire de services, avec possibilité d'arbitrage en cas d'échec des négociations.

Chercher à obtenir l'accès dans le cadre d'un régime d'accès existant : le système national prévoit la « certification » des régimes existants considérés comme efficaces. La clause 6 de l'Accord sur les principes de la concurrence (*Competition Principles Agreement*) énonce les principes devant régir un régime d'accès efficace au niveau des États ou Territoires. Un service couvert par un régime certifié ne peut faire l'objet d'une déclaration.

Chercher à obtenir l'accès dans le cadre d'un engagement du prestataire de service ayant été accepté et enregistré par la Commission australienne de la concurrence et de la consommation (*Australian Competition and Consumer Commission*, ACCC) ; cet engagement peut porter sur un service particulier ou servir de base à un code d'accès pour le secteur considéré. Les services couverts par de tels engagements ne peuvent faire l'objet d'une déclaration.

Il existe plusieurs décideurs :

Le Conseil national de la concurrence (*National Competition Council*, NCC) est chargé d'évaluer les demandes de déclaration et de certification. La compétence en matière de déclaration appartient en dernier ressort au Premier ministre de l'État, au Chef du Territoire ou au ministre des Finances fédéral, selon le régime de propriété de l'infrastructure concernée. Le ministre des Finances fédéral est aussi chargé de certifier l'efficacité des régimes d'accès existants. Outre l'évaluation des propositions d'engagement,

l'ACCC joue un rôle d'arbitrage en cas de litige à propos de services déclarés. Le régime national prévoit des voies de recours à presque toutes les étapes du processus, le plus souvent devant le Tribunal australien de la concurrence (*Australian Competition Tribunal*). Diverses instances de régulation des États et Territoires et l'ACCC gèrent l'application des régimes d'accès sectoriels couverts par le système national.

Vue d'ensemble

Le régime n'a pas à se substituer aux négociations commerciales entre détenteurs d'installations et demandeurs d'accès. Il vise au contraire à renforcer l'incitation à négocier et assure un moyen d'accès à des conditions raisonnables en cas d'échec des négociations.

A ce jour, les dispositions du système national relatives aux procédures de déclaration et d'engagement ont encore peu été utilisées directement pour obtenir l'accès. Le système de certification a été appliqué plus fréquemment. Jusqu'ici, 9 régimes d'accès ont été certifiés efficaces. Il s'agit pour la plupart de régimes concernant le secteur du gaz, qui ont été mis au point conformément au code sectoriel (*Gas Code*), mais deux régimes ferroviaires et un régime couvrant les voies de navigation dans l'État de Victoria ont aussi été certifiés.

L'impact du régime national d'accès ne peut être apprécié uniquement à partir du nombre de décisions effectives : la possibilité d'une déclaration au titre des normes nationales (*Part IIIA*) a influé sur la définition des régimes d'accès des États et Territoires, y compris dans certains cas où la certification n'était pas le but recherché. Des contrats d'accès ont été négociés pour un certain nombre de services ferroviaires pour lesquels une demande de déclaration n'avait pu aboutir. C'est pourquoi l'enquête a suscité un très vif intérêt. En dépit du soutien dont bénéficie en général le régime national, certains aspects des modalités actuelles d'accès suscitaient de graves préoccupations.

Raisons justifiant la réglementation de l'accès

Dans la plupart des cas, la concurrence entre fournisseurs de biens et de services aboutit à une baisse des prix, à l'élargissement de la gamme de produits offerts et à l'amélioration du service fourni au consommateur. Cependant, les systèmes de transport et de distribution nécessaires à la fourniture de certains services infrastructurels utilisent des technologies qui donnent lieu à un « monopole naturel ». En pareil cas, une seule entreprise peut répondre de manière plus avantageuse que deux ou plus à la demande totale de services. Dans une situation non réglementée et en l'absence de concurrence de la part d'opérateurs pouvant offrir un service de remplacement, l'entreprise en place peut bénéficier d'un pouvoir de marché substantiel et durable.

Outre la baisse des prix et l'utilisation accrue des services, la fourniture de l'accès peut grandement stimuler l'innovation et avoir aussi des retombées positives en termes d'« efficacité dynamique ». L'explosion de l'offre sur le marché des télécommunications ces dernières années montre bien quel peut être le rôle des nouveaux entrants à cet égard.

Coûts potentiels

D'un autre côté, la réglementation de l'accès peut empiéter fortement sur les droits de propriété et entraîner toute une série de coûts qui doivent être évalués au regard des avantages attendus. Ces coûts comprennent :

- les coûts de gestion pour les pouvoirs publics et le coût de l'application des réglementations pour les entreprises ;

- les contraintes imposées aux fournisseurs d'accès en termes de prestation et de tarification efficaces de leurs services ;
- la réduction de l'incitation à investir dans les installations afin de fournir des services essentiels nouveaux ou d'entretenir les installations existantes ;
- des investissements inefficients sur les marchés en aval ;
- un comportement stratégique des fournisseurs de services et des demandeurs d'accès qui est source de gaspillage.

Le problème principal pouvant résulter de la réglementation de l'accès est celui du « freinage » de l'investissement dans les infrastructures essentielles. L'investissement peut se trouver dissuadé pour deux raisons.

L'introduction d'une réglementation de l'accès entraînera probablement une augmentation du niveau général de risque pour l'investissement dans les installations essentielles. Les inévitables aspects discrétionnaires de la mise en œuvre d'une telle réglementation, et le sentiment que, probablement, les décisions réglementaires seront partiales et favoriseront les usagers des services, font partie des facteurs qui contribuent à créer ce que l'on peut appeler un « risque réglementaire ». Ce risque existe pour les investisseurs dans toute activité soumise à réglementation. Cependant, parce que l'investissement dans les infrastructures est de grande ampleur et qu'une fois en place, les actifs sont immobilisés et peuvent rarement se prêter à d'autres utilisations, le risque réglementaire constitue souvent un facteur plus déterminant dans les décisions d'investissement de ce type et peut même parfois dissuader la réalisation de certains projets.

L'investissement dans les infrastructures essentielles sera aussi dissuadé si les conditions mises en place par la réglementation ne permettent pas d'anticiper un rendement suffisant. Le problème ici est que la perspective de bénéfices supérieurs à la normale en cas de grande réussite du projet peut être nécessaire pour compenser le risque d'échec. Cependant, une fois l'installation devenue opérationnelle, il sera généralement impossible à l'instance de régulation de distinguer un rendement extrêmement élevé d'une véritable rente de monopole, c'est-à-dire un rendement supérieur au niveau nécessaire pour justifier l'investissement. Les dispositions réglementaires en matière de tarification qui aboutissent à une appropriation (involontaire) des « superbénéfices » (ce que l'on appelle l'« amputation réglementaire ») peuvent constituer un facteur important d'inefficience résultant de la réglementation de l'accès.

L'ouverture de l'accès aux tiers et les avantages qui peuvent en découler pour les usagers ne sont possibles à long terme qu'à la condition d'un investissement continu dans les services de l'infrastructure essentielle. D'un autre côté, bien que le refus de l'accès ou l'imposition d'un prix de monopole aient un coût pour la collectivité, de telles pratiques ne peuvent remettre en cause la continuité de la prestation des services concernés. Cette asymétrie de résultats montre qu'en cas de réglementation de l'accès, la priorité doit être accordée au maintien d'incitations à même de garantir l'efficience de l'investissement.

**ANNEXE D. EXTRAIT DE L'ANALYSE D'UNE ORDONNANCE PAR CONSENTEMENT
ET D'UN PROJET DE REQUÊTE CONCERNANT L'OUVERTURE À UN ENTRANT
D'UN SYSTÈME LOCAL DE DISTRIBUTION DE GAZ NATUREL**

Les « Conditions de l'accord DTE/MCN relatif à l'ouverture à un entrant du système local de distribution de gaz naturel de la région de Detroit » sont tirées de l'« Analyse aux fins de la consultation publique d'une proposition d'ordonnance par consentement et d'un projet de requête » (mars 2001), disponible à l'adresse www.ftc.gov/os/2001/03/dteanalysis.htm¹⁵¹.

Le règlement par consentement proposé vise à répondre aux problèmes de concurrence soulevés par la Commission [Commission fédérale du commerce] à propos du projet de fusion. Le paragraphe II de le règlement par consentement prévoit que le défendeur se dessaisira de certains avoirs (« avoirs cédés ») au profit de Exelon Energy Company (« Exelon ») en vertu et conformément aux dispositions de l'accord de désinvestissement entre MichCon et Exelon cinq jours (5) au plus tard après que la fusion aura pris effet. L'accord de désinvestissement comprend deux accords distincts : 1) une « convention de servitude » entre MichCon et Exelon ; 2) une « convention de contrôle » entre MichCon, Exelon et un tiers qui exercera une fonction de contrôle pour la convention de servitude conclue entre MichCon et Exelon.

La convention de servitude a été approuvée par la Commission des services publics du Michigan en tant que contrat spécial entre MichCon et Exelon (voir « Ordonnance d'homologation d'un contrat spécial suite à la demande conjointe de Michigan Consolidated Gas Company et d'Exelon Energy Company d'homologation non contentieuse d'un contrat spécial relatif à certains droits de transport et de stockage », affaire n° U-12825, 14 février 2001).

La convention de servitude reconnaît à Exelon un droit d'usage du système local de distribution de gaz naturel de MichCon, droit qui permettra à Exelon d'exercer des activités de distribution et de stockage de gaz naturel dans le secteur commun. En vertu de la convention de servitude, Exelon pourra utiliser cinq milliards de pieds cubes de capacité annuelle de transport (« capacité initiale ») afin de répondre aux besoins de tout utilisateur en fin de réseau à l'intérieur du secteur commun. Exelon pourra utiliser en outre 15 milliards de pieds cubes supplémentaires de capacité annuelle de transport (« capacité supplémentaire »), délivrés par paliers de 1 milliard de pieds cubes, afin de couvrir au moins 50 % de l'EDL (*Electric Displacement Load*) aux fins de la production locale d'électricité : cogénération, production municipale, nouvelles formes décentralisées de production (comme les piles à combustible et les micro-turbines), ainsi que d'autres systèmes électriques de substitution fonctionnant au gaz. Si Exelon utilise la totalité de la capacité initiale et de la capacité supplémentaire (un total de 20 milliards de pieds cubes, dont 7.5 milliards doivent servir à l'EDL), Exelon aura droit à une capacité de transport supplémentaire (« capacité de croissance ») afin de servir les producteurs locaux à l'intérieur du secteur commun. Exelon pourra aussi disposer d'une capacité de stockage égale à 10% de la capacité initiale et de la capacité supplémentaire. La tarification de la capacité initiale, de la capacité supplémentaire et de la capacité de croissance sera établie à un niveau permettant à Exelon de rester compétitif avec MichCon dans le secteur commun et l'incitant à distribuer le gaz naturel en vue des applications de type EDL.

La convention de servitude comprend un certain nombre de dispositions visant à garantir la viabilité d'Exelon comme concurrent. Elle exige en particulier des parties qu'elles désignent un contrôleur indépendant connaissant bien le secteur du gaz naturel, afin de superviser la convention de servitude et de

¹⁵¹ L'ordonnance finale rendue dans l'affaire DTE Energy Company / MCN Energy Group Inc., FTC Docket n° C-4008 (15 mai 2001) peut être consultée à l'adresse <http://www.ftc.gov/os/2001/05/dtemchdo.pdf>. Le texte de la convention de servitude est disponible à l'adresse <http://www.ftc.gov/os/2001/03/dteappa.pdf>.

remplir certaines fonctions nécessaires à l'exécution de la convention comme l'arbitrage des litiges, ainsi que d'autres fonctions et responsabilités visant à prévenir toute discrimination injustifiée de MichCon à l'égard d'Exelon (convention de servitude, ¶ D-17). En outre, la convention de servitude impose à MichCon de réparer ou remplacer tout élément nécessaire au bon fonctionnement du système de distribution et, dans le cas où MichCon manquerait à cette obligation, autorise le contrôleur à faire effectuer les réparations ou remplacements nécessaires aux frais de MichCon (convention de servitude, ¶ 7). D'autre part, l'accord autorise Exelon à développer le système en cas de besoin, soit aux frais de MichCon, soit au moyen d'une indemnité ad-hoc versée par MichCon (convention de servitude, ¶ D-5). Enfin, l'accord requiert de MichCon qu'il informe à l'avance Exelon et le contrôleur de tout événement opérationnel important susceptible d'affecter le fonctionnement du système de distribution, comme les activités régulières d'entretien, les interruptions, les changements de normes opérationnelles, les projets de points d'alimentation nouveaux, les propositions de modification des régimes d'acheminement ou de comptage ou des spécifications de qualité, ainsi que de tout autre événement pouvant affecter Exelon ou l'aptitude d'Exelon à servir ses clients, et autorise le contrôleur à revoir ou à modifier, si nécessaire, tout élément de ce type afin d'empêcher qu'il en résulte des incidences négatives pour Exelon (convention de servitude, ¶ D-6).

Le règlement par consentement proposé comporte aussi des dispositions visant à assurer le maintien d'un autre fournisseur viable et compétitif de services de distribution de gaz naturel pour les clients de l'EDL dans le secteur commun. Le paragraphe II.B.1 du règlement par consentement, par exemple, exige du défendeur qu'il assure l'entretien, la réparation et le remplacement de tout élément ou du système de distribution de MCN : 1) nécessaire au bon fonctionnement et à la sûreté de ce système ; 2) dans le respect de l'ensemble des règles et réglementations des organes fédéraux ou de l'État, ou de toute entité gouvernementale compétente pour un élément quelconque du système de distribution de MCN. Le paragraphe II.B.2 du règlement par consentement requiert du défendeur qu'il gère le système de distribution de MCN de façon raisonnable et non discriminatoire, dans le respect de l'ensemble des règles et réglementations des organes fédéraux ou de l'État, ou de toute entité gouvernementale compétente pour un élément quelconque du système de distribution de MCN.

Le paragraphe II.B.3, consacré au contrôleur, autorise celui-ci à prendre toute mesure lui paraissant nécessaire et appropriée pour réaliser les objectifs de l'accord de désinvestissement, y compris proposer les modifications à cet accord qui, à son avis, sont nécessaires pour assurer la viabilité et la compétitivité de l'acquéreur, et lui reconnaît le droit d'accéder à tous les livres de compte, fichiers, informations, systèmes et installations du défendeur, s'il juge cela raisonnablement nécessaire pour vérifier les performances du défendeur au titre de l'accord de désinvestissement. Lors de la recherche et de la consultation d'informations exclusives, le contrôleur est tenu de respecter les règles de confidentialité qui empêchent la divulgation non autorisée de telles informations.

En vertu du paragraphe II.B.4, le défendeur est tenu de fournir à Exelon une liste de tous les clients auxquels MCN fournit du gaz naturel dans le secteur commun, avec le nom, l'adresse et la classification tarifaire de chaque client, en indiquant si celui-ci utilise le gaz naturel pour l'EDL. D'autre part, selon le paragraphe II.B.5, le défendeur devra fournir au contrôleur les résultats de l'enquête réalisée par MCN sur les possibilités d'EDL dans le secteur commun. Le défendeur devra adresser à chacun des clients couverts par l'enquête une lettre l'avisant qu'il peut obtenir des services de distribution de gaz d'Exelon et lui demandant s'il souhaite que le contrôleur communique à Exelon les données d'enquête le concernant.

Le paragraphe II.B.6 prévoit que, pendant les deux années suivant l'entrée en vigueur de l'ordonnance, le défendeur devra répondre favorablement et sans délai à toute demande d'un client situé dans le secteur commun souhaitant mettre un terme à son contrat de transport ou de distribution avec MCN afin d'obtenir des services de distribution ou de transport de gaz d'Exelon, sans que le client soit pénalisé ou ait à régler des frais.

Le règlement par consentement proposé contient aussi des dispositions prévoyant la désignation d'un nouvel acquéreur pour le cas où Exelon mettrait un terme à l'accord de désinvestissement, ainsi que des dispositions précisant les responsabilités de l'administrateur éventuellement désigné pour exécuter la procédure de désinvestissement requise par l'ordonnance.

Le défendeur devra fournir à la Commission un rapport sur l'application du règlement par consentement proposé dans un délai de soixante jours à compter de l'entrée en vigueur de l'ordonnance, puis tous les soixante jours jusqu'à l'achèvement du désinvestissement, et ensuite tous les ans pendant une période de vingt ans.

La convention de contrôle liant MichCon, Exelon et le contrôleur définit les fonctions, les pouvoirs et les obligations du contrôleur indépendant prévu aux paragraphes II.B.3 et D-17 de la convention de servitude. Le contrôleur peut engager toute action nécessaire et appropriée pour remplir les objectifs de la convention de servitude ; il est habilité en particulier à établir le montant des dommages indirects à verser par MichCon au cas où la gestion du système de distribution par MichCon entraînerait un préjudice pour Exelon (convention de contrôle, ¶ 2). Le contrôleur est aussi chargé d'arbitrer les litiges entre les parties et de remplir toute autre fonction ou responsabilité nécessaire conformément à la convention de servitude, notamment la vérification du volume d'EDL d'Exelon, l'entretien et la réparation du système en cas de défaillance de MichCon, la désignation des applications reconnues comme EDL, le traitement des plaintes d'Exelon, la révision des modifications opérationnelles pouvant avoir une incidence négative pour Exelon, et les fonctions et responsabilités qui s'y rattachent (convention de contrôle, chap. A ; convention de servitude, ¶¶ 3, 7, D-1(j), D-2, D-4, D-6).

Le candidat à l'acquisition des avoirs cédés, Exelon Energy, est l'un des plus grands fournisseurs déréglementés d'électricité et de gaz naturel du pays. Il s'agit d'une filiale d'Exelon Corporation, constituée par la fusion d'Unicom Corporation et de PECO Energy Company. La société mère exerce des activités de production, de transport, de distribution et de vente d'électricité, de fourniture de gaz naturel et de services de transport de gaz naturel, de vente d'équipements de production distribuée d'électricité, ainsi que d'autres activités connexes. Cette entreprise connaît extrêmement bien le marché de ces services et celui de la distribution de l'électricité et du gaz naturel. Elle vend déjà du gaz naturel à certains acheteurs du Michigan (et d'autres États) et dispose d'une filiale s'occupant de la commercialisation de micro-turbines et de matériels de production distribuée.

En procédant à l'évaluation du candidat à l'acquisition des avoirs cédés, la Commission a en vue le maintien de l'environnement concurrentiel tel qu'il existait avant l'acquisition. Le candidat à l'acquisition ne doit pas lui-même soulever des problèmes de concurrence. Exelon est une grande entreprise du secteur de l'énergie qui dispose d'une vaste expérience dans le domaine du gaz naturel, de l'électricité et de l'exploitation d'installations essentielles. La Commission considère, par conséquent, qu'Exelon est tout à fait qualifié pour assurer la gestion des avoirs cédés et que le désinvestissement réalisé au profit d'Exelon ne sera pas anticoncurrentiel.

AUSTRALIA

1. National Competition Policy

In the mid 1990's the Australian Government undertook comprehensive competition based economic reforms which had their genesis with the release of the Independent Committee of Inquiry into National Competition Policy, chaired by Professor Fred Hilmer.¹

A unique agreement between the Australian and all State Governments in Australian in 1995² was the start of what continues to be a long journey of reform.

The National Competition Policy reforms were a major change to Australia's microeconomic framework. Competition was introduced into formerly sheltered areas of the economy, such as state run electricity and gas distribution businesses and rail services links. The Trade Practices Act (TPA) was extended to cover almost the entire economy, and structural and legislative impediments were removed to facilitate competition in the non-traded goods sector.

A raft of governance and structural reforms to government infrastructure businesses followed. Infrastructure businesses were made more commercially focussed:

- Monopoly elements of a business were separated from the contestable service elements
- The contestable elements were to be subject to greater competitive pressures
- To curb the market power of the monopoly elements, prices oversight and regulatory arrangements to secure third-party access to 'essential' services were introduced.

2. The access to essential facilities regime

A national third party access regime for those facilities that could not be economically duplicated and were of national significance was introduced. This regime was implemented within the TPA and administered by the Australian Competition and Consumer Commission (ACCC), the National Competition Council (NCC)³ and the Australian Competition Tribunal (the Tribunal).⁴ The development of a regime (Part IIIA of the TPA) to allow access to facilities which exhibit natural monopoly characteristics was based on a doctrine of access to essential facilities. The regime provided for access to infrastructure on terms and conditions that balance the interests of infrastructure owners, users and the broader public.

¹ The Independent Committee of Inquiry into National Competition Policy, chaired by Professor Fred Hilmer, was commissioned in 1992 to propose a National Competition Policy that would support an open, integrated, domestic market for goods and services

² Council of Australian Governments, Communiqué, 11 April 1995

³ National Competition Council (NCC) is an independent advisory body established by the Commonwealth, States and Territories

⁴ The Australian Competition Tribunal is a judicial body linked to the Federal Court

The purpose of this regime was to create competition in industries dependent upon that infrastructure, not in the infrastructure itself. The access regime is designed to cover those facilities which have entrenched monopoly characteristics and that consequently constrain the benefits from increased competition from being achieved elsewhere in the economy. This could be a particular problem where infrastructure owners also own businesses in dependent markets. These businesses have an incentive to restrict access to the infrastructure asset to favour their own downstream businesses.

A regulatory framework that oversees access conditions including negotiations to determine access prices was put in place. The access provisions in Part IIIA of the TPA allow:

- Services provided by nationally significant infrastructure to be open for access by third parties through a declaration process;
- Arbitration of disputes relating to access to these services when the dispute cannot be resolved through negotiation;
- Determination of the terms and conditions of access up front through court enforceable undertakings, and
- Certification of effective state and territory access regimes.

Specific criteria must be satisfied before access can be obtained through any of these avenues. While the exact criteria differ among the avenues, the criteria generally refer only to access to the services provided by nationally significant natural monopoly facilities. Experience has shown that in all industries covered by access arrangements that access assessments are complex and often contentious.

Declaration with the possibility of subsequent arbitration has been described as “default regulation” in the sense that “regulation, in the form of arbitration by the ACCC, is only engaged upon by default of commercial agreement between the parties as to an aspect of access to the service”.⁵

In Australia, the development of access arrangements has occurred in conjunction with a number of sector specific reforms. In particular, sector specific structural reforms and access regulation were introduced into a number of industries as part of the reform of public monopolies. These reforms were generally undertaken as part of national competition policy reforms overseen jointly by the Australian Government and State Governments with a view to the development of a consistent approach across the economy.

However, there has also been a proliferation of different access regimes at the State and Territory level.

Access arrangements for essential infrastructure have, or are being developed for the energy, telecommunications, transportation and water industries. In the transportation sector the main industries where access arrangements to essential infrastructure have been developed are airports, rail and ports.

The ACCC also administers competition law. In Australia, a single body for both competition law and industry regulation is thought to allow for the sharing of knowledge and expertise across the two functions and to ensure that the two forms of regulation, that ultimately have the same objective of facilitating competition, do not cross purposes.

⁵ Australian Competition Tribunal, *Virgin Airlines Pty Ltd*, (2005), para 67

3. Access to essential transport infrastructure

Transport infrastructure services will usually comprise potentially competitive segments and a natural monopoly segment. Access arrangements relate to the natural monopoly segments.

There are a number of factors that give rise to significant market power or to natural monopoly characteristics associated with certain transport infrastructure, particularly transport terminals and rail tracks:

- A transport terminal or a rail track may be essential for reaching customers and/or for competitors to access complementary markets;
- A transport infrastructure facility may be indivisible relative to the size of the market implying that it is often inefficient to have more than one local supplier of the service; and
- There may be no substitute for using the particular transport facility.

Airports, rail infrastructure and port facilities are the main transport infrastructure that are subject to access arrangements. The major airports are under the Commonwealth's jurisdiction with the ACCC being potentially involved in airport access arrangements. Rail infrastructure is covered by Commonwealth and State access regimes with the ACCC becoming increasingly involved in interstate rail access arrangements. Port access arrangements are entirely state based. However, issues have arisen in relation to port infrastructure services that have led to some ACCC involvement, though not through access arrangements.

Given that the ACCC's involvement in access to infrastructure services relates mainly to airports and rail infrastructure; and that significant access issues have arisen in these industries, this paper focuses on the experience with access to airports and rail infrastructure in Australia. In addition, the paper discusses the issue of access arrangements and investment which is currently being debated in Australia.

4. Access to airport services in Australia

4.1 *Privatisation of Australia's major airports*

In 1997 and 1998 the Australian Government privatised 17 of the 22 airports it owned and operated through the Federal Airports Corporation (FAC).

Before privatisation the government established a comprehensive system of regulation to apply to the private airport operators. A new Airports Act 1996 was introduced setting the regulatory framework. It covered ownership rules for the leasing companies, airport specific access arrangements, international aviation obligations and development, environment and airspace controls.

The Act divides the privatised airports into two broad groups. The major passenger airports are referred to as core regulated airports, and were subject to economic regulation administered by the ACCC. They comprised Sydney Airport and eleven privatised airports (the other major city capital airports plus four regional airports).⁶ These airports are characterised by significant interstate and, in some cases, international regular public transport services.

⁶ The eleven privatised airports were Adelaide, Alice Springs, Brisbane, Canberra, Coolangatta, Darwin, Hobart, Launceston, Melbourne, Perth and Townsville.

There was price regulation of aeronautical services at core-regulated airports including quality of service monitoring, price-cap arrangements and special provisions for necessary new investment at the airports. These airports and the other leased airports were also subject to the TPA including the access provisions contained in Part IIIA.

In addition to the general access provision in the TPA, an airport specific access regime was contained in the Airports Act covering the core regulated airports. This meant that there were two separate legislative instruments providing for access to airports: an airports-specific regime (s.192 of the Airports Act); and the general national access regime (Part IIIA of the TPA).

4.2 Airport specific access arrangements, 1997 – 2002

Airport-specific access arrangements, as incorporated in s.192 of the Airports Act, were introduced as a transitional measure to streamline the access processes under the TPA. They were introduced to apply to newly privatised ‘core’ airports. The intention was that the arrangements under s.192 would ultimately expire, and that airports would be subject to the generic access provisions of the TPA.⁷

Under the Airports Act, operators of the airports were allowed one year (with a possible one-year extension) from when their leases began to have an access undertaking accepted by the ACCC.⁸ If the ACCC did not accept an undertaking, services at the airport were automatically declared by the Minister under Part IIIA of the TPA for four years. There was no provision for the Minister to renew these declarations.

With declaration, the ACCC potentially had an arbitration role if an access seeker was unable to negotiate a satisfactory commercial agreement on terms of access.

The acceptance period for access undertakings for newly privatised airports expired in 1998 and in 1999. Melbourne and Perth airport operators provided access undertakings to the ACCC. Neither was accepted, principally because of the inadequacy of dispute resolution procedures and the enforceability of the provisions proposed in undertakings.

With regard to declared services, rather than listing the services, the Airports Act set out specified criteria for declaration. A service can be declared if it:

- Is necessary for the purposes of operating and/or maintaining civil aviation services at the airport; and
- Is provided by means of significant facilities at the airport, being facilities that cannot be economically duplicated; and includes the use of those facilities for those purposes. (s.192(5))

It was for the ACCC to determine whether a specified service satisfies the criteria and, therefore, whether it was an airport service covered by the Minister’s declaration. The Airports Act did not provide for appeal against a decision to declare a service as an airport service.

Given that no undertakings had been accepted by the ACCC prior to expiry of the designated period, the Minister determined that airport services at all privatised core-regulated airports were declared.

⁷ Minister of Transport and Regional Services and The Treasurer joint Media Releases, Productivity Commission Report on Airport Price Regulation 13 May 2002, p.7

⁸ An access undertaking is a legally binding document setting out terms and conditions upon which businesses can access the services provided by essential airport facilities.

The ACCC received two applications for a determination on whether a service is a declared airport service under s.192. The applications — from Delta Car Rentals and Virgin Blue — both related to services at Melbourne Airport.

The ACCC's first airport access determination, issued in April 1999, covered the roads and vehicle facilities for dropping off and picking up passengers at Melbourne airport. It followed an application from Delta Car Rentals.

Delta Car Rentals operated an off-airport car rental service and short and long-term car parks close to the airport. It provided a shuttle bus service to transport passengers to and from the terminal. The airport operator wanted Delta to pay a fee, based on its turnover, for access to the terminal. It also wanted Delta to operate from the car park opposite the terminal, not the service roads.

In the Delta determination, the ACCC decided that service roads needed for picking up and dropping off passengers are essential to the operation of civil aviation at Melbourne airport, and do have natural monopoly characteristics.

The airport operator then had to negotiate with Delta and allow the ACCC to arbitrate if necessary. It also meant that the airport operator was required to negotiate with any other company- such as a bus, taxi or hire car company- that sought access to roads and associated facilities for dropping off and picking up passengers. If involved in an arbitration the ACCC had to take into consideration existing, landside access regimes for ground transport, including existing arrangement for traffic management. However, the ACCC was not involved in any arbitration as a result of the determination.

In the Melbourne Airport Multi User Domestic Terminal case, the ACCC used its discretion not to make a determination that the terminal be covered by the Minister's declaration. Charges for the use of the terminal were already regulated under a price cap and necessary new investment provisions. It was not clear that a determination would promote competition.

In May 2002 the government announced that airport-specific access regulation would not continue to apply. Accordingly, s.192 of the Airports Act was repealed on 6 September 2003 by the Civil Aviation Legislation Amendment Act 2003.

Airports remained potentially subject to the general access provisions of Part IIIA of the Trade Practices Act.

4.3 Access to airport services under the Trade Practices Act access provisions

There have been two cases where access to airport services has been sought through the general Part IIIA provisions of the TPA. The first one was in November 1996, when Australian Cargo Terminal Operators Pty Ltd (ACTO) — a small business which provided independent cargo terminal services to international airlines — sought access to various freight handling and related services provided by facilities owned by the FAC at Melbourne and Sydney airports.

In the second case in October 2002, Virgin Blue Airlines Pty Limited (Virgin Blue) — a new entrant low cost carrier airline — sought declaration of airside facilities (and other services) at Sydney Airport (SACL) following disagreement on a change in the terms and conditions under which SACL was to provide services.

Under Part IIIA access to services, including airport services, can potentially be gained through the declaration process. An application is made to the NCC for declaration. A recommendation for

declaration is subsequently made to the Minister whether to 'declare' the service. Both ACTO and Virgin Blue took this approach.

Under the TPA the NCC may only declare a service if it is satisfied that:

- Access is needed to promote competition in related markets.
- It would be uneconomic for anyone to develop another facility
- The facility used to provide the service is of national significance, and
- The service is not already covered by an access regime.

The NCC is also required to consider public interest issues including health and safety.

4.3.1 The declaration of ground handling services at Sydney Airport

In 1996, ATCO applied for declaration of a range of freight handling and related services at Sydney and Melbourne international airports. These included the freight aprons and stands needed to load and unload freight from international aircraft, areas for moving and handling freight, equipment storage areas and land to construct cargo terminals. The facilities that the NCC reviewed were owned by the airport operators.

The application was initiated by ACTO and supported by South Pacific Airmotive Ltd. (SPAM), a provider of passenger and ramp handling services to airlines, and International Business Management Services Pty Ltd (IBMS), a provider of catering and ramp handling services to airlines operating narrow bodied aircraft. Up until 1996 ground handling services for airlines at Sydney and Melbourne airports had been controlled by the two major domestic airlines Qantas and Ansett Airlines. The services were considered by some to be highly priced and of a poor standard.⁹

The NCC found that services provided by the freight aprons, stands and freight moving and equipment storage qualified for declaration. Land for constructing cargo terminals was not recommended for declaration as ACTO could build cargo terminals off-airport.

The NCC inquiry determined that there was little competition in the freight forwarding, cargo terminal operations and related markets. The apron and equipment movement and storage facilities could not be considered separately from the airport as a whole, these were nationally significant facilities, accounting for 70 per cent of Australia's international air freight.

The NCC recommended that the services be declared at Sydney airport for five years and at Melbourne airport for a period to expire 11 months after the airport was leased. The Treasurer accepted the recommendations and made the declarations in July 1997.

The FAC applied to the Australian Competition Tribunal for a review of the Treasurer's declaration at Sydney airport. The application was taken over by the Sydney Airports Corporation and heard in December 1998. The tribunal upheld the declaration, making only minor amendments to clarify the service description.

⁹ Australian Competition Tribunal, Sydney International Airport, 2000, para.56

In the ACTO decision the Tribunal determined that Sydney Airport “exhibits very strong bottleneck characteristics”. (Para. 86) It was satisfied that increased access to the services would promote competition in at least one market, other than the market for the services, namely the market for ramp handling services at Sydney International Airport and that the other criteria required for declaration were satisfied. The Tribunal considered that provided it was satisfied that access to a service can be provided without undue risk to human health or safety, the issue of the number of organisations to whom access should be provided should not be determined by it but by agreement or in default of agreement by resolution of an access dispute under the TPA (Para. 128)

It is understood that following declaration of airport services required to provide ramp handling services that Sydney Airport provided space for SPAM and IBMS to operate their ramp handling services.

4.3.2 The declaration of airside services at Sydney Airport

In 2002 Virgin Blue applied to the NCC for declaration of airside facilities at Sydney Airport, that are necessary to provide services for aircraft carrying domestic passengers to take off and land using the runways at Sydney Airport; and move between the runways and the passenger terminals at Sydney Airport. The declaration application was prompted by a change in the charging base made by Sydney Airport (from an MTOW basis to a passenger basis). On 30 November 2003 the NCC recommended that the service, described by Virgin Blue as the ‘Airside Service’, not be declared on the basis that it did not meet the criteria that access to the service would promote competition in at least one other (dependent) market and that access (or increased access) to the service would not be contrary to the public interest.

The responsible Australian Government Minister, the Parliamentary Secretary to the Treasurer, accepted the NCC’s recommendation deciding not to declare the airside services on 29 January 2004. Virgin Blue with the support of Qantas Airways Limited, applied to the Tribunal for a review of the Minister’s decision on 18 February 2004.

The Tribunal considered that the change in the charging base was discriminatory against Virgin Blue and was not based on efficient costs (para 504). It considered that Sydney Airport misused its monopoly power in the past, and that, unless the Airside Service is declared, competition in the dependent market will continue to be affected. They considered that:

...the ability of SACL to exercise monopoly power in relation to the airlines’ use of the Airside Service is not subject to any effective constraints.(para 18)

The Tribunal’s determination declared airside services at Sydney Airport on 12 December 2005 for a period of five years commencing from 9 December 2005. In January 2006 SACL lodged an appeal of the Tribunal Determination in the Federal Court.

4.4 Experience with access to airport services in Australia

The ACTO application for declaration under (Part IIIA) of the TPA, and the ACCC’s first airport access determination under the airport specific access provisions in the Airports Act, show that parties other than airlines may seek access to airports services through the legislative provisions.

The experience of a decade of legislation relating to access to essential services in general and in addition airport specific access provision has given rise to a number of observations (and Tribunal findings) relating to access to airport services.¹⁰ These are discussed briefly below.

4.4.1 The length of time and the costs associated with the pursuit of access through the general (Part IIIA) access provisions in the TPA.

Decisions regarding access to airport services have been time intensive spanning over a number of years. Declaration under Part IIIA of the TPA allows negotiations of access arrangements and failing agreement on terms and conditions of access, there is the potential for arbitration by an independent arbitrator or the ACCC. As an arbitration decision can be appealed to the Tribunal and / or the Federal Court, the total length of the access process to resolve a dispute (over terms and conditions) can be five or more years.

These processes also involve significant financial costs. Typically expensive legal support and specialist economic consultants have to be used. Significant administrative and other costs can also be incurred.

Recognising concerns over regulatory delays, the Australian Government is introducing ‘target’ time limits for all decision-making processes within the Part IIIA access regime.

4.4.2 That the financial viability of an access seeker is not a consideration at the declaration of facilities stage.

The Tribunal found that the financial inability of the access seeker (in the ACTO application for declaration, ACTO went into voluntary deregistration prior to the completion of the process) is not a relevant consideration to a decision to declare airside services.¹¹ The issue of financial viability should only be considered at the post-declaration, access stage. The Tribunal likened the declaration stage to unlocking a door. The door must be unlocked first. It is at a later stage that a decision is made as to whether a particular party can then go through the door. (para. 20)

4.4.3 Competitive tendering is not considered a good substitute for access arrangements

The Tribunal found that declaration of the services will provide a greater degree of competition than the tender process, and therefore is superior.¹² This is because “[t]ender processes replace continuing and open competition *in* the market by periodic competition *for* the market. As a general matter, economists regard competition for the market, effected to the exclusion of continuing and open competition in the market, as a second-best option, to be used mainly when the costs associated with continuing and open competition in the market are high.” (para. 114)

4.4.4 The potential difficulties associated with negotiating terms and conditions of access to airport services.

As airports services are essentially vertically separated from airlines services the access cases relating to airport services that have arisen have not related to whether there should be access but related to whether

¹⁰ Without access regulation of airport services the only protection against the use of market power, following the removal of price regulation in 2002, is the general misuse of market power, and does not directly address situations where market power results in monopoly prices as monopoly pricing is not per se proscribed offence.

¹¹ Australian Competition Tribunal, Sydney International Airport [2000] A Comp T1, March.

¹² Ibid, para. 114

or not there should be an increase in the number of parties having access (as reflected in the ACTO Tribunal decision) and disputes in relation to the terms and conditions of access (Delta Car Rentals, the Multi- User Domestic Terminal at Melbourne Airport at the Virgin Blue declaration application.)

The Tribunal has noted that:

In the absence of declaration, we are satisfied that any commercial negotiations in the future, and certainly over the next five years or so, between SACL and the airlines would be likely to be contentious, protracted and inefficient.¹³ (para. 400)

Declaration of airside services at Sydney Airport allows for arbitration of a dispute if the parties cannot reach a commercial agreement. The arbitrator is the ACCC in the event that an alternative independent arbitrator is not agreed upon by the parties. The prospect of arbitration with an uncertain outcome is an incentive for the parties to reach agreement in their negotiations.

5. Rail Access in Australia

5.1 Rail industry reforms

Historically Australia's rail networks were built on a state basis with differences between states in the operation of these networks restricting competition and making interstate operations difficult. Even track widths varied between states.

Substantial structural reform to the rail industry occurred during the 1990's through a number of inter-governmental agreements.

The reforms made a single corporation (Australian Rail Track Corporation (ARTC)) responsible for the management and operation of Australia's interstate rail network. Reforms also introduced:

- Vertical separation of rail ownership from above rail businesses of some government entities;
- Corporatisation and privatisation of some government entities;
- Co-regulation of safety across states and mutual recognition of accreditation;
- Improved uniformity of technical standards and operating practices; and
- Access regimes and ring fencing to cover various track networks.

Vertical separation and an access regime have facilitated above rail competition on the interstate rail network. However, many challenges remain including the further development of a national access regime, the role of state rail access regimes, access provisions as they relate to intermodal terminals and the role of access provisions for privately owned rail services owned by some of Australia's largest mining companies.

¹³ Australian Competition Tribunal, Virgin Blue Airlines Pty Limited [2005] A Comp T5.

5.2 *The national access regime*

The ACCC accepted an access undertaking under Part IIIA of TPA in 2002 for the South Australian and Victorian interstate rail network. This undertaking includes a dispute resolution mechanism with the ACCC as the arbitrator.

Some features of the ARTC access undertaking are:

- Relative simplicity compared with equivalent arrangements for vertically integrated rail operators;
- The ACCC has not been notified of any disputes between the ARTC and access seekers; and
- The ACCC has not had any enforcement issues related to the ARTC's compliance with the undertaking.

The ARTC is due to provide the ACCC with access undertakings with respect to the New South Wales (NSW) section of the network this year. The impending ARTC undertakings for the NSW section of the interstate track will provide increased consistency and certainty for rail operators, bringing the NSW section of the track within the ARTC regime for the interstate track.

In its assessment of an undertaking for the NSW network the ACCC is expected to apply the criteria set out in Part IIIA. In essence, the ACCC is required to seek a balance between the interests of the ARTC and access seekers. The ACCC is interested in seeing that efficient use of rail is encouraged, that efficient new entrants are provided with the incentive to enter the market, and that there are correct signals for new investment.

5.3 *State access regimes*

The competition policy reforms of the mid 1990s were intended to establish a national approach to competition issues across jurisdictions and markets. The reality however is that there has been a proliferation of different access regimes at the State and Territory level.

Apart from the interstate regime, state based regimes also exist throughout Australia for both intrastate rail access, and access to interstate tracks not controlled by the ARTC. An interstate rail operator may potentially deal with six different rail access regimes:

State	Access Provider(s)	Regulator
Queensland	Queensland Rail	Queensland Competition Authority
New South Wales	RailCorp, ARTC	Independent Pricing and Regulatory Authority
Victoria	Pacific National	Essential Services Commission Victoria
South Australia	Australian Southern Railroad	Essential Services Commission of South Australia

South Australia / Northern Territory interstate track	Asia Pacific Transport Pty Ltd	Essential Services Commission of South Australia
Western Australia - Kalgoorlie to Perth	WestNet	Western Australian Economic Regulatory Authority
Western Australia - Pilbara	Private Interests, mostly mining companies	No formal arrangement in place
Tasmania	No formal arrangements in place	No formal arrangement in place

Interstate rail access arrangements in Australia have historically been state based, but there has been a shift away from this model, as arrangements for access to the interstate network are becoming centralised into a single, national regime. The current example of this shift is the change in arrangements in New South Wales. This has coincided with calls for regulatory harmony in rail access, most recently from the Government Export Infrastructure Taskforce.¹⁴ The view of the Taskforce was that the scope for simplifying and streamlining the regulatory process as it applies to export orientated infrastructure, including rail, should be explored.

The Australian Government has announced its intentions to examine and remove where appropriate the duplication of regulation overlapping due to Federal and State legislation. In particular it has announced its intention to implement a streamlined regulatory system for export infrastructure.

5.4 Intermodal terminals

In order to offer an intermodal rail service, terminals are required at either end to load and unload the wagons that carry the freight, including containers. Efficient facilities are required for the reception of containers, organising truck queues and for loading and unloading containers on rolling stock. The location of a terminal is important as pick up and drop off costs can be a significant component of the total freight operating cost. Therefore, rail terminals may exhibit “bottleneck” characteristics.

While the ARTC access regime appears to have been a successful approach to regulating track, intermodal terminals, which are not included in the regime, may also be considered to be bottleneck facilities. Most intermodal terminals are privately owned or leased. No intermodal terminals have been subject to mandated access pursuant to Part IIIA of the TPA.

In order for a service to become ‘declared’ by the NCC, a person or company must approach the NCC with an application for declaration. In 1997 Specialized Container Transport (SCT) applied to the NCC for a declaration of services provided by an intermodal terminal in Perth.¹⁵ The NCC found that such a terminal was economic to duplicate and not of national significance and therefore services provided by the terminal did not meet the criteria for declaration under Part IIIA of the TPA.

With the exception of Victoria’s major freight terminal located near the Port of Melbourne (Dybon Terminal), State Governments have declined to make intermodal terminals the subject of access regimes. The Victorian Department of Infrastructure has adopted a new legislative framework¹⁶ for its intrastate network, but again declined to declare mandated access for any intermodal terminal except for Dybon.

¹⁴ Australian Export Infrastructure Taskforce Report, p.44

¹⁵ SCT Application to NCC, 21 November 1997

¹⁶ Victorian Department of Infrastructure, Victorian Rail Access Regime, May 2005

Therefore, with the exception of Dynon, intermodal terminals are not subject to mandated access requirements.

Any proposal for mandated access would need to meet the criteria set out in Part IIIA, meaning that a terminal would be of national significance and it would not be economic to develop another facility. However the option is also open for owners of terminals to develop their own access arrangements and submit them in the form of an access undertaking to the ACCC. Once the ACCC accepts such an undertaking, the terminal would no longer be at risk of being declared.

Notwithstanding the existence of formal access arrangements, the owner of terminals or controllers of access to terminals remain subject to the general competition provisions of the TPA.

Over the last few years the ACCC has assessed a number of mergers in the rail industry which have raised the issue of access to intermodal terminals. In the assessment of one such case court enforceable undertakings relating to access to rail terminals were proposed by the acquiring party and accepted by the ACCC. The ACCC was concerned that the ownership by the merged firm of a section of track that led to a terminal could frustrate access to that terminal by competitors.

5.5 Access to rail services in the Pilbara

There have been two cases where new mining companies have sought access to privately owned rail lines in the Pilbara region in WA.¹⁷ In both cases access has been sought through applications for declaration to the NCC for rail services used for bulk iron ore transportation. Two particularly important issues have arisen in these applications:

- Whether a declaration should consider the social costs and benefits of access; and
- The role of diseconomies of scope associated with third party access.

5.6 Application by Robe River Iron Associates

In September 1998 Robe River Iron Associates applied to the NCC to have services owned and operated by Hamersley Iron Pty Ltd, a subsidiary of Rio Tinto, declared for access under Part IIIA. Robe River, a large iron ore producer in the Pilbara Region intended to commence iron ore production at its West Angelas mine, about 100 km west of Newman in early 2001, and sought access to part of Hamersley's rail service so it could transport the iron ore to its port at Cape Lambert. In October 1998 Hamersley challenged the jurisdiction and power of the NCC to assess Robe River's declaration application in the Federal Court. The Federal Court decided in June 1999 that the use of Hamersley's rail service was an integral part of its production process and therefore that the Part IIIA access regime did not apply to its rail services. As a result the NCC discontinued its assessment.

Prior to its discontinuation the initial debate that occurred about the application was over the issue of whether declaration under Part IIIA should be applied using a social test of 'uneconomical for anyone to develop another facility' or a private test.¹⁸

¹⁷ The Pilbara iron ore producers are world leaders in the use of heavy haul railways. Australia's lucrative export market for iron ore depends upon the rail tracks crossing the Pilbara.

¹⁸ National Competition Council discussion paper on the Application for declaration from Robe River Mining Co Pty Ltd, acting on behalf of Robe River Iron Associates (RRA), in relation to a privately run and owned rail line service provided in the Pilbara March 1999.

A social test considering the interests of the whole community would take into account factors such as whether it would be better for an industry to share infrastructure because new investment would substantially raise industry costs and therefore affect the prices paid by consumers or Australia's competitiveness overseas. A private test, in contrast, would be restricted to the perspective of the person making the investment decision and there need not be a benefit to Australia overall. The NCC's view was that the social perspective is the most appropriate and that this is supported by the TPA.

5.7 *Application by Fortescue Metals Group*

In June 2004, the Fortescue Metals Group Ltd (FMG) applied to the NCC for declaration of a service for transporting iron ore through the use of part of the Mount Newman railway line (owned by BHP Billiton) and part of the Goldsworthy line in the Pilbara. Applying the facts to the principles established from the Federal Court case which decided that part of Hamersley's rail line could be considered a production process and therefore exempt from Part IIIA, the NCC excluded the Goldsworthy line from their consideration of FMG's application for declaration.

In December 2005 the NCC released a draft decision. According to the decision, the Mount Newman line was capable of being declared under Part IIIA of the TPA. The NCC was satisfied that the possible granting of FMG access to the Mt Newman railway line would promote competition in the markets of rail haulage and iron ore tenements.

The NCC noted that declaration of this service could result in shared use of the Mt Newman railway, which would reduce costs associated with interfacing the rail operations of BHP Billiton and FMG. However, the NCC noted that, should the Minister declare the service, the ACCC arbitration process available to both parties is designed to ensure the costs of providing access are passed on to FMG or any other third party seeking access.

The NCC considered that the benefits of declaration included the promotion of competition in the Pilbara rail haulage and tenements markets and the economic and environmental benefits of avoiding unnecessary duplication of rail infrastructure.

The effect of access by a third party on a vertically integrated operation has been a central issue in the assessment by the NCC in the FMG application.

BHP Billiton argued that its iron ore railways, including the Mt Newman facility, are a highly efficient, vertically integrated element of the supply chain for iron ore. Significant production efficiencies are achieved through having a single user vertically integrated structure. They argued that the costs of access – including capital, operating and interface costs – would exceed the cost of duplicating the Mt Newman facility.

The NCC draft recommendation accepts that the shared use of a facility can potentially impose interface costs and that delay or loss of otherwise efficient investment would represent a social cost. However, the NCC concluded that:

“On balance, the Council is satisfied that the interface costs would not outweigh the capital and operating cost savings from access. The Council concludes, therefore, that it would be uneconomical to develop another facility to provide the Mt Newman Service.” (para. 6.194)

The NCC's final recommendation is due in the first quarter of 2006. Either FMG or BHP Billiton could appeal the Minister's decision on whether to declare the service. The Federal Court is due to decide on BHP Billiton's bid to demonstrate that Mount Newman railway is part of an integrated production process, possibly exempting it from third-party access late in 2006. If the government endorses a

recommendation for declaration and BHP Billiton fails in the Federal Court, FMG and BHP Billiton negotiate an access agreement which is potentially subject to arbitration by the ACCC and appeal process.¹⁹

6. Regulation of access and investment in essential transport infrastructure

Regulatory and competition issues are keenly debated in the Australian political and business arenas. In particular, the effect of economic regulation including access regulation on investment and whether or not it is creating under-investment in all types of infrastructure was strenuously argued in 2005.

The debate was ignited by the presence of queues of ships waiting to have coal loaded from ports in New South Wales and Queensland (Port Waratah and Dalrymple Bay).

In response to the perceived crisis in infrastructure capacity, the Prime Minister of Australia set up an Export Infrastructure Taskforce which reported to the Government in mid 2005.²⁰ The Taskforce found the principal reason for the queues was actually an unexpected spike in demand for Australian coal, although this was exacerbated at Dalrymple Bay by a disagreement between port operator and the coal producers.

In both these cases the unanticipated spike in demand was accommodated through proposals for transitional measures to reduce the excessive queues and save coal producers millions of dollars in deadweight demurrage costs until coal chain expansion projects could enable the ports to cope with greater volumes of coal. The ACCC assessed the demand management proposals under the authorisation provisions of the TPA which allow exemption from the competition provisions if agreements provide net public benefit.²¹

At Port Waratah the interim solution was to provide coal producers with the option to accept a pro-rata reduction in coal export contracts or participate in a demand auction, in the event that demand for coal shipping services from the Hunter Valley coal chain exceeds available capacity by 3 million tonnes.

To help safeguard against under-investment, the ACCC only granted authorisation until the end of 2007, and Port Waratah is required to report annually on the progress of the capacity expansion program. Soon after receiving authorisation, Port Waratah announced a \$170 million expansion to increase capacity at the port from 89 million tonnes per annum to 102 million tonnes by the end of 2007.

The resolution of the bottleneck facilities problems demonstrated the advantages of the ACCC's roles in authorising anti-competitive arrangements, where the detriment is outweighed by the net public benefit. The authorisation process enabled the businesses to implement procedures which quickly dealt with the short term capacity constraints and at the same time enabled industry to plan for the future.

In these cases the ACCC was conscious of the need to move quickly to meet fast changing circumstances, such as bottleneck at a port caused by a sudden unexpected spike in demand for coal.

¹⁹ The Australian Financial Review, Monday 16 January 2006, p3

²⁰ "Australia's Export Infrastructure" report to the Prime Minister by Australia's Export Infrastructure Taskforce in 2005.

²¹ The Australian competition law, in particular the authorisation process, provides an effective mechanism for resolving problems, as it recognises that there will be circumstances where conduct that may be anti-competitive should, nevertheless, be approved, because it provides an overall public benefit. The authorisation process allows businesses to obtain protection from legal action under the TPA, but only where they can demonstrate that their proposal results in sufficient public benefits to outweigh any anti-competitive detriments.

While there is debate over the effect that regulation has on investment, there is no clear evidence that economic regulation, as practised in Australia, has had the claimed negative impact.

Another area of debate is whether the framework in Australia allows processes to become too litigious, and hinders the opportunities to achieve effective outcomes within sensible timeframes. Changes are proposed to Part IIIA of the TPA which are designed to reduce timeframes at all levels and to give more guidance for regulatory decisions through pricing principles for arbitrations and undertakings. The changes are part of a package of reforms being made to Part IIIA by the Government in response to a review by the Productivity Commission. The proposed changes are currently before the Australian Parliament.

To ensure that Australia provides a supportive policy framework for productive investment in, and efficient use of, infrastructure the Commonwealth, State and Territory governments are undertaking a comprehensive review of National Competition Policy, with infrastructure reform, including transport, being a major area of focus.

7. Concluding observations

There are economic characteristics of transport infrastructure, in particular transport terminals and rail tracks, which give rise to natural monopoly characteristics, or significant market power, associated with these facilities.

Effective access regimes require that existing transport infrastructure owners share their facilities on a commercial basis where there are concerns that there would otherwise be monopolistic behaviour. These regimes should seek to strike a balance between the interests of the community, existing facility owners and access seekers. Through access arrangements to existing facilities industry efficiency and competitiveness can be improved and the sub-optimal development of transport infrastructure through duplication avoided.

Australia's access arrangements to essential transport infrastructure are expected to be improved through legislative provisions which reduce timeframes and provide pricing principles and, in the case of rail, rationalisation of the number of applicable regimes through the move to a more national approach.

To-date there has been commercial negotiation of airport services following declaration without the need for arbitration. The ARTC access undertaking for interstate rail services has established a framework for negotiation of access and no requests have been made for arbitration of terms and conditions.

GERMANY

1. Introduction

A number of markets can only be entered if newcomers are allowed to use the infrastructure on which activities in these markets are based. In these markets new suppliers in the downstream market wishing to enter into competition with the network owner have to use the existing networks if they do not wish to go to the lengths of setting up their own networks (often impossible in practice). In the German law access of existing and potential competitors to infrastructure facilities is determined by the essential facility doctrine. The general essential facility doctrine is laid down in the German Act against Restraints of Competition (ARC) and is complemented by sector-specific regulations. The provisions concerning the transport sector can be found in the General Railways Act (Allgemeines Eisenbahngesetz, AEG) and in the Act on Air Traffic (Luftverkehrsgesetz, LuftVG).

2. The essential facility doctrine in the German law

The essential facility doctrine was introduced into German law in 1999 as part of the general abuse control provisions. It is largely modelled after the essential facility doctrine developed in the US-American and European laws. Its wording is as follows:

“An abuse exists in particular if a dominant undertaking as a supplier or purchaser of certain kinds of goods or commercial services refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate remuneration, provided that without such concurrent use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market; this shall not apply if the dominant undertaking demonstrates that for operational or other reasons such concurrent use is impossible or cannot reasonably be expected.”

In the practical application of the law the essential facility doctrine creates competition through state intervention into market structures. In principle, this is incompatible with an understanding of competition as an open-ended process. The introduction of an essential facility doctrine to promote competition is therefore only justifiable where rigid market structures are complemented by a vertically integrated company structure. Typically these are situations where it is indispensable for the creation of competition that a competitor is granted access to resources owned by the dominant company. Rigid market structures are sometimes explained on the basis of the economic theory of natural monopoly. The theory of natural monopoly claims that due to their cost structure some markets are not open to competition. As a consequence a so-called natural monopoly emerges. Classic examples for such markets are the markets for gas and electricity, telecommunication services and railway transport.

One of the main motives behind introducing the facility doctrine into the ARC in 1999 was to prevent a fragmentation of the law on competition restraints into various sector-specific access regulations for the markets for gas and electricity, telecommunication services and railway transport. Meanwhile access to these markets is monitored in key areas by the Federal Network Agency (Bundesnetzagentur). After the amendment to the Energy Industry Act state control of gas and electricity network operators was transferred to the Federal Network Agency, which was established in 1998 under the name of Regulatory Authority for Telecommunications and Posts and was renamed in July 2005. In addition, as of 1 January 2006 the monitoring of the railway infrastructure market has also been consigned to the Federal Network Agency. Thus, responsibilities previously assumed by the Federal Railway Office have now also been

transferred to the Federal Network Agency. To sum up, the monitoring of access to the markets indicated above is in key areas assigned to **one** authority; nevertheless there are also sector-specific regulations for the individual sectors.

In particular with regard to the railway sector, however, the responsibilities and powers assigned to the Bundeskartellamt by the ARC remain unaffected by these developments. As part of the cooperation between the Bundeskartellamt and the Federal Network Agency the two authorities inform each other of facts that could be relevant for their respective tasks. In particular, the two authorities have to inform each other on any intended prohibition decision concerning abusive or discriminatory conduct. Before proceedings are terminated both authorities must give the other an opportunity to comment.

3. Sector-specific regulations in the transport sector

3.1 *The rail sector*

There is only one significant infrastructure provider in the German rail sector: Deutsche Bahn Netz AG. Deutsche Bahn Netz AG is a wholly owned subsidiary of Deutsche Bahn AG, the holding company of the Deutsche Bahn group. With the 1994 rail reform Deutsche Bahn AG was organised as an affiliated group under civil law. However, the state still owns all shares of Deutsche Bahn AG. The Deutsche Bahn group is the largest network provider in Germany and the leading provider of all railway services. In accordance with the objectives of the rail reform, railway companies must be granted non-discriminatory access to railway networks and, consequently, to Deutsche Bahn's infrastructure facilities. This principle of non-discriminatory access is laid down in the General Railways Act (Allgemeines Eisenbahngesetz, AEG) and corresponds in its nature to the essential facility doctrine. The last amendment to the legal framework for the railway sector has provided a clearer definition of this principle.

The amendment was carried out last year as part of the implementation in national law of the European infrastructure package, which consisted of several directives. The objective was to further advance the opening up of the rail sector to competition and, in order to do so, enforce the principle of non-discriminatory access to infrastructure facilities more effectively. For this purpose, the definition of railway infrastructure and thus the right to non-discriminatory access thereto was extended to facilities at the "last mile" stage of rail transport services, such as loading and unloading facilities. Furthermore, a new provision was introduced which commits railway companies to provide non-discriminatory information services, including information on train connections offered by other providers, in their timetable information systems.

The responsibility for monitoring compliance with these sector-specific regulations lies with the Federal Network Agency. It monitors compliance with the provisions on access to railway infrastructure facilities, in particular with regard to the preparation of a working timetable defining all planned train and rolling-stock movements, the decision on train-path allocation, access to service facilities and, finally, conditions for infrastructure utilisation, charging principles and amount of charges.

3.2 *The air traffic sector*

In the air traffic sector access is mainly controlled via airport coordination. Airport coordination refers to the allocation of take-off and landing slots at airports and is a result of the liberalisation of the European air traffic market. This liberalisation has considerably intensified competition between airlines for the increasingly scarce capacities at airports. While new competitors are not content to fly at whatever time is available, the established airlines are not willing to accept a reduction of their capacities for the benefit of other airspace users. It is the purpose of airport coordination to address this congestion problem at airports

and its anti-competitive effects by introducing a reliable and non-discriminatory procedure for capacity allocation.

A distinction is made between coordinated airports and fully coordinated airports. The classification of airports into these two categories is based on a capacity analysis. In Germany there are currently 10 coordinated airports (Bremen, Dresden, Erfurt, Hamburg, Hanover, Cologne/Bonn, Leipzig/Halle, Münster/Osnabrück, Nürnberg, Saarbrücken) and 5 fully coordinated airports (Berlin, Düsseldorf, Frankfurt/Main, Munich and Stuttgart). At coordinated airports it is sufficient if the owner of an aircraft notifies all intended take-offs and landings to the airport coordinator. At a fully coordinated airport an air carrier needs to apply for an allocation of take-off and landing slots. The airport coordinator deals with the applications for slots in order of receipt. Where an airport cannot provide sufficient take-off and landing slots the allocation is based on specific priority rules.

Apart from the allocation of slots, airlines are strongly dependent on groundhandling services in order to be able to carry out their air transport activities. These are services which are directly and inseparably connected with air transport. They include ground administration and supervision, passenger handling, baggage handling, freight and mail handling, ramp handling, cleaning, aircraft services, refuelling, surface transport and catering. Therefore, and in implementation of another EU directive, it was laid down in the Act on Air Traffic that airport providers are obliged to enable air carriers and other providers to supply groundhandling services. Exemptions from or restrictions of this rule are possible according to EU guidelines in the area of ramp handling and where there are under-capacities in terms of space and resources.

4. Competition law enforcement of the essential facility doctrine in the transport sector

Since the introduction of the essential facility doctrine the Bundeskartellamt has conducted several proceedings in which the granting of access was claimed on the basis of this provision. These proceedings involved in particular issues relating to network access in the energy sector. However, one of the proceedings in the electricity sector also concerned the transport sector as it involved complaints against DB Energie AG. Like DB Netz AG, DB Energie AG is a subsidiary of Deutsche Bahn AG. Within the Deutsche Bahn group its task is to provide Deutsche Bahn and other railway companies with all types of energy, in particular traction current. Some railway companies which were active in the market as Deutsche Bahn's competitors wanted to purchase the electricity for operating their railway vehicles from other suppliers than DB Energie AG. They demanded that these suppliers be granted access to Deutsche Bahn's electricity network or that adequate fees should be charged for the use of Deutsche Bahn's network. The proceedings were not formally concluded. In its investigations the Bundeskartellamt had to take into account that granting access to other suppliers is difficult due to the fact that the frequency of Deutsche Bahn's electricity network differs considerably from the frequencies of other electricity networks. Furthermore it became apparent that it would have been very hard to prove abusive pricing by Deutsche Bahn in these cases on the basis of the legal situation existing at that time and the Düsseldorf Higher Regional Court's case-law. After the amendment of the railway laws, however, traction current is no longer a part of the railway infrastructure, but is covered by the new Energy Industry Act.

One of the first prohibition decisions in the transport sector which was also based on the essential facility doctrine concerned the proceedings regarding port operations in the Baltic Sea ferry port of Puttgarden. The ferry connection between Puttgarden on the German island of Fehmarn and Rödby on the Danish island of Lolland was operated by Scandlines GmbH. Scandlines GmbH also owned the ferry port in Puttgarden. The company is a joint venture of Deutsche Bahn AG and the Kingdom of Denmark. Two competitors, both of which intended to establish an independent ferry service between Puttgarden and Rödby, were denied the joint use of Scandlines' landside and portside infrastructure at the ferry port of Puttgarden. At the end of 1999 the Bundeskartellamt prohibited Scandlines from refusing to grant at least

one of the competing ferry service providers joint use of its port facilities against payment of an adequate fee. In particular, Scandlines GmbH had not plausibly explained that a joint use of the port would be impossible or unreasonable for nautical or other reasons. According to the Bundeskartellamt the fact that the existing port facilities would have to be converted to some extent to allow joint use, and that organisational measures in the area of nautical safety would be necessary before a further operator would be able to start operating ferry services was not sufficient reason to deny a claim for joint use in the first place. The Düsseldorf Higher Regional Court revoked the Bundeskartellamt's prohibition decision on the grounds that it lacked precision. The Federal Supreme Court, however, considered the Bundeskartellamt's decision to be sufficiently precise and referred the case back to the Higher Regional Court for a rehearing. Meanwhile, however, the proceedings had become moot as one of the interested companies had filed a petition for bankruptcy and the other competitor, a consortium, had given up the project because the participating companies were no longer prepared to cooperate due to differences of opinion. Recently, however, the case has re-emerged because another ferry operator has claimed access to the Puttgarden port facilities as a competitor. This company filed a complaint with the European Commission which referred the case to the Bundeskartellamt. Deutsche Bahn AG has meanwhile initiated action to sell its share in Scandlines. Therefore it remains to be seen whether the new owner will also deny access to its facilities.

In another case the Bundeskartellamt examined, on the basis of complaints by two stevedore companies, whether the refusal of Bremer Lagerhausgesellschaft Automobile Logistics (BLG Automobile) to grant the stevedore companies access to the premises of the car terminal at Bremerhaven, where they intended to provide transshipment services for the import and export of motor vehicles, violated the essential facility doctrine. As a result of a hearing at the Bundeskartellamt BLG Automobile agreed to set up a hand-over point on the premises of the car terminal (close to the ships to be loaded) where the vehicles could be handed over to the stevedore companies. In the Bundeskartellamt's view this was sufficient to generally enable the stevedore companies to submit competitive offers for the provision of transshipment services. As the unfair hindrance was thus eliminated, the initiated abuse proceedings could be discontinued.

Other cases affected the railway sector in particular. These proceedings were based on the general provision regarding the essential facility doctrine and the sector-specific regulations for the railway sector. They were conducted by both the Bundeskartellamt and the Federal Railway Authority.

In February 2003 the Bundeskartellamt initiated investigations against Deutsche Bahn AG on account of the company's refusal to include information on timetables and fares of two long-distance routes operated by the Connex group in DB information and timetable systems. The Connex group is integrated into the Vivendi group of companies and has so far been the only competitor of Deutsche Bahn AG in long-distance passenger rail transport. It offers a regular train connection on the routes Gera-Leipzig-Berlin-Rostock and Zittau-Görlitz-Berlin-Stralsund. In parallel to the proceedings before the Bundeskartellamt, the Connex group took legal action before the civil courts and obtained a preliminary injunction obliging Deutsche Bahn to include the timetable data of Connex connections in their timetable information systems. The proceedings are pending because Deutsche Bahn AG has submitted an appeal against this decision. However, it has to be noted that, as already mentioned, with the amendment of the regulatory framework a provision was introduced which obliges railway transport companies to provide non-discriminatory information on all providers' train connections in their timetable information systems. Consequently the proceedings have become moot. One could thus say that the proceedings ended in a rather unusual way as the decisions to be made by the Bundeskartellamt and the civil courts became redundant due to the changes to the law.

A similar development took place with regard to complaints relating to the problem of non-discriminatory access to the "last mile" in the rail freight transport sector, i.e. in particular access to loading, unloading and shunting facilities. In these cases no formal abuse proceedings or prohibition

proceedings had to be initiated due to the fact that in the course of the Bundeskartellamt's investigation of the facts of the individual cases an amicable agreement could be reached with the parties involved. However, such proceedings will no longer be necessary in the future anyway as with the amendment the legislator has now explicitly clarified that the term "railway infrastructure", and thus the claim to non-discriminatory access, also covers the facilities of the so-called "last mile".

In the past the Federal Railway Authority also repeatedly exercised its powers with regard to granting non-discriminatory access to the railway network. Such interventions concerned on the one hand train-path allocation conflicts between DB subsidiaries and competing providers of rail transport services. However, the proceedings also concerned individual technical details of network access, such as the extent to which DB Netz AG had to provide specific services (e.g. manning periods of signal boxes) or the extent to which technical requirements had to be fulfilled by railway companies seeking access.

In summary, it can be concluded that since the mid-1990s the essential facility doctrine has gained importance in German legal practice as a consequence of the extensive liberalisation measures in the markets for telecommunication services, in the gas and electricity markets and in the railway sector. In this context it has to be considered that the liberalisation and the resulting changes in the infrastructure of these markets were based on the rationality behind the essential facility doctrine, i.e. to give potential competitors at the downstream market level access to the infrastructure of the upstream market level, thus creating competition for the first time.

HUNGARY

1. Current view of the essential facility doctrine within the GVH

According to the 1984 Competition Act refusal to supply only qualified as an abuse of dominance if the unjustified refusal was repeatedly practiced against the same business partner. In the 1990 and subsequent legislation the refusal did not have to be repeated for the establishment of illegality. This approach in line with the European legislation put more emphasise on the maintenance of the structure of competition.

During the early 90's a number of cases were initiated concerning refusal to supply. These procedures mainly affected two sectors, funeral services and waste management. The complaints in the majority of the approximately 30 triggered cases were submitted by undertakings active on the supply side of these services. Their complaints originated in the alleged abuse of the different municipal firms managing cemeteries or waste yards. The existence of dominance was established in all of the cases. Abuses were established in the case of direct refusal to provide access to the facility. On the other hand when access was restricted by the pricing policy of the incumbent illegality was not established. Summing up the lessons of the case law of the early 90's it could be said that the responsibility of a firm enjoying a dominant position built on an essential facility was to be established if:

- The company possessing an essential facility that reasonably can not be acquired or reproduced from other sources,
- Directly hinders its competitor in the use of that facility, provided that
- The parallel use of that facility is possible.

Beside ensuring access the GVH concentrated on the conditions for such an access as well. It was clear that equality of arms between the integrated firm and its competitor can only be ensured if the incumbent provides access for itself and its competitor under the same conditions. The determination of the appropriate access price is made uncertain by the need for the establishment of a competitive price level and the level of the deviation from it. Even if the establishment of the competitive price level is possible, the scale of lawful prices is still wide, this envisages the need for a price regulation. According to the GVH the optimal solution would have been the splitting up of the vertically integrated undertaking or if the access price would have been established by the municipality itself.

Though a number of cases involved the issue of access to cemeteries and wasteyards as essential facilities the GVH paid no real attention to the elaboration of the concept of essential facilities. Abusive behaviours were analysed within the general framework of refusal to supply. In the analyses more emphasis was put on the establishment of the than existing 30% market share threshold for dominance than on the essential nature of the facility. It can be stated that the fact that the possessed asset qualified as an essential facility caused no alteration in the analysis.

Due to new legal provisions providing remedy for the problems and other changes in the legislative background in the mid 90's putting an end to certain legal monopolies cases of different nature were dealt with by the GVH, mainly from the liberalised telecommunications sector. Concerning access to the local loop it was repeatedly established that those infrastructures can not be considered as economically duplicable, while access to those assets is indispensable to provide a number of services. Nevertheless the

essential nature of certain facilities and the impossibility of their duplication only served as a basis for the establishment of dominance neglecting a detailed elaboration of a doctrine on essential facilities.

Though the sectors affected by the issue changed during the last fifteen years no appreciable change happened in the approach of the GVH. The doctrine of essential facilities was not elaborated by the Hungarian jurisdiction and it is only considered as a stricter form of dominance, as in the case of the possessed asset duplication is not simply difficult but impossible. Abuses relating to such an asset are therefore covered by the more general approach, namely refusal to supply within which the issue of essential facilities was not distinguished in the jurisdiction.

2. Controversial issues and difficulties regarding access to essential transport infrastructure in Hungary

The difficulties and controversial issues which are discussed below has hardly links to substantive debates about the advantages and disadvantages of the existence of access obligations or various access regimes. Instead, they are mostly linked to potential procedural shortcomings and inconsistencies, as well as the institutional background of the regulation.

2.1 Energy

Encouraged by the Chairman's letter inviting submissions, this submission deals also with the access to electricity transmission network and cross-border lines since they can be regarded as part of transport facilities in a wider sense. While natural gas storage capacities are not means of natural gas transport in the classical sense, they are complementary elements of the pipelines, and – to some extent – substitute for the pipeline network or for some fractions of the network. As a consequence, natural gas storage facilities constitute a strategic asset, access to which can be equally critical for new entrants as access to the transport infrastructure. Therefore they are also included in this submission.

2.1.1 Access to natural gas storage capacities

In Hungary the liberalisation process of the natural gas sector started in 2004. There have been several difficulties in the market opening. One great problem which affects essential facility problem was that the former monopolist MOL Rt. was the owner of the high pressure pipeline company (MOL Földgázszállító Rt.) and (until January, 2006.) it was the owner of gas storage company (MOL Földgáztároló Rt.), and also the owner of the natural gas wholesaler incumbent MOL Földgázellátó Rt. (Hungary adopted the single buyer model).

Under the Hungarian natural gas regulation scheme there is regulated TPA to the high pressure and low pressure pipelines, but there is negotiated TPA as regards storage. This inconsistency might allow the incumbent to slow down the potential entrant. This regulation solution is not the only or most important factor of the slow evolution of competition, but an interesting part of the whole picture.

Nowadays the ownership structure of natural gas sector is changing; E.on-Ruhrgas International AG acquired the gas wholesaler incumbent (MOL Földgázellátó Rt) and the gas storage company (MOL Földgáztároló Rt) from MOL Rt. The merger had a community dimension and the Commission of the European Union already adopted its decision about it. In the decision the Commission did not prohibit the merger, but it set up remedies. The potential negative effects of the above mentioned regulation inconsistency was solved by one of the remedies as a side effect; the buyer E.on undertakes to provide the same conditions to its competitors in the gas storage service than to its own wholesaler. This remedy should guarantee that access to storage will not be discriminatory.

2.1.2 *Cross-border electricity lines*

The GVH has drawn up the structure of electricity sector and process of liberalisation in a submission in 2004 (DAFFE/COMP/WP2/WD(2004)50). The transmission grid owner, the TSO monopoly is the state owned MVM Rt. (Magyar Villamos Művek Rt.). Before the liberalisation process begun in 2001, it had strong positions in the wholesale market, in the electricity generation market, in the transmission, import-export of electricity. As a grid owner it has increased responsibility to develop the electricity system. Hungary is a small, open market in respect to the electricity sector. The rate of electricity import is quite high (app. 20%). Hungary has connection points to the neighbouring countries. As a tendency, it can be noticed, that import electricity is much more competitive than the product of domestic power plants, and the domestic generation capacities are bounded by long term power purchasing agreements to MVM. There is a growing demand in developing the high voltage electricity lines, mostly the cross-border lines.

System development decisions have several factors; some are professional (system security, ensuring supply of growing electricity demand from import sources, etc.) but some are business in nature, e.g. MVM as system owner has interests in electricity wholesale market (MVM is a public utility wholesaler and MVM is owner of a free market trading company, MVM Partner, which has quite strong position on the electricity free market). MVM is obliged by law to develop the grid, and in theory this development have to serve for the electricity system as a whole. Nevertheless, in practice MVM has a room to manoeuvre, to decide which areas of the grid will be developed. The network which will be built by MVM will be part of the system, and to use this, everybody has to pay system usage fee.

In the present stage of liberalisation, some market participants have economic interest to build their own cross-border network and import electricity on this line. The controversy is that regulation can not handle perfectly this intention. It is not clear how to handle this privately owned cross-border lines and this problematic case is in close relation with the problem of access to cross-border transmission capacities, discussed below.

2.1.3 *The position of the electricity system operator*

MAVIR Rt. (Magyar Villamosenergia Rendszerirányító Rt.) is the transmission system operator in Hungary. This firm has the obligation to balance the system, to secure the continuous electricity flow. In 2001. when the liberalisation started, Hungary has chosen the Independent System Operator model. This means that MAVIR Rt. was independent from all market players, it was owned by the state. This independence enabled to bring professional and not by particular interests influenced decisions to the whole electricity sector. The unique solution was that MAVIR was the system operator, but the assets (high voltage networks, secondary reserves, etc.) remained owned by MVM. The decisions brought by MAVIR affected the MVM assets. Several times MAVIR brought decisions which did not favour MVM.

The concept of an independent system operator that does not own assets did not prove to be successful. This is why the government decided in 2005 to change the ISO model. Though the GVH suggested that MAVIR should remain independent but that it should own the assets the proposal failed. Based on the decision of the government MAVIR became affiliated to MVM. The ministry of economy argued, that this solution is more optimal than ISO model, the unbundling rules secure the independent decisions of MAVIR and the TSO model is compatible with the 54/2003 EC Directive. The GVH upholds its opinion that from a competition viewpoint this solution is not perfectly satisfactory.

2.1.4 *Auction of cross-border transmission capacities*

This subject is not a purely domestic issue, therefore cannot be solved solely on the basis of the Hungarian regulation. Domestic power plants do not have sufficient free capacities, so electricity import is

an important source for competition in Hungary. Free market players base their supply portfolio mainly on import and as large market players are international energy firms they can import electricity to the Hungarian market from their own power plants in the neighbouring countries.

The problem rises from the fact that national regulations set up certain limits to free trading of electricity between states. All states have the responsibility to ensure security of supply in its own country. This requirement means that governments (the Hungarian government also) uphold certain degree of cross-border capacity to unexpected domestic electricity shortage. In addition, there are regulatory differences between the states. Some countries allocate free capacity throughout an auction mechanism, but there are countries, which do not have such competition-based mechanism. The Hungarian regulation regime is different from the Slovakian one as regards the allocation mechanism, but these countries have the right to decide about the 50-50% of the capacity of the connection point. Moreover there are countries (for example Ukraine), which do not have a transparent allocation mechanism.

One effect of the differences among the regimes is that a market participant, which has a power plant in a country not too far from Hungary (e.g. in Poland) has to reach coordinated free capacity both on the Poland/Slovakian border, and on the Slovakian/Hungarian border. In the different allocation and regulation regimes this can be hard to execute. In addition, while Hungary has a transparent – although developing – auction mechanism for cross-border capacities, access to these capacities, as a whole, is still not transparent and competition based.

2.2 *Railway*

The controversies described below bear a relation to two different categories of railway infrastructure: on the one hand, deficiencies of the regulatory-prescribed institutional regime of the sector gave reason for concern in case of access to the national public railway network, while on the other hand, unsettled legal and property relations caused difficulties in case of access to certain non-public infrastructure elements.

2.2.1 *A brief overview of the Hungarian Railway Sector*

In the past fifteen years, the direction of regulatory measures taken in the Hungarian railway sector were determined by the developing EU railway directives, due to the obligation of law harmonisation required in the accession process and later as a Member State. During this period, the Hungarian government applied a ‘minimalist’ approach towards the implementation of the EU railway directives, which meant at most the formal obligatory-to-do adoption of the EU regulatory model, and sometimes even an apparently incomplete implementation of the Community legislation.

The Railway Act of 1993 and its amendments (1993 Railway Act)¹ gradually implemented the rules for reorganisation of the historical incumbents and the opening of the railway (transport and traction services) markets. On 1st May 2004 the legal framework of liberalisation entered into force, thus rendering the entrance of new train-operating companies (hereinafter referred to as TOCs) possible. This regulatory framework soon proved to be an insufficient, inconsistent basis for liberalisation.

These regulatory shortcomings – as the examples described below might demonstrate – could significantly adjust to the poor achievements characterising the first period of the open market, and resulting that the market structure remained premature and is still dominated by the duopoly structure. By the beginning of 2005, it became clear that regulatory framework had to be taken on new grounds. The new 2005 Railway Act² was finally adopted by Parliament in December and entered into force on 1st

¹ Act XCV of 1993 on Railways

² Act CLXXXIII of 2005 on Railway transport

January 2006, while the relating government and ministerial decrees – necessary for the proper law enforcement – are still under elaboration. For clarity, it has to be noticed that the access controversies illustrated below related to the regulatory regime existing under the former 1993 Railway Act, as the GVH has no experience concerning the new legislation yet.

By the end of 2004, four new TOCs (train operating companies)³ had obtained operating licences beside the two historical incumbents: the Hungarian State Railways Company (hereinafter referred to as „MÁV”) and the Győr-Sopron-Ebenfurt Railway (Ltd.) (“GySEV”)⁴, providing rail freight transport and traction services. The new entrants are privately-owned companies operating with relatively low capital and mostly rented trains and rolling stock, established by freight-forwarders or companies formerly dealing with transport-related rail activities (engineering, track construction).

While the duopoly of the two state-owned incumbents cover about 90% and 10%, respectively of the rail freight transport market, and in the first year of liberalisation the CER Co. belonging directly to MÁV has captured about 1 % of the market, the independent companies’ market share amounts to less than 0,1%.⁵

In 2003 – in the harmonisation process mentioned above the different core activities of the incumbents were organized into separate business units. These are: (1) Infrastructure management; (2) Passenger transport; (3) Freight transport; (4) Engineering (traction); (5) Real estate management. The functional separation was to enable accounting separation of the different activities, but in its current form it proved to be insufficient to meet the requirements of the transparent and fair operation of the integrated railway companies on the liberalized market.

2.2.2 *Access to the national public railway network*

The 1993 Railway Act categorises the Hungarian railway infrastructure (i.e. the railway network and its accessories) by the owner: most of the railway lines are owned exclusively by the state (national network) or municipalities (local networks) and can be used publicly, and on the other hand there are privately-owned and used railway tracks. The national public railway network is operated by the

³ Three of the TOCs are independent companies:

- MMV - Hungarian Private Railways Limited
- Floyd Ltd.
- MÁV Hajdú Construction Ltd. – The company was established in 1992, its main activity is rail track line construction. The MÁV Hajdú Construction Ltd. used to be the subsidiary of MÁV till 2001 June, later it became an independent TOC by obtaining its operating licence in July 2004.

and one tied to MÁV

- "Central-European Railway" Transport, Trading and Service Co. (“CER Co.”). CER Co. was established in October 2004 to offer rail transportation services. According to articles of association the MÁV-REC Co. (subsidiary of MÁV) bears 51 % of the companies share, which means that MÁV has direct control over CER Co.

⁴ GySEV has a special status; it operates a fraction of the Hungarian and the Austrian rail track between Győr (in Hungary) and Ebenfurt (in Austria) under concession and provides passenger and freight transport services.

⁵ Antal, Dániel (2005): The first year of the Hungarian rail freight transport market - A Magyar vasúti áruszállítási piac első éve (Vasútpolitikai konzultációs anyag a magyarországi áruszállítási piac első évének tapasztalatairól) Available only in Hungarian.

infrastructure management divisions of the incumbents, and is used for all kinds of freight and passenger transport services.

The Act and the relating ministerial decrees specified the access regime of the national public railway network. Under this regime, train paths concerning railway lines belonging to the national public network are allocated by the Vasúti Pályakapacitás-elosztó Kft. (hereinafter referred to as VPE). VPE is the capacity allocation and charging body required by EU law. This institution is state-owned and independent of any railway companies. Concerning its legal form, VPE is a commercial entity, but the capacity allocation process made by VPE constitutes an administrative procedure under the 1993 Railway Act. Briefly, VPE is responsible for developing and publishing the capacity allocation and charging framework in the Network Statement, and deciding on concrete capacity allocation requests filed in according to the Network Statement. The Network Statement includes detailed data on line capacity, conditions of entering lines, restrictions of track usage as well as rules of procedure and charging scheme.

For reasons inherent in the system itself, VPE needs active contribution of the infrastructure management division of the vertically-integrated incumbent in question when trying to complete its tasks. This simply derives from the fact that it is the infrastructure manager who is in possession of information (e.g. on technology and traffic) and systems to produce the information as well. Therefore, when drawing the Network Statement or deciding on a capacity request, VPE cannot avoid consultation with the relevant infrastructure manager. In practice, lack of administrative and technical capacities resulted that in majority of cases VPE had no other choice but to rely almost completely on data provided by the incumbent, as it had not been in a position to at least check the information submitted by the incumbent, thus to provide (regulatory) oversight over the allocation process and its outcome.

Moreover, in spite of the fact that the decision of VPE and the allocated train path defined therein constitutes a right to access, it does not in itself allow for track use. The TOC is obliged to conclude an access contract with the infrastructure manager, defining the concrete terms of track use on the basis of the Network Statement and the VPE decision. The position of the parties is certainly not equal when concluding the access contract and negotiating on its terms, and neither VPE, nor any (other) railway authority had supervisory competences in this second part of the capacity allocation process.

Above all, the so-called Pályahasználati Testület (hereinafter referred to as PT), which was dedicated to fulfil the functions of the regulatory body of the sector under the 1993 Railway Act, had never been set up actually. It should have been a body operating besides the Supreme Transport Authority and deciding on appeals against the measures of VPE, while it lacked any other regulatory competences. In many controversial cases the absence of PT resulted that VPE had to play a mediatory role between the relevant parties without legal mandate.

Though “de iure” even two institutions were established to guarantee the fair and non-discriminatory treatment of new entrants when applying for access to the national public railway network, the circumstances described above all adjusted to the unchanged decisive role of the incumbents in the capacity allocation process.

2.2.3 *Access to certain non-public infrastructure elements*

Access is crucial for new entry also to infrastructure elements such as certain tracks (used for e.g. loading, unloading or re-loading wagons, for repairing trains), certain station facilities. Most of these infrastructure elements as well as tracks connecting the premises of industrial customers with the public railway networks are non public and do not belong to the national or local public network (these elements hereinafter referred to as industrial railway lines or feeder lines).

In Hungary, new entrants faced difficulties in accessing industrial lines managed or owned by the incumbent MÁV. Carriage of bulk goods constitutes – in respect of stability, competitiveness and profitability of railway sector – the most important segment of the Hungarian rail freight transport market, where house-to-house transport service is the only plausible option. For this reason, it is essential to have access to the feeder line serving logistic purposes for the customer. It is estimated that 70-75 % of the freight transport turnover in Hungary is realised with the use of these privately-owned industrial railway tracks, and MÁV – exclusively or partially – owns or manages majority of industrial lines of bulk goods shippers like power plants, mines, sugar works, cement works, mills etc. In this respect, the feeder lines are playing a role in the case of this kind of customers that is similar to the function of ‘last mile’ or ‘local loop’ in telecommunications, i.e. these are the end points to network at the customer.

The access controversies concerning MÁV-owned industrial lines resulted from the unsettled legal and property relations of these lines.

According to the 1993 Railway Act the national public railway networks and the local public railway networks are exclusively owned by the state and municipalities respectively, while non-public railway infrastructure can be owned by any natural or legal entity. The unsettled property status of feeder lines has historical roots. Most of these industrial lines were built decades ago either by the state-owned incumbent railway company or by the similarly state-owned industrial customer, the so-called industrial track user. In the 1950's MÁV was statutory obliged to take over maintenance and operation of industrial lines, and in many cases the licences of the industrial tracks were also transferred to MÁV. After a while, this resulted quasi-proprietary rights to MÁV.

As a result, some of the Hungarian industrial railway tracks are owned by the industrial customers, some of them by the incumbent railways, and sometimes the property relations are mixed: some of the assets of the track belong to the incumbent railway company and some of its other assets to the industrial rail track user, but all of them may qualify as non-public infrastructure elements. As we mentioned above, the exclusively or at least partially MÁV-owned industrial lines constitute the majority both in number and importance.⁶ What is more, the management and operation of MÁV-owned industrial lines – contrary to the national public network – belonged not to the infrastructure management, but the cargo division of MÁV. Both the MÁV and the regulator treated the management of industrial lines a cargo-related activity when the ministerial decree on the unbundled accounting of railways activities had prescribed the management of this infrastructure as task of the cargo division. Consequently, other TOCs (the new entrants) had to turn to MÁV cargo division, their direct competitor, for accessing industrial lines.

The freight service provision and the handling of goods – guided by contracts – on the industrial track exist independent of property relations, and these contractual relations between the service-provider railway companies and the industrial track users make the accessing possibilities even more complicated.

In close connection with the unsettled property relations, the unclear legal status of these infrastructure elements could also adjust to different interpretation of laws. On the one hand, a provision of the 1993 Railway Act can be interpreted as an obligation of the incumbent to grant access to any infrastructure elements irrespectively whether they belong to the public or non-public infrastructure. On the other hand however, the relevant EU legislation⁷ as well as the 1993 Railway Act provides for the special treatment of certain privately owned infrastructure elements, moreover the incoherent terminology

⁶ In case the industrial rail track belongs – at least partially – to the railway company, first of all the railway company and the industrial customer conclude a hire contract on the use of the track for rail freight operation purposes by the customer against a fee.

⁷ Directive 2001/14/EC – on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification – Article 1. 3 (d)

used in the relevant pieces of Hungarian railway regulation and the absence of clearly defined distinction between public and private lines – both in regulation and in the Network Statement – lead to the situation where the operational and specified regulatory framework covers only access to the national public infrastructure. In spite of the alleged access obligation to the rest of the infrastructure owned by MÁV, there is no practical procedural opportunity to realise such an obligation (e.g. VPE's competence covers only issues regarding the national public railway infrastructure).

As accessing industrial lines play an important role for rail freight transport service-providers, the controversies described above were brought to light in a few months after market-opening. MÁV first completely refused, then considerably hindered new entrants to access these lines, but later changed its point of view and made the access possible for competitors as well – though the access regime worked out by MÁV for industrial lines and other non-public infrastructure elements were sometimes also criticised by the new TOCs. The proprietary and contractual rights of MÁV relating to certain infrastructure elements in the unclear regulatory background were sufficient for MÁV to solely control accessing – in fact, sometimes the inadequate regulatory measures themselves promoted or justified the behaviour of MÁV.

The new entrants turned to all possible forums including the competition authority to complain about the 'refusal to access' practice of MÁV and seek for remedy. The GVH initiated proceedings against MÁV to investigate whether the incumbent's behaviour infringed the Competition Act.

2.2.4 Recent developments that might resolve controversial issues in access to railway infrastructure

As it is noticed in the introduction, the new 2005 Railway Act has just entered into force on 1st January 2006. The 2005 Railway Act has established the Hungarian Railway Office, redefines certain ambiguous categories and reforms rules governing access and operating licensing to a substantial extent.

On 9 September 2005 the Government decided to divide the MÁV freight transport activity into a separate company. The MÁV Cargo Ltd. was registered in November 2005 and it has begun its commercial operation on 1st of January 2006. The MÁV Cargo Ltd. is the subsidiary of the MÁV, although and MÁV has direct control over it. MÁV has decided that no 'industrial' rail track would be owned or operated by the MÁV Cargo. The 'industrial' rail tracks will be owned by MÁV and operated by MÁV's Infrastructure management division.

ITALY

1. Introduction

The Italian Antitrust Authority has dealt with a number of competition issues which have arisen in the context of access to key capacity for new entrants. There have been cases where explicit reference to the concept of essential facility was made, especially in situations where a monopolist, legally controlling the facility in the upstream market, refused to give access to potential competitors on the downstream market. These cases mostly concerned recently liberalised sectors like telecommunications, energy and transport.

In Italy, like in the EU, refusal to deal, unless objectively justified, is explicitly mentioned among the possible abuses of a dominant position. Indeed by refusing to deal with a competitor a dominant firm may prevent him from entering a relevant market to the disadvantage of consumers or represent a discriminatory practice putting a competitor at a competitive disadvantage (art. 82 of the Treaty and art. 3 of the Italian Antitrust Act).

This is the reason why some of the cases concerning access to key facilities were addressed under the more general rubric of abuse of a dominant position without mentioning explicitly the essential facility doctrine. However, when examining a problem of access, the tests outlined in the essential facility doctrine are usually applied. These steps in general are: (i) control of the essential facility by a monopolist; (ii) a competitor's inability practically or reasonably to duplicate the facility in a reasonable period of time; (iii) the denial of the use of the facility to a competitor; and (iv) the absence of an objective justification for denial of access. With respect to the well known MCI-ATT 1983 US case the test developed in Italy introduced a time dimension to the inability to duplicate the facility and restricted the possible justifications of the refusal of access to being objective. .

In most cases the position of the firm controlling the facility in the downstream market is assessed. In all the cases described hereafter, concerning access to transportation infrastructures, the firm controlling the facility was also operating, directly or through controlled firms) in the downstream market, often with a dominant position.

2. Access to regulated infrastructures

In some of the cases assessed by the Authority the essential nature of the facility was straightforward as in the case of airports (*De Montis Catering Roma vs Aeroporti di Roma*¹) or harbour infrastructures (*Nuova Italiana Coke/Provveditorato Porto di Venezia*²). In situations of exclusive rights and legal monopolies on the management of infrastructures refusals to deal and market foreclosures by regulated monopolists is particularly problematic because it completely blocks the possibility of competition to develop in downstream markets. In these cases, due to the nature and characteristics of the facilities that made their essentiality quite straightforward, the analysis focused mostly on the behaviour of the owner or manager of the facilities and, especially, on its position on the downstream market.

¹ Provv. N. 2854, 2/3/95, A61, Boll. 9/95.

² Provv. N. 3211, 4/8/95, A85, Boll. 31-32/95.

In *De Montis Catering Roma vs Aeroporti di Roma and Gruppo Sicurezza/Aeroporti di Roma*³) the airport operator, a state-owned joint-stock company controlling the airport of Rome and having an exclusive license to provide a range of maintenance and terrestrial services, denied access to the airport premises and discriminated against companies wishing to compete for airline catering and supplementary security. In both markets the licensee held a dominant position (a de facto monopoly in catering and a 70 per cent share in security).

In the case of catering, despite the defendant's claim that access was not technically feasible, no objective justification was found for the refusal to deal and the defendant was charged with the attempt to extend its monopoly power in contiguous markets, hindering competition and damaging users of catering services due to the higher prices and lower quality of services supplied by the incumbent to airlines. An interesting aspect of this case is that the cost structure of the incumbent firm in the catering market was heavily influenced by extremely high labour costs, presumably due to rent sharing with unionised workers. Entry by a competitor would therefore seriously jeopardize the market share of the incumbent. The existence of rent sharing phenomena was later confirmed by the strong opposition of unions to attempts by the airport operator to sell part of its catering activities in the airport premises to a private firm, in spite of guarantees by the buyer that it would keep employment levels unchanged⁴.

In the case of security services, the defendant was charged of unduly extending its exclusive rights over the infrastructure using the licensing process to acquire sensitive commercial information concerning potential competitors and granting licences to supplementary security companies in a discriminatory way. As in the catering case, no objective justifications were found for refusals to deal. In addition, fees charged to licensees were found to discriminate among security companies, applying different contractual conditions to companies providing similar security services.

The final decision stated that "it is an abuse of a dominant position for a firm having such a position in a market to refuse to provide to existing and potential competitors a good or a service which is needed for the competitor's activity". Referring to a previous EC case (*Rødby vs Denmark*⁵), the decision explicitly stated that "a firm owning or operating an essential facility cannot deny, without objective justification, access to the facility".

Similar problems of access to those experienced in airports were found in harbours. In *Nuova Italiana Coke/Provveditorato Porto di Venezia* the Provveditorato, a public agency responsible for regulating Venice harbour, and holding a dominant position on the market for harbour operations, refused access to companies, rejecting the request for authorisation to provide harbour services and imposing unjustified restrictions on companies already operating in that market, in order to prevent entry to the harbour operations market for commercial traffic by competing companies. The conduct was considered abusive.

3. Terms of access

Not always the behaviour of the firm denying access took the form of an explicit refusal. Sometimes access is granted but the terms of access are effectively exclusionary, undermining the new entrant's ability to compete. In such cases it is not the nature of the facility that is questioned, since it is straightforward that such facilities as railways are essential to compete in downstream markets and the facility are subject to a legal monopoly, but the conditions of access are examined to prove that the monopolist controlling the

³ Provv. N. 1587, 17/11/93, A44, Boll. N. 35.

⁴ Interestingly, trade unions proposed to withdraw their opposition to the sale in exchange of a lump sum transfer to each employee, effectively monetising the rents enjoyed under public ownership.

⁵ OJ 26/2/94, L 55 p. 52.

facilities is discriminating against the new entrants in order to exclude them from the liberalized market and to favour its own suppliers.

In *Cesare Fremura/Assologistica – Ferrovie dello Stato*⁶ the Authority determined that FS had abused the dominant position it held as a result of a legal reserve, in the rail haulage market. FS had discriminated in favour of Italcontainer, an FS subsidiary operating in the intermodal container transportation market, and Cemat, in which FS held a relevant (although without reaching control) stake, a company operating in the bimodal transportation of crates, to the disadvantage of competitors.

Intermodal container transportation and bimodal transportation of crates are two particular forms of freight transport that differ in organizational terms from other forms of traditional freight. Rail haulage is indispensable for both since large quantities of goods could not be transported by road over medium-long distances (port/terminal links or terminal/terminal links) at a comparable cost.

The conduct of FS under investigation primarily concerned the definition of the tariff system (prices, discounts, penalties) for the sale of haulage services to operators in the two combined-transport sectors. The Authority discovered that the major changes made to the tariff structure after 1995, mainly involving very huge discounts for large shipments, had no basis in efficiency. The documentation found in FS offices showed, on the contrary, that the company had applied a tariff policy that often failed to cover even variable costs.

The tariff system was applied in such a way that was clearly intended to favour Italcontainer and Cemat in their respective markets, being these two companies by far the largest in the country. .

The inquiry showed that during the period under consideration the conduct of FS in the intermodal container transportation market had produced discriminations that allowed Italcontainer, whose share of train movements rose from 25% to over 44%, to benefit fully from the growth in the container transportation market, to the detriment of other competitors. In order to benefit at least in part from the privileges enjoyed by Italcontainer, some of the competitors were obliged to become clients of this company. In the crate transportation market, the abusive conduct of FS obstructed any form of potential or actual competition, and played a part in maintaining a substantially monopolistic market.

It is finally worth mentioning a case (*Eni – Trans Tunisian Pipeline*⁷) where a problem of access to a gas pipeline did not concern existing capacity, that was saturated, but the new capacity that would result from an investment by the owner of the facility. In this case no explicit reference to the essential facility doctrine was made.

In *Eni – Trans Tunisian Pipeline* the Authority opened an investigation into an alleged abuse of dominant position by ENI concerning access to the pipeline transporting Algerian natural gas into Italy. ENI is the most important national producer and the main importer of natural gas in the Italian market, with a market share of 68%. It has a dominant position and/or control of all the international gas pipelines into Italy. ENI is vertically integrated in transmission, where, through its controlled company SNAM, it owns almost all existing nationwide high pressure transmission capacity and also operates, through Italgas, at the distribution level.

⁶ Provv. N. 8065, 24/2/2000, A227, Boll. N. 8/2000.

⁷ Provv. N. 13986, 27/10/05, A358, Boll. N. 4/05.

The Algerian gas is carried to Italy through a pipeline crossing Algeria (TTPC) and then through a submarine pipeline from Algeria to Sicily (TMPC). ENI owns 100% of TTPC and holds exclusive rights of transportation on the pipeline⁸.

In 2002 TTPC announced its intention to expand the capacity of the TTPC pipeline. Following this announcement TTPC received several requests and allocated the “new” capacity, accounting for 6,5 billion cubic meters a year and available from 2007 to 2019, to some shippers. In March 2003, following the allocation of new capacity, TTPC concluded take or pay agreements with seven shippers. The agreements were subject to the fulfilment, by June 2003, of several conditions (administrative authorizations, bank guarantees, etc.). In June 2003, TTPC wrote to the shippers that it wished to postpone the effect of the agreements. Finally, in November 2003, TTPC announced its intention to rescind the agreements since the conditions provided in the take or pay contracts had not been fulfilled, even though the shippers had all signed binding agreements with the Algerian supplying company Sonatrach. The problem was that the fulfilment of the conditions was partially in the power of ENI and TTPC themselves. The legal disputes on the responsibilities in the fulfilment of the conditions contained in the agreements went on throughout the whole year 2004, when, in November TTPC offered a new allocation of the additional capacity. The new allocation contained the provision that the expansion of the pipeline would have been postponed from 2007 to 2012.

The case is, in a way, peculiar considering that access has not been denied to existing capacity, but on the capacity resulting from an investment that ENI had no obligation to undertake. However, in opening the investigation the Authority considered the fact that, once the decision to expand the pipeline had been taken and the shippers had defined their commercial strategies, the behaviour of TTPC, first wasting time in legal disputes and finally rescinding the contracts, resulted in delaying the entry of competitors into the Italian natural gas market where ENI has a dominant position. The lack of objective justification for the refusal was also stressed. In fact, the investments required for the expansion of the pipeline would be entirely recouped with the contracts subscribed by the shippers that would account for all the additional capacity planned from 2007 to 2019.

The case is still open and a decision is expected by February 15.

⁸ The pipeline connecting Algeria to Sicily is owned by the Trans Mediterranean Pipeline Company , whose shares are owned by ENI for 50% and by Sonatrach, the Algerian supplier of natural gas, for the remaining 50%.

JAPAN

1. Views of the Essential Facilities Doctrine

The report of the Study Group on the Antimonopoly Act¹, which was published on October 28, 2003, shows its point of view regarding the problem of “Essential Facilities” as below.

2. Deregulation in Public Utility Sectors and Issues of Essential Facilities

Recently, there has been a gradual advance of deregulation centered on sectors that had come to be considered so-called natural monopolies. Even in public utility sectors involving electricity, gas, telecommunication and airlines, for example, the enlargement of new competition has proceeded aggressively as a result of deregulations.

One problem has been pointed out in public utility sectors where this new competition has been introduced: competitive principles are not functioning effectively because existing entrepreneurs possess the essential facilities needed to compete. In these types of markets, the concern is that the effects from introducing competition merely by authorizing market entry will be limited. Therefore, the question of how to deal with the issues of essential facilities from the point of view of competition policy has become a big topic of concern.

3. Definition of Essential Facilities

According to the aforementioned report by the Study Group on the Antimonopoly Act, the following three conditions can be considered to be the fundamental prerequisites of essential facilities:

(a) Natural monopoly characteristics

Assets having natural monopoly characteristics (declining cost on the supply side, substantial investment requirement), or assets such as facilities, rights and information deliverables that are scarce resources for which the usage rights are exclusively allocated by the central government or other public institutions

(b) Necessity and indispensability

Assets whose use is necessary and indispensable when supplying goods or services

(c) Difficulty of constructing competing facilities

Facilities and other assets in question, and facilities that enable firms to effectively compete, which entities conducting or thinking of conducting business activities in certain business sectors for goods and

¹ In response to the request from the Japan Fair Trade Commission (JFTC), “the Study Group on the Antimonopoly Act,” which is comprised of eminent persons from academia, industry, media and consumer groups, discussed the enforcement systems and of the Antimonopoly Act as well as monopoly and oligopoly regulations. As a result of the discussion, the report was published on October 28, 2003. The summary of the report of the Study Group on the Antimonopoly Act: <http://www.jftc.go.jp/e-page/reports/survey/2003/031028sgroupama.pdf>

services find markedly difficult to construct on their own because of economic, technical, legal or other reasons

In addition to these fundamental prerequisites listed above, the said report notes that “determining there is a need to allow competitors or other parties to use such essential facilities under appropriate conditions” must be made a prerequisite. The said report adds that the conditions below should be considered as well:

- Influence on competition at a long-term, dynamic level such as technology development or capital investment, against the backdrop of the investment risk of the facilities in question

Beginning with situations where grants or public enterprise rights have been granted, the necessity to consider the influence on competition at a long-term, dynamic level such as technology development or capital investment, against the backdrop of the investment risk in question, is relatively strong for facilities constructed by a business at its own investment risk, compared to facilities that were constructed under conditions where investment risk was reduced.

- The size of the use market

When the size of the use market for the essential facilities is extremely large, because the competitive benefits from approving appropriate use of the facilities in question are large, even when the facilities were constructed at a company’s own investment risk, the necessity to approve the appropriate use of the essential facilities in question is relatively strong.

4. Essential Facilities and Their Competition Problems

The owners of facilities defined in (2) above can maintain or enhance their own position by engaging in unprofitable transactions in competition against competitors because such owners command the key elements for business operations by competitors. Accordingly, the question of how to ensure fair competition in such sectors when the entrepreneurs who own the facilities or technology can make competitors use said facilities or technology can be said to have become a pressing issue.

The aforementioned report by the Study Group on the Antimonopoly Act states that when businesses that independently own, exclusively or in common, essential facilities and force others to use such essential facilities, by means such as engaging in conduct on one’s own or through related businesses, and carry out disadvantageous transactions against competitors as described below, this places their competitors in a disadvantageous position for competition and distorts competition in the use market for these essential facilities, and such conduct must be dealt with swiftly and effectively under the Antimonopoly Act.

1. Denial to use essential facilities; discrimination and transaction-based restrictions and obligations
2. Conduct to use a position of independent ownership, exclusively or in common, of essential facilities to prevent or obstruct the movement of customers to competitors
3. Conduct in parallel to prevent entry by two or more entrepreneurs who have been exclusively allocated usage rights for essential facilities by the central government or other public institution

5. Recent Transportation Infrastructure Access Controversies

5.1 *Electricity*

In the electric power supply market, geographical monopolization in retail supply has so far been approved by entrance restraints under the Electricity Utilities Industry Law, and the harmful effects accompanying monopolization have been managed by regulations on business activities (regulation on rates, obligation to supply, etc.) under the provisions of the Electricity Utilities Industry Law.

However, the Electricity Utilities Industry Law was revised in 1995, and entrance restraints were abolished in principle in the wholesale supply business. A wholesale tender system and wholesale wheeling service system were created. Revision of the Electricity Utilities Industry Law in May 1999 introduced a partial deregulation in the retail supply business, and with regard to the supply for special high-voltage users, entrance restraints were abolished while rate restraints were abolished in principle. Further, the regulatory reform based on the amended Electricity Utilities Industry Law has been promoted and the liberalized area has been expanded since June 2003.

In introducing competition as a result of the emergence of the above-mentioned new entrants in the retail supply business, it has become inevitable that, as a base for competition, existing nationwide transmission networks owned by electric power companies must be made open to new entrants for utilization under the same conditions applied to the electric power company itself. For this purpose, in the Electricity Utilities Industry Law revised in 1999, a wheeling service system has been incorporated to guarantee impartial and fair utilization of networks owned and operated by electric power companies.

In view of the following characteristics of the electric power market, however, there is concern that the establishment of a wheeling service system alone may not, as a matter of fact, produce new participation or competition in the electric power market:

1. Existing electric power companies have almost 100% market share in each of the service areas.
2. As there is a small number of existing electric companies, it is possible for these companies to engage in cooperative behavior.
3. New entrants, who have no other means to compete other than to depend on the wheeling service of the relevant electric power company by the amendment of the Electricity Utilities Industry Law in 2003 (which is also a competitor and has a marketing department as well as a monopolistic network), will be put in a position of disadvantage.
4. Compared with new entrants, the electric power companies, by possessing large-scale power generating facilities, etc., can more easily achieve an energy supply of the same volume at the same time.

In order to allow the electric power market with the characteristics mentioned above to function competitively, guidelines for proper electric power trade that are consistent with the Electricity Utilities Industry Law and Antimonopoly Act were formulated, with the Ministry of International Trade and Industry (now the Ministry of Economy, Trade and Industry) having jurisdiction over the Electricity Utilities Industry Law and the Japan Fair Trade Commission (JFTC) having jurisdiction over the Antimonopoly Act. Both entities have responsibility for areas in their respective jurisdictions and for coordination with each other. (“Guidelines for Proper Electric Power Trade,” revised on May 20, 2005)²

² <http://www.jftc.go.jp/e-page/legislation/ama/electric.pdf> (not updated to the latest version yet)

The said guidelines note that, particularly in the area of the wheeling service business, it is essential that networks are made open to new entrants under the same conditions as those for internal trade by electric power companies themselves, from the standpoint of fair and effective competition. For example, in order to secure impartiality in the wheeling service rate, desirable and undesirable trade practices regarding the calculation of wheeling service rates or the refusal of usage of connection lines and other facilities are enumerated. Furthermore, in order to secure neutrality in network operations, the guidelines also specify desirable and undesirable trade practices regarding the prohibition of usage of information which is obtained by electric power companies through the wheeling service business for purposes other than the original intent and prohibition of discriminatory treatment in the wheeling service business by electric power companies.

5.2 *Gas*

In the general gas business, business regulations such as fee control, compulsory supply and accounting regulations, under the Gas Utility Industry Law, have managed to address the harmful effects of regionally monopolized supply through conduits. However, amendments of the Gas Utility Industry Law since 1994 have promoted deregulation and the introduction of competition in the gas business.

For example, gas supply services provided to large-scale users with an annual contracted volume of one million cubic meters or more were liberalized (The market has been further deregulated. Since April 2005 services for users with an annual contracted volume of 500 thousand cubic meters or more were liberalized.). In addition, under the amendments, regulators obliged certain general gas companies, including the Tokyo Gas Co., Ltd., to submit and publish their terms and conditions concerning the transmission service of gas using existing conduits for large-scale supply by new market entrants. As the amended Gas Utility Industry Law came into effect in 2004, the scope of the transmission service operators was expanded to include general gas companies and other gas companies which operate gas supply through specific conduits maintained and controlled on their own as well as all general gas suppliers. Through measures for ensuring neutral and transparent transmission service, the amended Law stipulated a new regulation on accounting adjustments and also prohibition of the use of information obtained by the transmission service for other purposes, as well as discriminatory treatment of the services.

But although progress was made in the system reform of the gas market, such as with the entry of new companies and reduced gas charges to some extent, the gas market still has characteristics including those described below. There remains some concern that the principle of competition may not fully function in the gas market.

1. In terms of gas supply through conduits, general gas companies still hold large market shares in their respective service areas.
2. In some districts, it is difficult to install new conduit networks in addition to the existing networks.
3. While general gas companies are shifting their supply to high-calorie gas, there are limited sources of liquefied natural gas (LNG) and natural gas, which are major raw materials of those gases.

In order to allow the gas market (with the characteristics mentioned above) to function competitively, the Ministry of Economy, Trade and Industry, responsible for implementing the Gas Utility Industry Law, and the JFTC, responsible for implementing the Antimonopoly Act, bear responsibility in their jurisdiction

and collaborate with each other in order to prepare guidelines concerning proper gas trade that are consistent with the two laws. (“Guidelines for Proper Gas Trade,” revised on August 6, 2004)³

These said guidelines note that, particularly in the area of the transmission service business, it is essential to ensure social credibility in impartiality and transparency in the use of conduit networks in order to encourage new market entry and to ensure fair competitive conditions among gas companies. For example, from the standpoint of fair and effective competition, the said guidelines enumerate desirable and undesirable trade practices regarding the prohibition of the usage of information which is obtained by gas companies through the transmission service business for purposes other than the original intent and prohibition of discriminatory treatment in the transmission service business by gas companies.

Furthermore, regarding the use of LNG terminals by third parties, the said guidelines point out that the LNG terminals are the starting points of conduit networks in Japan since the country depends on a large portion of its domestic gas supply from the LNG import. Because of that situation, encouraging third parties to use the LNG terminal is desirable to promote new entry in the market and to diversify gas procurement sources from the viewpoint of invigorating the gas market and developing conditions for fair competition. Based on the above idea, the said guidelines enumerate desirable and undesirable trade practices regarding the use of LNG terminals by third parties, from the standpoint of fair and effective competition.

6. Airlines

(a) Issues of Essential Facilities from the Point of View of Competition Policy

In order to enhance competition in the domestic air transportation sector, permission of new entry is of great importance. In particular, it is essential to develop a competition infrastructure which makes it possible for incumbents and newcomers to sufficiently compete. In “The Competition Problems in the Domestic Air Transportation Sector,” (published in February 2000) the JFTC enumerates the problems of essential facilities in the domestic air transportation sector as below.

– Allocation of Slots in the Crowded Airports

Even if new entry is possible under the framework of the domestic air transportation sector, the reality is that it is almost impossible to enter into the market without obtaining slots at the airports, especially in crowded airports where slots are limited. Therefore, it is important to allocate slots appropriately in order to promote competition in the domestic air transportation sector.

However, the increasing of slots through the expansion of airport capacity or by other methods has a certain limit. In order to prevent the slots owned by incumbents from becoming their own vested interests and in order to promote competition between newcomers and incumbents, it is necessary to reallocate the slots by periodical retrieval of the existing slots from the incumbents as well as new allocation of slots when airport capacity expansion takes place.

– Impartial Use of Airport Facilities between Newcomers and Incumbents

Airport facilities include runways, aircraft parking aprons, airport control facilities as well as airport buildings. Considering that maintaining a counter with a good location can also be an important form of competition in the domestic air transportation sector, the modality of use of airport facilities should be examined.

³ <http://www.jftc.go.jp/e-page/legislation/ama/gas.pdf>

– Construction of Maintenance System of Airplanes

In the past, the maintenance of airplanes was basically conducted by incumbents' own operated systems and there was no external market of maintenance of airplanes. In this situation, it is difficult for newcomers to construct their own maintenance system, and as a result they must request consignment contracts from the incumbents.

From the viewpoint of competition policy, the JFTC researched the conditions of the domestic air transportation sector, including the problems of price-setting and the use of airport facilities after the new entry of two newcomers (Skymark Airlines Co., Ltd. and Hokkaido International Airlines Co., Ltd. (“Air Do”). The JFTC published the results of that research in December 1999. Subsequently, the JFTC conducted the follow-up research on the domestic air transportation sector, focusing on domestic air transportation fare trends and the conditions of competition in the routes where the two newcomers entered. In its report, the JFTC made some proposals, including the fact that (i) further consideration is desirable in the allocation of slots from the viewpoint of the maintenance of infrastructure of competition for newcomers and (ii) further efforts are necessary to allow air transport companies to use the airport facilities based on fair and transparent standards on the occasion of reform or relocation of airport facilities. (“Survey on the situation of competition in the Domestic Air Transportation Sector,” published on July 11, 2001)

(b) Case Example of Issues of Essential Facilities in the Area of Airline Industry

Business Consolidation by Japan Airlines Co., Ltd. and Japan Airsystem Co., Ltd. through Establishment of a Holding Company (published on April 26, 2002)⁴

In this case, a business consolidation between two out of three major airlines in Japan became controversial. Regarding this planned integration, the JFTC pointed out some factors, including the following point:

Haneda Airport (Tokyo International Airport), with an overcrowded schedule, has little room to increase takeoff and landings and has no slots to allocate for newcomers because all of them have already been occupied by the incumbent airlines. This inability of new airlines to acquire slots is an entry barrier. Therefore, the entry of new players is unlikely to deter concerted fare-setting actions.

In response to the JFTC's views, the parties concerned submitted the following remedies to the JFTC for facilitating entry and business expansion by new airlines:

1. To return some of the takeoff-and-landing slots currently held by the parties at Haneda Airport to the Ministry of Land, Infrastructure and Transport;
 2. To make the airport facilities that the parties are using available for new airlines and also to cooperate with new airlines by means of undertaking aircraft maintenance etc.
- In addition,
 - New airlines have not been allowed to hold more than six slots at Haneda Airport in the past. Since the Ministry of Land, Infrastructure and Transport planned to create “competition promotion slots” at Haneda Airport, they can now receive more than six slots.

⁴ <http://www.jftc.go.jp/e-page/pressreleases/2002/april/020426JJ.pdf>

It is believed that these and other measures help to eliminate the lack of open slots, which has constituted an absolute entry barrier to new airlines. Also, the cooperation in using airport facilities, aircraft maintenance service, etc. simplifies the entry and business expansion by new airlines. For these reasons, the JFTC considers that the proposed integration plan would not substantially restrain competition within the domestic air transportation market.

KOREA

1. Introduction

Essential facilities are defined as facilities without which no company can provide consumers with products and services. In particular, essential facilities are closely related to industries connecting production and consumption via hardware or software network.

Essential transportation facilities are those established to transport certain products, including railroads, natural gas transmission facilities and oil pipelines. These facilities have common characteristics of: i) some users might be excluded if these facilities are used in excess of their capacity, because essential transportation facilities have limited capacity, ii) much time and capital is needed to build up these facilities, iii) an integration with other sectors where competition can be introduced does not yield huge economic benefits, iv) facility usage fees can be charged individually and the usage amount can be controlled, and v) access to these facilities is allowed to new entrants or other competitors through laws, contracts or decisions.

In the next part, the essential facilities doctrine legislated by competition agencies will be explained, followed by the nature of essential transportation facilities such as railways, natural gas transmission facilities and oil pipelines, and the current status and evaluation of access to each facility by new entrants.

2. Recent change on legal treatment of essential facilities doctrine

2.1 *Legislation of essential facilities doctrine*

2.1.1 *Situation prior to legislation*

Article 3-2 of the Monopoly Regulation and Fair Trade Act (MRFTA) prohibits market dominant enterprises from committing an act unreasonably interfering with the business activities of other enterprises or an act unreasonably impeding the participation of new competitors. Under the MRFTA, companies owning essential facilities and meeting the criteria for market dominant enterprises could be punished for abuse of market dominance if they interfere the business activities of other enterprises by restricting access of new enterprises or competitors to their facilities. However, the MRFTA had no explicit provisions related to essential facilities.

2.1.2 *Background of legislation*

As network backbone industries such as electricity, telecommunications and gas were privatized and as the importance of these industries as economic infrastructure was increasing with the advent of the information society, promotion of competition in these industries has emerged as a key issue for the development of national economy. Accordingly, the essential facilities doctrine was incorporated in the Enforcement Decree of the MRFTA. This is aimed at setting a clear policy objective of promoting competition in sectors related to essential facilities and enhancing transparency and predictability of law enforcement.

2.1.3 *Essential facilities doctrine*

Amendments to the MRFTA in March 2001 introduced provisions on essential facilities. Article 3 of the Enforcement Decree bans an act refusing, discontinuing or limiting, without justifiable reason, the use of or the access to essential facilities for the manufacturing, providing and selling of the products or services of other enterprises.

The Guidelines for Reviewing Abuse of Market Dominant Position specifies matters to be considered in determining “justifiable reason¹” or “essential factors²”.

2.2 *Evaluation of legislation of essential facilities doctrine*

Although the essential facilities doctrine was legislated in March 2001, the doctrine is stipulated in the Enforcement Decree, not in the Act enacted by the National Assembly. For this reason, it is difficult to ensure the effectiveness of its application. An effective application of the doctrine requires clear standards for the judgment of essential facility, authority of ordering specific performance order and compulsory mediation of access conditions. However, these requirements cannot be easily set forth because, under the MRFTA, an act restricting access to essential facilities is classified into an abuse of market dominance.

If such act were stipulated in the MRFTA, provisions related to essential facilities could be added to Article 3-2, “Prohibition of Abuse of Market-Dominant Positions”, or stipulated in a separate chapter. It would be better to incorporate a new chapter titled “Prohibition of Unfair Business Practices Regarding Essential Facilities”, since provisions covering specific types of prohibited acts, standards for judging essential facilities, specific performance order and compulsory mediation of access conditions could be stipulated under the chapter.

¹ IV 3. a. (4) of the Guidelines for Reviewing Abuse of Market Dominant Position

In determining whether there is a justifiable reason, followings shall be considered:

- (a) the case where justifiable compensation for the investment made by an enterprise providing essential factors is significantly undermined; provided that, a reduction in interests caused by increased competition shall not be seen as the undermining of justifiable compensation;
- (b) the case where it is impossible to provide essential factors without significantly reducing the amount provided to existing users;
- (c) the case where access to essential factors might significantly deteriorate the quality of existing services;
- (d) the case where it is technologically impossible to provide essential factors due to a failure to meet technology standards; and
- (e) the case where a danger might be posed to the life or physical safety of users.

² IV 3. c. (1) of the Guidelines for Reviewing Abuse of Market Dominant Position

Essential factors shall include tangible or intangible factors such as networks and backbone facilities and meet one of the following requirements:

- (a) Without using the factor concerned, an enterprise cannot participate in a certain business area because it is, in effect, impossible to manufacture, supply or sell products or services, or an inevitable situation of disadvantageous competition continues in the business area;
- (b) A certain enterprise exclusively owns or controls the factor concerned; and
- (c) It is impossible de facto, de jure or economically for anyone trying to use or access the factor concerned to re-produce the factor or replace it with another factor.

3. Access to the Railroad Facility

3.1 Overview

In the past, the Korea Railroad Office, a government agency, had owned, managed general railroad infrastructure and operated railroad trains, while the Korea Train Express, a state-owned enterprise, had owned, managed and operated the high-speed railroad infrastructure which was constructed more recently.

After the vertical separation of the railroad industry, however, the railroad infrastructure including tracks and electric and signal facilities are state owned, while the railroad service is provided by the Korea Railroad Corporation, a public corporation financed by the government. In addition, new competitors can enter the railroad transportation service market after obtaining a license from the Ministry of Construction and Transportation³.

The separation of railroad facility operation and service operation brought competition to the railroad service market. Additionally, provisions regarding the access to the railroad facilities for new entrants in the railroad service market were incorporated in the Railroad Business Act which came into force in July 2005.

3.2 Access to railroad facilities: the joint usage system

Article 31 of the Railroad Business Act stipulates that anyone managing railroad facilities such as tracks for the purpose of public transportation shall allow access to the facilities by signing an agreement if a relevant enterprise such as a railroad service provider requests joint usage of the facilities. Under this Article, the Korea Rail Network Authority in charge of managing railroad facilities is obliged to allow a new enterpriser an access to the facilities. The Act also stipulates that anyone refusing, without justifiable reason, a request for joint usage is subject to imprisonment of not exceeding 2 years or a fine of not exceeding 20 million won. This is to ensure access to the railroad facilities.

3.3 Evaluation of the joint usage system

The joint usage system of railroad facilities has been implemented for companies managing such facilities for the purpose of public transportation. Therefore, the system is not applied to companies establishing or managing the railroad facilities for their own needs. This is to prevent distortion of decisions to invest in the railroad facilities they installed. If private owners of railroad facilities are required to open them to other companies, these owners could not use their facilities as they want, and therefore their investment would be delayed or hindered.

³ Article 5 of the Railroad Business Act stipulates that anyone intending to operate a business to transport passengers or cargo using railroad cars shall obtain a license from the Minister of Construction and Transportation. Criteria for the license stated in Article 5 are as follows:

1. Commencement of business does not cause concern over a possible danger to the safety of railroad transportation;
2. Operation plans meet the demand for transportation, the transportation capacity and the convenience of users in the railroad section concerned;
3. An applicant has the financial ability to undertake the business concerned; and
4. The number of railroad cars, their age and size meet the standards set forth in the decree of the Ministry of Construction and Transportation.

Although there has no application for railroad transportation business license, the number of new entrants is expected to grow in the future. Therefore, standards for allocating tracks or setting rates should be established sooner than later.

The Railroad Business Act does not include provisions related to the essential facilities doctrine. The Act just stipulates that access to railroad facilities should be available through an agreement between the party managing tracks and a company desiring to use the tracks. Therefore, the Act needs to include provisions expressly stating that those managing railroad tracks should not restrict competition between facility users by interfering their usage of the facilities, delaying negotiations with them, or discriminating users.

4. Natural Gas Transmission Facilities

4.1 Overview

Korea has to depend entirely on imports of natural gas because it has no natural gas reserves. In this situation, the use of facilities for gas import, storage and transportation are essential to the relevant market such as import and sales of natural gas. Due to their characteristic of natural monopoly, major facilities have become owned and operated by the Korea Gas Corporation (KOGAS), while competition is introduced in the market of import and sales of natural gas. At the same time, the Open Access System has been introduced to ensure importers and sellers of natural gas an access to the transmission facilities.

4.2 Access to natural gas facilities: The Open Access System

The Open Access System was planned as a policy tool for ensuring access to essential facilities, but has not been pursued effectively.

Article 39, Paragraph (3) of the Urban Gas Business Act stipulates that any importer of natural gas other than the Korea Gas Corporation (KOGAS) may jointly use gas supply facilities through consultations with KOGAS. The Article, however, is not a mandatory provision, but only a recommendation. So, when KOGAS refuses to negotiate an open access to the facilities, there is nothing to force KOGAS to do so.

Under Article 40 of the Act, the Minister of Commerce, Industry and Energy may order gas companies to make the necessary adjustments in accordance with the Presidential Decree when it is deemed necessary. However, since matters regarding open access to facilities are not included in matters subject to adjustment under the Act, the Minister of Commerce, Industry and Energy cannot issue an order allowing natural gas importers to jointly use transmission facilities of KOGAS.

4.3 Evaluation of the Open Access System

It is evaluated that provisions regarding access to natural gas transmission facilities under the Urban Gas Business Act cannot ensure gas importers access to the facilities.

For an effective access, KOGAS should be obliged by law to allow new entrants access to its facilities in the event of application for open access.

Another obstacle to effective implementation of the Open Access System is a lack of clear standards for operating the System. For the areas where interests of facility users directly conflict with those of facility operators, clear standards should be stipulated by law as to who should be responsible for safety issues, who will pay the installation costs of connection equipment, how to secure the facilities in desirable size and how to set usage fees at an appropriate level based on a separate accounting of sales and facilities.

Recently, POSCO, Korea's leading steel maker, directly imported natural gas to generate electricity for its steel production. POSCO requested KOGAS to allow open access to transmission facilities. As a result, POSCO was able to transport its natural gas to a power plant, using the transmission facilities operated by KOGAS.

POSCO's usage of the facilities was the first case for a new natural gas importer to have access to transmission facilities. However, KOGAS had declined POSCO's request several times, on the ground that, as aforementioned, allowing access to transmission facilities is not mandatory under the law, and that specific standards for access are not clearly defined. Due to a lack of the specific standards, it took much time to reach an agreement between the two parties. As direct imports of natural gas are expected to increase, it is imperative to improve the Open Access System in a way that would guarantee effective access to transmission facilities.

5. Access to Oil Pipeline: a case

5.1 Overview

In 2001, the KFTC made a decision on a case where SK Corp.(SK), Korea's largest oil refinery, became the largest shareholder of the Daehan Oil Pipeline Corporation (DOPCO), gaining control over DOPCO⁴.

DOPCO is a company that exclusively owns and manages oil pipelines used for transporting petroleum products. The Korean government, once took control of DOPCO as the largest shareholder, sold its stake in the company to oil refineries as part of privatization efforts. As a result, SK, the largest refinery in Korea, became the largest shareholder holding 34.04% of DOPCO's shares, and shared control of DOPCO with other refineries such as LG(22.59%), S-Oil(15.57%), Hyundai Refinery(12.90%), Incheon Refinery(4.75%).

S-Oil, one of the shareholders of DOPCO, filed a complaint for Korea Fair Trade Commission (KFTC). The complaint asserted that the stock purchase of SK from Government increased the possibility of discrimination among users of the pipeline and revealing business secrets of users.

5.2 Whether oil pipelines are essential facilities

Besides oil pipelines, other means such as oil tankers, tank truck and tank cars are used to transport oil products from refineries to gas stations. Therefore, to determine whether SK's conduct of securing control over pipelines restricts competition, it was necessary to judge whether oil pipelines are essential facilities for refinery companies.

The KFTC determined that a market for petroleum product transportation using pipelines is a separate market from one for petroleum product transportation using other means such as oil tankers and tank cars, and that oil pipelines are essential facilities in the pipeline-based transportation market. The following is the reasons for this decision.

First, due to a considerable difference of transportation costs between oil pipelines and other means, there is not a great possibility of substitution among these means.

Second, oil pipelines should be used if a refinery wants to transport oil products to inland areas.

⁴ Korea Fair Trade Commission Decision No. 2001-090

Third, it is not likely for refineries to establish oil pipelines for their own needs, because construction of these facilities requires huge capital investment.

Fourth, unlike other transportation facilities, oil pipelines are strategic national infrastructure and, particularly, common carriers.

5.3 *Measures to ensure access*

KFTC found that there is a high possibility of restriction on the access to the pipeline facilities because the user who took control of the pipeline facilities maintains the incentive to increase its profit by the restriction. Therefore, KFTC decided that the transfer of share of DOPCO from government to SK would lessen competition in the market of oil products transportation and the market of oil products sales. At the same time, KFTC issued following remedies to guarantee open access to the oil pipeline facilities.

First, SK should include a ban on restrictions with regard to use of the facilities, such as refusal to use, restriction on the amount of transportation, discrimination in the order of use, the rental fee, and other contract conditions, in DOPCO's Articles of Incorporation and comply with it.

Second, SK should establish and operate a council for deliberation and decision on the matter of the use of the facilities owned by DOPCO. Participants of the council are representative of DOPCO, users of the facilities, and persons represent public interest.

5.4 *Evaluation on the decision*

Vertical separation had been regarded as an effective structural form for a privatization of publicly owned facilities for the purpose of ensuring access to the facilities by new entrants of the market. However, because it failed to draw attention from other investors, the oil pipeline was privatized by the way of selling the government share to the users of the facilities. Consequently, the facility was owned in the structure of Club Ownership.

However, in the case where users share ownership of the facilities, owners who obtain control of the facility have incentive to restrict access of other users. Therefore, KFTC issued behavioral rules on the user who took control of the facilities in order to prevent the possible anticompetitive activities.

It is considered that the decisions of KFTC were effective in preventing anticompetitive restriction on the access to the facilities because there were no anticompetitive activities until now, 5 years after issuance of said remedies.

6. Conclusions

In Korea, new entrants are not fully guaranteed access to essential transportation facilities such as railroads and natural gas transmission facilities.

Therefore, the essential facilities doctrine, a principle universally applied to all facilities, should be incorporated not in Enforcement Decrees, but in Acts in order to ensure effective enforcement. In addition, to facilitate the use of the joint usage system of railroad facilities and the Open Access System of natural gas transmission pipelines, clear standards should be established as to the usage fees and the facility allocation.

As explained earlier, in a merger case regarding oil pipelines, the KFTC applied the essential facilities doctrine in determining competition-restrictiveness of the merger. However, there has been no case where the doctrine is applied to abuse of market dominance by a company with control over essential

transportation facilities. In the future, competition laws should be more actively enforced to ensure new entrants access to essential transportation facilities.

MEXICO

1. Introduction

Mexico has followed different strategies to develop infrastructure sectors. These models clearly involve dissimilar market structures and competition conditions, and the performance of individual production agents has led to unlike access issues.

In Mexico, access to key facilities is legally prescribed in the regulatory framework and major controversies arise in its implementation, especially as to the fee that the incumbent provider must charge to new entrants over the key facility. The purpose of this report is to introduce basic concepts and criteria on access conditions in transportation sectors from both, legal and economic point of views. It focuses on selected case studies on railroads and ports, from which it attempts to identify main characteristics of the causes and solutions of access controversies for key transportation facilities in Mexico.

The report is organized into four sections. The first section sets forth core legal and economic concepts on access provisions in public utilities, including transportation. The following two sections illustrate particular features for railroads and ports and provide a summary of recent case studies on controversies, including causes, solutions, and impacts on users. Finally, section four draws concluding remarks.

2. Legal and Economic Foundations

Based on the OECD reference papers, this section outlines the legal and economic features of facilities that are subject to access conditions in order to allow new competitors to emerge the near term in transportation industries.

In Mexico there is neither a definition nor a clear statement on the essential facilities concept and doctrine (EFD). However economic regulations in place adopt common principles regarding access to foster entry and competition to underlying facilities in public utilities, which are outlined in following paragraphs.

Access to key facilities became an issue for economic regulation since the liberalization program adopted in the late eighties. The government took several steps in divesting major firms, including setting up a specific program and structure for privatization, followed by the issuance of tailored regulation and the creation of regulators.¹ In part as a result of the Federal Competition Commission's (FCC) intensive advocacy, several sectoral regulations enacted since 1993 adopted competition and efficiency goals compatible with competition policy and legislation.

In infrastructure sectors, including all modes of transportation, privatization was aimed at encouraging investment, enhancing productivity and extending networks to overcome severe financial restraints, low penetration and poor quality in service provision. In most sectors, decisions on structural separation involved trade-offs between enhancing competition, and increasing the sale price of the assets, and thus government revenues.

¹ Excepting telecommunications, the regulatory frameworks and institutions were established prior to privatizations.

Regulations, in turn, permitted limited modifications to the original structural design for privatization (horizontal and vertical), but did not foresee any further separation measures, and introduced a new generation of economic regulation mechanisms to foster private participation, defend consumer interests and market competition. In this arrangement, access regulations became an important tool to foster competition and efficiency in the sector by granting access for new entrants to key facilities.²

The following paragraph provides a schematic overview of the legal and economic characteristics of access regimes for public utilities in Mexico, including transportation. Subsection 1.1 provides some characteristics of the Mexican legal system that are crucial to determine the legal binding force of access provisions in case of controversies, while subsection 1.2. Identifies the most relevant economic concepts underlying access provisions to infer what constitutes a key infrastructure in Mexican regulation.

2.1 The legal foundations

The legal foundation for access provisions is solely positive law. Although access controversies are common in public utilities, up to now there is no jurisprudence on the essential facilities concepts. Lack of jurisprudence is explained by the fact that only a few cases have gone all the way through the judiciary process and Courts have not assessed the underpinnings of economic analysis of law, but have only addressed procedural issues to overturn authority decisions.

2.1.1 Positive law

In Mexico, access regime foundations are on the Constitution and derived specific laws, codes of regulations, and administrative orders for both, across the board (horizontal) and sector specific enforcement. Main elements of the access regimes for public utilities opened to private investment are the following:

- The government retains ownership of the infrastructure and natural resources, and shall regulate and promote the activities that the general interest demands.³
- The legislature usually decides what resources, activities, infrastructures or services are “affected with a public interest” (public utilities) and, thus, should be regulated.
- Those activities declared by law as public utilities must be provided by the State, either directly or by private concessionaires. In granting concessions and permits to provide public services, the government must assure efficiency and avoid concentration phenomena against the *public interest*.⁴
- In solving access controversies, competition and sectoral legislations play a complementary role. Sectoral laws have focused on regulating industry structure and guaranteeing access to new entrants, whereas the LFCE focuses on preventing anticompetitive conduct and the emergence of a dominant agent in the markets. A more detailed description for transportation and competition legislation approaches is provided the following subsections.

² Hereinafter, the report will refer to key facilities instead of key infrastructure as proposed in the background paper in order to address infrastructure, but also services connected to infrastructure, products, access to a place, and others.

³ Articles 25, 27 and 28 of the Mexican Constitution.

⁴ Articles 27 and 28 of the Mexican Constitution.

- Concessions are administrative contracts subject to established general and sectoral specific legislation, in which the State confirms not only a right of control, but also a right to intervene if the *public interest* so requires. Therefore, concessions: (i) can supplement what the law establishes, but cannot substitute the general law; (ii) shall remain within the scope of the general framework; and (iii) must establish which facilities (infrastructure, services, inputs) are subject to the obligation to provide the public service to all those who ask for it and are willing to pay for it, as well as the proceeding to settle the terms and conditions for its provision.⁵

2.1.2 *The transportation regulation approach*

Sectoral specific laws and regulations govern tenure issues, including rules and procedures for allocation, maintenance, transfer and termination of property rights, access and other rights and obligations of the title holders, and dispute resolution mechanisms.

Access to key infrastructure is established by direct legislation and is administered by the Ministry of Communications and Transportation (SCT), through different laws, regulations, and General Directorates for each mode of transportation. Regulatory frameworks specifically establish what facilities are subject to statutory third party access under non-discriminatory terms and those whose tenure rights must be granted through government authorizations, such as concessions, and specific separation (vertical or cross ownership) applicable.

In resolving access rates and terms of service, the common approach of the SCT is arbitrage by letting companies negotiate terms and conditions, and intervening only when negotiations fail. The implementation of access regimes include dispute settlement mechanisms, which are limited to these issues and do not include the possibility to mandate additional access obligations beyond the law. However, these mechanisms were broadly designed to resolve occasional carrier disputes based on the hypothesis that the inclusion of access rights and obligations would be enough to introduce competition so that the intervention of the sectoral regulator would only be necessary by exception.

As mentioned before, ex-ante access provisions for each mode of transportation were tailored in sectoral regulations to fit the structural design of the industry. Thus private investors were aware of statutory access provisions prior the actual restructuring process. Both, structural and regulatory design differs between all modes of transportation and leads to different controversies and solution alternatives.⁶ The rationale underlying the relationship between structure and access provision is mainly economic, and the main foundations are inferred in subsection 1.2.

At present, access controversies are more common than expected. Common causes refer to how to set up the terms and conditions to provide access to key infrastructure. More importantly, in solving access controversies, neither the SCT nor the judiciary have ordered access over facilities different from those specifically defined at sectoral legislation, but the FCC is empowered to do it under the competition legislation, as described in the following subsection.

2.1.3 *The competition law approach*

In Mexico, the 1993 Federal Law of Economic Competition (FLEC) explicitly deals with market access, specifically article 2 states that:

⁵ The obligation to serve is not absolute it depends on payment, damage, and if it is able to supply the service.

⁶ Additionally, regulatory asymmetries have affected the development of multimodal transportation, main issues are related to access conditions. However, this issue is outside of the scope of this contribution.

“The purpose of this law is to protect the competition process and **free market access, by preventing monopolies, monopolistic practices and other restrictions that deter the efficient operation of goods and services markets.**” (Emphasis added)

The FLEC applies to all areas of economic activity within the Mexican territory, included all public utilities, and makes no distinction between national and foreign, or public and private economic agents. The exceptions apply for strategic areas, labor unions, intellectual property rights and certain types of export cooperatives are not considered monopolies by the Constitution.⁷

The FLEC and its Code of Regulations (RFLEC) do not explicitly refer to essential facilities. However, they typify the following relative monopolistic practices that enclose all the access disputes arising in public utilities:

- Refusal to deal over goods or services normally available and offered to third parties (Article 10, section V of the FLEC);
- Discrimination in price or conditions of sale (Article 10, section VII, and Article 7, section IV, RFLEC); and
- Raising rivals’ costs (Article 10, section VII, and Article 7, section V, of its RFLEC), which commonly occurs by delaying access.

Relative monopolistic practices are illegal only if they demonstrably harm competition in the case at issue. The FLEC states that practices must:

“Improperly displace other agents from the market, substantially limit their access, or establish exclusive advantages in favour of certain persons.”

More importantly, a relative monopolistic practice is unlawful under the LFCE only if the responsible party has substantial market power in the relevant market. Both, the FLEC and the RLFCE clarify the criteria applied both for defining the relevant market and for determining the existence of market power. Firms wielding substantial market power are still subject to a rule of reason analysis and can present arguments about any potential efficiency-enhancing benefits of the relative monopolistic practices they undertake. See [Annex 1](#) for a detailed list of the elements to define relevant market, assess market power, and the elements that, among others, may be offered for an efficiency defence.

Therefore, the definition of the relevant market is a critical issue to determine if the agent has substantial market power, and, thus to determine ex-post access obligations.

2.2 The economic foundations: ex ante and ex post approaches

Transportation and competition legislations adopt different economic approaches to define key facilities under private control that will be subject to access provisions in order to allow competition by new entrants in the downstream market.

Sectoral specific regulation adopts an ex ante approach to establish access provisions, while the competition law approach adopts an ex post approach in order to assess actions whose purpose or effect is harming competition.

⁷ Article 28 of the Mexican Constitution.

2.2.1 Sectoral regulation: *ex ante* approach

In order to foster effective competition, transportation laws adopt access provisions on *essential* or *bottleneck* facilities and interconnection (to preserve network effects in each transportation mode). These provisions differ between transportation modes, depending on the structural characteristics and degree of private control over facilities, but have common elements that are similar to some of those considered into the EFD:⁸

- There are no feasible alternatives to replicate the facility involved (i.e. there are practical or reasonable impediments to duplicate the essential facility, including physical, geographical and legal constraints). For this reason, most key facilities are assets involving large sunk costs that would be expensive and inefficient to duplicate.
- The facility involved is essential to permit effective competition in a complementary (downstream or upstream) activity and to integrate networks under private control.

Sectoral regulations do not consider possible substitutes or alternatives for the facility, but only the possibility to reproduce the same facility. The assessment of *essentiality* is measured only in terms of the significance for the complementary activity (not the market) involved. Section 2 illustrates this assessment for freight services in railroads and ports.

In access provisions, the market power of the owner of the key facility is not explicitly considered, the analysis focuses instead in the way it determines its fees and conditions for access. Thus, tariff regulation does not distinguish between agents with and without market power, a situation that may impose unnecessary burdens to non dominant carriers.

On the other hand, transportation legislation authorises the regulator to impose price regulation, access controls, and use other regulatory instruments if the FCC issues a finding of an absence of effective competition in the relevant market (in telecommunications, the FCC's finding would relate to the existence of an economic agent possessing substantial market power). The FCC may also make a subsequent determination that reverses its previous finding and regulatory controls must be subsequently terminated. See [Annex 2](#) for a list of competition provisions in transport legislation.

2.2.2 Competition legislation: *ex post* approach

Under the FLEC, access controversies are usually analysed as relative monopolistic practice are reviewed on a case-by case basis. In competition analysis, the definition of relevant product and geographic markets is central to determinate whether a facility is essential or not: an improper definition may result in a facility being labelled *essential* when it clearly may not be the case. Likewise, the concept of market power cannot, unjustifiably, be attached to a product, but to a relevant product market.

Under a competition analysis, the definition of a relevant product market must meet two criteria: it should be sufficiently broad to include all substitutes and it should be sufficiently narrow to exclude demand and supply non-substitutes. In this sense, the scope of a competition analysis is broader than the sectoral approach, which limits itself to the facility and ignores substitutes.

A competition analysis defines both the relevant market and complementary markets. The relevant market is where the key facility lies (upstream market), while the complementary market is where the new entrant is seeking access. Under this analysis, access concerns may arise even with no vertical integration

⁸ Adapted from OECD (1996).

on the part of the key facility provider. For example, if the agent limiting access wields substantial market power, unjustified access denial, delay or discrimination is considered a relative monopolistic practice in violation of the FLEC.

Making a market power determination requires the identification and assessment of the effects of barriers to entry on competition conditions, and some of these elements that are common to the EFD:

- A competitor's inability to develop alternative facilities (Article 11 RFLEC, index I): the importance of financial costs or the costs of developing alternative channels, access to financing and the term for recouping the required investment, and determining whether costs are effectively sunk.
- The existence of normative barriers: exclusive rights over key facilities as barriers to entry.

In addition, proceedings under the FLEC allow the responsible party to justify access denial, delay or discrimination. The arguments submitted by the dominant party for its conduct are weighed against their effect on competition, which can be either technical or commercial. Some common justifications for refusal are: that the competitor has a poor credit history or is technically ill-equipped; that there is no spare capacity and no additional capacity can be created. If objectively justified, the FCC can agree to accept a refusal of access.

The next section deals with the general features of access regimes for public services, specifically those of railroads and ports, where the majority of access controversies over key infrastructure have arisen. These two sectors highlight the contrasts that result from differences in regulatory design, as ports are characterised by vertical separation in infrastructure administration and service provision, whereas railroads' infrastructure and service provision are vertically integrated.

3. Access regimes and controversies in ports

3.1 Access regimes

The 1993 Port Law opened the port industry to the participation of private investors for the operation of terminals and other facilities, and eventually even allowed participation in port administration. The current market structure is characterised by vertical separation between infrastructure, administration and service provision. This structural design was adopted to ensure efficient access to harbour and other key facilities for different service providers. It was intended to eliminate entry barriers so that all companies that wished to operate terminals or provide port services could do so, subject to space restrictions.

The original market design was aimed to introduce competition between ports, terminals within a port, and operators within general purposes terminals. Table 1 briefly describes access provisions at each one of these levels.

Table 1. Port structure and access provisions

Activities	Structure and access for each port	Competition between
Port administration	<div style="border: 1px solid black; width: 100px; margin: 0 auto; padding: 2px;">API</div>	Ports
Terminals and berths	<div style="border: 1px solid black; width: 150px; margin: 0 auto; padding: 2px;">Statutory vertical separation and open access</div>	Terminals in the same port
Access	<div style="display: flex; justify-content: space-around; margin-top: 10px;"> <div style="text-align: center;"> <div style="border: 1px solid black; width: 80px; padding: 2px;">Self-service</div> <div style="border: 1px solid black; width: 100px; padding: 2px; margin-top: 5px;">Other operators: exclusive</div> <div style="border: 1px solid black; width: 80px; padding: 2px; margin-top: 5px;">Users: exclusive*</div> </div> <div style="text-align: center;"> <div style="border: 1px solid black; width: 80px; padding: 2px;">Specialized</div> <div style="border: 1px solid black; width: 100px; padding: 2px; margin-top: 5px;">Other operators: exclusive</div> <div style="border: 1px solid black; width: 80px; padding: 2px; margin-top: 5px;">Users: public service</div> </div> <div style="text-align: center;"> <div style="border: 1px solid black; width: 80px; padding: 2px;">General</div> <div style="border: 1px solid black; width: 100px; padding: 2px; margin-top: 5px;">Other operators: public service</div> <div style="border: 1px solid black; width: 80px; padding: 2px; margin-top: 5px;">Users: public service</div> </div> </div>	Operators in general cargo terminals
Operations	<div style="display: flex; justify-content: space-around; margin-top: 10px;"> <div style="text-align: center;"> <div style="border: 1px solid black; width: 100px; padding: 2px; margin-bottom: 5px;">Terminal facilities and services</div> <div style="border: 1px solid black; width: 100px; padding: 2px; margin-bottom: 5px;">Port and ancillary services</div> <div style="border: 1px solid black; width: 100px; padding: 2px;">Storage and maneuver areas</div> </div> <div style="text-align: center;"> <div style="border: 1px solid black; width: 100px; padding: 2px; margin-bottom: 5px;">Terminal facilities and services</div> <div style="border: 1px solid black; width: 100px; padding: 2px; margin-bottom: 5px;">Port and ancillary services</div> <div style="border: 1px solid black; width: 100px; padding: 2px;">Storage and maneuver areas</div> </div> <div style="text-align: center;"> <div style="border: 1px solid black; width: 100px; padding: 2px; margin-bottom: 5px;">Port and ancillary services</div> <div style="border: 1px solid black; width: 100px; padding: 2px;">Storage and maneuver areas</div> </div> </div>	
<p>* / Facilities granted for self-service is always exclusive, except for those cases where the SCT justifies the obligation to provide the public service.</p>		

An Integrated Port Administration (API) was created at each port with the legal status of a commercial company. It is the only concessionaire in the Port that can take over administrative functions, including planning, promotion and construction of infrastructure.⁹ Although APIs prime responsibility is to provide public services, their concession requires them to sign contracts for the partial cession of rights to third parties (contracts), allowing private firms to undertake the construction, expansion and operation of facilities and terminals under a Build-Operate-Transfer (BOT) scheme, as well as to provide port services. In practice, the federal government holds a majority share in most APIs, while the SCT keeps the role of port authority, acting both as a policy maker and regulator. This situation has reduced incentives for port competition, causing new entrants to seek access to *winner ports* only.

Within a terminal, there are no restrictions to vertically integrate port services. The strongest structural limitations are horizontal: the same economic agent is not allowed to participate, directly or indirectly, in operating the same facility or service along the same Coastline.

Each contract establishes the services to be provided, the rights of access and accommodation in port facilities, as well as the associated fees and terms. All port service providers, either in public or specialised facilities, are compelled to serve any vessel that may be suitably handled at the terminal under non-discriminatory conditions. Access to waterfront facilities differs between specialised and general terminals. Service providers in specialised terminals must serve vessels under a *first come-first serve* basis and have exclusive rights to occupy the associated deck. In general purposes terminals, vessels may obtain grandfathering rights depending on the volume and frequency of shipments.

⁹ The APIs are generally public/private enterprises responsible for the management of 22 of Mexico's maritime ports. Of the current 22 APIs, 15 of these have a majority share from the Mexican Federal Government, 5 are under the control of state governments (Baja California Sur, Campeche, Quintana Roo, Tabasco and Tamaulipas), one is completely private (Acapulco) and one is under the control of a Trust Fund (Cabo San Lucas). In addition to port management, the APIs maintain information about cargo and passenger activity and vessel entrances and clearances. The last phase of port reform is the sale of APIs' shares to the private sector.

Under the Port Law, tariffs are liberalised and regulation only applies in cases where, at request of the SCT, the FCC declares that there is no effective competition among operators. Lack of effective competition prevailed when Ports were initially privatised so access tariffs were subject to regulation. Currently, Port tariffs charged by APIs to service providers and ships for the use of infrastructures are still subject to price caps, with each cap differing between port and service providers, according to the economic and legal rights involved (E.g. exclusive versus non exclusive access). To provide incentives for cost reductions and innovation, these limits will be revised every five years, to reflect any efficiency gains that may have been obtained from competition between the ports.

3.2 *Case study on access controversy: Port of Veracruz*¹⁰

In 1991, under a pre-reform regulation, the SCT granted three private firms permits to provide services to vessels at the general purposes berths in the port of Veracruz. In the beginning, all provided general cargo services, but over time each has specialised in the types of goods they handle: containers, grains and automobiles. Pursuant the 1993 Ports Law, the SCT substituted permits with contracts granted through direct allocation. The new contracts included additional rights to operate warehouses.

In 1995, the API in Veracruz (APIVER) auctioned a contract to solely operate the specialised terminal for containerised cargo (TEC) and to provide services with exclusivity within the terminal. Internacional de Contenedores Asociados de Veracruz, S.A. de C.V. (ICAVE) submitted the highest bid and obtained the concession. In 1996, at the request of ICAVE, the FCC assessed and declared the absence of competition conditions in the provision of port services in Veracruz, effectively maintaining the SCT's tariff regulation.

On May 2002, ICAVE issued a request to the SCT so that its existing TEC concession could be broadened to include access to the berth for general purposes. Although it was not required by regulations, the SCT sought the FCC's opinion on ICAVE's arguments on competition. ICAVE alleged that agents operating in the public facilities were paying lower tariffs to APIVER for the use of equivalent infrastructure and benefited from favourable entry controls because, having obtained their contracts through direct allocation instead of a public tender process.

Based on its 1996 determination on competition conditions, the FCC concluded that ICAVE and the operators of public port facilities belonged to different relevant markets within the Port of Veracruz. ICAVE participates in the market of specialised container manoeuvres, whereas service operators in public facilities provide non-specialised manoeuvres to containers and are physically and legally barred from participating in the other market; hence they do not compete with ICAVE.

The differences in payments to APIVER arise from differences in the allocation mechanisms and the rights of access involved: ICAVE pays tariffs it bidded for the exclusive right to operate the TEC, and tariffs are also set according to differences in the infrastructure they access, including waterfronts, docks and the degree of protection against congestion and interference (i.e. exclusive vs. shared access to berths and corridors). ICAVE has exclusive access to the docks assigned to the TEC, which results in an advantage since they have greater capacity and access possibilities than do agents that participate in public docks. On May 2004, the FCC notified to SCT that ICAVE's arguments on competition matters were not valid. As a result, the SCT denied ICAVE's request.

¹⁰ File AD-694-2002.

3.3 *Results from consumer's point of view*¹¹

Recent studies estimate considerable improvements in operational performance in ports, including containers, cargo and ship handling. Table 3 compares port performance indicators before and after the privatisation.

Table 3. Port performance indicators

Activities	Before privatisation (1990-1995)	After privatisation (1996-2000)
Annual average grow rate		
General cargo	2 %	5.7 %
Commercial cargo	5 %	10%
Container	16%	18%
Investments in infrastructure		
Private parties	n.d.	US\$ 1,509 million
APIs	n.d.	US\$ 330 million
Number of specialized non-oil terminals*	21	53
Installed capacity (million tons)*	59	120
* Figures at the end of each period.		

The modernization of equipment and installations, mainly at specialized terminals, has achieved highly competitive handling rates: they have doubled in the case of conventional or semi-mechanized terminals; and quadrupled in the case of main container terminals (Veracruz and Manzanillo). In parallel, the turn-round time of container ships at both ports has fallen from 51 hours to 19 hours in the last decade.

However, the services between the yard or storage area and the land transportation vehicle (second manoeuvre) are less fluid, causing unnecessary delays and discontinuities in the transportation and distribution chain. Complex series of cargo inspections, lack and mismanagement of space for ports, and lack of investments in intermodal terminals are probable causes.

4. *Access regimes and controversies in railroads*¹²

In 1995 the government began the restructure of the Mexican railroad system according to a regional segmentation, with vertically integrated regional companies responsible for providing all public railway transportation services such as maintenance, construction, operation, and commercialisation. In order to create a non-stitched system, the regulatory framework established mandatory access to key infrastructure under non-discriminatory conditions.

4.1 *Access regime*

The 1995 Railroad Services Law (RSL) and the 1996 Regulations to the RSL (RRSL): (i) establish statutory interconnection and terminal services; (ii) empower the SCT to impose mandatory trackage rights and haulage agreements for specific route portions in concessions for each regional company, as well as, additional interconnection points and distances where the exchange of equipment is expected to take place; and (iii) allow parties to negotiate additional trackage and haulage rights. At the present, the SCT has imposed 62 mandatory trackage rights for specific routes. Private parties have not agreed on new trackage rights and there are no mandatory or voluntary haulage rights.

¹¹ Based on Martner and Moreno(2002).

¹² OECD (2005)

Interconnection and terminal services were established to preserve network and scope economies of the integrated railroad system. Trackage and haulage rights establish access rights to other concessionaire's key facilities in order to promote competitive interlineal traffic. The four categories of access rights are defined in table 2.

As part of the privatisation process, service tariffs, including those for access, were liberalised and it was established that tariff regulation would only apply when the FCC declared that reasonable competition conditions did not exist.¹³ Until now, this provision has not been enforced. The SCT is also empowered to play an arbitrage role in defining access fees and terms in the event the parties are unable to reach an agreement.

In case of disagreement on access conditions the regulatory framework foresees that the SCT play an arbitrator role and defines them. To define fees for statutory interconnection services and commercial trackage rights, the SCT must consider the following elements, among others: maintenance and operating costs, investment amortization for the related infrastructure, and a reasonable profit for the access provider. In the case of the haulage rights, the fees will also include costs caused by harmful interference.¹⁴ In elaborating the basis for tariff regulation, the SCT must request the FCC's non-binding opinion.¹⁵

Table 3. Statutory access provisions for railroads

Access	Definition
Terminal service	Include the railroads' terminal functions, loading and unloading, and shipment monitoring.
Interconnection service	Include the interchange of railroad equipment, interlineal traffic among concessionaries, movements, transfers and any other activities that must be undertaken to ensure the continuity of railroad traffic and the delivery or return of the respective railroad equipment to its origin or destination, including terminal services.
Trackage right/obligation	Allow concessionaires to lease the tracks of other concessionaires and pass their trains and crew through it. These rights can be divided into those that are mandatory and voluntary, and those that are commercial and operational.
Haulage right/obligation	Allow concessionaires' freight cars to be hauled onto another concessionaire's rail tracks, using the locomotives of the latter concessionaire, and covering the corresponding fee.

In practice, the major weakness of this controversy settlement scheme has been a lack of information to assess the relevant costs involved in the provision of these services and to determine whether the initial payments for the concessions should be included or not. Differences in these initial payments between the concessionaires have led to significant asymmetries in average fixed costs, which are in turn reflected in the tariffs. For example, the payment for the railway concession of FNE was 13,012 million pesos (24,358 million pesos, in constant 2002 pesos, or about US\$2.5 billion), whereas the winning bid for FPN was 3,941 million pesos (6,434 million pesos, in constant 2002 pesos, or about US\$665 million). [Annex 3](#) presents a summary of main characteristics of the concessionaires in the railroad system.

4.2 Access controversies

The structural separation and the regulatory framework in railroads provides strong incentives for concessionaires to behave strategically to favour non-switched services and to halt competition in switched services by delaying, denying and raising the costs of other concessionaires when using segments in their tracks to serve a route.

¹³ Articles 47 of the RSL and 172 of the RRSL.

¹⁴ Article 114 of the RRSL.

¹⁵ Article 174 and 175 of the RRSL.

In the railroad sector, a lack of effectiveness in solving access controversies has turned disputes on interlinear traffic into a competition problem, since concession holders have adopted strategies aimed at barring access to their competitors from their essential facilities.

The SCT has issued administrative decisions to terminate specific controversies, and even emergency technical standards to provide a general solution. However, at present, all SCT decisions have been challenged before Courts and subsequently suspended. The result being a limited competition between switched and non-switched lines, in favour of regional companies. The situation has been aggravated by disagreements on access fees, described in the following paragraphs.

4.3 *SCT decisions on access rights*

a) General trackage rights

TFM and Ferromex, the two largest railroads in terms of freight, have not been able to agree upon the access fees each of them is required to pay to the other for interline services and haulage and trackage rights. Therefore, in accordance with the RSL and the RRSL, in 2001, both concessionaires initiated an administrative proceeding requesting a determination of such fees by the SCT.

With respect to trackage rights, the main disagreements were whether the fee should allow carriers to pay off for the value of the concession and a reasonable rate of return, but not a monopolistic rent, following a FCC's opinion on the issue. The SCT established a methodology whereby trackage rights were calculated as a percentage of average fees effectively charged by carriers. Different percentages applied to operative and commercial trackage rights: while the former included only the operative costs foreseen in the RRSL (ie. total operation, maintenance and traffic control costs), commercial rights also comprised amortization of investments, interference and a reasonable rate of return. The grounds for using average fees effectively charged by carriers was the lack of financial or accounting information regarding the operation of railroads, since all carriers had obtained a judicial order against a SCT standard for presenting this information.

The methodology was intended to apply to all pending payments and to become void if the parties were able to agree on the fees. Both TFM and Ferromex objected this methodology by means of judicial proceedings. The main issues referred to the fact that article 114 of the Regulations links pay-offs to the particular stretch involved and thus the methodology was incorrect to relate it to the whole railroad system. The judicial authority acknowledged this fact but stated that this relationship could not be extended to other factors such as infrastructure maintenance costs, operation interference and reasonable return. It thus declared void the methodology and ordered SCT to issue another one, that should take into consideration the issues foreseen in article 114 of the RSF with respect to each carrier and not with respect to the whole railroad system.

b) Controversies on specific trackage rights: Celaya

In connection with the previous dispute, Ferromex temporarily prevented TFM from using certain short trackage rights that TFM has over a stretch of its route running from Celaya to Silao, which is the site of a General Motors plant from where TFM transports finished vehicles to the border crossing at Nuevo Laredo. Ferromex denied such access in several occasions to TFM on the grounds that their operations exceeded the scope of the statutory trackage right because: (i) the auxiliary rails that provide access to Celaya and Silao yards were not part of it; and (ii) it only included cars, not automotive parts or any other input used by the automotive industry.

In order to avoid affecting GM, Ferromex offered to provide interlinear service in Celaya yard to move the train to Silao. By means of an administrative decision, the SCT ordered Ferromex to provide the

trackage right to TFM by providing access to the auxiliary ways to enable it to provide railway services to GM, including any inputs and finished products. This decision was challenged by Ferromex who obtained a suspension order. TFM, in turn obtained nullification of such order, on the grounds that it affected social interest because the substitution of interlineal services for trackage rights implies the provision of railroad services in a longer term and higher access fees.

TFM has promoted several proceedings before the SCT pursuing the initiation of administrative proceedings to sanction Ferromex for denying statutory trackage rights. So far none of these proceedings have lead to the imposition of fines on Ferromex, but some of them are pending final decision.

5. Controversies on interconnection and terminal services

Disagreements between TFM and Ferromex regarding fees to be charged for interconnection and terminal services also lead the SCT to issue a methodology on these topics. Following the RRSL, the fees should comprise amortization of investments including the payment for obtaining the concession,¹⁶ but should not encompass monopolistic rents. The carrier should also consider costs it charges itself to provide the service. The user would make a single payment for the service along the whole route to the “originating carrier” who will be responsible for paying each carrier participating in the provision of the railroad service. Whether the service is provided by a single carrier or more, discounts and promotions on fees must be the same for services with the same direction (same origin-destination), thus impeding tariff discrimination. In addition, where the user does not specify the route for the railroad service, the originating concessionaire will provide the service along the shortest route.

Interconnection rights were calculated by applying an average discount per product to registered tariffs. Three levels of average discount were defined for three corresponding sets of products and two geographic areas. The first area corresponds to terminal services defined as those provided to a carrier who holds trackage rights to a zone or industry located within 30 km along the rails from a specific established facility.¹⁷ Terminal access fees are fixed at a level that covers costs incurred by the carrier granting the service and a reasonable return, but not a rent for affecting the exclusivity, and apply per car travelling fore and back. Either carrier may request terminal services to the carrier granting the right of way in order to access the industry.

The second area corresponds to distances beyond 30 km, the fee for interlineal traffic services would consider fix and variable costs for regular freight registered by Ferromex and TFM with the SCT. Where the calculated fee for a concessionaire is lower than the prevailing commercial fee, the interlineal traffic fee will be calculated based on those effectively charged.

Both TFM and Ferromex filed judicial proceedings against this SCT decision. TFM obtained a definite suspension (until the Court reaches a final decision) on the grounds that railroad service would not be affected since the provision of interconnection and terminal services in non discriminatory terms is compulsory, even if there is no agreement on fees. TFM argued that only the costs incurred by the carrier providing interconnection and terminal services should be considered, not those of the other carrier as occurs when using the average tariff in its estimation. Both proceedings are pending a final decision.

¹⁶ Annex 3 presents a summary of the payments made by each concessionaire.

¹⁷ Facilities may correspond either to the yard for incoming freight or from a point on the concessioned way where equipment is exchanged.

c) Controversies on specific interconnection and terminal services: Altamira

Altamira is an industrial city located near the international cargo port of Altamira. TFM's concession established a statutory trackage right to "Altamira". Controversies on the geographic scope of the access right gave rise to a controversy with Ferromex.

TFM used its right of way to serve freight whose origin or destination was the Port of Altamira until 1999, when Ferromex intended to charge TFM retroactively for the interlineal service it has been using from Altamira Station to the Port of Altamira, arguing that TFM's right of way was clearly set at the former.

In 2002, the SCT ordered Ferromex to grant TFM the trackage right settled in its concession for both, the Station and the Port of Altamira, as they were named in the same way in the railroad system. Ferromex challenged SCT's decision before a judiciary Court that declared it void. The Court based its decision on the fact that the concession might refer ambiguously to "Altamira", but it was clear at setting the railway track from Altamira to the Port of Altamira to distinguish between both. Further, the Court did not find evidence to support that the government's intention was to give access to this port to two different rail concessionaires.

5.1 Competition authority decisions on access rights

a) FCC's Opinion on haulage and trackage rights¹⁸

In 2001, Ferromex requested the FCC's opinion on alleged differences in criteria between the original concession terms and new interpretations issued by the SCT on haulage and trackage rights. The same year, the SCT issued two emergency, and therefore temporary, technical standards for trackage and haulage rights, and interconnection and terminal services. These standards included specifications on how to interpret the scope of access rights and services and on payments.

In responding to this consultation, the FCC offered an outline of the competition criteria behind the design of the railroad system. Namely, that access conditions had been explicitly accounted for when designing the market structure prior to privatisation and in assessing bidders in the auctions that allocated ownership and operation rights of existing railroads. The FCC voiced its support for the legality of a concessionaire's exclusivity in supplying access rights by the terms specified in their concession titles, since these exclusivities were necessary to guarantee the recovery of initial investments. Nevertheless, the Commission added that competition in the sector would depend, among other things, on the certainty of the terms and conditions in the supply of access rights.

Regarding the scope of trackage rights, the FCC determined that these must include access to the manoeuvres yard as it is an essential component for in-track services. The Commission further elaborated that the concession holder could include the taxes and duties paid for the concession in the costs it uses to set access charges, and that these costs must be the same for all access carriers, including those provided for self-service. Indeed, the Commission reasoned that insofar as it was possible to render this service through agreements with the concession that holds the exclusivity, access charges were not monopolistic rents charged to the final consumer, but opportunity costs.

¹⁸ CFC Files CON-08-2001 and AD-46-2001.

The SCT has adopted the content of this opinion in its subsequent decisions even it is non-binding.

b) Relative monopolistic practices in freight railway transportation¹⁹

In November 2001, TFM filed a complaint against Ferromex alleging relative monopolistic practices in the interlinear service of freight transport in some of the routes it operated. The alleged conduct consisted in: (i) artificially raising tariffs for interlinear traffic and registering them as the Unique Tariff for Express freight (TUCE);²⁰ and (ii) duplicating car hire services charges to increase TFM's costs and to displace it from the market. The effects of these practices were to leave Ferromex as the sole provider of this service along its exclusive routes.

The Commission defined the relevant market as railway lines given in concession to TFM and Ferromex, which, if integrated, created a network that covered a number of cities that had as their interconnection point the City of Celaya, Guanajuato. On October 2003, the Commission determined that Ferromex was guilty of relative monopolistic practices in violation of the LFCE. These consisted of cost increases for interconnection and transport in traffic along several interlinear routes where the origin railway was TFM, as well as duplicate charges for car hire services.

Based on these findings, the FCC ordered Ferromex to suppress its practices and implement corrective measures in the relevant market. These measures consisted in setting interlinear traffic service tariffs per kilometre no higher than the minimum tariff charged by Ferromex to its exclusive route customers transporting similar products. The FCC also ordered Ferromex to charge car hire tariffs in traffic along interlinear routes no higher than the minimum tariff charged to its exclusive route customers. On February 2004, the Plenum of the Commission resolved that Ferromex's appeal was unfounded and confirmed its previous resolution.

5.2 Results from the consumer's perspective

Gains from the railroad's privatisation obtained between 1996 and 2003 include operative improvements such as an increased participation in total inland freight transportation by an average rate of 5.3%;²¹ increased number of tons transported, by 53%, and an increase in the number of tons/kilometers of 37%; also a boost in productivity of personnel, 357%, locomotives, 48%, railway cars, 43%; fuel, 15%; and traffic density 37%. In terms of its profitability, the sector recovered from operative annual losses of around 9,000 million pesos between the years 1992 and 1996, to net operative profits of 4,563 million pesos between 2002 and 2003. In similar fashion, indicators related to service quality have shown significant improvements, for example, the number of consumer complaints fell by 66%, and accidents had an overall decrease of over 80%.²²

However, interlineal traffic has fallen as a result of strategic behaviour in establishing tariff discounts and disagreements on interconnection. The share in the total freight transported by rail decreased from

¹⁹ CFC File DE-57-2001.

²⁰ The TUCE are maximum tariffs that are freely set by concessionaires, and are not required to rely on costs. Tariffs, including those for interconnection, must be registered before the SCT for public disclosure and must be non-discriminatory. Moreover, the service contracts are considered private and confidential agreements only restricted to respect registered maximum tariffs. Concessionaires register high maximum tariffs and apply discretionary discounts to favour the non-switched line they provide and to deter switched services over the same route.

²¹ Annex 4 gives a historic overview of the modal split of freight transport in the Mexico.

²² Estrada (2004)

24% to 12% between 1995 and 2002. This situation results in a significant sub-utilisation of existing facilities and a loss of network economies, while tipping is affecting competitiveness of captive cargo.²³

Meanwhile, final users have filed complaints before the SCT and FCC against rail concessionaires alleging damages as a result of higher tariffs on a loss in their competitiveness. The complaining users also alleged that railroads are extracting monopolistic profits from *captive cargo*, which can best be described as point-to-point transport of large amounts of bulk cargo over relatively long distances where railroads do not face competition from road transportation.

6. Findings and preliminary conclusions

In the Mexican experience, the access regime based on ex ante (sectoral) and ex post (case-by-case competition analysis) provisions has effectively foster competition and entry of new market participants. However, the implementation of this regime has also shown some drawbacks, specially when setting fees and conditions to provide the statutory access to key facilities.

Setting access fees involves a trade off between private rights and public interest, and the determination of the appropriate balance requires judiciary interpretation. The lack of jurisprudence has created the opportunity for regulated parties to challenge individual administrative decisions to cause regulatory delays, increase the costs for new entrants and limit competition.

²³

Idem.

Mexico's experience shows that it is not enough to require concessionaires to provide compulsory access. It is essential for sectoral regulations to provide precise guidelines on how to resolve disagreements among concession holders and confer legal certainty to all parties involved. Additionally, it is critical to strengthen the powers and independence of the sectoral regulator so that it can effectively implement these regulations.

BIBLIOGRAPHY

Abbott B. Lipsky Jr. and J. Gregory Sidak (May 1999), “Essential Facilities,” *Stanford Law Review* 51:5, pp. 1187-1248.

Australian Productivity Commission (28 September 2001), Report No 17.

Doug Andrew (January 1998), Director of Economic Regulation Group, CAA, “Corporatisation of the New Zealand Air Traffic Control System,” memorandum to the Parliament of the United Kingdom, House of Commons, Committee on Environment, Transport and Regional Affairs.

Estache Antonio, Marianela González and Lourdes Trujillo (July 2001), “Technical Efficiency Gains from Port Reform: The Potential for Yardstick Competition in Mexico”; Policy Research Working Paper no. 2637; The World Bank Institute; Governance, Regulation, and Finance Division.

Estrada, Ernesto (2004), “Regulación y Competencia en los Ferrocarriles Mexicanos”, chapter XIII in *Competencia Económica en México*, edited by the Federal Competition Commission, Porrúa: Mexico DF.

García Alba Iduñate, Pascual (2002) “Competition Issues in the Privatization of the Mexican Railroads”, Presented at the Seminar on Railway Reform, Restructuring and Competition, Beijing, China, 28-29 January 2002.

OCDE (2004) *Structural Reform in the Rail Industry: Should Train Operations be Separated from the Provision of Track Infrastructure?*

(1999) *The Essential Facilities Concept*.

(2005) *Experiences with Structural Separation, Mexican Contribution*

(2005) *Roundtable on Barriers to Entry, Mexican contribution*

Martner, Carlos y Moreno, Aurora (2002) “The Restructuring of Mexican Ports and Modal Integration of Transport in Mexico”.

Robert Pitofsky, Donna Patterson and Jonathan Hooks (2002), “The Essential Facilities Doctrine Under U.S. Antitrust Law,” *Antitrust Law Journal* 70:2, pp. 443-462. Abbott B. Lipsky Jr. and J. Gregory Sidak, “Essential Facilities,” *Stanford Law Review* 51:5 (May 1999), pp. 1187-1248.

Roop, S. Stephen (February, 2001) *The impact of Mexican Rail Privatization on the Texas Transportation System* Texas Transportation Institute , Texas A&M University, February 2001.

Sánchez González, Álvaro and Víctor Paredes (1997) “Privatización y Política de Competencia en Servicios Ferroviarios”, Federal Competition Commission, 1997 Annual Report.

DAF/COMP(2006)29

Sebastian J. Eward (2004), "Essential Facilities in the European Union: Bronner and Beyond," Columbia Journal of European Law 10.

SCT, Annual Railroad Statistics 2003.

Structural Change in the Mexican Railroad System, September 2003.

Communications and Transport Sectoral Programme, 2001-2006.

ANNEX 1. TREATMENT OF MARKET DEFINITION AND MARKET POWER UNDER THE COMPETITION LEGISLATION

Relevant Market ¹	Market power ²	Efficiency defense ³
<p>Goods and services that make up a market, be they produced, marketed or offered by national or foreign economic agents, and those that substitute or may substitute them over time. The definition limits this market to a specified geographic area where these products or services are demanded, and where clients or suppliers can access them without incurring excessively different costs. In its determination of the relevant market the Commission follows these criteria:</p> <p>Substitution possibilities of the good or service in question, either in the national territory or abroad, considering technological possibilities, the types of substitutes available to consumers and the time required for this substitution</p> <p>Distribution costs for the good in question, its inputs, complements and substitutes, accounting for transport, insurance, tariffs and non tariff costs, restrictions imposed by economic agents and the time required to supply a market from other regions (be they national or foreign)</p> <p>Users' or consumers' costs and probabilities of access to other markets</p> <p>Normative restrictions that limit users' or consumers' access to alternative supply sources, or suppliers' access to alternative clients</p>	<p>An economic agent's market share, and whether it can unilaterally set prices or restrict supply in the relevant market.</p> <p>Any <u>entry barriers</u> and elements that may alter those barriers and also other competitors' supply. The elements that can be construed as barriers to entry include: Capital requirements, that is, "financial costs or the costs of developing alternative channels". It also considers whether financial markets are efficient, that is, if conditions of "limited access to financing" exists. Adjustment costs, "[the] term for recouping the required investment", and whether costs are effectively sunk, "[the] return for alternative uses of infrastructure and equipment". Fixed costs such as advertising and investments in brands or trademarks as barriers to entry. Marketing and business practices, such as exclusive arrangements, lie within the definition of barriers</p> <p>Normative barriers: regulation and regulators' actions, including the use of intellectual and industrial property as barriers to entry, and regulation relating to international trade as a special case of barriers to entry.</p>	<p>The practice achieves resource savings, which permits the allegedly responsible agent, to produce the same quantity of the good at a lower cost, or to produce a greater quantity of the good at the same cost, on a permanent basis.</p> <p>The Commission will consider the following elements, amongst others, when presented with an efficiency defence.</p> <p>The practice achieves resource savings, which permits the allegedly responsible agent, to produce the same quantity of the good at a lower cost, or to produce a greater quantity of the good at the same cost, on a permanent basis.</p> <p>The actions achieve lower costs if two or more goods or services are produced jointly as opposed to separately.</p> <p>The conduct in question lowers administrative costs significantly.</p> <p>The conduct in question transfers production technology or market know-how.</p> <p>These actions lower production or trade costs arising from an expansion of infrastructure or a distribution network.</p>

1/ Article 12 of the FLEC, 9 of its code of rulings

2/ Article 13 of the FLEC, 10-14 of its code of rulings

3/ Article 6 of the Rulings of the FLEC

ANNEX 2. COMPETITION PROVISIONS IN TRANSPORT LEGISLATION

Regulations	Date of publication in the Federal Gazette	Evaluation of participants in public auctions to grant concessions or permits	Declarations on competition conditions		Others
			To impose tariff or price regulation on	To suppress tariff or price regulation	
Regulatory Law of the Railway Service	May 12th, 1995	Article 18	Article 47	--	--
Regulation on Railway Service	September 30th, 1996	--	Article 172 Set the tariff bases to be initiated at the request of private parties or the FCC.	--	(Article 175) The methodology adopted by SCT to establish tariff regulation must have in advance a favorable opinion of the FCC.
Law on Airports	December 22th, 1995	Requisites that the bases of the bidding should contain	Article 68	Article 70	--
Civil Aviation Law	May 12th, 1995	--	--	Article 43	--
Regulations on Federal Road Transportation And Auxiliary Services	November 22th, 1994	--	Article 64	--	--
Navigation Law	January 4th, 1994	Article 36	--	Article 106 The Ministry, subject to a favourable opinion from the FCC, shall establish the respective rate bases.	Article 33, traffic on the high seas, and article 34, coastal traffic. the Ministry can reserve for Mexican companies the provision of these transportation services, when the FCC is of the opinion that the principles of competition are not respected and it affects national sovereignty
Law on Roads, Bridges And Federal Road Transportation	December 22th, 1993	Article 10	Article 19	Article 21	--
Law on Ports	July 19 th , 1993	Article 29	Article 59 To impose maximum benchmarks to prices and tariffs	Article 62	--

ANNEX 3. SUMMARY OF THE MEXICAN RAILROAD SYSTEM

Concept	Railroad Line					
	Northeast	Pacific-North	Coahuila-Durango	Southeast	Nacozari	Chiapas-Mayab
Length (miles)	2,77	5,067	609	924	200	969
Bid	Aug. 9, 1996	March 7, 1997	July 31, 1997	Feb. 18, 1998	March 24, 1999	March 24, 1999
Terms of Concession	50 years	50 years	30 years	50 years	30 years	30 years
Winner	TFM	Ferromex	Grupo Acerero del Norte – Industrias Peñoles	TRIBASA	Ferromex	Compañía de Ferrocarriles Chiapas-Mayab
Offer Presented (in Millions of U.S. Dollars)	\$1,400*	\$527**	\$23	\$322	\$2	\$15
Investment Commitments for the 2000-2004 period (in Millions of US Dollars)	\$731.8	\$703	\$19	\$187	\$31	\$8
Beginning of Operations	June 23, 1997	Feb. 18, 1998	April 26, 1998	Dec. 17, 1998	Aug. 31, 1999	Aug. 31, 1999
Access to						
Inland principal Maritime Ports	Lázaro Cárdenas, Michoacán Tampico, Tamaulipas Veracruz, Veracruz	Altamira ,Tamaulipas Manzanillo ,Colima Tampico, Tamaulipas		Coatzacoalcos, Veracruz Salina Cruz, Oaxaca Veracruz, Veracruz		
Inland intermodal Terminals	Monterrey, Nuevo León Pantaco, State of México Ramos Arizpe, Coahuila	Aguascalientes, Aguascalientes Guadalajara, Jalisco Pantaco, State of México Querétaro, Querétaro Ramos Arizpe, Coahuila Saltillo, Coahuila		Pantaco, State of México		
Inland automobile Manufacturing Facilities	Monterrey, Nuevo León Ramos Arizpe, Coahuila	Hermosillo, Sonora La Encantada, Coahuila Ramos Arizpe, Coahuila Silao, Guanajuato		Puebla, Puebla		
US-México	Brownsville-	Eagle Pass-				

Border Crossings	Matamoros, Texas-Tamaulipas Laredo-Nuevo Laredo, Texas-Tamaulipas	Piedras Negras, Texas-Coahuila El Paso-Ciudad Juárez, Texas - Chihuahua Nogales-Nogales, Arizona-Sonora Callexic-Mexicali, California-Baja California				
Trackage rights						

*Offer included only 80 percent of the stock shares.

** Offer included the Chihuahua-Pacific Shortline Railroads from Ojinaga to Topolobampo for \$ 32 million.

Source: Secretaría de Comunicaciones y Transportes, 2000. In: Roop, S. Stephen, et al, *The impact of Mexican Rail Privatization on the Texas Transportation System* Texas Transportation Institute , Texas A&M University, February 2001.

THE NETHERLANDS

1. Introduction

This paper gives an overview of access issues regarding railways, airports and ports. The paper serves as input for the Round table on 'Ensuring access to essential transportation Structure for new entrants' in *Working Party 2* at the Competition Committee meeting on Monday, February 6, 2005. This paper has been drafted by the Knowledge Center for Economic Regulation and the Ministry of Transport, Public Works and Water Management.

2. Airports

2.1 *Background of access to essential airport facilities: the allocation of scarce airport capacity in the Netherlands*

- Amsterdam Airport Schiphol is a publicly owned private company that operates the national airport as well as a number of regional airports in the Netherlands. A planned partial privatisation of Schiphol is currently considered and subject to political decision making. Because Amsterdam Airport Schiphol has a dominant position in some market segments, airport charges and conditions (like quality of service) of Amsterdam Schiphol Airport are subject to economic regulation. A new regulatory framework for airport charges has been developed and is based upon the criteria of general competition law (cost relatedness, non-discrimination, transparency);
- Although large hub airports like Amsterdam Airport Schiphol may have many characteristics of a monopoly, it should be recognized however that competition between the users (the airlines) providing transportation services at the airport exists. Currently there is no vertical integration between the providers of the essential facilities of Amsterdam Schiphol Airport and the users (the airlines). Amsterdam Schiphol Airport not only owns the runways but also the terminals (operated according to a so-called One-terminal concept) that are open to all airlines on a non-discriminatory basis. The essential infrastructure facilities of Amsterdam Airport Schiphol are capacity constrained and there is no room for timely expansion.
- In the situation of Amsterdam Airport Schiphol, the airport has to provide a major hub for at least one of the major airline alliances in order to accommodate European and intercontinental air transport of both passengers and cargo. In order to provide for optimum network connections, the hub operations at Schiphol result in a concentration of arriving and departing passenger flights during peak hours, with the runway capacity as the main constraining factor. The number of movements during the night period and the total number of movements per year are constrained due to environmental regulations (in particular noise constraints).
- Council Regulation (EEC) 95/93 of 18 January 1993 has established a set of rules for the allocation of slots at Community airports. The Regulation's objective was to ensure that access to congested airports was organised through a system of fair, non-discriminatory and transparent rules for the allocation of landing and take-off slots so as to improve the utilisation of airport capacity and to enhance competition. The Regulation was modified by

Regulation (EU) 793/2004 of 30 April 2004 which contained a number of technical improvements such as provisions with regard to enforcement, clearer definitions, better monitoring tools and stricter sanctions against abuse or non-compliance with the allocation rules. The latter Regulation has left the basic system of slot allocation i.e. its administrative nature, unchanged.

- Against this background, in 1998 Amsterdam Airport has been designated as a slot coordinated airport. This means that in order to be able to operate from Schiphol airlines need to obtain slots(= permission to operate an air service on a specific date and time for the purpose of landing and take-off). Slots are allocated through the slot coordinator, an independent entity designated by the Member State (N.B. traffic rights and slots are separate issues and airlines need both to operate commercial services).
- It has to be pointed out that any discussion on the principles of access to scarce essential infrastructure of airport facilities needs to take the Regulation into account.
- One of the key elements of the Regulation is that of grandfather rights or historical precedence: an airline holding a series of slots and operating such slots during at least 80% of the time during the scheduling period (summer or winter season) for which it has been allocated, shall be entitled to the same series of slots in the next scheduling period. If the airline does not use that series of slots in that manner, it has to return the slots to a pool managed by the slot coordinator. Without affecting the principle of grandfather rights, the Regulation aims at promoting new entrants at slot coordinated airports. For this reason slots placed in the pool shall be distributed among applicant airlines: 50% of these slots shall first be allocated to new entrants (a new entrant status requires the airline to meet certain conditions, for instance an airline that has less than 5 slots at one day, the requested slots included. Apart from the allocation of slots and scarce traffic rights, the Dutch competition authority (NMa) is responsible for all other access issues regarding upstream or downstream firms at Amsterdam Airport Schiphol.

2.2 Current developments at EU level

- Two reports of the EU Commission on the state of the application of the original slot Regulation have indicated that the main disadvantage of the slot Regulation has been that the gap between available airport capacity and demand has been increasing thus accentuating the problem of scarcity. The absence of any price setting mechanism for slots indicates that the current allocation system has limitations when it comes to dealing with the increased scarcity of airport infrastructure which leads to inefficient use of slots. Little or no incentive exists for air carriers to use the most valuable slots in the most efficient way.
- The measures laid down in Regulation (EU) 793/2004 are according to the EU Commission not sufficient to remedy situations where the level of saturation at an airport is such that
 3. New entry or
 4. Optimisation and maximisation of the use of allocated slots by incumbent carriers is not feasible without a structural change to the system. New entry cannot take place because there is not sufficient turnover of slots into the pool to be allocated to new entrants for them to economically launch air services.

- Incumbent air carriers are not compelled to make the most efficient use of their slots and this has a negative impact on the optimal and maximal use of airport capacity. Therefore, in order to give both incumbents and new entrants possibilities to use their slot portfolios with maximum effectiveness, in 2003 a study was commissioned to develop and assess market oriented slot allocation schemes. This study was presented in January 2004 and has since been published on the EU's website. The study identified a number of possibilities (like primary trading like auction and posted prices and secondary trading) for commercial slot allocation and described, in general terms, the possible effects of their implementation.
- As a follow-up to the study, the Commission published a Consultation document late 2004 on commercial slot allocation mechanisms to which it invited comments from Member States and stakeholders. As a result of the consultation, the Commission has the intention to focus its future work on the second revision of Regulation (EEC) 95/93 as amended, on the introduction of secondary trading. A new proposal for the second revision of Regulation is expected in 2006.

3. Railways

3.1 *Ensuring Access to essential transportation Structure for new entrants in the Railway sector*

3.1.1 *Introduction: major developments 1990-2005*

Before 1995

There was one player: the NS= Dutch Railways

1995-2001

- Implementation of directive 91/440/EEG

The railway reform initiated in 1995 in the Netherlands aimed to increase the market share of railways in overall transportation. European Directive 91/440 on the separation of railway infrastructure and operations was one factor triggering this reform. Its implementation at NS created a 'market sector' (operating under market principles) and three so-called 'task organizations' (infrastructure manager) whose costs are covered by Ministry of Transport.

- Possibility for competition on the tracks (in 1996). The 1995 reforms made competition possible and a new operator appeared in 1996-1999.
- Competition on the track did not work out the way it was intended → 'rethinking railways'

2001-2005

- Developing new railway act. The new railroad legislation will strengthen co-operation between the infrastructure administrator and the transport companies (NS), thus optimising the system.
- Implementation first railway package including directive 2001/14/EU (capacity management, independent regulatory body)
- Focus on quiet improvement and on co-operation between Railway undertaking companies and infrastructure manager

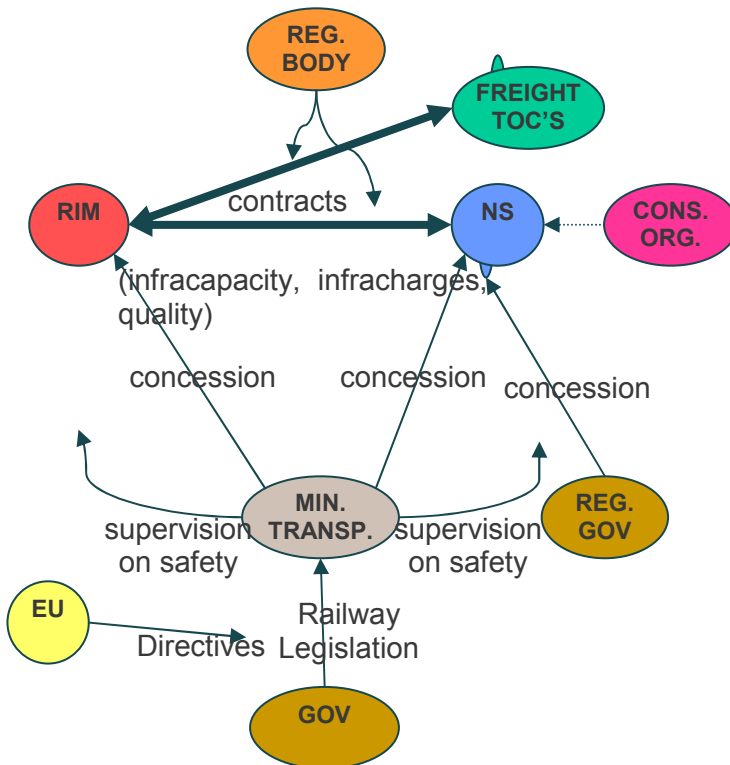
- Ongoing liberalisation of the rail-freight market. Contrary to the passenger transport sector, competition on the tracks is widely accepted for the freight transport sector.

2005 >

- The new railway act comes into force

3.1.2 *New Railway act (2005) into force: importance for railway capacity*

- Implementation of directive 2001/14/EU
- Railinfrastructure manager (ProRail) allocates railway capacity.
- NMa Vervoerkamer (the Competition Authority) is regulatory body on access and transit rights (equitable conditions). According to the Railway Act de 'Vervoerkamer' is the regulatory body; a.o. ensures that the access to the Dutch network is non-discriminatoire to freight transport and international passenger-transport and that the charges set by the infrastructure-manager comply with legislation.
- Railinfrastructure manager & Railway undertakers must come to an agreement on railway capacity (and price)
- In case of congested infrastructure the infrastructure manager must use priority criteria set by the State
- These priority criteria reflect the account of the importance of a service to the Netherlands
- Open access (cf: directive 2004/55/EU) for railfreight and international groupings
- For national passenger traffic a national license is needed (granted to NS until 2015 for main network)

Figure 1: The new institutional setting

3.1.3 Process allocation of railway infrastructure capacity

Process:

- Yearly process coordinated by the rail infrastructure manager (Prorail)
- Process start by publishing network statement
- Railway undertaker requests for capacity (there's a possibility for a framework agreement to ensure long term capacity rights)
- Infrastructure manager shall as far as is possible meet all requests for infrastructure capacity (scheduling)
- When applications conflict a process of coordination starts
- Declaration of congested infrastructure follows when coordination is unsuccessful
- Then two parallel processes starts:
 - Allocation of capacity according to the priority criteria
 - Capacity analysis followed by a capacity enhancement plan

- For Railfreight there's room for short-term request for capacity

ProRail allocates, after agreement with the requestor, capacity to the operators on an independent basis, in accordance with the appropriate domestic and EU legislation. ProRail closely monitors the capacity in the network to prevent disruptions in traffic. The access conditions and possibilities are published in the Network Statement. The rules under which access to the track is granted are stated in the Dutch Network Statement. This Statement contains all the information railway companies need to access the Dutch railway net. Not only practical information on the lay-out of the Dutch railway net, but also the access conditions for a standard access agreement. It also offers procedural information such as capacity application and utilization. Furthermore, it sums up the different service packages offered by ProRail and describes the fee system. The key principle of The Network Statement is "to deal with the capacity applications and possible conflicts that may arise from it in an honest, transparent and non-discriminatory manner".

The capacity allocation procedures are intended to ensure that the requested capacity is made available to the applicants in consensus and in accordance with their wishes as far as possible." For this, an extensive procedure is followed. If there are conflicting claims, ProRail must use priority criteria set by the State. Railway undertakings can apply to ProRail for long-term capacity allocation. The process of allocation can take up to one year, which covers the standard planning cycle for the year to year timetable. Not all requests are granted, particularly in congested areas of the network.

Some short-term (i.e. daily or weekly) additional capacity is available upon expiration of previously allocated paths. For example, certain capacities are reserved in advance for international Railfreight. If no candidate has come forward by five days prior to the transport day, the reservation expires and the paths are available to other railway undertakings.

In order to gain access to the railway infrastructure managed by ProRail, and to utilise it for the transport of railway vehicles, a railway company has to conclude an Access Agreement with ProRail. There are various admission requirements like requirements with regard to business operations and personnel and for instance requirements with regard to the provision of information.

Terms of conditions of access are determined in advance and can be found in the Network Statement.

Prices are set in the access agreement.

3.1.4 Allocation: priority criteria

- Dutch railway network is heavily used, therefore 'protection' of certain market segments is needed
- Passenger traffic gets higher priority in the Randstad and during peakhours than Railfreight traffic
- Order of priority:
 5. Urban regional public passenger transport (Randstad)
 6. International public passenger transport
 7. Conventional freight transport
 8. National public transport

9. Heavy freight transport
 10. Rapid freight transport
 11. District and regional public passenger transport
 12. Very high speed freight transport
 13. Private passenger transport
- In 2007 opening three major new rail-lines (HSL-Zuid, Betuweroute, corridor Amsterdam – Utrecht)
 - A-licence for high speed passenger traffic
 - Betuweroute is the main corridor for railfreight traffic to Germany (from our harbours in Amsterdam and Rotterdam)
 - Re-allocation of railinfrastructure capacity
 - Introduction new market segment: high speed passenger traffic
 - Redefining priority criteria for railfreight traffic
 - Railsector working closely together (design 2007) on the timetable for the year 2007. The opening of the three mentioned projects means a big change in the usage of the network.

3.1.5 *First experience*

- New system is firstly used for timetable 2006 and will be used for the timetable 2007 (project ‘design 2007’)
- System (priority criteria) was criticised by Railfreight operators, infrastructure manager and regulatory body saying:
 - Priority criteria favour the big player (NS) by enforcing Declaration of congested infrastructure
 - Not functional to optimizing the use of the infrastructure
 - More dominant position for the infrastructure manager
- In 2008 main evaluation of the effect of the new railway act
- In the schedule for 2006 there were two declarations of congested infrastructure. For two railtracks ProRail could not facilitate all the demands for capacity. For 2007 there are no declarations expected. The railsector have found each other.

3.1.6 *First conclusions*

- Railsector working closely together (design 2007)

- New system seems to work
 - Invitation to work closely together leads to cooperative approach of allocating capacity
 - Distribution of ‘pain’ instead off repelling
 - Minimal declarations of congested infrastructure (every party is prepared to make little adjustments to their original request)
- Not all the incentives in the system are used, further optimizing of the system possible:
 - Performance regime
 - Reservation charges
 - Raising infrastructure charge in case of congested infrastructure

4. Ports

4.1 Access to netherlands seaports

4.1.1 Situation

NL seaports are generally owned by a port management that forms part of or is controlled by regional and local authorities. Exceptions are the privately owned seaport of IJmuiden (Corus) and the port of Rotterdam. As to the latter, before 2004 the port management was a municipal service. Since that it has been corporatised (Port of Rotterdam). Since 2006 the stakes are owned by the Municipality of Rotterdam (75%) and the State of the Netherlands (25%).

In most ports, the land is owned by the municipality; if the port management body is not part of the municipality, it leases the land from the municipality and on its turn leases it out to port-based companies. In some cases (e.g. Groningen seaports) private companies can buy land in the port. Port management bodies prefer to allow companies in their port that not only pay rent for the land, but also attract streams of goods through the port and thus bring in port dues. In general, these are cargo-handling companies and port-related industries (oil and chemicals).

In the Netherlands, infrastructure in ports consists of and is the responsibility of: general-purpose infrastructure: maritime access channels and main hinterland connections (road, rail, inland waterways, and pipelines). Except for the privately owned and managed pipelines, this kind of infrastructure is built, owned and maintained by the State; docks, quays, infrastructure from the terminal to the hinterland connections: generally built, owned and maintained by the port management, and charged on the users through rent and port dues; infrastructure at the site, suprastructure: generally built, owned and maintained by the company. Unlike in the Netherlands, in neighbouring countries (excl. UK) central governments co-finance infrastructure investments in the second category.¹

Port access is an issue for port-based companies that want to establish themselves in a specific port. In principle, the port management bodies welcome port-related companies to establish themselves in the port. Access can be limited due to capacity constraints, environmental, health, safety and security reasons, or

¹ Temporarily, in the NL a limited subsidy scheme existed to co-finance port infrastructure of the second category. This is expected to be terminated.

due to the port development policy. Often, the port development policy will aim at attracting port-based companies that on their turn attract streams of goods (=port dues, employment, added value). Port development policies might also focus on specific kinds of activities (e.g. dry bulk, containers, or oil) that the port management wants to facilitate – and thus facilitate access for other kinds of activities. Port are free to do so, the NL government sees no need to interfere in this.

4.1.2 *The market*

Competition for customers in the Hamburg - Le Havre range (HLH) is particularly fierce. Port management bodies strongly compete to have crucial companies to establish themselves in their port, and also invest in getting shipping lines to come to their port. Both the port customers (port-based companies) and their customers (shipping lines) are fully aware of their power to switch to competing ports. If they cannot get access on good terms in port A, they will turn to port B or port C. whereas access to and competition within specific ports is limited (mostly due to limited space), the competition between the ports makes that access is not a sincere problem. Port managers are all striving to create new possibilities to provide land to existing or new terminal operators, in order to get a bigger share of the growing demand for port services (China factor). Expansion plans for new container facilities exist or are recently realized in all major ports in the HLH-range: Altenwerder (Hamburg), CT3a and CT4 (Bremerhaven), JadeWeserport (Wilhelmshaven), Tweede Maasvlakte (Rotterdam), WCT (Vlissingen), Deurganckdok (Antwerpen), Port2000 (Le Havre). So, whereas access cannot always be guaranteed in individual ports, there is enough competition to facilitate various port service providers.

Because of the corporatisation of the Port of Rotterdam and its expansion plans (Tweede Maasvlakte), the Dutch government asked the Dutch Competition Authority (NMa) to investigate whether the Port of Rotterdam has a dominant position in terms of port dues or land leases. The NMa contracted part of its study out to Charles River Associates (CRA) in Brussels.² The study of the NMa and CRA shows that there is a dominant position for the Port of Rotterdam, in particular for port dues, and that abuse of this dominant position cannot be excluded. For this study NMa and CRA used the SNIPP-test. The dominant position of the Port of Rotterdam is particular important in the oil and coal sector. Oil companies have made large investements in their facilities. For the biggest coal ships from South-America competition within the HLH-range is limited because only the Port of Rotterdam offers the right draught for these ships. Oil and coal companies and their carriers are tied to the Port of Rotterdam. At this moment the Dutch government is considering if sector specific regulation is necessary to meet to the objections found in the report of the NMa and CRA.

4.1.3 *Access to the market*

At this moment, port-based companies that want to establish themselves in a specific port, will start discussions and negotiations with the port managing body. This might end with a contract between the two parties. The Port of Rotterdam has made clear that it intends to increasingly use open tender procedures to select the best company for new plots of land in the port. Thus, for the planned Tweede Maasvlakte a first round of pre-selection of interested companies has started.

In the past, Rotterdam had only one big container terminal (ECT). In recent years, big (Maersk) and small competitors (Hanno) have established themselves. Although the previous monopoly of ECT was not a major problem (thanks to competition from other ports), the NL government welcomes this additional competition within the port. However, external developments (concentration) have countered this new

² The report can be downloaded from: http://www.nmanet.nl/Images/CRA-rapport_openbaar_tcm16-75310.pdf

development, as the small companies (Hanno) have been taken over by the bigger ones. The planned Tweede Maasvlakte will provide ample room for new, big competitors.

More in general one can say that the policy of various port management bodies to provide access to competitors inside their ports can be counteracted by the continuing concentration of terminal operators and shipping lines.

4.1.4 Regulating access?

The port services directive, as proposed by the European Commission and recently rejected by the European Parliament, aimed at regulating port access by obliging port management bodies in case of limitations on access to start an open tender for a authorization (i.e. contract or concession to offer port-related services in a port). Strangely enough, the Commission fully focused on access in individual ports, without any reference to competition between ports. The real problem (inefficient port services through monopolist companies) could be addressed in either way: or through competition within a port (competition between multiple companies or, if there is room for only one service provider, competition for the single contract), but also through competition between ports.

For the NL, market access is not a goal in itself, but a means to ensure a competitive market. As the HLH-range is very competitive, there is no need to force through stringent regulation market access on the ports. The Commission proposal neglected the costs of strictly regulating market access: termination of existing contracts, with various procedures on the compensation (administrative burden for the judiciary); insecurity for investors and their financiers (and thus diminishing investments in the short term); insecurity for personnel; high administrative burdens for the port management body (that would have to handle dozens or evens hundreds of tender procedures); and high administrative burdens for existing and potential service providers that have to enter tender procedures (which tend to favour big instead of small companies and thus might increase concentration tendencies). These costs can only be accepted if the gains of forcing market access will be much higher. This is not to be expected in an already competitive market.

PORTUGAL

1. Introduction

This paper addresses access to natural gas transportation and storage infrastructure in Portugal. After a brief introduction to the sector, we address key some issues related to ensuring access to essential transportation structure for new entrants. This analysis is undertaken under the framework for market opening and access regime established by European Parliament and Council Directives 98/30/EC and 2003/55/CE setting common rules for the EU internal market in natural gas.

2. The Portuguese natural gas project

The supply of natural gas to Portugal through pipeline only started in 1997/1998. The upstream pipeline comes from Algeria, crossing Morocco, the strait of Gibraltar and Spain. The pipeline was built under a joint venture between the Portuguese and Spanish gas incumbents. Under this joint venture an agreement was established on the use of pipeline capacity at the entry and exit points throughout the Portuguese territory. Under this agreement, the Spanish gas Transportation System Operator (TSO) has booked capacity in the Portuguese section of the pipeline in order to allow for the transit flows of natural gas to the northern Spanish region of Galicia.

At the time of project implementation, there was only one gas distribution network in Portugal – an urban system in Lisbon serving a population of about 550,000 inhabitants. In order to ensure investment break-even, a key component of the Natural Gas Project was the commissioning of a new power plant, using Combined Cycle Gas Turbine (CCGT). The operation of that CCGT was set under three different agreements: a gas supply contract with the incumbent; a Power Purchase Agreement (PPA) with the electricity TSO, the single buyer of power for the public electric system; and the Consumption Management Agreement between the gas incumbent and the electricity TSO. Under this last agreement, the TSO is committed to purchase a minimum amount of electricity from that CCGT, hence setting a minimum annual amount of gas to be consumed by the power plant

In 2003, and in response to increased demand, a new LNG terminal, located at Sines, on the Atlantic seashore of Portugal, became operational.

From 2000 to 2004, demand grew at an average annual rate of 15%. This rapid grow is mainly due to consumption by power plants. Indeed, in 2003 another CCGT was commissioned by the electricity incumbent. The rapid conversion from other energy primary sources undertaken by industrial activities has also contributed to the sharp rise in natural gas consumption. Finally, domestic demand of gas has also been rising in line with the expansion of local gas distribution networks. As a result, in 2004 consumption by power plants represented 58% of the final gas consumption in Portugal¹, whereas domestic consumption accounted to less than 10%.

¹ Relatório Anual para a Comissão para a União Europeia, 2005, Entidade Reguladora dos Serviços Energéticos

In 2004, the final consumption of gas in Portugal was slightly above 3.5 bcm. Potential for future growth remains high, with a consumption of 6-7 bcm per year projected for 2010². Power plants will remain dominant in the estimated future consumption of natural gas.

3. The supply contracts

The original supply contract for natural gas, signed in the early-1990s, was entered into between the incumbent (*Transgas*) and the Algerian *Sonatrach* for a period of 23 years. From 2001 onwards, the average contracted gas is 2.5 bcm³ per year, subject to Take-Or-Pay (TOP) commitments.

With the prospect of the new LNG terminal becoming operational, the incumbent entered into LNG supply agreements. One was a short-term supply agreement with *Shell España*. The remaining are supply agreements with Nigeria for periods of 20 years, with TOP commitments. The average quantity of contracted gas from Nigeria will rise to more than 3 bcm p.a., during the life of the contract.

As a result, the total gas contracted by the incumbent on a long term basis is 5.75 bcm p.a. (*Transgas*, Annual Report 2002). These quantities cover most of the demand forecasted for years ahead, including the foreseen new CCGT plants to be commissioned before the end of the decade.

4. The infra-structure

Portugal has a total import capacity of gas of some 8,935 bcm p.a., of which 3,769 from the upstream pipeline from Algeria and the remaining from the Sines LNG terminal. The LNG terminal has also a workable storage capacity of 240.000 m3. A new storage facility, corresponding to some 20 days of average consumption, is expected to become operational soon.

At present, the import pipeline capacity is almost fully allocated to the incumbent. The same happens with the full LNG regasification capacity. With the opening of the Portuguese gas market, the incumbent is expected to release the capacity not used to meet the quantities under the long term contracts it has entered into. Indeed, long term gas contracts (pipeline and LNG) would amount to some 64% of the total import capacity, in average.

The dominant position of the incumbent in infrastructure compounded by dominant position in the supply contracts leads to an important potential for market foreclosure.

5. The opening up of the Portuguese gas market

The implementation of the EU Internal Gas Market Directives, in what concerns market opening, is derogated until 2007. However, in view of the successful introduction of natural gas supply in Portugal and of the foreseen creation of Iberian Electricity Market, the Government has decided to anticipate the possibility for power producers to become eligible to choose their gas suppliers.

Moreover, in late-2005, a Resolution from the Council of Ministers⁴ decided a structural separation of the gas incumbent. Following this Resolution, all natural gas infra-structure should be transferred to the electricity TSO, with proper legal unbundling between gas and electricity infrastructure. In addition, only

² Portugal 2004 Review, International Energy Agency

³ Billion cubic meters

⁴ Resolução do Conselho de Ministros n.º 169/2005, de 24 de Outubro

minority stockholdings of gas and electricity undertakings would be allowed in the company that will operate both networks.

6. The Portuguese Competition Authority submission to OECD

The EU directive 2003/55/EU provides the framework for access to essential transportation structure for new entrants into the natural gas market.

The answer to the questions posed by OECD takes into account this framework and identifies the key problems that need to be solved to ensure a proper access regime to new entrants in the Portuguese natural gas market.

The position of the Portuguese Competition Authority also reflects the ECA document jointly prepared by Portuguese and Spanish Competition Authorities, presented in ECA's (European Competition Authorities) meeting held in London in April 2005.⁵

6.1 *What principles should govern when a facility should be opened for access?*

Following the first gas internal market directive 98/30/EU, the terms of access to transportation and storage facilities that should be granted to third party's, should be non discriminatory, transparent and aligned with costs. In order to comply with these principles different solutions were allowed to Member-States. Third party access could be negotiated or regulated. Unbundling was also required, standard accounting separation being set as a minimum.

The recent European competition case history provided sufficient evidence that negotiated third party access and accounting separation, in the context of vertically integrated utilities, were clearly not enough to ensure that the principles of non discrimination, transparency and cost reflection would be attained. Indeed, vertically integrated incumbents had the opportunities and the incentives to foreclose access or rising costs to rivals competing on the downstream or upstream levels.

In response to these shortcomings, the 2003 gas internal market Directive sets regulated TPA (Third Party Access) on access to transport and distribution networks, with negotiated TPA being allowed solely in accessing storage facilities. Legal unbundling is also set as the minimum unbundling standard.

It is the Portuguese Competition Authority view that, should structural unbundling of activities not feasible, the best solution to comply with the principles of non discriminatory, transparent and cost reflective access should be regulated TPA.

Although Directive 2003/55/EU still allows for negotiated TPA on access to storage facilities, it is the Portuguese Competition Authority view that regulated TPA should also be implemented in storage facilities. E.g., although storage facilities may not be necessarily natural monopolies, in the coming years there will be only one storage facility in operation in Portugal.

Refusal of access, as stated in article 21 of the Directive, should only be allowed on the grounds of lack of capacity or where the access to the system would prevent the facility owner from carrying out public service obligations. Careful evaluation of public service obligations should be made in order to achieve the optimal balance with competition enhancement objectives. This is of particular relevance in

⁵ A public version of this report is available in http://www.autoridadedaconcorrenca.pt/vImages/Report_EC_Internal_Energy_Market.pdf

access to storage facilities, where the objective of securing short term strategic reserves may limit the ability of new entrants to use storage facilities.

6.2 *Can socially valuable investments be deterred by the possible imposition of access requirements? If so, how can governments act to promote such investments?*

The introduction of the natural gas supply in Portugal provides an example of a possible solution to promote socially valuable investments. The project was based on legal monopoly concessions and with the financial support of EU's structural funds. A derogation to open up the Portuguese gas market was granted in the EU Directives for a period of 10 years. In the end of this period, access requirements must be put forward.

In general the Portuguese Competition Authority shares the underlying principles set out in article 22 (New infrastructure) of Directive 2003/55/EU. Exemptions to third party access should only be granted if the conditions stated in this article are met.

6.3 *Can group ownership or management of facilities be designed in such a way that entrants can ensure adequate capacity for themselves?*

An LNG facility can be jointly owned and operated by competitors in downstream retail markets provided that the undertakings' market shares are low and the joint venture is the only way for entrants to have access to downstream markets. This may well be the vehicle for new entrants challenging incumbents detaining existing LNG facilities. However, if that joint venture is undertaken by dominant players it should be evaluated whether it does not contribute for joint dominant behaviour, which would threaten new entry in downstream markets.

6.4 *Can auctions and trading be used to distribute access rights?*

Before market opening, in order to introduce a proper access regime to entry points in the Portuguese gas system, the key questions that need to be properly assessed are:

- How to challenge the reservation of entry points that currently exists;
- How to reflect the existing long term TOP contracts on the allocation of access rights;
- How to efficiently allocate entry points capacity among system users.

At the present moment there exists sufficient spare import capacity for new entrants to source their gas on the world LNG market or on the Spanish market through the pipeline connections. However, Directive 2003/55/EU does not provide a clear framework to define the proper access regime to entry points on the Portuguese gas system.

On the one hand, the Directive does not provide for a clear policy on opening access to upstream pipelines other than asking (article 20) "member states to take the necessary measures to ensure that natural gas undertakings and eligible customers, wherever they are located, are able to obtain access to upstream pipeline networks (...)".

On the other hand, Directive 2003/55/EU clearly defines derogation (article 27^o) on third party access to new entrants in relation to take-or-pay commitments. Considering that, at present, TOP contracts already ensure a substantially coverage of future demand needs in Portugal, and should new entrants source their gas independently from the current contracts, competition at downstream level may imply that the incumbent may face difficulties in complying with its TOP commitments.

If territorial restriction clauses (i.e. that restrict the country where the gas may be sold) in incumbent's supply contracts are not of concern (the action of the Commission, at the beginning of the decade, against the main gas producers / suppliers of Europe may have mitigated this problem), then the incumbent can short term trade the quantities bought under its long term TOP gas contracts in the world LNG market. If so, the behaviour of the incumbent may not raise fundamental concerns about the execution of TOP commitments, since he can trade in the world market its gas commitments over and above its domestic retail demand. However, if competition erodes the incumbent market share in downstream retail markets beyond a certain level, that may provide sufficient arguments for the incumbent to ask the protection of article 27 of Directive 2003/55/EU.

Consequently, the structural separation envisaged in the recent Resolution of the Council of Ministers, as well as the establishment of a regulated TPA on the Portuguese gas networks, all conditions that guarantee non discriminatory TPA access, may not be sufficient to introduce a level playing field for competition to develop. On the one hand, it may narrow the room for new entrants' to source their gas independently without the incumbent claiming the protection of the derogation set in article 27^o of Directive 2003/55/EU. On the other end, sourcing gas directly from the incumbent's portfolio of upstream gas contracts may expose new entrants in retail activities to all sorts of discriminatory behaviour.

Therefore, auctions of gas supply contracts and the corresponding access rights may be the only feasible way to introduce competition in downstream markets. The auctions should be carefully designed and implemented in order to provide the most efficient allocation of access rights. A proper use-or-loose-it regime should be implemented in order to prevent the incumbent from deterring entry of third parties.

Short-term trading of access rights could also be allowed and the allocation of access rights should be carefully monitored, since an uneven allocation may allow for a dominant player to use the trade of rights in order to raise rivals costs, or even deter entry.

SWITZERLAND

1. Introduction

Many essential facilities are or were in the past owned by the government or by public utility companies. Current regulatory reform projects in the concerned markets in Switzerland are aiming at fostering economic efficiency. In this reform process, the independence of public utility companies is strengthened or they are even privatized. On the one hand their greater independence and business- (and efficiency-) oriented behavior is very welcome from an economic perspective. On the other hand new questions are raised, specifically on how to deal with essential facilities that generate market power and if competitors should benefit from open access to these facilities.

Sometimes, public utility companies are subject to universal service provisions also after their gain of independence. Hence, the implicit question is raised whether open access to essential transport infrastructure endangers universal service, e.g. by lowering incentives to invest in infrastructure. In Switzerland, the question of ensuring access to essential transport infrastructure is always discussed not only from an efficiency perspective, but also from a perspective that takes into account the will of the public to retain the perceived high quality of the delivered services throughout the country.

2. The Essential Facilities Doctrine in Swiss Competition Law

There is neither a definition of essential facilities nor a specific article making reference to the essential facilities doctrine in Swiss competition legislation. However, the Federal Act on Cartels (LCart) comprises an article on unlawful practices of enterprises having a dominant position. Art. 7 states that:

“Practices of enterprises having a dominant position are deemed unlawful when such enterprises, through the abuse of their position, prevent other enterprises from entering or competing in the market or when they injure trading partners.”

The provision was introduced into the Swiss LCart in 1995. Scholars agree that many cases that would fall under the essential facilities doctrine in the United States or in the European Union are covered by Art. 7 in Switzerland. Nevertheless, its interpretation must be developed case by case. The denial of access by the owner of an essential facility can often be interpreted as abuse of market power by hindering production and/or promotion of a product in a downstream market. However, the lack of a precise definition of an essential facility gives a lot of room for interpretation, specifically because the owner of a facility can justify his behaviour with legitimate business reasons.

When transportation facilities are considered, there are two markets where the essential facilities doctrine played a major role in legislation as well as in competition policy, namely electricity transmission and the rail sector. Both of them will be described in the following.

3. Essential Facilities in the Electricity Sector

The Swiss electricity market is heterogeneous and consists of regional electricity producers, which also own the long distance transmission network, and hundreds of regional monopolists owning regional and local distribution networks with household access. Both the transmission network and distribution networks are essential facilities for competitors.

In 2002, a new legislation that provided for liberalization and regulated access to the networks was rejected in a referendum. As long as a new reform project is not in force, the competition legislation is the only tool for market opening at the moment. Article 7 of the LCart and hence implicitly also the essential facilities doctrine play an important role.

3.1 *The Watt/Migros-EEF case*¹

In a decision in 2001, the Competition Commission obliged the distribution network monopolist of the Fribourg region, EEF, to transmit power to a large client that had closed a supply contract with a power supplier without network in the client's region. The Comco stated EEF was abusing its dominant position by refusing to transmit electricity from another supplier through its network and that the denial of transmission could not be justified with legitimate business reasons. In a decision dated 17 June 2003 the Swiss Federal Court upheld the opinion of the Competition Commission. Since competition legislation only allows market opening on a case-by-case basis, there remains a lot of legal uncertainty in the market. Nevertheless, the case contributed to a market opening at least for very large clients.

3.2 *The Swissgrid case*²

The establishment of an independent system operator (ISO) is essential to coordinate transmission with the ISOs of the neighbor countries and to assure system stability. Creation of an ISO and also of an independent regulatory body was planned in the rejected electricity legislation of 2002 and is again envisaged in the new legislation. Considering international developments and the growing importance of long-distance transmission in the European market for electricity, the Swiss electricity companies decided to create a single, long-distance transmission network company named Swissgrid even before the new legislation is accepted. Swissgrid is planned to be owned jointly by the 7 largest current electricity undertakings (*Club Ownership*).

The Swiss Competition Commission opened an investigation on Swissgrid, as its creation could result in a great amount of market power. In March 2005 the Comco conditionally accepted the creation of Swissgrid. The conditions were non-discriminatory access to Swissgrid's network to competitors, the publication of Swissgrid's (non-discriminatory) access conditions, independence of Swissgrid's management from other electricity companies and the commitment of Swissgrid not to enter into electricity production. These conditions play an outstanding role in ensuring open access for competitors to the transmission network, which is clearly an essential facility in the market. In a decision dated 3 January 2006, the Swiss Federal Court provisionally upheld the decision of the Comco. As the latest decision is very recent, it is not possible yet to comment on the economic results of the interesting setup comprising club ownership and non-discriminatory access.

4. **Essential Facilities in the Rail Sector**

Clearly, rail tracks but also other facilities such as certain traction services comply with most of the criteria set-up in the OECD background paper to identify essential facilities. In Switzerland, the largest incumbent SBB and other vertically integrated railway undertakings were required by law to *separate organizationally the infrastructure* from other parts of the undertakings. In the following, the vertically integrated incumbents adopted a divisional structure, with separate accounting for infrastructure, freight

¹ See <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm>

² See <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>

services and passenger services. Access policy is quite different for the passenger market on the one hand and the freight market on the other hand:

4.1 *Passenger Services*

The market for passenger services is currently only marginally liberalized in Switzerland. SBB holds an exclusive concession in regularly scheduled long-distance national passenger traffic that is running until 2012. Hence, potential competitors currently have no access to the essential facilities in this area. In regional transportation, the situation is somewhat different. Swiss legislation allows tendering for regional passenger transport, but it has only rarely been used so far. The policy is influenced by factors that are well-described in the background paper of the OECD: Firstly, it cannot be excluded that there are important economic gains from vertical integration in passenger railway transportation. Thus, open access could endanger quality of service and reduce incentives to maintain infrastructure. Secondly, certain lines are not profitable and/or congested, which makes competition beyond competitive tendering for selected services difficult to establish.

4.2 *Freight Services*

In contrast to passenger services, the rail freight sector was nearly completely liberalized in Switzerland. Since the beginning of the reform, Switzerland has focused on ensuring *non-discriminatory access* to essential facilities. Access pricing as outlined in legislation of 1999 is based on variable cost in order to ensure equal treatment of competing undertakings of different size. An independent arbitration commission handles disputes between infrastructure owners and other railway undertakings. Access to train paths is managed by a one-stop-shop that is jointly managed by the largest infrastructure owners. Further reform steps, such as greater independence of the one-stop-shop from the incumbents are planned. In comparison to the passenger market, granting access to essential facilities seems much easier in the freight market. This is mainly due to fewer network issues and fewer congestion problems in the freight market, as many freight trains run at night, while rail tracks are only congested at peak hours.

In the liberalized freight transportation market, competitors of the largest incumbent SBB have steadily gained market share (about 20% in 2004 measured in ton kilometers). The liberalization of the rail freight sector comprising access to essential facilities is widely recognized as a success story in Switzerland. Efficiency has increased dramatically and studies show a beneficial development of prices and quality in an international comparison³.

4.3 *The Lokoop-SBB case*⁴

So far, there has been one case dealing with essential facilities in the rail sector. In January 1999, the Swiss competition Commission received a complaint of Lokoop, a competing train operator. It accused SBB, the largest vertically integrated incumbent operator, of abusing its dominant position. Lokoop had requested access to certain of SBB's lines and demanded additional services from SBB, such as the shunting in several of SBB's stations. SBB insisted on offering the requested services only as a wider package, while Lokoop intended to buy only essential facility services from SBB. The Swiss Competition Commission found indices of a possible abuse of a dominant position and therefore opened an investigation in February 2000. In particular, SBB's behavior was apt of impeding market entry by a

³ See a study from Plaut Economics for further details:
http://www.plaut.com/switzerland/public/publikationen/studien/Plaut_Liberalisierung_Netzsektoren_2003.pdf

⁴ See <http://www.weko.admin.ch/publikationen/00212/rpw02-1.pdf?lang=de>, p. 72ff.

potential competitor. During the investigation, SBB adapted its behavior, offering the requested services to Lokoop. Therefore, the investigation was closed.

5. Conclusions

Even though the Swiss competition legislation does not contain a specific provision on the essential facilities doctrine, the doctrine has gained a lot of importance in the past years. Often, the current article on the abuse of dominance can compensate the absence of the doctrine in Swiss law, although under present circumstances more freedom is left to courts. So far, the rail sector and electricity distribution were the markets with the most (even if implicit) importance of the doctrine. But there is no doubt that the doctrine will further gain importance in competition policy as well as in legislation, specifically in network industries. Serious challenges in applying the concept of the essential facilities doctrine in Switzerland will be congestion issues e.g. in passenger rail services, but also ensuring maintenance of infrastructure and universal service in a competitive environment.

UNITED STATES

This paper discusses issues relating to access to key capacity with respect to railroads, energy transportation facilities, and airport take-off and landing slots.

1. Rail

In general, the U.S. relies on both intermodal competition (from motor and water carriers) and intramodal competition (among independent, vertically integrated railway enterprises) to protect shippers of rail freight from the exercise of market power by a railroad. Rail freight rates are mostly deregulated (or, more correctly, are generally set by the market at rates far below regulated ceilings), and railroads are generally not required to provide access to their infrastructure to the trains of other companies. On the other hand, it is common for two vertically integrated railway companies to agree among themselves on terms and conditions for either unilateral or bilateral access to the infrastructure of one by the trains of another, with levels of compensation (if any) freely determined.

There are only two situations in which the Surface Transportation Board (STB) – the U.S. rail regulator that succeeded the Interstate Commerce Commission – sometimes requires one railway enterprise to allow infrastructure access to the trains of a second. The first is as a condition to protect intramodal competition in the event of a rail merger. Both the choice of a railway enterprise that will gain access and the terms under which it will do so may be negotiated voluntarily by the merger partners and presented to the STB for approval, or the STB may impose its own specific conditions as part of its approval decision. In the latter case, there are well established regulatory precedents for the calculation of the access charges (generally a single tariff based on marginal cost).

The second situation may occur in response to a request to the STB by a “captive shipper” for protection against the rates charged by the railway enterprise serving it. The STB does not often grant such requests, and the conditions for approval are accordingly strict: not only must the shipper demonstrate that it has no economic alternatives for shipping its product, but it must also demonstrate that the rate charged by the railway is above both the “stand-alone cost” of a hypothetical railway constructed to handle this traffic and 180 percent of the railway’s variable costs of carrying the traffic.

There are regular proposals by captive shippers and shipper groups for the STB to ease their burden of proof that they merit rate relief. Many recent proposals would require rates to be set by arbitration after certain (less stringent) conditions are met.

2. Energy

2.1 Overview

Energy transportation facilities are important to maintaining competition in the energy industry. They are often not easily reproducible, and control of these facilities may give the owner the opportunity to exercise market power. Access to such facilities may facilitate maintaining competition among either the originating producers or the receiving consumers. Attention to maintaining competition in markets upstream and downstream of the transportation facility is important since an accessible facility that serves an uncompetitive market is of little benefit.

The U.S. has used a two-pronged approach to maintaining access. One federal agency sets detailed rules and provides supervision to assure that access functions. Its efforts, particularly in the natural gas industry, have helped to create a competitive transportation market. The antitrust agencies work to maintain a competitive structure in the energy industry, including maintaining competitive transportation facilities where ever possible.

The U.S. experience suggests that provision of access to energy transportation facilities can successfully enhance competition, provided that markets up and down stream of the facilities are also conducive to competition. However, mandated access may not work well in emerging markets, and the U.S. has dropped access provisions in two such instances. Persons familiar with the industry need to be involved in structuring access to assure that crucial elements are not overlooked in designing programs. In addition, agencies involved in access promotion may need to be involved in ongoing monitoring and dispute resolution. Merger reviewers need to be cognizant that access rights are a valuable competitive asset, and that consolidation of access rights in a single facility or competing facilities needs to be evaluated as any other competitive overlap.

This submission first addresses the common elements of access regulation in the U.S. for energy transport facilities and discusses the characteristics of the facilities that make access important. Then, this submission examines how access problems have been approached in specific cases in each industry (natural gas, petroleum, and natural gas liquids) where access has been an key element to maintaining competition.

2.2 Regulation

Energy transportation facilities have been the subject of Federal regulation for nearly a century. Two principal agencies are involved: the U.S. Federal Energy Regulatory Commission (“FERC”) provides detailed economic regulation (rates, terms of service, and access) of interstate pipelines and necessary support facilities, and the U.S. Federal Trade Commission (“FTC”) has primary antitrust jurisdiction (mergers and anticompetitive practices), for almost all energy transportation facilities but does not exercise traditional regulatory oversight.¹

FERC functions by issuing detailed regulations concerning various matters affecting the specific industries within its jurisdiction and then by adjudicating issues concerning the application of the regulations as they arise. To ensure access, FERC’s principal activities, in the last 20 years, have been associated with the restructuring of the natural gas pipeline industry. The guiding policy principle has been to have natural gas pipelines provide “open access” transportation service on a non-discriminatory basis to all natural gas shippers.² Most observers consider the regulatory reform of the natural gas pipeline industry to be successful and to have contributed toward a competitive supply of natural gas.³ Access to petroleum and LPG pipelines has received relatively less recent regulatory attention, perhaps because these have a longer established regulatory structure.⁴ Required access seems not to have been as beneficial in areas of

¹ The U.S. Department of Justice Antitrust Division has concurrent antitrust jurisdiction. Other Federal agencies regulate safety and environmental concerns. State governments regulate local distribution of natural gas and pipelines that operate entirely with a single state, although FTC merger jurisdiction usually extends to state-regulated entities.

² The key expression of these policies is contained in FERC Order 436 (1985) and Order 636 (April, 1992).

³ There is one notable exception. Alleged manipulation of gas deliveries by El Paso Natural Gas was widely believed to have contributed to the California energy crisis of 2000.

⁴ In October, 1993 in response to passage of the Energy Policy Act of 1992, FERC significantly reduced the regulatory burden on oil and LPG pipelines by permitting market-based rates in those areas where a pipeline faced significant competition and indexing by inflation most other established rates. This trimmed

emerging technologies, such as offshore oil ports and LNG terminals, where the implicit sharing of benefits of an open access regime may discourage risky, pioneering investments.

The FTC administers antitrust statutes of general application across a wide range of industries. Its principal activities affecting access to energy transportation facilities have arisen through its merger review process. It has acted in nearly 40 mergers affecting these facilities, primarily by requiring the divestiture to competitive buyers of facilities that would pose competitive problems if they were owned by a single enterprise. In several matters, the FTC required divestitures of partial interests in jointly owned pipelines so that their use might remain competitive. Since merger review has been the subject of other OECD conferences, this submission concentrates on those limited instances in which the FTC required access to a specific facility, often as an adjunct to a divestiture of another facility.

2.3 *Facility Characteristics*

2.3.1 *Pipelines*

Pipelines are the most important transportation mode for the U.S. energy industry. An extensive network of natural gas and oil pipelines covers almost the entire country, with almost 500,000 km of natural gas lines alone. In the United States, pipelines transport four principal commodities: (1) natural gas, (2) crude petroleum, (3) refined petroleum, and (4) natural gas liquids. Natural gas pipelines are the only effective means of transporting natural gas domestically, and oil pipelines account for 87 percent of interregional movements of petroleum.⁵

Pipelines share many of the characteristics of other transportation modes that foster natural monopoly or oligopoly structures, and experience corresponding access problems. These include substantial, although not unlimited economies of scale; substantial sunk costs; high fixed costs; large daily, short-run and seasonal demand variations; potential congestion; efficiencies of vertical integration in certain situations; and possibly network economies.

There may be important differences in organization and regulation of pipelines depending on whether a pipeline serves primarily as a producing area gathering line, a long distance shipment line, or a local distribution line. Moreover, the extent of access regulation activity has varied with the particular products that a pipeline carries. Natural gas pipelines have been subject to the most extensive rule making actions by FERC, while the FTC has been active in reviewing the many mergers affecting petroleum and natural gas liquids pipelines.

2.3.2 *Terminals, Interconnections, and Storage Facilities*

Transportation systems often require support facilities to perform necessary functions, *e.g.* terminals, interconnections, and storage facilities. Compared to pipelines, these auxiliary facilities are subject to relatively little regulation, although the FTC has investigated a number of terminal acquisitions as part of its merger reviews and has obtained the divestiture of petroleum terminals in many metropolitan areas to preserve competition. FERC has initiated an inquiry into possibly modifying and expanding the rules

the frequency of FERC addressing oil pipeline issues. FERC Order 561, Docket RM93-11-000, 65 FERC 61,109 (Oct. 22, 1993); "President Bush Signs National Energy Policy Act ...," *Fosters Natural Gas Report*, No. 1900, p. 1 (Oct. 29, 1992).

⁵ Pipeline length: Energy Information Administration, *Natural Gas Annual*, 2004. Pipeline movements: Energy Information Administration, *Petroleum Supply Annual*, 2004, v. 2, Tables 33, 34.

governing natural gas storage facilities, and brought the 1995 *Lakehead* proceeding, which required access to intermediate storage facilities.⁶

3. Natural Gas

3.1 Pipelines

FERC has created an open access transportation system for natural gas pipelines. This is achieved by two principal mechanisms; (1) to allocate newly available capacity, either from new construction or from significant expansions of existing lines, pipelines companies are ordinarily required to hold “open seasons” prior to receiving approval to commence construction; (2) to allocate existing capacity, FERC has created rules and an enforcement effort to ensure that shippers that hold long-term transportation rights can sell them in an active, competitive secondary market.

During open seasons prospective shippers “bid” for capacity by offering volumes, proposed rates, and contract terms. Successful bidders receive the right to transport a guaranteed volume of gas for the duration of the contract. If the pipeline is oversubscribed, capacity is allocated on the basis of the net present value of the per unit rate bid by the shippers, which tends to favor smaller shippers.⁷ Within the FERC guidelines, each pipeline may devise open season procedures, subject to review by FERC should prospective shippers or the FERC staff object to proposed procedures.⁸ Competing projects may proceed at their sponsor’s risk.

One of the principal goals of regulatory restructuring of the late 1980’s and early 1990’s was to create an active secondary market in transportation rights. This was achieved by assigning long-term firm transportation rights to the then-existing, largely diverse, customer base of the pipelines, which had previously only purchased gas from the pipeline at the delivery point. Customers are permitted to resell their space on either a short-term or longer term basis, or even to assign all of it to another party for the remaining term of the agreement. Such a secondary market has developed, and has led to the pipelines offering innovative services tailored to the market.

The greatest problem with existing capacity allocation procedures arose during the California energy crisis of 2000. When demand for natural gas in California grew rapidly in 2000, because of changes in the electricity market, a single pipeline controlled a high proportion of the incremental capacity into the state. Several parties alleged that El Paso Natural Gas deliberately withheld capacity in order to drive up the price of natural gas because the principal source of additional gas was El Paso’s gas sales affiliate. El Paso settled these complaints by paying \$1.69 billion in compensation and agreeing to several steps to increase capacity available for the California market.⁹

⁶ See the discussion at p. 9 below.

⁷ 51 FERC 61,195 (1990) cited in 51 FERC 61421 at 62491 (Dec. 20, 1990).

⁸ On occasion, both pipelines and prospective major shippers have proposed eliminating or de-emphasizing the open season in favor of permitting much of the capacity to be pre-subscribed, at negotiated rates. They argue that advance contracting may significantly reduce risk and therefore encourage development. FERC has either rejected or significantly modified such proposals in favor of maintaining the open season procedure. 50 F.E.R.C. 61,070, 1990 FERC LEXIS 126 (Jan. 24, 1990); 53 F.E.R.C. 61,421, 1990 FERC LEXIS 3215(Dec 20, 1990); FERC Order 2005-A section xx (2005).

⁹ FERC Docket RP00-241-000, 105 FERC ¶ 61,201 (Nov. 14, 2003). In other cases, FERC also has acted to prevent pipelines from providing improper assistance to their marketing affiliates, which are selling gas or capacity in competition with pipeline customers reselling unused capacity, and the agency recently adopted a comprehensive set of regulations on such practices. FERC Order 2000

In sixteen natural gas pipeline mergers since 1980, the FTC required the divestiture of competitively overlapping natural gas pipeline assets. If access is defined more narrowly as a mandated shared use of a critical asset, then the FTC has used access to maintain competition in those circumstances in which an outright divestiture might not be necessary, such as where the competitive overlap was in a few localized markets served by a major part of an integrated system. Two examples are as follows.

In the 2001 DTE/MCN merger of a local electrical company with a local gas distribution company serving the same area, the FTC consent order required the merged company to allow another gas distribution company to use the gas distribution system of the merged firm for a period of at least 20 years, in order to allow competitive sales of gas to independent electrical generators that competed with the merged firm.¹⁰

In the Duke Energy merger, CMS, a local distribution company, bought a pipeline from Duke, which served CMS's service area. The competitive concern was that CMS would reduce the capacity of the interconnections with competitive pipelines, thus forcing its customers to use CMS's newly acquired pipeline at higher cost. The FTC consent order required that CMS maintain a minimum amount of capacity at specified receipt points.¹¹

3.2 *Liquefied Natural Gas Terminals*

Liquefied natural gas ("LNG") is a growing source of U.S. natural gas imports. Both the liquefaction plants in producing areas and the unloading, storage, and regasification plants (terminals) in consuming regions have significant economies of scale, long lead times to construct, and substantial sunk costs. The world LNG industry has developed using a partial integration model, from the well head to the outlet of the importing terminal. Producers, transporters, and consuming area marketers enter into long-term contracts (often with partial equity interests) tying a significant portion of the supply of a terminal to a specific liquefaction facility and providing for dedicated vessels to supply transportation.

Through the early 2000's there were only three LNG terminals in the U.S. From the mid-1970's to the mid-1990's, the industry was static, with one of the terminals being closed for much of the period. As natural gas supplies began to tighten in the late 1990's, interest in building new terminals revived, and the closed terminal was reopened.¹²

In the 1990's and early 2000's, FERC required LNG terminals to follow open access procedures, similar to those of pipelines. Others, however, argued that the procedures impeded new capacity. For example, potential terminal developers expressed concerns that the open access regulations would limit their ability to raise capital, in part because they could not commit space.¹³

Late in 2002, FERC amended its policy. LNG terminals no longer had to provide open access. Rather, FERC decided to treat them as unregulated gas production facilities. Given that the gas market was competitive, FERC believed it unnecessary to require terminals to provide access, since the terminal

¹⁰ FTC Docket C-4008, (Dec. 14, 2001).

¹¹ FTC Docket C-3877, (Mar. 19, 1999).

¹² Now there are six operating, and 34 are currently in some stage of permitting.

¹³ FERC Docket PL02-9, "Notice of Public Conference and Agenda," (Oct. 18, 2002); Robert Cupina, Presentation, "Review of Natural Gas Imports," FERC, (2002)

operators had to compete with the many other sources of gas. To explain this revision in policy, FERC also cited reasons similar to those raised by the project developers.¹⁴

4. Petroleum

4.1 Pipelines

4.1.1 FERC Activities

In 1906, the U.S. Congress placed interstate oil pipelines under the regulation of the Interstate Commerce Commission, which principally regulated railroads. The primary reason for regulation was to ensure access for independent refiners to the crude oil pipelines operated by the Standard Oil Trust.¹⁵ Access was to be assured under the general duty of a “common carrier” to accept freight from all potential shippers on a non-discriminatory basis. The regulation encompassed both crude oil and refined product lines. In 1978, FERC assumed responsibility for regulating oil pipelines.

Beyond a general requirement that charges and tariff conditions not be unreasonable or unduly discriminatory, FERC’s regulation of pipeline access has focused on two areas: (1) the rules that the pipeline uses to determine how capacity will be allocated in event that demand exceeds physical capacity, and (2) the circumstances under which a pipeline can be required to provide connections to a new shipper.¹⁶

The “common carrier” obligation requires such pipelines to accept all shipments, except when demand exceeds capacity, and, in effect, creates a form of open access. Provided that the pipeline is not capacity constrained, this approach has generally proved effective. Difficulties arise if demand exceeds current capacity. FERC has two preferred methods of capacity allocation: (1) first-come, first-served; for a given period, usually a month, all prospective shippers must state (“nominate”) their desired shipping volumes; if the nominations exceed the total capacity then shippers are assigned space proportional to their requests; (2) historical prorationing, whereby shippers allocations are proportionally determined on the basis of past shipments, often over the last 12 months. These procedures evolved from a series of reviews of pipeline tariffs.

Both methods have shortfalls that FERC has addressed on a case-by-case basis. For example, first-come, first-served may create uncertainties about future pipeline availability, which may discourage investments in complementary facilities. In the shorter-term, first-come, first-served can encourage shippers to over nominate to assure that they will get a larger allocation. To limit over-nominations, FERC has permitted pipelines to impose penalties for over nomination.¹⁷ The alternative allocation method,

¹⁴ FERC Docket CP02-376, 101 FERC ¶ 61,294 (Dec 18, 2002)

¹⁵ Jordan Jay Hillman, "Oil Pipeline Rates: A Case for Yardstick, Regulation," in Michael A. Crew, ed., *Competition and the Regulation of Utilities* (Kluwer Academic Publishers: Boston, Dordrecht, London, 1991), 72-73.

¹⁶ In the Bonito Pipeline case FERC ruled that a pipeline with spare capacity had to connect with a new shipper notwithstanding concerns about the quality of that shipper’s oil. 61 F.E.R.C. P61,050; 1992 FERC LEXIS 2248 (Oct. 8, 1992).

¹⁷ For example, in once case it approved tariffs on a pipeline that require a shipper to pay for a significant amount of the nominated capacity, even if the shipper does not use it. In another case, it required that future allocations be reduced in the event that the shipper fails to use its nominations, FERC Platte Pipeline decision, Docket No. IS97-9-000, 80 F.E.R.C. P61,036; 1997 FERC LEXIS 1410 (July 16, 1997); FERC, SFPP decision, Docket Nos. OR92-8-000, OR93-5-000, OR94-3-000, OR94-4-000, OR95-5-000, OR95-34-000. 80 F.E.R.C. P63,014; 1997 FERC LEXIS 2140 (Sep 25, 1997), n 821.

historical prorating, disadvantages new entrants that have little opportunity to build up volume if the pipeline is frequently or continually under proration. It may possibly also encourage shippers to maintain uneconomic output or serve otherwise relatively less attractive markets in order to ensure space.¹⁸

In general, FERC has not allowed oil pipelines, in contrast to natural gas pipelines, to function as contract carriers whereby the pipeline is able to guarantee the shipper a set amount of capacity for a specified period of time.¹⁹ However, in three pipeline construction projects, FERC has approved oil pipelines having long-term carriage contracts, awarded through an open season process. Latecomers would be accommodated only when additional capacity became available.²⁰

4.1.2 *FTC Activities*

Consistent with its general preference for structural over behavioral remedies, particularly in the merger context, the FTC has generally not mandated access in oil pipeline matters. Instead, the FTC usually requires the divestiture of the pipeline interests of the merged firm to preserve the transportation options available to shippers.²¹ Only when the affected interest is small relative to the size of the facility or when vertical elements predominate has the FTC used an access remedy. Since 1980, the FTC has required only three access-related remedies for petroleum pipelines; the major interventions involved the same pipeline:²²

The FTC acted to provide access to a pipeline designed to take heavy crude oil from the San Joaquin Valley oil fields to the San Francisco Bay area. In both the Texaco/Getty merger (1984) and the Shell/Texaco refining/marketing joint venture (1997), the FTC required the surviving firm to sell crude oil from the pipeline to certain small refineries in the San Francisco Bay area, which competed with the line's new owners in the refined products market.²³

4.1.3 *Terminals and other ancillary facilities*

The government has taken a very limited role in regulating access to petroleum terminals and other ancillary facilities such as storage, ports and docks. FERC generally does not regulate petroleum terminals

¹⁸ For a concise discussion of several of these issues see the FERC Proteus Pipeline decision. 102 F.E.R.C. P61,333; 2003 FERC LEXIS 579, ¶¶22-26

¹⁹ 104 F.E.R.C. 61,163, at 61,165, 2003 FERC LEXIS 1574 (July 23, 2003)

²⁰ 76 F.E.R.C. 61,245, 1996 FERC LEXIS 1613 (Sep. 11, 1996); 102 F.E.R.C. 61,333, 2003 FERC LEXIS 579 (Mar 27, 2003); 102 F.E.R.C. 61,339, 2003 FERC LEXIS 583 (Mar. 28, 2003).

²¹ In at least eight major petroleum mergers since 1981, the FTC has required, as part of consent settlements, the divestiture of pipeline interests. "FTC Merger Enforcement Actions in the Petroleum Industry Since 1981," available online at http://www.ftc.gov/ftc/oilgas/charts/merger_enforce_actions.htm (Last viewed 22 Jan 2006); information updated for publicly announced actions in 2005.

²² In Texaco/Getty, the FTC ordered Texaco to continue service to existing customers on another short crude oil pipeline in California, with rate increases limited to inflation. Texaco and Getty Oil Co Proposed Consent, op cit.

²³ FTC, Texaco Inc. and Getty Oil Co.; Proposed Consent Agreement with Analysis to Aid Public Comment, File No. 841-0077, 104 F.T.C. 241; 1984 FTC LEXIS 49 (1984); SHELL OIL COMPANY, - and - TEXACO INC., 125 F.T.C. 769; 1998 FTC LEXIS 54 (April 21, 1998). The line was the only practical source of heavy crude oil to these refineries. The sale of oil was functionally equivalent to providing transportation; the approach was used because the pipeline was not a common carrier.

and storage, unless they are considered essential to operating a pipeline.²⁴ FTC prefers to use divestiture as a remedy in merger matters; for example in the Exxon/Mobil merger the FTC required divestitures of terminals in the entire Northeastern part of the U.S. as well as Northern California.²⁵ BP/Amoco was required to divest terminals in nine locations in the Southeast.

In the recently completed action on the Valero/Kaneb refiner/pipeline merger, the FTC issued an order that required divestiture of terminal and pipeline assets in several areas. The theory was that Kaneb as an unintegrated pipeline/terminal company had incentives to promote open access, but post merger Valero would have incentives to protect the profits of its integrated petroleum operations. However, the FTC allowed Valero to retain two smaller California terminals, where there was a potential competitive problem. The order required Valero to continue to serve third-party customers for a particular product stored at those two terminals on the same terms as before the merger and on terms no less favorable than granted to Valero's own operations.²⁶

Outside of the traditional regulatory framework, there has been one other well known attempt to create access to a major petroleum transportation facility, the Louisiana Offshore Oil Port ("LOOP"). In 1974, Congress passed the Deepwater Ports Act, authorizing construction of offshore platforms to receive oil imports from deep draft crude tankers. Such facilities were thought, at the time, likely to become the dominant means of crude oil importation. At the urging of the FTC and DOJ Antitrust Division, Congress included requirements for an antitrust review of the proposed operating regulations for the facilities. This led to a detailed set of regulations, prescribing that access to non-owners be on an open and non-discriminatory basis. By 1996, after LOOP had been the only such facility built in more than 20 years, Congress deregulated LOOP's operation. Proponents' principal argument for deregulation was that the cumbersome regulations, not the least of which was the access regulation, severely inhibited investments in such facilities.²⁷

5. Natural Gas Liquids Pipelines

5.1 Overview

Natural gas liquids ("NGL") are produced as byproducts of natural gas production or of petroleum refining; they are also sometimes referred to as liquefied petroleum gas ("LPG"). NGL include propane, butane, ethane, and pentanes plus (or natural gasoline) and are used for petrochemical feedstocks, gasoline blending stocks, and domestic heating.

²⁴ In one instance Wolverine Pipeline agreed as part of a settlement to provide common carrier storage at one location in order to facilitate through movements that would be otherwise unavailable for shippers who did not own storage at that junction point. FERC Docket No. 0R99-15-000, 95 F.E.R.C. P63,023; 2001 FERC LEXIS 1429 (June 18, 2001).

²⁵ In the Exxon/Mobil merger, the merged company had to continue to grant a competitor joint use of a petroleum dock in Norfolk, Virginia. FTC, Exxon/Mobil Consent Agreement, File No. 991-0077, Nov. 30, 1999, ¶ XIII, p. 50.

²⁶ FTC Docket C-4141, Consent Paragraph VI, 2005 FTC LEXIS 112 (July 22, 2005). Valero had previously been a customer of the terminals for that product, and the concern was that it would have an incentive to raise the costs of its competitors that also used the terminal. The consent also compelled Valero to create a "firewall" so that competitively sensitive information about customers was not provided to Valero's refining division.

²⁷ Testimony of Thomas P. James, Secretary and General Counsel, Louisiana Offshore Oil Port (Loop), Inc., U.S. Congress House of Representatives, Committee on Transportation and Infrastructure, Hearings: "H.R. 2940, the Deepwater Port Modernization Act" "OGJ Newsletter," March 28, 1996; *Oil and Gas Journal*, July, 8, 1996, 4.

5.2 *FERC Activities*

NGL pipelines are regulated by FERC under the same general regulations as oil pipelines, although FERC has given them little regulatory attention in recent years. FERC had only one major proceeding, the *Lakehead* case, in which access to NGL pipelines has been an issue.

The Lakehead pipeline transports raw NGLs from the Canadian border in North Dakota around the southern side of the Great Lakes and back into Canada. In the early 1990's, Lakehead (and its connecting Canadian parent the Interprovincial Pipeline ("IPPL")) had only one shipper, Amoco Oil, the largest NGL firm in Canada. Lakehead was configured so that product arriving from Canada at an intermediate point in Superior, Wisconsin had to be placed in "breakout" storage facilities before continuing further East. Lakehead, however, did not own the breakout storage facilities; Amoco, which did, was unwilling to allow others to use its facilities.

A NGL competitor of Amoco began a two pronged campaign to secure space on Lakehead for NGL shipped from Western Canada. One prong was to have the Canadian authorities require IPPL to accept shipments. The other was to have FERC require Lakehead to make breakout storage available at Superior. FERC concluded that breakout facilities were necessary, and ordered that Lakehead provide the facilities, if the Canadian authorities also ordered IPPL to accept shipments other than Amoco's. This decision has served as a basis for FERC's ordering use of other storage facilities.²⁸

5.3 *FTC Activities*

Since 1990, the FTC has reviewed several transactions involving NGL-related assets. In only three instances did the FTC require the provision of access as an ancillary condition to a divestiture.

In the 2002 Phillips/Conoco merger, Phillips was ordered, among many other requirements to divest its interests in two propane terminals. As part of the divestiture, Phillips also had to provide the buyer with access to two pipelines serving the terminals on terms as favorable as granted any affiliate of the merged firm.²⁹

In the 2001 Chevron/Texaco merger, Texaco was ordered, among many other requirements, to provide the purchaser of an NGL fractionation plant a contract on competitively favorable terms to ensure access to Texaco's pipeline serving the plant.³⁰

In the 1998 Williams/Mapco merger, which involved both propane and raw NGL pipelines, the FTC devised two access remedies: (1) Williams was required to continue a multi-year lease granting pipeline access to the operator of propane terminals that competed with terminals Williams acquired; and, (2) Williams was required to allow Williams' newly acquired lines to connect to Williams' gas processing facilities, in a major producing region.³¹

²⁸ 71 F.E.R.C. P61,338, at 62320-28; 1995 FERC LEXIS 1193; George Koch, "A Slumbering Beast; Liquefied Natural Gas Industry", *Oilweek*, v 46, no. 42, 20 (Oct. 16, 1995)

²⁹ Conoco/Phillips Consent Agreement, FTC Docket C-4058, FTC LEXIS 49, (Aug. 20, 2002).

³⁰ FTC "Chevron Corp., et al.; Analysis to Aid Public Comment" 66 FR 48136 at 48144.

³¹ FTC File 981-0076, Mar. 27, 1998.

6. Conclusions

Open access to oil and gas transportation facilities has generally worked well; the regulatory reform of the natural gas pipeline industry has been considered by most observers to be successful and to have contributed to a competitive supply of natural gas. Access to crude oil, LPG, and petroleum products pipelines has received relatively less recent regulatory attention, perhaps because many access issues were addressed earlier in the 20th century. Required access appears to have been less beneficial in emerging technologies, such as offshore oil ports and LNG terminals, where the implicit sharing of benefits of an open access regime may serve to discourage risky, pioneering investments. As the history of FERC proceedings suggests, a degree of continuing expert supervision of access may be necessary, as technical disputes arise or as a facility owner, which is also a competitor of the users, reduces its willingness to provide good service.³²

The FTC has concentrated its enforcement efforts on the maintenance of a competitive industry structure, primarily by requiring structural remedies such as divestitures. Less often has it mandated access through a form of shared use as a remedy to potential competitive problems; the most common applications have been as part of a merger remedy in which access to a pipeline or other facility has been ancillary to the divestiture of some other asset, such as a local distribution network, as a remedy for a vertical problem. If the pipeline or other transportation facility has been the major source of horizontal competitive concern, the preferred approach has been to order its divestiture rather than try to affect a behavioral remedy in the assets' use.

7. Airport Take-Off and Landing Slots

“Access” to congested airports can be regulated by government authorities through the allocation of “slots,” or rights to take-off or land at a particular time. Slots were first used in the U.S. in 1969 and until recently were imposed to allocate capacity at four major airports: New York’s LaGuardia and Kennedy, Chicago’s O’Hare, and Washington’s Reagan National. Slots have always been apportioned administratively by the Federal Aviation Administration (FAA), largely to incumbent carriers based on existing service. In 1985, the FAA created a buy/sell market for slots, which was expected to lead to a more efficient allocation of these scarce resources. Instead, the FAA found that it was rare for more than a few slots to be available in the secondary market at any given time. Only when an existing carrier exited the airport, as when Eastern and TWA went out of business, were large groups of slots available for sale. Due to the sporadic availability of slots, entrants (or incumbents seeking to expand service) often found it difficult to acquire sufficient slots to establish a viable service pattern in a city pair.

On two occasions, the FAA and Congress responded to this difficulty by relaxing the slot constraints at various airports. Airlines responded by promptly scheduling more flights at these desirable destinations, thereby inducing congestion. The airlines’ response to the temporary lifting of slot controls is not surprising because the current system of airport pricing does not factor in the potential costs of congestion. Absent any price signal that indicates that congestion of the airport is costly, airlines will choose to add too many flights because congestion imposes costs on all users of the airport. The costs of delay, though very real, are a classic type of externality imposed on all users of the airport, not just on the airline that seeks to add a flight. Thus, lifting slot controls alone, without imposing an alternative method of rationing scarce capacity, cannot resolve congestion problems.

In theory, the existence of a buy/sell market for slots should create a market price that results in an efficient allocation among users. No matter how slots are distributed (including a government giveaway to

³² Some FTC orders have also required the appointment of independent monitors with industry expertise of oversee the administration of an access remedy.

market incumbents), as long as a secondary market exists and transaction costs are low, slots should be bought and sold until each finds its highest valued use.³³ In practice, however, the slot market did not result in an efficient allocation among incumbents, nor did it facilitate competitive entry in the constrained airports.³⁴ The secondary market never became sufficiently liquid to achieve these results, for several reasons.

7.1 Transparency.

Transparency in the market for slots is one reason the secondary market never became sufficiently liquid. Transparency means that the identity of buyers and sellers is widely known. Transparency in the secondary slot market permits strategic purchases by incumbents to prevent new entry. An incumbent carrier probably would never knowingly sell to an entrant that was likely to compete against it, given that such a sale would likely decrease the slot holder's profitability. More importantly, a potential entrant would have equal difficulty buying from other slot holders. Such slot holders, if approached by the potential entrant, would have every incentive at that point to seek out the threatened incumbent and solicit a better offer. Because the rents from limiting competition almost always exceed the more competitive rents an entrant would earn, the threatened incumbent should be willing to outbid the entrant, even if it would use the slots in an economically less efficient manner. Strategically purchasing available slots can be an effective entry deterrent, especially since multiple slot holdings required for significant entry rarely come up for sale.

7.2 Market Power.

Another reason the secondary slot market never became sufficiently liquid is that the FAA's initial allocation of slots gave the bulk of all slots to incumbent carriers. This allocation gave those carriers much larger market shares in slots than any other carrier could obtain, and effectively limited the amount of competition other carriers could offer on at least some routes. For those incumbents with extensive operations at an airport, any slot they sold would have almost certainly been used to compete with them on some route. Therefore, the incumbents were unwilling to sell slots to potential competitors, making the bulk of slots unavailable to others.

7.3 Uncertainty of Duration and Value.

Another obstacle to creating a liquid market in slots is the repeated use of temporary administrative allocation mechanisms that do not create long-term property rights. Under each of the FAA's administrative allocation systems, the award of a slot has been a temporary right, exercisable only until the system changes again. That right has become quasi-permanent in practice, but anyone interested in buying a slot takes the risk that the system may change in a way that reduces the expected value of the property conveyed. The uncertainty about the time period over which the right can be exercised, therefore, makes it difficult for buyers and sellers with different views about the likely duration of that time period to agree on price. In addition, by periodically giving away slots, Congress and the FAA have contributed to the uncertainty about slot value. The result is that fewer slot transactions occur, and the market is less liquid than it would be absent the uncertainty.

³³ See, e.g., Ronald Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960). "Highest valued use" for the carriers, however, might translate into market power on particular routes. Any distribution of slots must be subject to vigilant antitrust oversight.

³⁴ *Airline Deregulation: Barriers to Entry Continue to Limit Competition in Several Key Domestic Markets*, Government Accounting Office, October 1996, GAO/RCED-97-4.

To a great extent, the problems described above are inherent in any administrative allocation of slots, and can be fixed only by a more comprehensive market-based approach. Any design for a market-based system should keep two objectives in mind. First, the system must establish a price-setting mechanism that reflects both supply of and demand for scarce airport resources. This price should replace existing regulatory fee structures which encourage carriers to use scarce airport capacity inefficiently. Second, the system should promote competition by enabling scarce capacity to be more easily transferred among carriers, and by preventing capacity from being locked up in ways that allow the exercise of market power. There must be a sufficiently liquid market in slots to permit new carriers to enter an airport rapidly and on a large enough scale to efficiently serve routes in competition with large incumbents.

There are two possible market-based approaches for allocating scarce airport capacity: congestion pricing and auctions. Both have the potential to be far superior to an administrative system. Each approach has strengths and weaknesses, as outlined below; the optimal choice will depend on particular market conditions.

8. Congestion Pricing

Under a congestion pricing system, the existing slot allocation system would be abolished in favor of congestion fees set for particular times.

Airlines currently pay weight-based fees for landing. The consequence of the weight-based fee structure is that a small regional jet, which causes just as much airspace congestion as the largest 737, pays a much lower landing fee than the much larger plane. Airlines thus do not face a price that reflects the fact that airspace is a scarce input.

If airlines were charged a flat landing fee based upon demand at particular times of day, regardless of the size or type of plane, smaller aircraft such as regional jets would appropriately have to bear a higher per-passenger cost for using an airport's scarce landing capacity than they do now. Regional jets would continue to be part of the airport's mix of aircraft, but at the margin where airlines are choosing between larger jets and regional jets, larger jets operating slightly less frequently will become a more attractive option than scheduling multiple trips on regional jets. The result would be an increase in passenger throughput at capacity-constrained airports.

The advantage of congestion pricing is that it is relatively easy to implement. The regulator would set prices for slots at different times and airlines would set their quantities accordingly. If the prices are initially too low, then the congestion prices can be raised over time to ration demand. A uniform fee for landing at a particular time would reduce the congestion bias caused by the current system of weight-based landing fees.

Congestion pricing has been used for several years to improve the flow of traffic on two highways in Southern California. Highway SR-91 in Orange County, California has four free lanes next to two toll lanes in each direction. There is a pre-determined toll schedule for every hour of the day. The rates vary from \$1.05 for most overnight and pre-dawn hours to \$7.00 for some afternoon rush hour time periods. On Interstate 15 in San Diego, there is a toll schedule for two reversible lanes. The toll varies with the level of congestion on the road and can change as often as every six minutes.

Although congestion pricing is likely superior to administrative allocation, a drawback to congestion pricing is the regulator's lack of knowledge about what price to set. A regulator may not have good enough information to allow it to set the right price without frequent experimentation. Even that mechanism may have problems because the necessary feedback for quantity adjustment may be slow. In particular, airlines often advertise service well in advance so as to schedule and make ground facility

arrangements efficiently. This, in turn, implies that adjustments based on the changing price of arrival authorizations may be slow. For highly congested airports, the cost of setting the wrong price and getting too much (or too little) airline traffic may be high.

9. Slot Auction

A slot auction would allocate scarce arrival authorizations through a periodic open-bidding mechanism. For example, the FAA has good information about an airport's capacity for arrivals and departures, and can set a maximum quantity relatively precisely. An auction would determine the price for arrival authorizations at a particular time, regardless of the size or type of plane.

A well-designed slot auction would both assign prices to allocate efficiently scarce airport resources, and limit the maintenance or accumulation of market power by individual carriers. Such goals require careful attention to the details of auction design. For instance, the auction should limit informational feedback during the auction itself. Bidders might know the aggregate level of demand and supply of all arrival authorizations in each time period, but not be permitted to know the identity of the other bidders. This practice is fairly typical at auctions and is designed both to limit collusion among bidders and to prevent strategic bidding. Although more information allows more informed bidding on the part of bidders in ways that can be efficient, full knowledge of which airlines are bidding for which slots in an auction could encourage incumbent airlines to attempt to foreclose entry by particularly strong competitors. In this case, the government's interest in preserving competition among carriers should take priority over bidders' desires to have complete information about rival bids.

Any auction design must allow for sufficient liquidity so that potential entrants are not unnecessarily impeded. Annual auctions of a significant portion of airport arrival capacity (20%, for instance) would help allow for rapid entry when it is efficient. Such a five-year rotation would provide a concrete duration for the property right, and therefore assist airlines in valuing the slots.

A switch to a market-based mechanism for allocating arrival authorizations will not by itself achieve the twin goals of reducing congestion and encouraging more competitive outcomes. Entry and expansion of new carriers, a key mechanism for encouraging competitive outcomes, is constrained not only by scarce landing rights, but by the limited availability at some airports of ground-based assets such as gates, baggage-handling, and check-in positions. To make any auction for arrival authorizations effective in this environment, aviation authorities must help ensure that ground-based assets will not be a constraint for new slot owners. A common-use pool of gates, for example, might be one solution to overcome some of the hurdles associated with limited ground-based assets. Another issue that authorities must take into account is that the transfer of ground facilities to slot holders can be disruptive of current operations. Auctioning off only 20% of the airport's capacity at a time, as discussed above, would allow for efficient transfer of needed ground facilities.

EUROPEAN COMMISSION

1. Introduction

Obtaining access to essential infrastructure or input often is a key element of obtaining entry to the market. Incumbents controlling such infrastructures generally have few incentives to provide fair and non-discriminatory access to competitors. Indeed, providing access to their infrastructures to a new entrant will in most cases imply loss of market share and revenues in the downstream markets.

Since the early 1990's the European Commission has dealt with complainants under EC competition law from firms which have sought third party access (TPA) to physical property or intellectual property by claiming that this property constitutes an essential facility. The Community courts have never recognised any specific doctrine on essential facilities. They have, however, assessed in a number of cases whether the refusal to supply a good or service or the refusal to grant access to a certain input could constitute an abuse of a dominant position under Article 82 of the EC Treaty. Therefore the question whether access to certain infrastructure or input should be granted concerns the application of Article 82 and an obligation to allow access can only be imposed if a refusal fulfils all the conditions of this provision.

Although a refusal to supply is sometimes used for other purposes too¹, it can often be categorized as an exclusionary abuse. A dominant company may deny a buyer access to an input in order to exclude that buyer from participating in an economic activity (vertical foreclosure). Although the excluded buyer could be only a customer, typically competition problems arise when the excluded buyer is also a rival to the dominant company in the economic activity for which the input is needed. This type of exclusions may cover a board range of practices, among which is a refusal to grant access to an essential facility or a network. The dominant company prevents the requesting or terminated party from getting access to an input [or facility]. As a result, this undertaking is either driven out of the market, marginalised or prevented from entering the market.

Any obligation to supply pursuant to Article 82 – whether it concerns a so-called *de novo* refusal to supply or a termination of an existing supply relationship - can be established only after a very close scrutiny of the factual and economic context; the factors which go to demonstrate that an undertaking's conduct in refusing to supply is abusive are highly dependent on the specific economic and regulatory context in which the case arises.

The main purpose of forcing companies to supply is to improve the competitive situation in the downstream market. But enforcement policy towards refusal to supply has to take into account both the effect of having more short-run competition and the possible long-run effects on investment incentives.²

According to the approach proposed in the Commission's recently published Discussion Paper a refusal to supply that consists of a termination of an existing supply relation must, have a likely anticompetitive effect on the market which is detrimental to consumer welfare.³

¹ See examples in the DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, paragraph 208.

² DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, paragraph 213.

For *de novo* refusals to supply, the Discussion Paper proposes to apply the case law developed by the European Court of Justice which is reflected in the *Bronner* judgement (see below).

1.1 *The Bronner case-law*

The most important guidance on EC Courts approach to essential facilities is found in the judgements in the *Magill* case⁴ and in the *Bronner* case⁵, both of which show that the EC Courts pursue a very restrictive course in finding an abuse in this type of cases. The *Magill* case concerns a specific situation involving intellectual property right issues and a new product with separate demand⁶. As the purpose of this roundtable is to discuss on access to essential transportation structure, the *Magill* case is not described in any further detail in this paper.

The refusal of access issues that occur under competition law are generally assessed on the basis of the principles set by the European Court of Justice (ECJ) in the *Bronner* case. This case concerned litigation in which *Oscar Bronner*, the publisher of the daily “Der Standard”, sought (against payment of a remuneration) access to the only existing nation-wide newspaper home-delivery scheme operated by its competitor *Mediaprint*. The Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), in its capacity as the court of first instance in competition matters, referred to the ECJ for preliminary ruling the question whether Article 82 was to be interpreted in the sense that *Mediaprint*’s refusal to make a binding offer of access to *Bronner* constituted an abuse of a dominant position, in the sense of an abusive barring of access to the market, also in the light of the circumstances – as *Bronner* had claimed – that it was not possible for him, on account of the small circulation and small number of subscribers of its newspaper to build up his own home-delivery scheme for a reasonable cost and operate it profitably, either alone or in cooperation with the other undertakings offering daily newspapers on the market.

First, the ECJ underlined that:

“Although in *Commercial Solvents v Commission*⁷ and *CBEM*⁸ ..., the Court of Justice held the refusal by an undertaking holding a dominant position in a given market to supply an undertaking with which it was in competition in a neighbouring market with raw materials (*Commercial Solvents v Commission*, paragraph 25) and services (*CBEM*, paragraph 26) respectively, which were indispensable to carrying on the rival’s business, to constitute an abuse, it should be noted, first, that the Court did so to the extent that **the conduct in question was likely to eliminate all competition on the part of that undertaking.**”

³ DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, paragraphs 207-210.

⁴ Court of First Instance (CFI) judgement in case T-69/89 *RTE v Commission* [1991] ECR II-485; CFI case T-70/89 *BBC v Commission* [1991] ECR II-535; CFI case T-76/89 *ITP v Commission* [1991] ECR II-575; confirmed on *RTE*’s and *IPT*’s appeal by the European Court of Justice in joined cases C-241/91 P and C-242/91 P *RTE and IPT v Commission* [1995] ECR I-743.

⁵ See judgement of the ECJ of 26 November 1998 in Case C-7/97- *Oscar Bronner v Mediaprint Zeitungs*, European Court Reports [1998] Page I-7791.

⁶ Another case in that category is the Case C-418/01 *IMS Health GmbH Co. OHG v NDC Health GmbH Co. KG* [2004] ECR I-5039.

⁷ Joined cases 6-7/73 [1974] *Commercial Solvents v Commissions*, [1974] ECR 223

⁸ Case 311/84 *CBEM v CLT and IPB* [1985] ECR 3261 (so called *Télémarketing* case)

Secondly, the ECJ underlined that in the *Magill* case the Court had found that the refusal of an IPR holder to grant a licence did not in itself but only in exceptional circumstances constitute an abuse of a dominant position:

“in *Magill*, at paragraphs 49 and 50, the Court held that refusal by the owner of an intellectual property right to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position, but that **the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve an abuse.**”

In *Magill*, the Court found such exceptional circumstances in the fact that the refusal in question concerned a product (information on the weekly schedules of certain television channels) the supply of which was indispensable for carrying on the business in question (the publishing of a general television guide), in that, without that information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale (paragraph 53), the fact that such refusal prevented the appearance of a new product for which there was a potential consumer demand (paragraph 54), the fact that it was not justified by objective considerations (paragraph 55), and that it was likely to exclude all competition in the secondary market of television guides (paragraph 56).”

The ECJ concluded in the *Bronner* case that, even if the case law on the exercise of IPRs were applicable to the exercise of any property right, for the *Magill* judgement to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article 82 EC in a situation such as that which formed the subject matter of the preliminary ruling question:

- The refusal is likely to eliminate all competition on the part of the person requesting access;
- The refusal is not objectively justified, and
- The service or input is indispensable to the applicant’s business, for lack of any actual or potential substitute. It must be impossible or even unreasonably difficult, for *any* other party, because of technical, legal or even economic obstacles, to create a substitute.⁹

With regard to most of the transportation infrastructures that are subject to this roundtable, in the EU majority of the issues relating to access to the transportation structure have been regulated through sector legislation (in particular concerning pipelines, LPG terminals and storage facilities as well as railroads).

The line set by the ECJ in the *Bronner* case is the appropriate framework for assessing essential facility arguments in cases that are not dealt with in the sector regulations. However, there has generally been only little room for applying essential facility type of assessment under the EC competition law. As discussed above, the *Bronner* judgement has defined strict criteria for imposing access. Particularly the indispensability criterion will not be easily fulfilled and thus competition law often cannot be used to obtain access.

1.2 Legacy issues

A further category of competition problems relating to access arises from the fact that incumbents in the liberalising industries normally enjoy first mover advantages because they have already been active in the sector or market before it was liberalised and before other suppliers were given the possibility to enter.

⁹ The same issues arise in the event of a so-called ‘constructive refusal to supply’, i.e. in situations where the owner of the essential input charges a prohibitive fee for access or imposes unreasonable conditions.

Competition problems caused by the legacy of incumbents have primarily arisen in relation to the following issues:

- Allocation of scarce resources
- Reservation or tying of customers and
- Favourable treatment of incumbents by EU Member States¹⁰.

The privileged access former monopoly suppliers have to scarce resources such as networks or other essential structures has become a competition obstacle in EU in the liberalising network industries. As regards attribution of scarce resources after opening up the markets for competition, the relevant Community law for the respective sector in general provides that they should be allocated according to the principles of non-discrimination, transparency, objectivity and proportionality (see the energy sector regulations mentioned below). Liberalisation legislation generally is less explicit, as to whether incumbents can keep their existing rights of access to scarce resources.

A further legacy issue is that of tying of customers to incumbents by means of long-term supply agreements before liberalisation and running well beyond the date for market opening. This reservation of customers has the effect to preserve existing monopoly positions and delaying the arrival of competition.

In the following we summarise the principal access issues that the European Commission and courts have dealt with under competition law in three sectors: *energy, airports and ports*.

2. Energy sector

2.1 Sector regulation concerning access

In the energy sector access to both long distance “transmission” networks (large pipes or high voltage lines) and more local “distribution” networks (smaller pipes and low voltage lines) is crucial to enter into the energy supply market. When such transmission networks cross borders, they are generally qualified as “interconnectors”. Both the Gas and the Electricity Directives¹¹ provide for regulated third party access (RTPA) (i.e. published tariffs or tariff methodologies approved by the regulators) for all transmission and distribution networks¹². Similar rules apply to the so called LNG terminals for gas.

New entrants also have to obtain access to the storage of gas in order to be able to supply gas to customers. This has led to the inclusion of a specific provision for negotiated third party access (NTPA) to gas storage facilities in the Gas Directive 2003/55/EC¹³.

¹⁰ This issue relates to State subsidies and does not fall under issues set to be dealt with in 6 February 2006 roundtable. For information, the Commission has dealt with favourable treatment issues in various circumstances in the liberalised network industries, for example challenging favourable terms of investments by public shareholders or unlimited State guarantees or in a number of cases dealing with pensions.

¹¹ Directives 2003/55/EC and 2003/54/EC respectively.

¹² See, for instance, Article 18 of Directive 2003/55/EC. The previous Directives (Directives 96/62/EC and 98/30/EC) merely imposed negotiated third party access (NTPA) for these networks, but this was generally considered not to be functioning effectively, as highlighted amongst others by a number of antitrust cases.

¹³ See Article 19 of Directive 2003/55/EC.

In the energy sector scarce transmission capacity is in principle to be allocated on the basis of non-discriminatory market-based solutions. Article 6 of Regulation 1228/2003 on cross-border electricity exchanges provides, in essence, the choice between explicit auctions¹⁴, implicit auctions and market integration mechanisms (like the Nordpool integrating the Scandinavian markets). Pro-rata arrangements are *a priori* excluded as they imply “transaction curtailments” or first come first served allocations as they lead to a preferential treatment of first movers. In the gas sector, the Common Position of the Council for a Regulation concerning conditions for cross-border exchanges provides that the maximum capacity should be made available through non-discriminatory and transparent capacity allocation mechanisms (Article 5). No reference to market based principles is made in this context. The draft Regulation merely indicates that each allocation mechanism should be compatible with the “market mechanisms” for the sale of gas at spot markets and trading hubs.

Both the Electricity and Gas Directives and their implementing (draft) regulations contain references to the treatment of historic contracts after liberalisation. Downstream customers have been traditionally bound by long-term contracts to offset the risks taken upstream, by importing for instance large volumes of gas for a long period. Such practices have, however, led to foreclosure and rigidity in the market, thereby endangering the liberalisation process. Long-terms contracts will continue to be an important part of energy supply and should be maintained as an option for suppliers, provided they do not undermine the objectives of liberalisation and competition rules. Priority access rights to an interconnector cannot therefore be assigned to contracts breaching the EC competition rules, and existing long-term contracts cannot have pre-emption rights when they come up for renewal.

Finally, it should be noted that certain new infrastructure projects, or significant increases to the capacity of existing infrastructure, can be exempted from the TPA regime under Article 22 of the Gas Directive and Article 7 of the Electricity Cross Border Regulation, provided that they enhance competition in energy supply and meet a number of other conditions relating, in particular to the risk level, ownership and cost of the project. It is, for instance, difficult to conceive of a case where an exemption could be granted to a new piece of infrastructure controlled by a dominant player in one of the markets affected. A great likelihood of dominance also reduces the level of risk of the investment for the company, and makes an exemption less justifiable from that perspective. The same applies to investments for which the cost could be remunerated through general transmission tariffs with minimal impact on consumers. Finally, the legal separation of the infrastructure concerned from the system operator aims at ensuring sufficient ring-fencing of infrastructure activities from network activities of the major transmission system operators (TSOs).

2.2 *Application of EC competition law*

In the energy sector European Commission and courts have dealt with under competition law the principal issue of access to the network to ensure the entry of newcomers. The key cases are summarised below. In these cases the *Bronner* case-law was not, however, applied since these cases did not concern the only means of accessing the downstream market or the issue was rather on discrimination between customers than on foreclosure.

The Commission is also currently carrying out a sector inquiry on electricity and gas¹⁵. Among other things the inquiry examines barriers to entry: e.g. long-term agreements and access to gas customer markets. The inquiry will also look at relations between network operators and their affiliates.

¹⁴ Conditions are foreseen in the Regulation

¹⁵ See Commission Press Release of 13 June 2005 IP/05/716 and MEMO/05/203.

The main legacy issue arising in the electricity and gas sectors is the long-term reservation by historic transport contracts of (cross-border) network capacity. These reservations have raised two conflicting interests in the first years of the liberalisation process: the objective of the creation of functioning markets, in particular unfettered access to networks, on the one hand, and the safeguard of the financial interest of incumbents which entered into the reservation contracts before liberalisation in order to implement long term energy supply contracts, on the other hand.

While the Commission sector inquiry is still ongoing, the initial findings¹⁶ conclude that market entry at wholesale level is still limited by the incumbents' control over gas import contracts. Those contracts are typically flexible as to volumes, reducing incumbents' incentive to trade gas. Most of the contracts are of very long duration, with 15-20 years being typical. Few new entrants have the ability to enter into "take or pay"¹⁷ obligations of the magnitude or duration which have been normal until now¹⁸. Also with respect to electricity, it appeared in the initial findings that interconnectors are the key for market integration. Long term capacity reservation (so called grand fathering) and inadequate capacity rules are barriers to efficient market integration. According to the initial findings incentives to increase capacity and reduction of administrative burdens to build new interconnectors are important. Congestion between two areas leads to a higher price in the deficit area, reducing consumption and increasing generation, and a lower price in the surplus area, increasing consumption and reducing generation. Unless more efficient use of revenues is available congestion fees should be ring fenced with a view to using the revenues for reinforcing the existing interconnectors¹⁹.

2.3 *Discriminatory network access*

The *Marathon cases*²⁰ show how discriminatory network access can be detrimental to the creation of an integrated internal gas market. The case concerned the refusal by the German companies Ruhrgas, Thyssengas and BEB, the Dutch company Gasunie and the French company Gaz de France to grant pre-liberalisation access to their gas networks to the Norwegian subsidiary of the US gas producer Marathon. Marathon was refused access to ship Norwegian gas through the continental pipelines owned by the above-mentioned companies several times during the nineties.

The Commission services considered that the refusal to grant access could be considered unilateral abusive behaviour by each of the companies individually, but also as a collective boycott (cartel), as the refusals were jointly agreed by the five companies. After withdrawal of the complaint, following a commercial settlement between Marathon and the European companies, the Commission took the view that it was in the Community interest to continue the investigation. The cases were settled in November 2001 (Thyssengas, now RWE), April 2003 (Gasunie), July 2003 (BEB) and April 2004 (Gaz de France and Ruhrgas), following the acceptance of commitments from the parties on implementation of third party access rules going beyond the regulatory requirements applicable at the time.

¹⁶ See Energy sector inquiry issues paper of 15 November 2005, which is available at DG Competition website: http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/energy/issues_paper15112005.pdf.

¹⁷ Take or pay contracts are a particular kind of long term contract common in the gas industry worldwide. The principal particularity is that buyers who do not "take" scheduled quantities are obliged to pay for them anyway and, under most take or pay contracts, buyers have prescribed rights to the untaken gas that has been paid for (prepaid gas).

¹⁸ See Energy sector inquiry issues paper, par. 19 and Conclusions par. 2.1.

¹⁹ See Energy sector inquiry issues paper, Conclusion Par. 3.3.

²⁰ See Commission case COMP/36.246 Marathon/Ruhrgas/GDF et alia. (Commission Press Releases IP/04/573; IP/03/1129; IP/03/547 and IP/01/1641).

While the commitments relate to the same issues – such as transparency, balancing, short-term trading and congestion management – they reflect the market situation in each country and are not therefore identical in all cases. The commitments have led, for instance, to the introduction of so-called Entry/Exit regimes in a number of TSO networks. This means that shippers book capacity at the relevant entry and exit points separately (rather than from point-to-point), allowing them to purchase capacity without the need to be tied into transportation contracts that specify dedicated entry and off-take point combinations.

Other interesting cases in this regard were *Gazprom/ENI*²¹ and *Gazprom/OMV*²², involving the Russian gas producer Gazprom as well as the Italian oil and gas company ENI and Austrian gas company OMV, respectively. In the former, the Commission reached settlements with Gazprom and ENI in which ENI undertook, *inter alia*, to promote an increase of the capacity in its majority-controlled trans-Austria Gasleitung (“TAG”) pipeline, which it used to transport Russian gas destined for the Italian market through Austria. This expansion has to be completed between 2008 and 2011. ENI also committed to promote an improved TPA regime by facilitating the use of the TAG as a transit pipeline, including the introduction of one-month transport contracts, an effective congestion management system, the introduction of a secondary market and regular publication on the internet of available capacity. In *Gazprom/OMV*, in turn, OMV agreed to contribute to increasing capacity on the TAG pipeline and improve TPA on this pipeline. The reasoning for these commitments was not linked to alleged infringements in the transport markets, but they were made to compensate for the removal of the exclusivity clauses that ENI and OMV had in their contracts with Gazprom.

In 2003, the Commission settled an antitrust investigation involving the incumbent Danish gas supplier DONG and the country's main gas producers Shell, A.P Møller and ChevronTexaco, grouped in a cooperation called DUC (the case *Dong/DUC*²³). Further to several other commitments, DONG undertook to introduce an improved access regime for its off-shore pipelines linking the Danish gas fields with the Danish main land in order to facilitate the market entry of the DUC partners and potentially other suppliers into Denmark. In this respect, DONG committed in particular to increase the transparency of the system by publishing information on available capacity, to allow for short term trading in line with the access regime applying to its on-shore pipelines and to introduce interruptible transport contracts.

2.4 Allocation of scarce resources

In 2003, the Commission closed its investigations into the allocation of transport capacity in the Dutch electricity interconnectors between the Netherlands and neighbouring Member States in the cases *Corus Nederland/Nederland*²⁴ *Pechiney Nederland NV/Nederland*²⁵. The complaints concerned the higher electricity prices in the Netherlands compared to its neighbouring countries and pointed to a problem of congestion in Dutch interconnectors. In the Commission’s view, there was no indication of discrimination in the mode of allocating transmission capacity and it rejected the complaints. The specific electricity transports concerned by the complaints served the fulfilment of electricity supply contracts signed before the adoption of Directive 96/92/EC²⁶ partially liberalising the electricity market in the EU.

²¹ Commission Press Release IP/03/1345, 6.10.2003.

²² The Commission Press Releases IP/05/195, 17.2.2005 and IP/05/710, 10.6.2005.

²³ See Commission Press Release IP/03/566, 24.4.2003.

²⁴ See case COMP/E3/38.063, Competition Report 2003, p. 202.

²⁵ Case COMP/E3/38.201, Competition Report 2003, p. 202.

²⁶ Directive 96/92/EC of the European Parliament and the Council of 19.12.1996 concerning common rules for the internal market in electricity (OJ L 27, 30.1.1997).

The Dutch interconnector issue was, however, referred to the European Court of Justice (ECJ) for a preliminary ruling by a Dutch national court in 2002. In the case before the national court, three Dutch parties challenged the decision of the Dutch energy regulator (DTe) to grant priority to the historic reservations on the Dutch interconnectors. The Dutch court submitted a preliminary question to the European Court of Justice (ECJ) concerning the compatibility of the reservations with Community law. In a landmark judgment of 7 June 2005²⁷ the ECJ held that the grant of preferential access to the cross-border electricity transmission network granted by the Dutch regulation and legislation to an undertaking (which previously held a monopoly), because of contracts concluded prior to liberalisation of the market, amounts to discrimination prohibited by the second EU Electricity Directive: Articles 7 and 16 of this Directive require all users of the network – old and new – to be treated equally²⁸. According to ECJ, any other interpretation would risk jeopardising the transition from monopolistic and compartmentalised national markets to an open and competitive internal energy market. This judgement is expected to considerably facilitate market access in the electricity sector.

The ECJ also relied on the fact that Article 24 of the Electricity Directive foresees a special procedure whereby Member States could ask the Commission for derogations from the Directive. As the Netherlands did not use this possibility, it could not maintain priority access for incumbents.

The Court explicitly rejected the argument that holding priority access as discrimination would amount to a violation of the general principles of legitimate expectation and legal certainty²⁹. As regards legitimate expectations, the ECJ highlighted that the liberalisation process – and the principle of third party access to the networks – had been proposed by the Commission as early as 1989 in a Communication. Incumbents could therefore not have “well-founded” expectations that they would enjoy their import monopoly forever.

A merger case worth mentioning in this context is *EDF/Hidrocantábrico*³⁰, in which the main competition concern was the scarce commercial capacity of the French-Spanish interconnector which created a barrier to electricity imports into Spain and resulted in the isolation of the market to the detriment of customers. The Commission’s fear was that once EDF had gained a foothold in Spain with access to Hidrocantábrico’s electricity generation capacity, EDF would likely resist any substantial increase in the capacity of the interconnector. To eliminate these fears, EDF and the French grid operator committed to take all the necessary steps to increase the commercial capacity on the interconnector, fostering thus electricity imports into the Spanish wholesale market.

In 2005, the Italian competition authority also opened an investigation under Article 82 EC into an alleged exclusionary abuse by *ENI* of its dominant position for preventing the entry into the Italian gas sale market of *ENI*’s competitors.³¹ In this case, *ENI* had previously decided to increase the transport capacity of its main gas pipeline from the Algerian border which imports Algerian gas into Italy. *ENI* entered into transport agreements with a number of shippers, which agreed to share the investment in new capacity and to start importing gas into Italy as of 2007. Thereafter, *ENI* refused, however, to pursue further the expansion due to concerns over a possible situation of oversupply. Such strategy may have the effect of

²⁷ Judgement of the ECJ of 7 June 2005 in case *Vereniging voor Energie, Milieu en Water et al. vs Directeur aan de Dienst uitvoering en toezicht energie*, Case C-17/03 (not yet reported in the European Court Reports)

²⁸ Article 7 imposes this obligation on the network operator and article 16 on the national authorities.

²⁹ Paragraphs 72 to 88 of the judgment.

³⁰ Commission Press Release IP/02/438, 19.3.2002.

³¹ See Bollettino Autorità Garante della Concorrenza e del Mercato (AGCM) 4/2005 and http://www.autorita.energia.it/inglese/press/segnalazione_050127.htm.

hampering the access of independent operators into the Italian wholesale market for the supply of natural gas, which is the major concern examined by the Italian authority.

3. Air transport passenger services

The most important (market) access issue in the area of air transport passenger services concerns the limited availability of take-off and landing slots at congested airports. At many European airports the demand for slots, particularly during commercially attractive time periods is significantly higher than the available capacity.³² Unlike other network industries (such as railways) the access issue is neither linked to the existence of a natural monopoly nor to vertical links between airlines or airports. The access problem largely results from the fact that at many congested airports the incumbent operators (notably the previous national flag carriers) often occupy the majority of slots available, thanks to so-called ‘grand fathered rights’ (see below). The Commission’s enforcement experience in the air transport sector, particularly with respect to airline alliances and mergers, clearly shows that slots at congested airports represent the most important barrier to entry. Scarcity of slots protects incumbent airlines from effective (low-cost carrier) competition to the detriment of the air traveller. Suitable slots may thus represent an indispensable input for air carriers to enter a market.

3.1 Sector regulation

The allocation of slots at Community airports is governed by Council Regulations 793/2004 and 95/93.³³ New entrants can get slots only if these become available in the ‘slot pool’ (for each coordinated period). According to Article 10(7) of the EC Slot Regulation a total of 50% of pool slots shall be allocated to new entrants. However there are usually hardly any commercially usable slots available in the slot pools of the most congested airports. This results from the fact that the slots allocated *prior* to the adoption of the EC Slot Regulation remain subject to the same rules as before; i.e. incumbents are not deprived of their slots as long as they use at least for 80% of them (so-called ‘grandfather rights’). In practice, this has led to a situation that at many congested airports no slots can be acquired, particularly during peak hours. As a result, the current administrative system of grandfather rights prevents new competitors entering markets linked to a congested airport. As a consequence the benefits of liberalisation are unevenly spread and airline competition is distorted at congested community airports.

3.2 Application of EC competition law

Overall it appears that general competition law is not particularly well suited to address the fundamental competition obstacles resulting from the scarcity of slots at congested airports.³⁴ Without a

³² See for example the study on the use of airport capacity prepared by the Airport Council International, available under: <http://www.aci-europe.org/upload/ACI%20EUROPE%20study%20on%20the%20use%20of%20airport%20capacity%20-%20final.pdf>

³³ Regulation (EC) 793/2004 of the European Parliament and of the Council of 21.4.2004 amending Council Regulation (EEC) 95/93 on common rules for the allocation of slots at Community airports, OJ L138 of 30.04.2004.

³⁴ The EC competition rules provide in principle three main instruments to address competition concerns related to congested airports: Article 81, Article 82 and the Merger Regulation (ECMR). There are clear limitations in the ability for merger control to address market access issues isolated from a specific airline merger, since for example individual slot transactions are unlikely to lead to change of control or in substantial terms to have a significant effect on any relevant slot market. Article 81 appears to be only well placed to address explicit market sharing terms written into possible slot trades, but would not be well placed to address the general market access issue. Article 82 may apply if a hub carrier is found to be dominant in a “slot market” at an airport. However several difficulties in the practical application of Article

functioning ‘market for slots’ the only available competition policy remedy to the airport congestion problem are slot divestures by incumbent carriers. This remedy however can in practice only be applied when investigating an airline alliance or merger case and then only with respect to markets negatively affected by the transaction.

The Commission has handled more recently a string of competition cases in the air transport sector having the result that take off and landing slots were released to competitors:

In the *Lufthansa/bmi* alliance case slots were released to a competitor on the Frankfurt-London hub-to-hub route. Also in the *Lufthansa/Austrian Airline* alliance case the carriers agreed to make available up to a maximum of 40% of the slots they operate on any given city-pair to any newcomer wishing to operate routes between Germany and Austria. This triggered new entries by several carriers on the routes in question. In the *British Airlines/SN Brussels* alliance case the parties undertook to release enough landing and take-off slots at Brussels-National for a new entrant to operate three daily services to Manchester, in case slots were not available through the normal slot allocation procedure. In the *British Airways/Iberia* alliance case the Commission identified a competition problem at the London and Madrid airports as a result of the co-operation agreement and requested corresponding undertakings from the parties to release enough landing and take-off slots to allow competitors to effectively compete with the alliance parties. A similar approach was taken in the *Air France/Alitalia* alliance case, where competition problems were identified at the Paris, Milan and Rome airports. The parties agreed to surrender up to 42 pairs of slots per day to create conditions for a total of up to 21 return flights a day on the affected markets. In addition the Commission stipulated that the slots should be made available on a preferential basis to the competitor operating the highest total number of frequencies on the route, considering that it is more effective to add frequencies to an existing service than to start a new service. Also in *Air France/KLM* the Commission imposed that slots should be allocated preferably in block to one single new entrant. In the *Air France/KLM* merger case the parties committed themselves to surrender 47 pairs of slots per day. In this case, for the first time, the surrender of slots was for an unlimited duration, compared with six years for the alliances, and the slots must be returned to the slot coordinator if they are misused or underused by the new entrant, not to the airline partners. In order to encourage market entry, a new operator might also acquire so-called grandfather rights over the slots obtained for the Paris-Amsterdam route after a confidential period, provided that the new entrant stays on the route for at least three years. The impact of such a provision is to increase the value of the slots released, and, thereby, to significantly reduce the risk of lack of new entry. A corresponding approach was recently applied by the Commission in the *Lufthansa/Swiss* merger case, where the parties committed themselves to surrender slots at the congested airports of Zurich, Frankfurt, Munich, Düsseldorf, Berlin, Vienna, Stockholm and Copenhagen. This created conditions for a total of up to 41 roundtrips per day by competing airlines to emerge on the affected routes. Finally also in the *Eurowings/Lufthansa* case the parties committed to surrender slots at the airports of Vienna and Stuttgart.

As a consequence of the above described remedies several carriers were able to enter on some of the competitively identified markets. However on certain other routes new entry has not so far taken place despite the set of slot remedies in place. In any event the existence of slot remedies provides the necessary conditions for effective new entry and this alone may already constrain the merging or coordinating parties’ competitive behaviour. Nevertheless slot remedies in structural *air transport cases* as described above should be considered only as a *second best* solution to the airport access problem. Firstly, these remedies are sometimes accompanied by difficult implementation and monitoring problems, which may affect the overall effectiveness of this instrument. Secondly, they are not able to resolve the access problem at congested airports in a more general and fundamental way. Remedies imposed in the context of a

82 exist, if the airline is using all its slots. This is primarily because of difficulties in considering such cases as a refusal to supply slots at a particular airport.

structural airline transaction clearly do not create the same level of market contestability as would be provided by a functioning, market principle based slot allocation regime.

3.3 *Regulatory avenues to improve access at slot congested airports*

None of the above remedies would be necessary if the current administrative slot allocation system were to be replaced by a more market-based slot allocation regime. The Commission therefore currently explores avenues to move away from the current, administrative system towards a more economic-principles based EC slot allocation regime, involving mechanisms such as auctions or secondary trading. The overall purpose of the current review is to move towards greater flexibility in slot allocation with recourse to market mechanisms to improve access to air transport markets linked to a congested airport.

As a first step in this direction the Commission has commissioned a study exploring the feasibility of market oriented slot allocation schemes.³⁵ The prime objective of this study was to look into mechanisms that encourage mobility of slots and lead the most efficient use of scarce airport capacity, while maintaining effective competition at Community airports. As a second step, in September 2004, the Commission published a staff working paper that explored the feasibility of a selected set of market based slot allocation mechanisms, such as auctions, secondary trading or the redistribution of x% of grandfathered slots. It is expected that the Commission will come up with a new legislative proposal, taking up some of these mechanisms in the course of 2006. From a competition policy perspective the possible introduction of a market principles based slot allocation regime, which as such is highly welcomed, should nevertheless be accompanied by certain safeguards to prevent a further strengthening of the slot portfolio of the already dominant incumbent carriers.³⁶

4. Access to ports

There is wide diversity as to the ownership, organisation and financing of ports in Europe. The majority tends to be publicly owned, with the exception of the UK where several major ports were privatised in the 1980's. As regards market access issues in ports, one should distinguish between access to a) the port infrastructure, and b) access to the port services market. There is no sector legislation at Community level concerning market access to ports.

4.1 *Market access to port infrastructure*

As opposed to airports (regulation on the allocation of slots), there is no Community legislation regulating market access to port infrastructure. It may be noted that problems of congestion, which are typical for many airports, do not arise that often in ports (at least not to the extent that would call for legislation). Apart from that, airports and ports have similar features. Like airports, ports are usually managed by a port (infrastructure) manager under a long-term concession granted by the State (in some

³⁵ See NERA study: http://europa.eu.int/comm/transport/air/rules/doc/2004_01_24_nera_slot_study.pdf

³⁶ For example the introduction of slot trading may offer leeway for hub carriers to increase their slot holdings and potentially create or enhance any market power at hub airports. This is not unlikely, since incumbent (flag) carriers often enjoy on many extra-EU markets a protected market position flowing from restrictive regulatory aviation regimes and hub-carrier advantages. It cannot be excluded that these carriers may use some of the profits generated in a competition-restricted environment to cross-subsidize their market behaviour on purely competitive (intra-EU) markets. They might be able to pay higher prices for traded slots than it would be possible under perfectly competitive market conditions on all relevant downstream air transport markets linked to a particular congested airport. In this respect it appears crucial that for example the introduction of secondary trading is complemented by some safeguards, such as the prohibition of restrictive terms associated with sales and leases of airport slots (such as not to resell a slot to a competitor of the seller).

cases the infrastructure manager may manage several ports). The infrastructure manager is responsible e.g. for the use and financing of the general infrastructure in the port as well as for the allocation of the use of specific infrastructure/superstructure to providers of port services, as explained below under point b). As regards access to the market of *managing the port infrastructure*, we have not come across problems of access, which is probably because this market is rather stable as concessions are often granted for very long periods of up to 100 years.

One could distinguish a sub-category, which is distinct from the management of the port infrastructure, namely access for the *use of port infrastructure*. The Commission has taken several decisions in the past under Article 82 EC in cases of refusal by a ferry port to grant access to the port infrastructure³⁷. In some cases, like the port of *Rødby*, Article 82 was applied in conjunction with Article 86 EC. It was in the case concerning the port of *Holyhead* in 1992 when the Commission used for the first time the expression ‘essential facility’ (this case was settled, so it never went to a final decision except for interim measures). The general principle is that the owner of an infrastructure abuses a dominant position if he refuses access to a port and thereby impedes the start up of a new service. In all cases, except for the one concerning the port of *Roscoff*, the port refused access because it had an interest in the incumbent ferry operator. In other words, there was a conflict of interest on behalf of the port owner which at the same time was the incumbent ferry operator, and hence wanted to exclude a potential competitor from the downstream market. Also, the Commission has stated (in the port of *Holyhead* case) that a company which owns and uses an essential facility should not grant its competitors access on terms less favourable than those which it gives its own services. In the situations described above, the Commission has used the essential facilities arguments and the EC courts’ case law on access to certain input, described above, to liberalise the market and encourage competition where there had previously been a monopoly.

In the case concerning the port of *Holyhead* (in Wales), Stena Sealink was the owner and operator of the port and ran ferries to and from Ireland. Sea Containers was a company operating ferries which wanted to operate a fast ferry service on the central corridor route by lightweight SeaCat catamaran. There was a series of negotiations between the two companies but Sealink would not agree to the access which Sea Containers wanted. Sea Containers complained to the Commission. However, the parties came to an agreement, with Sealink offering access on terms which the Commission considered to be reasonable and non-discriminatory, before the Commission had made any order. Nevertheless, the Commission adopted a decision with regard to the situation before the agreement, where it held that Sealink was in a dominant position as the port authority on the British side of the central corridor and that there was a sufficient prima facie case of a pattern of behaviour constituting an abuse under Article 82 to order interim measures. In the end, no interim measures were ordered because of the developments which had occurred in the meantime.

It is more unlikely that refusal of access situations would arise in respect of cargo ports because they would normally not be in a dominant position. It is not, however, excluded that also a cargo port could be considered dominant and where Article 82 could be applied, e.g. because of the geographic location of the port for a given type of cargo.

4.2 *Market access to port services*

As opposed to airports (directive on ground handling services), there is no sector regulation for the liberalisation of port services. The Commission’s proposal for a directive on access to port services market was recently rejected by the European Parliament. This was the second attempt by the Commission to achieve market liberalisation in this sector (the first draft was rejected by the European Parliament with a

³⁷ Sealink/B&I Holyhead: Interim measures, [1992] 5 CMLR 255; Sea Containers Ltd/Stena Sealink [1994] OJ L 15/8, [1995] 4 CMLR 84; Irish Continental Group/CCI Morlaix – Port of Roscoff [1995] 5 CMLR 177; Port of Rødby [1994] OJ L55/52; 5 CMLR 457.

narrow majority in November 2003). This proposal dealt with access to port services market and not to the infrastructure as such. Various restrictions therefore still exist in the field of port services notably in the form of exclusive and special rights. However, even in the absence of a legislative framework, some port services, such as cargo-handling have gradually, albeit not entirely, been opened up by market forces. Ports therefore remain the only part of transport for which no specific legislation exists to liberalise the market with a view to ensure freedom to provide services.

While the draft directive dealt with competition for the market (tendering procedures etc.), the EC competition rules apply to ports and port services mainly to ensure competition in the market. The two approaches are thus to some extent complementary.

INDONESIA

1. Introduction

After the monetary crisis in 1998, Indonesia has undergone a fundamental change of economic policies. One of the fundamental changes has been the creation of a condition where the role of the private sector and the people is given greater in the economic development. In the previous era, the government had a role that was quite dominant in controlling various economic sectors whether through regulations or State-Owned Enterprises (SOE). It is expected that the shifting of the paradigm will encourage the improvement of investments and economic growth.

To ensure that such change brings maximum benefits for the welfare of the people in the form of better quality of goods and services and affordable prices for the public, the regulations prepared contain the principles of fair competition. Such principles are reflected in several arrangements of various sectors deemed under a natural monopoly due to their characteristics as networking industry. Such arrangements include the following:

- Institutional design that separates the role of the operator and regulator.
- Open access obligation of the owners of essential facilities.
- Stipulation of Public Service Obligation (PSO) for public goods and services subsidized by the government.

Oil and Gas, Telecommunications, Roads, Electricity and Water are industrial sectors that have undergone changes adjusted to the new economic policies of Indonesia. Such changes are directed to a more competitive structure, alteration of institutional design and regulations that guarantee legal certainty.

Although the fair competition issue is relatively new in Indonesia, the regulations issued contain the principles of fair competition. Like other countries that are in the transition phase of reducing state domination on economy, Indonesia still faces several challenges, among other things matters related to the substances set forth by the regulations and problems faced during its implementation.

2. Implementation Essential Facilities Doctrine in Gas Pipeline in Indonesia

2.1 Policy Framework

The term Essential Facilities Doctrine (EFD) is used to describe a situation where the owner of an essential or bottleneck facility is required to give access to other business actors at a reasonable price. In general, EFD is implemented in sectors that comprise upstream and downstream industries. The incumbent parties operate in the two areas while other business actors are only interested to operate in the downstream area. The obligation is imposed to prevent upstream business actors from setting up barriers to entry.

One of the requirements to ensure effective implementation of EFD is an institutional design that strictly separates the institutions that function as operators from those who function as regulators. A regulator is an autonomous body as an arm of the government that conducts supervision so that operators operate in accordance with the applicable regulations.

In the past, certain authority of regulators to supervise business actors was delegated to SOEs, while at the same time, those SOEs were business actors or operators which pursues profit maximization. That condition gave competitive advantages to SOEs to prevent their competitors from establishing Essential Facilities or to share the utilization of the existing Essential Facilities fairly.

At present, after the sectoral regulatory body has been introduced as a part of the new institutional design, the development of Essential Facilities in regions is conducted by means of open tender to business actors. In addition to that, the regulatory body has the authority to determine the access charge for other business actors that intend to use the facilities. Such authority is used to avoid excessive pricing by facility owners so that investors may generate returns from their investments.

2.2 *Regulations and Regulatory Body*

The change of the development policy paradigm in the oil and gas sector in Indonesia is relatively new. It was indicated by the enactment of Law No. 22 regarding Oil and Gas in 2001, which replaced Law No. 44 Year 1960, Law No. 15 Year 1962, and Law No. 8 year 1971. Based on the law, the Indonesian oil and gas industry is directed to become more open by unbundling upstream and downstream industries. Business actors with the same entity are prohibited to operate at the upstream and downstream levels at the same time.

At the upstream and downstream levels, the law sets forth the establishment of a regulatory body (Chapter IX). Therefore, the Government issued a regulation regarding the Implementing Body serving as the regulator at the upstream level (Government Regulation No. 42 Year 2002) and the Regulatory Body (BPH Migas) as the regulator at the downstream level (Government Regulation No. 67 Year 2002).

BPH Migas as the Regulatory Body at the downstream level has the duties to regulate and stipulate the following:

- Oil fuel availability and distribution,
- National oil fuel reserve,
- Utilization of oil fuel transportation and storage facilities,
- Tariff of natural gas pipeline transportation,
- Price of natural gas for households and small customers, and
- Management of natural gas transmission and distribution

2.3 *Regulation regarding access charge*

Law No. 22 year 2001 regarding oil and gas has mandated open access as a mean to jointly utilize facilities in downstream activities (article 8 number 3). Such utilization is useful to optimize the excess capacity unutilized by the incumbent party.

Based on its authority, BPH Migas have issued a regulation concerning access charge, namely the stipulation on the price of gas transportation through pipes (BPH Regulation No. 04/ P/BPH Migas/II/2005).

The regulation gives a guideline as a legal reference for a stakeholder to individually propose a tariff for natural gas pipeline transportation to be considered by BPH Migas. The objectives of the guidelines are as follows:

- Create a reasonable, fair and transparent condition in the natural gas pipeline transportation business.
- Minimize uncertainty in the natural gas pipeline transportation business.
- Avoid conflicts among related parties.

2.4 Procedure for Determining Tariff

There are two alternatives to determine the tariff for pipeline transportation. The tariff can be determined using the Postage Stamp System or Distance System. The Postage Stamp System applies the same tariff at each delivery point from the gas source to the customers. While the determination of the tariff using the Distance System depends on the distance of the gas source and the delivery point. Natural gas pipeline transportation business entities submit tariff proposals to BPH Migas by providing information on the following:

- The calculation of tariff and proposed tariff.
- The volume of the natural gas to be transmitted.
- Location map.
- The specification of the natural gas to be transmitted.

Such a tariff is decided by BPH Migas through a Committee meeting after conducting evaluation, analysis and hearing with related parties.

2.5 Market Structure and Problems Faced

After the enactment of Law No. 22 Year 2001 and several supporting regulations, many new business actors have applied for a license to operate at the downstream level.

Table 1

The Number of Application for Oil and Gas Downstream Activity Business License

As Per December 2004

Commodity	Processing	Storage	Transportation	Trading	TOTAL
Natural Gas	0	0	18	30	48

Source: the 2004 KPPU Oil and Gas Study

Based on the record of the Ministry of Energy and Mineral Resources, up to December 2004, 11 out of 48 business actors applying for a license have been permitted to operate in the downstream sector as traders or transporters. Such addition of new players has not changed the structure of the industry

significantly. There are 2 incumbent parties, namely SOEs, which have existed in the market for quite a long time and have grown based on the previous regulations and market situation, which was not as open as now. The two SOEs are still the owners or control almost all essential facilities.

Until the preparation of this paper, there has been no new business actor that wins the tender to obtain the right to develop new essential facilities. The Government is still in the process of offering the development of transmission pipeline that connects Kalimantan Island and Java Island.

The structural condition described above provides an illustration that the great number of new business actors interested in entering the market have not been able to significantly reduce the domination of the incumbent parties. It also indicates that there are still some problems to be solved to create a fair competition in the oil and gas transportation and trading sectors.

The difficulty to create a fair competition in the oil and gas transportation and trading sectors may be caused by the following :

- The competition law and policy is still new in Indonesia. Many parties do not know and understand how the principles of fair business competition are implemented in industrial development policies and practices.
- The minimum of experience of the regulators in controlling and developing the industry. In some cases, the incumbent business actors still hold key information that may influence the decision of BPH Migas in determining tariffs.
- In addition, business actors who are not accustomed to implementing the principles of fair competition in their daily business practices, reflected in their behaviour also influence the behaviour in doing business, among other things the reluctance to open access although the present utilization rate is only about 51%.
- With respect to infrastructure network, the incumbent parties have built quite large networks that make the competitors difficult to compete. It discourages new business actors to build new networks needed in certain areas and encourages them to merely utilize the existing networks. The situation, on one hand promotes competition in the areas having such networks, but on the other hand, it does not encourage new development in other regions.

3. Conclusion

Indonesia is still new in encouraging natural monopoly networking industries to be more open. It is still too early to conclude the success and failure of the effort. However, the changes in the regulatory framework and institutional design as set forth based on Law No.22 year 2001 have provided a sufficient space to create a more competitive market for the gas pipeline transportation business.

Several corrective efforts may be performed by means of learning from valuable experiences of countries that have developed fair competition markets for gas transportation and trading. In addition to that, the effort to improve the capacity building of the related policy making institutions may become the key to strengthen the improvement of the business competition climate in this sector.

ISRAEL

In recent years the Israeli Antitrust Authority (hereinafter: "the IAA") has dealt with a number of cases that raised the issue of "essential facilities" in transportation and infrastructure.

The IAA dealt with the issue in connection to the following markets: central bus terminals; electricity supply grid; communication cable network; fuel pipelines; chemical import and storage facilities.

Prior to delving into the description of the Israeli experience let us point out the special characteristics of the Israeli economy:

- Israel is a small economy, thus the creation of natural monopolies is not rare, taking into consideration the volume of investments which are needed on the one hand, and the limited demand on the other hand for a certain product or service.
- The State of Israel has a real estate shortage; therefore allocating land for infrastructure purposes is not trivial. This situation creates, in some instances, a prohibitive obstacle to duplicative infrastructures facilities.

According to the policy of the IAA, an essential facility is one which meets the following cumulative conditions:

- The facility's operation is controlled by a monopoly.
- The new entrant is unable, within reasonable or practical means, to duplicate the facility. There is no need to prove a physical or legal inability to duplicate the facility, but one should show that it is not possible from an economic point of view.
- The potential or actual competitor's accessibility to the facility is blocked.
- Granting the competitor accessibility to the facility is in fact possible.

If the above conditions have all been met, the IAA is inclined to order the owner of the facility to grant accessibility rights to its competitors.

The Israeli court rejected owners' claims that prevention of access to essential facility are permissible on the ground of the "business justification doctrine". The court ruled that "business grounds" are insufficient, and one must consider the market effects caused by blocking access to the essential facility. The court indicated its preference to the balancing formula implemented by the European Union, which weighs the damage to the monopoly vis-à-vis the effects of competitor disappearance and creating high barriers to entry.

It is clear that the accessibility to the essential facility by the competitor should be possible in the practical sense. The monopoly's obvious business interest in preventing the competitor's access to the essential facility does not imply that accessibility cannot take place. On the contrary, in cases in which a strong business interest in blocking competitors' access exists, the logic of implying the doctrine often grows stronger.

The implication of the doctrine in Israeli law implies that an essential facility owner may not be allowed to refuse to grant access to an essential facility or refuse to grant such access on equal terms to businesses which depend on it as a raw material or a vital input, including those businesses which maybe in direct competition.

Section 29 of the Antitrust Law states that a monopoly is not entitled to unreasonably refuse to provide a product or a service over which a monopoly exists. Section 29A prohibits a monopoly from abusing its market power. Section 30 of the Law, is titled “regulating monopoly’s conduct”, and authorizes the General Director to impose particular instructions on monopolies found to harm the competition or the public.. Sections 29, 29A and 30 stand independently and are not linked to the essential facility doctrine. However, in cases in which the doctrine applies, enforcement through execution of the General Director’s powers is even more justified.

A Case study demonstrating Israel’s Antitrust Authority implementation of the essential facility doctrine, in the public transportation market's opening to competition:

- Over a long period of time, two bus companies controlled the urban and intra city public transportation in Israel, a result of mergers that took place prior to the legislation of the Antitrust Law and its enforcement. In 1999, “Egged”, Israel’s largest bus transportation company, controlled roughly 70% of urban public transportation, and nearly 100% of all public transportation between cities. The second company, “Dan”, concentrated in the Tel-Aviv metropolis area, as the only urban municipal company. At the time, no alternative public transportation company operated in or between the cities, except a single underdeveloped railway route, which mainly connected the cities of Tel-Aviv & Haifa.
- “Nitzba”, a sister company of “Egged”, maintained the majority of central bus terminals. Each city in Israel has only one central bus terminal, with the exception of Tel-Aviv, due to their relative small size, and the nature of their transportation systems. All public transportation buses depart from and arrive at the city’s central bus terminal.
- “Egged” and “Nitzba” had a series of restrictive agreements and practices, which maintained mutual exclusivity: “Egged” was obligated to embark only from “Nitzba”’s facilities and “Nitzba” gave sole access to their central bus terminals to “Egged” (except for “Dan” in the Tel-Aviv metropolis).
- In order to open the public transportation market to competition, it was necessary to grant competing bus transportation companies’ access to the central bus terminals. The public bus terminals were recognized as an essential facility due to the following:
 - A monopoly controlled the activity of most public city bus terminals.
 - A new operator was unable, practically or reasonably, to duplicate the input that a central bus terminal provides, due to high barriers to entry and since most of the bus terminals were natural monopolies in their activity area and since limited demand makes it economically unprofitable to build a second central bus terminal in a particular area.
 - In many geographical areas the restrictive agreements and particular arrangements, provide “Egged” with the exclusive access to public bus terminals.
 - In principal, granting private operators access to the public bus terminal was possible.

- The access to public transportation terminals was a vital input for an entrant, necessary for providing quality service at an affordable price. The lack of such accessibility will, in most routes, result in no economic viability.
- The Antitrust Authority was not presented with any objective and reasonable justification for blocking entrants from access to central bus terminals. Such blockage will reduce competition considerably and will greatly profit “Egged” and its affiliate companies.
- Due to the above findings, in 1999, the General Director declared “Egged” a monopoly in public transportation services, both in clusters of city per intra-city routes and in various cities as the urban bus company.
- In addition, the General Director declared “Nitzba” a monopoly in central bus terminals in a number of cities, and those terminals were recognized as an essential facility.
- The restrictive agreements between “Egged” and “Nitzba” were declared illegal.
- As a result of the General Director's declarations, the bus transportation companies and the central bus terminal operators reached a compromise with the Antitrust Authority and the Ministry of Transportation regarding the terms on which competing companies will be granted access to the central transportation terminals. Consequently, the Ministry of Transportation issued tenders for the operation of public transportation routes, which were previously operated by “Egged” and “Dan”.
- Today, 18% of the routes are operated by new entrants, which enjoy access to the public transportation terminals of “Nitzba”, a result of the public Transportation market reform. In addition, one can see that in routes that were opened to competition, prices have been reduced and the quality of service has been improved.

ROMANIA

1. Introduction

The specific objectives regarding the transportation infrastructure can be summarized as follows:

- Improving the general accessibility level of the country and its integration within the global economy by reducing the average time period necessary to get to the all national destinations;
- Ensuring the development of the various means of transportation and promoting intermodal transportation;
- Improving the quality and the efficiency of the transportation services;
- Ensuring the transportation services' tenacity as regards the environment.

The law regarding the setting up, development and modernisation of the national and European interest transportation network came into force in 2003. Through this normative act a list on the projects identified by Romania together with EU and that will be put into practice until 2015 was adopted; furthermore, an Inter-ministerial Committee has been set up which deals with this national and European interest transportation network.

Ensuring the non-discriminatory access of the end-users to the infrastructure in acceptable economic terms of quality and safety is one of the objectives taken into consideration by this Committee. Among its priorities are:

- The set up and development of the infrastructure used for accessing the network. This network will connect the Romanian isolated regions with the central ones;
- The development and implementation on the network of the *traffic management* and *users' information* systems, in order to optimally use the infrastructure.

2. Railway Transport

EU adopted the vertical separation as a pre-condition for opening the market and introducing the competition (Council Directive 91/440 regarding the development of the European Community railway network, modified by Council Directive 2001/12).

In Romania a separation between the infrastructure ownership and the exploitation of the transportation services by reorganizing the Romanian Railway National Company in operational sectors has been set up in 1998. The railway transportation infrastructure is State's public property and is administrated by Infrastructure – Romanian Railway National Company (hereinafter IRRNC), under the jurisdiction of the Ministry of Transportation. The administration is based on a concession contract concluded with the Romanian State, on a 49 years period, without the payment of a royalty.

IRRNC owns public and private railway infrastructure elements. The main income source of the company is the network access fee that is charged to all the operators on non-discriminatory basis.

The infrastructure administrator negotiates the activity contract on a four year period, with the Ministry of Transportation.

IRRNC' activity is regulated through Guidelines adopted by the Ministry of Transportation and the Romanian Railway Authority.

According to the legal framework regulating the access to the public railway infrastructure, IRRNC grants the access of the operators at the railway infrastructure, on non-discriminatory basis, in accordance with the access contracts concluded between them. The access for the foreign railway operators is also allowed.

The framework for the tariffs charged for using the public railway infrastructure and the specific rules are established through normative acts.

The tariff is calculated and collected by IRRNC; this tariff has a fix component and a variable one and, therefore, it can be negotiated with the railway transportation operators.

The amount of the tariff is calculated taking into account the exploitation costs and the costs related to the infrastructure's wear.

The operators pay a rent or a tariff for the solicited services and facilities on the private railway infrastructure. RRNC is the single provider on the Romanian market for the following services:

- Maintaining the railway infrastructure on the interoperable lines;
- Train schedule and setting up the railway routes for all the operators, on their demand;
- Energy supplying for the passenger and freight transportation;
- Railway traffic management by the traffic regulators.

Almost 75% of the network is regulated by the technical norms on interoperability (8500 km of the network is covered by the freight transportation – 98%- and passenger transportation -92%-), the other 25% of the traffic being of local interest (2800 km, freight transportation – 2% and passenger transportation -8%).

In 2004, RRNC leased 35 units from the non-interoperable railway infrastructure (railway sectors with a low degree of profitability) to certain private operators, on the basis of a normative act. These operators are obliged to deploy safety mixed or passenger railway transportation, to maintain and fix the railway infrastructure and also to grant the access to those units to other railway operators. Also, the undertakings are allowed to charge their own tariffs (e.g. Railway Transportation Company, Via Terra Spedition, RC-CF Trans SRL, Transferoviaria Grup SA, Rompetrol Logistics SA, Euroconstruct SA and ICIM Arad).

The decisions taken by the railway infrastructure administrator or by the railway operator can be appealed before the Surveillance Council – Ministry of Transportation. These decisions are the subject of:

- Allocation procedure for the railway infrastructure capacities and its results;
- Tariff procedure;

- The level or the structure of the railway infrastructure utilisation tariffs that have to be paid by the operators;
- Checking the conformity of the tariffs' set up with the legal framework and with the non-discriminatory principle.

The Surveillance Council authorises the negotiations between the applicant and the railway infrastructure administrator in regard with the level of the tariffs charged for the usage of the railway infrastructure and can intervene when the negotiations could infringe the legal provisions. It also monitors the competition on the railway transportation services market, including the freight railway transportation market.

The railway network is so structured as to allow interconnection with the other transportation networks and to grant the access to the international railway networks. The railways will be divided in 2 main categories: high speed and conventional. The high speed railway network is to be realised after 2015, together with the neighbouring countries. The network is to be built in two stages: the modernisation of the existing tracks and their up gradation for speeds up to 200 km/h and the construction of special tracks for the speeds over 250 km/h.

2.1 Conclusion:

- The State company is in a monopoly position as regards the railway infrastructure;
- The Romanian and the foreign railway transportation operators benefit of transparent and non-discriminatory conditions in order to access the railway infrastructure;
- The legal framework related to the access to the railway infrastructure and the procedure for setting up the tariffs charged for the usage of the railway infrastructure is fully harmonised with the European framework. Thus, the above mentioned tariff is so calculated as to avoid any discrimination between the operators; the requirement to separate the infrastructure control and the transportation activity is a necessary condition for ensuring a non-discriminatory and equitable access to the infrastructure;
- Within the Ministry of Transportation there is a body responsible for monitoring the activity of the Company that administrates the railway infrastructure;
- Competition Council has not proceeded any investigations regarding the infringement of the Competition Law provisions by limiting and preventing the access to the railway infrastructure.

3. Naval Transport

The Ministry of Transportation is the national authority in the field of naval transportation, responsible for the elaboration and promotion of the normative acts and specific norms regarding the administration, use and concessions of the naval transportation infrastructure.

The harbour and/or navigable routes administrations are under the jurisdiction of the Ministry and realise the implementation of the harbour policies as well as the harbour and navigable routes infrastructure developing programmes that have been elaborated by the Ministry. The Ministry is also responsible for the ensuring the harbours' and the naval transportation infrastructure functionality. Examples of such administrative bodies are: "Maritime Danube Harbours Administration" National Company (NC), "Fluvial

Danube Harbours Administration” NC, “Navigable Canals Administration” NC, “Maritime Harbours Administration” NC Constanta.

One of the main duties of these national companies is to allow the users’ access to the naval transportation infrastructure on non-discriminatory basis and in accordance with the legal framework. The harbours are classified as follows:

- Harbours with the infrastructure – property of the public domain;
- Harbours with infrastructure – private property.

The lands where the harbours, dikes, quays and other facilities used for waylaying the ships, technological roads and railways located within the harbours that are part of the public domain can be leased to the administrations structured as undertakings or national companies, given in administration to the public bodies or *régie autonome* or landed to other Romanian or foreign private legal persons.

As regards the harbours’ infrastructure, no other undertaking did have interest in investing in the existing infrastructure except the companies that acquired the control over the existing harbours operators. The demand in this field is quite reduced and therefore starting this kind of activities might be non-profitable. The factors that influence the entry on the relevant markets are related to the high level of investment costs and to the obligation of hiring specialized personnel. On the other hand, low demand generates a reduce degree of interest in investing in this specific field, characterised by a high level of risk regarding the profitability (the investment can be recouped only on long term). The conservation and stationary costs for the installations and ships are also high and because the demand is low, there is no interest in investing in this field. A non-tariff barrier to entry on the relevant markets is the administrative authorisation for operational activities of the ships in the harbours or the administrative authorisation for the freight fluvial transportation. The access to the harbours infrastructures is non-discriminatory and therefore other competitors can enter on the market.

In Romania, maritime transportation includes three harbours: Constanta, Midia and Mangalia; all these ports are administrated by “Maritime Harbours Administration” NC Constanta.

Amongst the policies that will be promoted in order to attain the strategies’ objectives in this field are:

- Ensuring and granting the free access to the railway and road infrastructure within the harbours with many operators and transportation beneficiaries in order to stimulate the competition;
- Transmission of the full rights of use over the harbour infrastructure to the harbour operators;
- Ensuring the competition between private fleet operators and ports and granting the free access of them to the naval and terrestrial infrastructure (the access to the transportation infrastructure is free for all the operators in accordance with the legislation).

Until now, the Competition Council has not dealt with any case regarding the access to the air transportation infrastructure.

4. Road Transport

According to the legal framework, the transportation beneficiaries have equal and non-discriminatory access to the transportation infrastructures of public interest; can freely choose the means of transportation,

having the possibility to perform the transportation on their own or to get the services of a specific operator in the field.

Road transport, together with the other means of transportation, is part of the national transportation system, which has as objectives the connection of all the regions to the national transportation network, the granting of the free movement of persons and goods, economic and social development of the country.

The road transportation activities, together with the auxiliary activities, have to be performed as to respect the legal provisions related to the working conditions, the exploitation of the vehicles and the use of the road infrastructure, the conditions regarding the traffic safety and also the international agreements and conventions to which Romania is part of.

A tariff has been introduced for the use of the Romanian road network. In this respect, the beneficiaries get a document that certifies the right to use the national road network. The collected sums represent income at the disposal of the "Romanian National Road Administration" NC and are exclusively utilized for financing the national roads construction, modernisation, maintenance and repair works, for granting the bond issuance on the national or international markets. The costs related to the issuance of the mentioned documents are supported by the "Romanian National Road Administration" NC.

The total length of the Romanian public roads network is of 78.836 km (25% are represented by modernised roads). These roads are relatively uniformly distributed in the country with only one exception, Bucuresti-Ilfov region, which disposes of a much higher density of public roads.

The program of rehabilitation and modernisation of the national roads has been launched in 15 steps, in 1991. This programme regards the improvement of the national roads up to the standards foreseen in the European agreement regarding the main roads of international traffic.

The rehabilitation and modernisation of the public roads remains a priority for the Romanian economic policy.

5. Air Transport

In Romania, the infrastructure in the air transport field is represented by the 17 airports. The main ones are "Henri Coanda" International Airport (almost 75% of the local traffic), Bucuresti Baneasa (9.3%), Timisoara (5.2%) and Constanta (2.2%).

These four airports function under the authority of the Ministry of Transportation and the other 13 under the authority of the County Councils. All the 17 airports are open for the international traffic. On 9 of them the international flights are performed on regular basis.

In the air transportation field Romanian legislation is harmonized with the one existed at the international level. Romania is member of the International Civilian Aviation Organisation, Eurocontrol, European Conference of Civilian Aviation and Joint Aviation Authority.

The legislation that sets the access to the infrastructure refers mainly to the licences issuance, access on the transportation routes and taxes and tariffs for the supplied services.

The necessary licences required to the Romanian operators in order to activate on the market is granted through an Order adopted by the Ministry of Transportation, which is harmonized with the European Regulation no. 2407/92/CE regarding the licensing of the air operators. Through this regulation, European Commission established a set of principles of interpretation as regards the relationship between the licensing rules and the freedom of access to the market. These principles are focused on two main

points; first of all, the access on the market of a transportation operator has not to be restricted through additional conditions included in its license. The area provided in the license has not to be limited on certain inter-Community routes or on exclusive purveyance of certain regular or non-regular services. Secondly, the access of the transportation operators on the market is based on the principle of mutual recognition of the licenses and on the control of these licenses in the origine country. In order to perform the traffic on intra-Community routes, a license granted by one Member State has to be accepted by all the other Member States and the access on the market can not be refused by them on the ground that the licensed operator does not fulfil anymore its obligations, provided by the law. The duty to check the conformity of the license with the relevant legal provisions is performed by the Member State that issued the license in question.

The European principles regarding the access of air transportation operators to the intra-Community routes, according to which these operators have the freedom of providing their services, have been introduced also in the Romanian legislation. Therefore, all the Romanian air transportation operators that hold a license have a non-discriminatory access to the internal routes.

Traffic rights on the international routes are granted on the basis of the provisions of the bilateral air agreements concluded by Romania.

The criteria and the procedures to be taken into account on establishing the costs of voyages and the tariffs for the air transportation services are provided by the European legislation (EU Directive 2409/92/CE). According to this legislation, an air transportation operator can freely fix its prices charged for the services provided inside the EU.

In Romania, the tariffs for the air transportation services are freely established, depending on the existing demand on the market. The State intervention in the tariffs policy is limited, in cases when anticompetitive agreements are proved (agreements on price fixing).

Until now, the Competition Council has not dealt with any case regarding the access to the air transportation infrastructure.

RUSSIA

1. Current Views of the Essential Facilities Doctrine

The following principles are the **basis of transport policy**: increase of transport availability, separation of the State management and economic activity, limitation of the economic functions of the State, privatization of economic entities.

The spheres of State' responsibility are: removing and prevention of the legal and administrative barriers in the processes of passengers and commodities transportation, elaboration and control over observance of competition rules and conditions and non-discriminatory access to the infrastructure, securing of safety and ecological requirements in the sphere of transport, international integration and realization of international agreements.

Spheres where the State stimulates and supports necessary changes are: development of competition in the market of transport services, termination of cross-financing of one kinds of activity at the cost of others, increase of availability of transport services for the population with low incomes, invalids, pensioners and students. When financing of privilege transportation, the transfer from coverage of losses of transport operators to direct compensation of the expenses of transport services' consumers is conducted.

The main directions of the development of competition in the market of transport services are:

- **Elimination of unjustified administrative and economic barriers** for competition among transport operators; perfection of the access to transport activity on the basis of licensing and gradual transfer to "softer" forms of the State regulation including voluntary certification; forming of the co-regulation procedures which enable to form requirements and conditions of the access to provision of services with the attraction of operator' organizations, consumers and their associations;
- **Excluding of unjustified competition advantages** for separate operators ahead of other; creation of the conditions that provide for **non-discriminatory access** of transport operators to transport infrastructure; support to small and medium business in transport sphere;
- **Gradual reduction of the sphere of price regulation and expansion of the market of free prices**; reduction of natural monopoly' spheres of activity with gradual replacement of direct regulation (including through tariffing) by market instruments.

2. Recent Transportation Infrastructure Access Controversies

2.1 *The general character of controversies*

Those who are going to receive a service have smaller volume of information during the negotiations with an owner (user) of infrastructure. A user is not able to realize in practice his right to equal contract conditions under which an economic entity dominating in commodity market should conclude a contract (sometimes, due to announcement of this information to be a commercial secret and can not be disclosed, the other one that can be disclosed becomes unavailable on various pretexts).

The delay in negotiations (for example, while considering of the problem in the authorized body or in court) brings less damage to the owner of infrastructure than to his contractors. Undetermined relations with separate contractors are not able to influence essentially the economy of infrastructural company. At the same time, delay or error in receiving of infrastructural services could cause significant losses or become the reason for contractors' leaving the market.

The significant uncertainty towards the results of the negotiations with infrastructural company still remains. During the negotiation company the prospect of its result mainly depends on the "good will" of the owner of the infrastructure which possesses the market power and asymmetric (in compare with contractors) opportunities. If the negotiations become the subject to consideration by the court it is practically impossible to talk about constructive agreements. In this connection, repeated violations with regards to the same economic entities occur rather often.

2.2 *How these controversies are being solved*

The abuse by economic entities – owners (operators) of infrastructure - of the dominant position still remains the widely spread violations of competition legislation. They consist of, including, the limitation of the access to the market, creation of discriminatory conditions of the provision of services. The analysis of the antimonopoly authority' practice (more than 500 cases annually) shows that despite the fact that these cases are more important from the statistics point of view (in compare with the whole statistic data of the violations of antimonopoly legislation) but do not secure in full size the provision of the normal conditions of functioning and development of commodity markets.

Ex-post measures are not enough in this case, the application of ex-ante measures is necessary. With this aim since 2003 the Russian antimonopoly legislation contains the measure aimed at prevention of the violations of the antimonopoly legislation connected with the opportunity to introduce preliminary requests of information, technical and economic character within the frameworks of the Rules of non-discriminatory access. The provisions of these Rules, based on the antimonopoly legislation' requirements, are specified into the specialized branch legislation as well as into the frameworks of the Rules of non-discriminatory access approved by the Government of the Russian Federation. FAS Russia has prepared a number of such draft Resolutions (in the spheres of railway transport, transportation of gas and oil by pipelines, transportation of electric power by electric networks) that are approved by the Russian Government.

3. *Successes*

The example of the realization of the principle – Elimination of unjustified administrative and economic barriers for competition among transport operators; the perfection of the system of access to transport activity.

At present about 30% of cargo are transferred by private rolling stock. As a result, the problem of the deficit of car fleet was taken away, the quality of provided services increased.

Besides, in the result of institutional reforms, regulation reform and development of market relations, including ones based on competition, the economic growth of the country was secured. So, starting with 2001 when the dominant position in the market of railway services become weaken but the situation of the monopsony in the market of cargo railway carriages was overcome, the significant growth of the production of cargo carriages occurs.

In 2001 its volume constituted to 162,5% in compare with the previous year, 164,6% - in 2002, 210% - in 2003. Recently, the growth rate has decreased but still they are ahead of the country' average. At present, the capacity of machine building plants is secured for 1-2 years ahead, economic conditions for development, modernization and innovations are created.

The example of the realization of the principle – Step-by-step reduction of the sphere of price regulation and widening of free prices market; reduction natural monopoly spheres of activity with gradual substitution of direct regulation (including, through tariffing) by market methods.

The Federal antimonopoly authority has deregulated transportation in sleeping carriages and compartments of fast trains (in a quantity of more than 100, which work on the territory of the entire country) when the availability of vacant places is guaranteed.

The transportation of passengers by electric high-class trains of local (inter-regional) railway communication has been deregulated as well. Due to this decision taken a number of railway lines started to introduce electric high-class trains (the number of lines is more than 50 already).

With all this going on, it was entrusted to satisfy the passengers demand both in alternative trains and long distance carriages, local and inter-regional lines which do not belong to high-class category. The transportation of passengers in these segments has become profitable. The quality of services has increased. The growth in passengers' machine building has been secured, the volume of investments has been secured multiply, the introduction of know-how and innovations has been provided.

4. Problematic Cases

Example on the problems with realization of the principles - Elimination of the unjustified administrative and economic barriers for competition among transport operators and exception of the unjustified competition advantages for some operators as compared to others; support of small and medium business in transport sector.

Every year FAS Russia considers more than 100 cases concerning limitation of access to the city markets of motor transportation for private passenger carriers. Very often decisions and prescriptions adopted by FAS Russia are appealed in the courts. Preliminary two thirds of decisions are taken in FAS Russia' favour, remaining 1/3 – in FAS Russia opponents' favour, as usual they are regional or municipal authorities.

Regional authorities limit the access for private passenger carriers (small enterprises, individual entrepreneurs, associations of individual carriers) to the market of city passenger carriers, including by limited tenders.

Private carriers consider that tenders should be held only for municipal orders for unprofitable transportation: distant itineraries, night trips, privilege transportation, schoolboys and students. Municipal orders with grants that cover losses of such transportation should be the subject of the tenders and there is no use in holding tenders for the right to access to work at itinerary if these tenders are aimed at limitation of amount of carriers and transport.

Overwhelming majority of the carriers supposes that municipal authority has no right to consider the "itinerary" as its own property with the right to pass it to any carrier for monopoly using (lease). Majority of carriers supposes that the quality of service for inhabitants could be improved only if competition is available and after privatization of state and municipal passengers transport.

Private carriers consider that procedure of opening new itineraries and recurring agreement on functioning itineraries, holding the tenders for the right to operate at the itinerary, etc., brings to redistribution and monopolization of the passengers carriers market that favours affiliated with power bodies carriers (municipal transport, transport organizations headed by relatives or friends). They suppose that there is a need in notification order of the entrance and leaving the market with strict sanctions against the violators of the notified timetable.

More than half of the carriers suppose that it is advisably to pass organizing and control over passengers carries to public non-profit associations and unions of carriers.

Almost all carriers face the facts of provision of unjustified benefits to individual carriers, infringement of interests, unequal terms of competition mainly in favour of State and municipal transport.

5. Unusual Approaches

New approach was realized as an example of the realization of the principle – formation of co-regulation procedures which enable to formulate requirements and conditions of access for rendering of services with engaging of organizations of operators, users and their associations.

During the reformation of electric energy industry the new institute of commercial market operator-*Trading System Administrator* (hereinafter – *TSA*) was formed. On one hand – it is the place where purchase and sale of electric energy is carried out. On the other hand – it is the place, where “rules of the game” on the base of elaboration of drafts of legal acts and internal procedures are formed

Representatives of the State and business structures are represented in equal terms in the *TSA*' management bodies. In its turn, representatives from business structures in equal terms are represented by manufactures and consumers. Representatives of the State in equal terms are represented by the legislators and state employees of bodies of executive power.

Besides, the Grievance Commission is created by *TSA* for regulation of issues connected with the access to the relevant markets in the field of electric power industry.

In the rather short period of time (about 3 years) legal and contract basis of functioning of competitive market was created. Currently 11% of all electric energy is being traded at free prices on *TSA* place. As to its annual turnover - it is one of the largest in Europe. Also, the power supply reliability is secured.

At present the opportunity of the expansion of this experience to other infrastructure spheres is discussed.

6,7 Alternatives to Access

Ex-post and ex-ante measures of the provision of non-discriminatory access, in accordance to which some obligations are imposed on operators, which dominate in relevant commodity markets, do not apply to the markets which function in the competition conditions.

Thus, the presence of several stevedoring competitive companies in the territory of a port may serve as an example of alternative access to services of sea and/or river ports.

The ports can also compete between each other if they are situated in the same area of water or if the transport lag to the places where the cargo is formed or consumed is acceptable. As to Moscow avia-hub the competition among three largest airports can exist as well as among other small airports situated in Moscow region.

Besides, the competition can exist among airports that are situated in a long distance between each other, especially with regards to transit transportation.

Different transport infrastructures can compete between each other. Thus, the competition conditions exist (or may arise) with regards to transportation of oil cargos that is accomplished by pipe-line, railway, marine and motor transport.

SLOVENIA

1. Introduction

Although general principles concerning the access to essential transportation structure may be equal, the application may differ according to several elements among which the size of the country; general economic conditions; the development of infrastructure and possibilities for its efficient use; potential interest of new entrants; sector over- and/or under-regulation; efficient application of sector and competition rules, can be pointed out as especially important.

Slovenia is small by surface and population¹ and the infrastructure is developed accordingly to the size and geopolitical situation.

Certain transport facilities are less effective than expected, certain facilities are not sufficient and it is not always the case that additional facilities may be built and put into operation. Due to several reasons, among which an element of ecology may not be excluded, the access of potential new entrants to existing facilities is more favorable than new investments.

2. Some basic elements

A broadly defined transportation infrastructure may be exposed to special and differential treatment especially due to its importance in providing (among others) services of general economic interest, security of supply and to fulfill public interest. Sometimes these elements are over estimated for the purpose of creating and protecting monopolies to the harm of effective competition, including the harm to existing and potential competitors, customers and consumers.

Certain sectors are regulated and it is sometimes an open question whether such regulation is sufficient or excessive, taking into account both, a freedom of establishment, free business initiative and profit oriented operation on one hand and the fulfillment of public interest and securing a level playing field on the other hand.

Sometimes certain specific interests may appear when the government presents itself in two different positions, as an owner and as a regulator. In such a situation a potential conflict of interest may lead to less efficient use of infrastructure than desired and necessary; this observation does not only apply to the effectiveness of the use, but also and even more to the potential entry barriers and price/quality ratio.

Clear definition of competences between sector regulators and competition authorities may be one of the basic preconditions for an efficient use of infrastructure, as through transparent rules, normative and implementing ones, market participants can expect an efficient application.

3. Access to facilities

Essential transportation infrastructure is not something that is broadly available in unlimited quantities. The infrastructure is usually limited and that is why it is very important how to use it. The management of infrastructure, the possibilities of access etc are important in order to ensure an efficient

¹ App. 20.000 sq. km, population less than 2 million

use, but the fact is that the question of access means much more: potential entry barriers, different treatment of (potential) competitors etc. lead to negative effects on general economic development, because transport as an economic activity represents an integral part of almost every product and/or service. Limited access to infrastructure facilities results in less competitive economy as expected and necessary.

According to the above, one of the important questions concerning the access to infrastructure is how to grant it and how to respect certain elements in connection with public interest on one hand and the ownership and all rights on the basis of it, on the other hand.

If the infrastructure is state owned, the original question that might arise is how to open the infrastructure for access on transparent, non-discriminatory and efficient way.

As infrastructure is hardly ever unlimited, very probably in each and every specific case where there is a limitation of infrastructure and the access can not be granted to everybody, there should be a very clear definition of the criteria to define the potential new entrants.

The most transparent way may be an open tender in which the owner (the state) would invite the bidders to compete for the access.

Another important issue may represent the question whether the owner of the infrastructure may apply for access as one of the service providers (i.e. if the state is the owner of the railroad can the company controlled have the access to the infrastructure for providing rail transport in competition with other service providers). Originally, there should be no problem when the regulatory framework is effective and when every eligible competitor would have the same conditions to access. Regulatory framework is even more important in such cases in order to prevent from potential discrimination that may arise through artificial technical barriers, non-transparent state aid, cross-subsidies and different kinds of other competitive advantages that may be granted to the company, directly or indirectly state-controlled.

It is therefore very important that a potential conflict of interests (between the ownership and regulatory function) be avoided at the very beginning.

When the infrastructure is private owned the original conflict of interests may represent the relationship between the private ownership rights and the public interest. Again, and in such case especially, the role of the state, directly or through a sector regulator, is very important. Limitation of the rights of the owner have to be just, to the extent absolutely necessary and proportional for the fulfillment of the public interest and primarily when it would be economically unjustified to build alternative infrastructure.

In such cases the responsibility of the state and/or sector regulators is even more sensitive, because the decision to limit certain rights should be justified; in addition to that, setting the proper price for the use of infrastructure may be one of the important tasks of sector regulators in order to prevent potential abuse.

Regulatory function of the state is also very important when certain infrastructure is built under BOT² project. It is a specific responsibility of a state to define thoroughly in the contract all relevant elements, in addition to classic elements of a BOT contract also the conditions of access of the third parties.

BOT projects and other projects where there is a share ownership among state and private investors may call for a specific definition of conditions of access of third parties already at the very beginning,

² Build, Operate, Transfer

when designing the project. If at the very beginning the terms and conditions are set very clearly then the third parties access is less problematic when the situation calls for such access.

4. Some specific experience

Sometimes the access to infrastructure is theoretically (and practically) free, yet through different agreements among market operators the access, although still theoretically free, is limited and may lead to exclusion of competitors from the market.

4.1 Theoretical example:

Slovenia has only one commercial (maritime) port³, the Port of Koper; some ports in Northern Adriatic Sea (Trieste, Monfalcone, Venice; all of them in Italy) represent complementary and competitive ports, depending on the type of cargo.

Important business operations represent overseas transport of cars (both ways), coal, grain etc.

Cargo transport to and from the port is realized via railway and road transport.

When the commercial operator would establish a joint venture with the forwarding agent specialized for road transport, another one specialized for railway transport and a maritime agent, the explanation for establishing such a joint venture company may be in expected synergy effects and in the presented benefit for a customer that would get a package of services in one place at an interesting price.

First impression is positive, benefit for customer through fast and cost efficient service.

Second impression is different, as such approach can lead to exclusion of competition in certain services (forwarding and maritime agents) and as a result (not taking into account potential negative effects on competitive ports and final customers) an absence of comparisons of the prices of other service providers and as a final consequence monopolization of the service as a whole with all related negative effects.

4.2 Practical example:

Slovenia has three international airports, among which only one has steady daily connections with major European airports. This airport has a monopoly on the cargo ground handling. On the vertically integrated market of aero-logistics one of the economic operators, specialized in road transport and forwarding, has a market share of app. 30 % on the Slovenian market.

Both companies, the airport operator and logistics operator signed a contract, establishing a joint venture company for providing combined logistical services and notified the intended merger to the Competition Protection Office.

When reviewing the intended merger the Competition Office established that it would be almost impossible to prevent from misuse of the information that such joint venture would get over its competitors on the relevant market of aero-logistics and that such access of the information would represent a considerable competitive advantage of the joint venture over the competitors. It appeared that it would be difficult to prevent from potential abuses, through unequal conditions. Such a situation could lead to exclusion of other competitors on the market of aero-logistics; for that reason the Competition Office

³ The Slovenian coast has than 50 kms

advised the notifying parties not to establish the intended joint venture. The parties withdrew the notification and cancelled the contract.

5. Conclusion

Transport infrastructure is a very important element of a general economic development. Limited access to infrastructure can result in less competitive access to goods and services; the specific responsibility of the state is to provide for an efficient use of infrastructure through reasonable number of competitors that have granted access under transparent conditions.

Such policy leads to an efficient use of resources, innovation, competitive markets and as a final result to a consumer benefit, exposed through better price/quality ratio and better choice.

CHINESE TAIPEI

1. Current Views of the Essential Facilities Doctrine

This submission outlines the ways in which Chinese Taipei has adopted and embodied the essential facilities doctrine in the laws and regulations governing competition and telecommunications, and it describes the ways in which the competition authority and the telecommunications regulator have applied the doctrine in the telecommunications sector.

To review issues pertaining to requests for access to essential facilities among carrier-based telecommunications enterprises and to ensure such access is completely fair, both Chinese Taipei's competition authority, the Fair Trade Commission (the FTC), and the regulator of the telecommunications sector, the Directorate General of Telecommunications (the DGT) under the Ministry of Transportation and Communications (the MOTC), adopted the essential facilities doctrine in their respective laws and regulations.

Among other prohibitions, the Fair Trade Act, which was enacted in February 1992 and is administered by the FTC, prohibits monopolistic enterprises from using unfair means to directly or indirectly prevent any other enterprises from competing. To clearly demonstrate its commitment to providing fair access to essential facilities in telecommunications-related markets, the FTC released its Policy Statements on the 4C Enterprises' Cross-Ownership and Joint Provision Practices. The Statements clearly reveal the FTC's adoption of the essential facilities doctrine which was first developed in the U.S. and has since been adopted by many countries. The doctrine states:

- An essential facility is owned or controlled by a monopolist;
- Competitors (including potential competitors) are unable to duplicate an essential facility in an economically reasonable way within a short period of time;
- An essential facility is inaccessible to competitors, with the result that competitors are unable to compete with the owner or controller of such a facility; and
- The owner or controller is able to provide a competitor with such a facility.

In the FTC's view, in the telecommunications market monopolized by the incumbent, if competitors do not have access to an essential facility, they lack the ability to compete with the owner or controller of such facility. In this case, the enterprise owning or controlling an essential facility could possess sufficient market power to impede or exclude competitors from the market. Hence, if the monopolistic enterprise denies its competitors' access to the essential facility, ceases to provide the essential facility without justification, or provides the facility in a discriminative way that restrains and impedes fair competition, it is most likely violating the Fair Trade Act.

In general, the FTC does not keep a list of the names of essential facilities in different sectors. To identify an essential facility when it is applying the doctrine, the FTC states that it is the relevant parties' responsibility to prove whether a facility, service, function, an ability or certain information constitutes an essential facility. The FTC, in its Policy Statements on the Telecommunications Enterprises, also states that essential facilities are not confined to tangible facilities, such as a rail track, a power grid, or a telecom network. The FTC takes the position that intangible services can be recognized as essential facilities, too.

Take the telecommunications sector as the example; the essential facility can be physical facilities (such as ducts, man holes, hand holes, towers, poles, main distribution frame), space (such as co-location, telecommunications equipment room), as well as services (e.g. billing service), function (e.g. emergency telephone service), ability (e.g. access to specific international submarine cable system), or information (e.g. access to a specific signal system or database).

Compared with the Fair Trade Act, the Telecommunications Act, which was substantially revised in 1996, mandates the telecommunications regulator, the DGT, to take charge not only of designing and implementing liberalization projects in the telecommunications market, but also of maintaining an environment for fair and effective competition. Sector-specific competition laws are embodied in the revised Telecommunications Act and are enforced by the DGT and/or the MOTC. Both the competition authority and the telecommunications regulator acknowledge there is a need for harmonized enforcement policies in cases related to access to essential facilities in the telecommunications sector.

The Telecommunications Act requires that owners or controllers of essential facilities shall provide competitors access to essential facilities under certain circumstances. More to the point, it stipulates that a facility-based telecommunications enterprise, while constructing pipeline infrastructure for its own fixed telecommunications network, may request co-location for its pipelines with the essential facilities of the telecommunications network at a charge and that the owner of such facilities being so requested shall not refuse without due cause.

To implement the Telecommunications Act, the DGT issued its Regulations Governing Fixed Network Telecommunications Businesses in 1999 to govern the operating items, the service areas, the technical specifications and inspection items, the terms and conditions for granting a franchise, the requirements and procedures, the terms of validity of a franchise, the establishment of the enterprise, the method of payment and conditions of refund of a performance bond, matters related to the supervision and management of the said enterprise, and other compulsory rules.

To explain the mandatory access provision in the Telecommunications Act, the Regulations stipulate that, during the construction of network infrastructure facilities for its fixed telecommunications network, where the essential facilities in the telecommunications network cannot be self-constructed or substituted for by other available technologies within a reasonable period of time, an operator or an applicant who has received the establishment's approval may request to share the network infrastructure facilities with fixed network telecommunications business operators who possess the essential facilities. The request for the sharing of network infrastructure facilities shall not be rejected by such other operators without due cause.

The Regulations further state that operators shall mutually negotiate, in an equal and reciprocal manner, the terms and conditions with regard to the charges for sharing the network infrastructure facilities, the management and maintenance of the shared portions, the handling procedures for damages to or interruption of telecommunications in the shared portions, the quality and safety of telecommunications, the point of division of liabilities and other relevant matters. The sharing agreement shall be reported to the DGT for their records within one month after the execution thereof. In the event where an agreement is not concluded within three months after the negotiations are commenced, or the negotiations are not commenced within one month after the request is made, either party may request for mediation by the DGT.

However, unlike the FTC which decides on what constitutes an essential facility on a case-by-case basis, according to the Regulations Governing Fixed Network Telecommunications Businesses, essential facilities shall be submitted by the DGT to the MOTC for approval and declaration, i.e. the MOTC is in charge of compiling a list of names of essential facilities. Currently, the MOTC has already declared pipelines of bridges, pipelines of tunnels, lead-in pipes to users' buildings, telecommunications equipment

room, and vertical/horizontal telecommunications pipelines within buildings as the essential facilities of the telecommunications network.

One somewhat controversial issue remains, however: to date, the MOTC has not yet showed its intention to declare the local loop an essential facility of the telecommunications network even though new competitors have made such a request several times and the DGT has submitted such a recommendation to the MOTC.

2. A Recent Transportation Infrastructure Access Controversy

In an attempt to liberalize its telecommunications market, Chinese Taipei has initiated a series of reforms throughout much of the past decade. The relevant services in the market had all been monopolized by the DGT. Some very significant amendments to the Telecommunications Act in 1996 provided a legal basis and direction for the opening-up of the relevant markets, as well as for separating the DGT into two entities, with the new DGT acting as the sector regulator, and the state-owned Chunghwa Telecom Co., serving as the incumbent operator running all telecommunications businesses, ranging from data communications and mobile communications to the fixed network.

The monopolized telecommunications services were liberalized in sequence: paging, mobile phones, satellite phones and mobile data communications in 1997; virtual private network, fixed satellite service and mobile satellite service in 1998; domestic long distance, land cable leased-circuit business in 1999; integrated fixed communications network, including local, long distance and international business, in 2000; and international submarine cable leased-circuit business, third generation mobile phones and voice-over-Internet phones in 2001.

A Fixed-Network Deregulation Task Group was established to draft the licensing rules and regulatory guidelines for liberalizing the fixed communications network. And, in March 2000, Chinese Taipei's fixed-network services passed a major milestone with the issuance of operating licenses to the Taiwan Fixed Network Co., Eastern Broadband Telecom Co. and New Century InfoComm Tech. Co., promising users better quality, more diversified and lower priced communications services.

One of the main objectives of liberalizing the fixed communications business market was to develop an alternative network to that of Chunghwa and to pursue multi-network competition. To achieve this policy goal, high entry barriers were set for applicants to ensure that all new competitors were in a position to compete. According to the Regulations Governing Fixed Network Telecommunications Businesses, under their contract with the government, the three competitors are obliged to build their own Internet infrastructures and to put at least 1 million households online by 2006. The three operators are also expected to invest nearly NTD154.9 billion (around USD5 billion) and provide 7,116 employment opportunities in the following 6 years.

The three new competitors began operating in mid-2001 and initially broke into the international telephone business. By December 2002, in terms of revenue, they had already taken over a 39.4% share of the international market. By contrast, in the local telephone market, they had captured less than 1% of total market share.

During the construction of their network infrastructure facilities for their respective fixed telecommunication networks, the new operators allegedly suffered because of the local governments' numerous and sometimes contradictory regulations on the construction and collocation of lines on ducts or other relevant facilities owned by public utility enterprises. It was further alleged that the local governments' administrative measures had significantly delayed the construction schedules and increased the expenses of the new operators. They then turned to the central government for assistance to collocate

with the lines of the relevant facilities owned by the public utility enterprises and to have the local loop owned by Chunghwa Telecom declared an essential facility. The central government responded by revising the Telecommunications Act, and it released a regulation on the collocation of the pipelines and a regulation on rent for the pipelines on a short-term basis. Since declaring the local loop owned by Chunghwa Telecom an essential facility may have contradicted the original policy goal of liberalizing the fixed communications network market, to encourage the construction of alternative networks to Chunghwa's network and to pursue multi-network competition, the government declined to do so.

In 2004, the three companies started to negotiate with Chunghwa Telecom about renting the local loop – the price of copper wire between a residence or business and a local area network. In May, 2004, Chunghwa Telecom announced that they had signed local loop unbundling contracts with Taiwan Fixed Network, Eastern Broadband Telecom and New Century InfoComm after lengthy negotiations. The contracts were valid for only two years so as to encourage the three companies to continue their efforts to construct their own networks. It is estimated that Chunghwa will lose 2-3% voice service because of this. Until now, none of the new competitors has succeeded in connecting their lines to 1 million households, as stipulated in their contracts.

3. The FTC's Role in the Local Loop Unbundling Dispute

In late 2003, the FTC received complaints over the local loop unbundling dispute between Chunghwa Telecom and the three private competitors. Among others, one major issue that was at stake was whether Chunghwa Telecom should be required to open up local loop access.

During its investigation, the FTC solicited opinions from the parties involved, as well as those of the industrial regulator. As understood by the FTC, the "local loop" refers to the telecommunications lines between the telecommunications services provider's switchboard and end-users, or the so called "last mile." The local loop is necessary for fixed communications network operators; in fact, it is crucial for competition among operators of fixed communications networks. The quantity and quality of the local loop an operator owns affects the amount, scope and quality of its services, as well as the revenue it receives. To obtain a local loop, an operator can build its own, rent from a current local loop owner, or find other circuits available for communications transmission. However, since Chunghwa Telecom is the monopolistic enterprise in the fixed communications network market, with nearly 99% of total market share, the FTC was bound to investigate whether Chunghwa Telecom's refusal to open up its local loop constituted a misuse of its monopolistic position and was, as a result, operating in violation of the Fair Trade Act.

As mentioned above, if an owner or controller of an essential facility refuses to provide such a facility without due cause, or sets an obviously unreasonable price and/or conditions, with the result that competitors are unable to compete with the owner or controller of such facilities, the owner or controller may be operating in violation of the provisions of the Fair Trade Act. The issue in question at that time was whether or not the three new competitors were really unable to obtain a local loop in an economically reasonable way within a short period of time. In reviewing the case, the FTC took the following facts into account:

- The MOTC had not declared the local loop of Chunghwa Telecom an essential facility. The industrial regulator had set clear rules for new entrants to construct their own network infrastructure facilities for their fixed telecommunications networks. Until then, the MOTC believed that there could not have been much difficulty installing telecommunications lines or acquiring substitute technology, and thus did not see a need to force the incumbent to share its facilities with its competitors;

- The FTC was fully aware that it was not just Chunghwa Telecom's local loop that could connect with end users' residences or businesses. In Chinese Taipei, the penetration rate of cable TV subscription had already reached 85%, and several telecommunications companies had already been co-operating with cable TV companies to provide broadband services. For data communications transmission at least, it was not difficult to find cable TV companies to provide the relevant service. As for voice communications transmission, it was also highly unlikely that the relevant service could not be provided via (the) cable lines.

Given these facts, it would have been unreasonable for the FTC to draw the conclusions that the three competitors could not find an economically reasonable way to acquire a local loop within a short period of time and that Chunghwa Telecom had misused its monopolistic position to impede competition.

From the long-term economic point of view, the provision regarding mandatory access, as specified in the Regulations Governing Fixed Network Telecommunications Businesses, could be both beneficial and detrimental. On the one hand, mandatory access could accelerate the new entrants' participation in the market and enhance competition in the fixed communications network market immediately. But on the other hand, the compulsory rule could impede the incumbent's right to deploy its own facilities, could be unfair to the incumbent's operations, could reduce the new competitors' incentive to self-construct and could even weaken the incumbent's motivation to invest in the maintenance or upgrading of its local loop, thereby being detrimental to the general economy in the long term.

Based on the claims of economy of scope and the economy of density in the telecommunications industries, within certain areas, it might be more efficient for only one business to operate, and it could be that a duplication of a local loop and some other facilities may actually be redundant investments. In fact, there have always been arguments advocating that the local loop should be unbundled for all market players and that the owner of the local loop should then be compensated in a reasonable way.

In reality, however, without competition, it was hard to determine whether one operator would be more efficient than two; it was equally difficult to foresee which operator would be the most efficient. If the local loop were to be opened up without thoroughly thought out plans and conditions, the new competitors could, for instance, try to rent the local loop in the most profitable operation areas, which would unquestionably create unfair competition to the incumbent. In the case the FTC investigated, not once did the new competitors ever try to develop or seek possible substitute technology for the current local loop. However, at least in the data communications transmission service market, it was not difficult to find an alternative to the local loop. Mandatory access might therefore have weakened the new entrants' incentives to look for alternative solutions or advanced technology, and this would have been detrimental to the overall development of the relevant industries.

Based upon the above mentioned reasoning, the FTC reached the conclusion that it was not necessary to require that Chunghwa Telecom open up its local loop for the new competitors to rent. It also ruled that the FTC should not be involved in setting the amount of the rent. Thus, the operators were put into the position of having to negotiate on their own.

SUMMARY OF THE DISCUSSION

Introduction

The Chairman, Alberto Heimler, opened the discussion by stating that competition laws do not generally impose a duty to deal. When a firm – even dominant – refuses to deal with a customer, as opposed to a competitor, in most circumstances an intervention by the Competition Authority is not justified. The underlining hypothesis is that refusing an opportunity for profit is not rational, even for a dominant firm. There are usually other justifications for this behaviour and so we should be quite positive about accepting refusal to deal with customers. However, he pointed out, refusal to deal with a competitor may be an abuse. For example, when a vertically integrated dominant company refuses to supply an essential input that it controls to a downstream competitor, this refusal potentially could impede the development of competition in the downstream market and can be an abuse. The roundtable will concentrate on access issues in the transportation sector where very often access to a uniquely situated capital intensive facility is necessary to enter the market downstream and the facility is rigid in the sense that it cannot be expanded easily to meet increased demand either by new investments or by other means. The background paper written by John Hilke makes clear the types of essential facilities that will be dealt with, that is ports, pipelines, airports, railway infrastructure and electricity grids.

Firstly he pointed out that it is often the case that unless there is some form of vertical integration, access to a facility by customers such as ships or planes, is being provided in an efficient and timely way, because the customers are not in competition with the essential facility owner. However, complementary service markets may be unduly protected from competitive entry: stevedoring companies, handling, baggage handling, catering companies, etc. Furthermore one question that is always behind any order to provide access is what type of duty has been imposed on the dominant firm and how far can antitrust enforcement go in imposing investment to accommodate entry. Or what type of obligations do we impose on the dominant firm that is required to provide entry. Do they have to invest, to reorganise, what is it that they have to do or are obliged to do. Finally the Chairman pointed out that the essential facility doctrine originated in U.S. case law and that it is characterised in that jurisdiction by four criteria

- The control of an essential facility by a monopolist,
- The competitor's inability to practically or reasonably duplicate that facility,
- The denial of the use of the facility to the competitor,
- The absence of a valid business justification for denial of access.

Across jurisdictions there are a number of differences regarding this definition, especially on the question of what is a valid justification for refusing entry.

The Chairman then turned to the European Commission which described the definition of essential facility provided in the European Court of Justice in its submission, regarding the Oscar Bronner case in 1999. In the case, it was clearly stated by the European Court that the refusal is an abuse –and is similar to the MCI and AT&T criteria. The difference is, it says, that the refusal is a violation if it is likely to eliminate competition in the market and is incapable of being objectively justified. There is duty to provide an objective justification, not a business justification, but also that the refused service be “indispensable” to

carry on that business in as much as there is no actual or potential substitute. In the case of gas, he asked the European Commission, would liquefied natural gas be considered as substitute to natural gas, whether in such cases access to a pipeline would not be considered an essential facility because there is a substitute and it is not indispensable to entry? How would the EC would interpret these Oscar Bronner criteria

The delegate from the EC responded by stating that in the EU, liquefied natural gas is still a small fraction of the market and that they are currently looking at energy and it is a sector that will be followed with interest.

The Chairman continued that the criteria may be too strict, as related to energy, as the criteria related to the issue that was being addressed in the case; access to the major distribution network owned and controlled by the major Austrian newspaper. He explained that a request was made in the Austrian Court asking whether the editor of that journal was obliged to provide access to a competitor and the Court said that they were not obliged to provide access and these four criteria were identified.

The Chairman then turned to Korea where he stated the essential facility doctrine is not applied because it is not explicitly mentioned in the antitrust provisions. In fact, in the submission, they suggest that it would be a very important step forward if Korea would formally adopt an essential facility type provision in its antitrust law. In fact is it correct that if Koges, being the monopoly pipeline owner, refuses access there is nothing that could force access? Assuming that the four MCI and AT&T criteria are met, he enquired of the delegate from Korea, it is indeed an essential facility, so why can the antitrust provisions not be applied against abuse of dominance in such a case?

The delegate from Korea responded that although the sector-specific regulation does not include the rule on open access to the facility, of course antitrust law can be applicable in the situation. The Competition Authority can force the gas facility operator to open their facility to the new entrant. In that case, antitrust law in Korea has criteria for deciding what constitutes an essential facility. The first one is that it should be impossible to conduct business without a facility. The second is that there is a monopolistic control over the facility. The third is that there should be a practical impossibility of building a new facility of this kind.

The Chairman then addressed the situation of property rights in Hungary and the fact that they have to be well defined in order to apply the essential facility doctrine, otherwise it is never clear what the incentives for the refusal are and the case is difficult to bring. Secondly while direct refusal to access is easy to identify because the company is being told no directly, it is much more difficult to prove that a high price policy is equivalent to a refusal to access, according to the submission from Hungary. Why is that?

The delegate from Hungary responded that it was indeed possible and there are ways to define whether or not the pricing practice of an incumbent integrated firm is excessive. At the time the Hungarian authority did not have the resources to assess all of the factors or to carry out different cost studies. In our experience, these cases, when the access was allowed by the owner but pricing was the question, become excessive pricing cases which are very difficult to judge because a competition authority is not necessarily prepared to establish whether a price is a competitive price or not. The cases in the past were not really related to transport infrastructure but were cemetery services; in the end the delegate explained that the authority was not able to properly assess the costs of these firms or to say whether or not the prices were excessive without the capacities to do what a regulator is able to do in other sectors.

The Chairman asked if the authority employed a margin squeeze test.

The delegate from Hungary expanded that at that time the authority did not even know about price squeeze logic but that even so, price squeeze cases can be difficult if the infringement is not very clear and if the integrated firm does not go very far in its pricing policy.

The Chairman then referred to the submission from Indonesia where state-owned enterprises were perceived as being part of the state when in fact they were profit maximizing firms that behaved as private companies. He felt that the same statement could apply to a number of delegations. He went on to note the description of regulatory problems in oil and gas from the Indonesian submission and to ask why the Competition Authority did not have refusal to deal cases by incumbent vertically integrated monopolies.

The delegate from Indonesia pointed out that Indonesia has a new oil and gas law since November 2001, law Nr 22, regarding oil and gas. This mandates open access as a means of jointly utilising a facility in downstream or upstream markets. Also there is a regulatory body, called BPH Migas which issues regulations concerning access charges and the price of gas transportation through the pipes. However, it is new, and needs capacity building to implement the laws.

The Chairman asked Australia to explain their different system where a facility has to be *declared* essential before obligations of access are imposed. The question was whether in order to be declared an essential facility you need the four criteria that were mentioned. Secondly, whether the antitrust provisions would nonetheless be able to be used in the case of a refusal to deal by an essential facility owner, which is by a dominant company that owns an essential facility. And finally whether the fact that a facility is *declared* means that there are restrictions on the pricing of access and whether it should be free or whether the price should be reasonable, and what type of restrictions there are on prices.

The delegate from Australia explained that the criteria that are imposed by the National Competition Council in determining whether a facility should be declared essential are set out by the NCC. Essentially there are four criteria that are applied in that particular situation, that access is needed to promote competition in related markets; it would be uneconomic for anyone else to develop another facility; the facility would be used to provide services of national significance; and the service is not already covered by another access regime.

To respond to the second point raised, the delegate continued, there is no specific essential facility doctrine established under Australian trade practices law which is the antitrust law in Australia; there is provision for the misuse of market power provision or abuse of dominance, to be used in certain circumstances, in situations where the courts can address the issue of access to essential facilities. The Australian scheme, he explained, was introduced to try to avoid uncertainty amongst the business community and to prevent extensive litigation in courts while trying to provide some clarity in that particular situation.

Finally he concluded that access to essential facility is not free. Basically when there is a provision for access, it is has to be provided on fair and reasonable terms. There is scope for arbitration over those terms and costs.

The Chairman replied with two questions, whether the period of declaration was limited and what 'national significance' meant.

The delegate from Australia replied that certainly the declarations can be time limited and there are examples where they have been time limited. In the airport services area, there was a declaration for 5 years in one particular case. Secondly 'national significance' comes down to major infrastructure and objective analysis of the importance of the facility to the Australian economy. The NCC is well grounded in assessing that.

The Chairman then turned to the question of the duties of a dominant firm. He asked what type of duties are imposed on a dominant firm required to give access and turned to Israel and asked from their submission what was the definition of 'possible' for the granting of access.

The delegate from Israel replied 'possible' meant possible from the technical and from the regulatory point of view, that is, the possibility to enforce the access by the rules laid down. However, the most relevant aspect of possibility is really the question of capacity. What does one do when the incumbent company uses all the capacity of the essential facility? Does one require a dominant company to reduce its use of this essential facility in order to allow a new competitor to enter and also use the essential facility? The case that was presented in the contribution of the central bus stations in the cities, where there was a claim by the incumbent that it used all the piers of the central bus station completely; and because it was the largest company and had the most amount of bus routes it also used the piers more efficiently. Its claim was that it is inefficient to allow small companies that operate only one or two routes to use a whole pier as it would be less efficient. A compromise was reached; the small and new entrants to the market would use the piers in the central bus station only at specific hours, like slots in airports. It was both efficient and also allowed new competitors, new entrants to pay less for the piers. The question however is raised as to what would happen if no such compromise could be reached? It seems that one must consider how the essential facility harms competition. If the harm to competition is severe, there could be a case where an incumbent company would be forced to allow a competitor to use the essential facility although it uses the facility completely.

The Chairman then wanted clarification if there had been a complaint by a competitor against the monopolist.

The delegate from Israel replied that The Ministry of Transportation and the Ministry of Finance together with the authority wanted to introduce competition into the market and to allow new competitors in order to encourage competition in the bus industry. There was no initial complaint because there were no competitors in the area.

The Chairman reminded delegates of this pro-competitive way of addressing access and wanted to underline that particular example. He then turned to Italy where its submission refers to a case which has not yet been finalised; the decision would be taken in a few weeks. In Italy, claims against companies, whenever a case is opened against them, are made public; so, in this particular instance, these claims are known to everybody and indeed the description of the case is not only contained in the Italian submission, but is also briefly contained in the EC submission because the case has been opened up as a violation of article 82 of the EC treaty. The case is a very controversial one, referring to the decision by ENI, the former gas monopolist in Italy, to stop a planned expansion of capacity of a pipeline without objective justification. Due to the many intricacies in this case, the chair asked Italy to briefly describe it and to briefly describe the claims made and to discuss in general their implications.

The delegate from Italy began by clarifying that the case refers not to the denial of access to existing capacity but also to future capacity. He went on to explain that the capacity in discussion is that of the pipeline transportation of gas from Algeria to Italy. The transportation prices for the pipeline are held by the Trans Tunisian Pipeline Company, controlled by ENI, and ENI is the dominant firm in the Italian gas market, both as producer and distributor. In 2002, the TTPC announced its intention to expand the pipeline which is currently saturated and allocated the future capacity to a certain number of shippers and concluded a take-or-pay agreement with the shippers. Then in the process of fulfilling some of the conditions to make the contracts effective, TTPC first announced a postponement and finally – and that was almost 2 years after the first announcement of expansion had been made – it decided to resign the contracts. So the peculiarity of the case is that it is not a typical case of refusal to deal because the question is whether ENI had an obligation to make an investment decision on an expansion of the existing capacity.

In opening the case, the assessment was that although there was no obligation of this type, the behaviour of TTPC, and ENI who controls TTPC, had in fact delayed the entry of competitors in the Italian gas market because the shippers had been bound by agreements on the expectation that the capacity would be expanded; so this had conditioned their commercial strategies and their possibility of looking for alternatives. A point which was stressed in the opening of the decision was the lack of reasonable justification for deciding to resign the contracts.

The Chairman explained that the problem was that the companies were very small, not big companies like ENI. The Chairman then invited Mr. John Hilke to pose some questions

Mr Hilke turned to Italy to suggest that it was perhaps an unbundling question and to ask if there is an inherent difficulty in monitoring expansions of a system when the expansions will end up harming the vertically integrated firm and its downstream sales efforts. He asked if the delegate from Italy saw this case emerging or moving towards the Italian authority leaning towards vertical unbundling as opposed to trying to restrict, by a matter of rules, the way the expansions are designed into the system.

The delegate from Italy concurred that in the background of the case there is a problem of vertical integration and so a problem that might be solved in an unbundling rationale but he felt this case would not lead to asking for unbundling but would be treated as a behaviour delaying the entry of rival firms in the market.

Mr. Hilke then turned to Australia to enquire how the notion that social costs versus private costs could be an issue in determining whether it was economical to construct duplicate facilities; he asked in what way this would be done if the holder of the network facility thought there was a possibility of expansion while an intervener did not want the expansion to take place.

The delegate from Australia responded it had never happened and the fact that infrastructure costs are very high in Australia- a large continent with very long transport routes and a lot of economic developments in areas such as resources, the implications for duplication are quite high. The scheme also allows exemptions through authorisation on public benefit ground so social issues can be taken into account in access.

The Chairman moved the discussion to the subject of access issues in the gas sector and turned to the United States. From the U.S. submission it was clear, he stated, that the FTC is making sure that mergers between gas companies would not substantially lessen competition and, whenever possible, they choose structural divestiture of competing pipelines and overlapping pipelines, maintaining infrastructure competition. The FTC introduced behaviour remedies aimed at guaranteeing access to competitors. The chairman asked if these remedies were respected in general and what would happen if the remedies were not respected? How could the entry be forced and who would resolve that matter?

The delegate from the United States responded that this question has often occurred in essential facilities cases, be they abuse of dominance cases or merger reviews. One solution chosen is to mandate the appointment of an independent third party to oversee the administration of the remedy. The conceptual approach was to create a 'the straw in the pipeline' for which access would be overseen by a third party auditor. The settlement agreement required the appointment of this third party. The agreement contains elaborate provisions dealing with dispute resolution and with respect to the fidelity to terms. Quite importantly, because the agreement was to run for 20 years, it included a number of adjustment mechanisms dealing with the payments for maintenance of the pipeline, possible expansions of capacity and other issues associated with the continuing administration of the agreement over time. To date, this mechanism seems to have worked quite well. That is, the independent auditor can be a conduit for complaints both from the party that was granted access as well as other parties that might have objections.

The paths of recourse, and to date I do not think there have been any recourse requested, would be two. One would be for the independent auditor to come to the FTC and report a violation of the terms of the order. The other path would be regional local oversight by the public service commission of the state itself, which approves the underlying terms of the easement agreement. The basic approach was to delegate the function of administration and oversight to a third party who would report back to the FTC.

The Chairman asked who would pay for the independent party.

The delegate from the United States replied that it is contracted out to the merging parties.

The Chairman then asked the U.S. to explain what constitutes an 'independent third party'.

The delegate from the United States responded that it would be someone who is not retained at that moment by either of the parties to the settlement itself. Typically it would be an expert in the sector whose current practice or retainer agreement did not implicate the very subject matter of the settlement itself.

The Chairman continued by asking about the relationship between the regulator and the FTC or the Department of Justice in the example of duties imposed for liquefied natural gas facilities. In the 1990s, there were access duties imposed and then in 2002, when the market changed a number of "regasification" facilities, were built. The energy regulator amended its policies and now they are treated as unregulated gas production facilities. The Chairman pointed out the importance of regulators taking a step back every once in a while to again look at the market they regulate and see if regulation is indeed necessary. He then posed the question of why this policy changed. Was it the owner of this liquefied gas facility who made their case to the regulator or was there some intervention on the part of the antitrust authorities?

The delegate from the United States responded that the advocacy was the consequence of the relationship built over time between the competition authority and FERC. He went on to say that it was John Hilke's work with several other colleagues and the two agencies that were instrumental in providing advice. So far as causation was concerned, he stated that there were a number of external inputs to the Federal Energy Regulatory Commission's decision; but certainly the basic message that the policy making should be attentive to incentives to make investments that would enlarge total capacity, was consistent with the guidance that was offered. As a collateral matter, the FTC's interest in this matter led the Commission to bring a merger case to unwind a transaction that had consolidated production capacity in the construction of the tanks and storage facilities that are indispensable to the creation of these facilities. So the interaction not only informed FERC's judgement about how to proceed, but it also provided a crucial base of knowledge for the FTC to police mergers that would ultimately affect the costs of developing these facilities.

Mr. Hilke added that there is a more general issue about the treatment of new and additional investment. The FERC in a number of instances decided that while they will work on adjusting a reasonable price regulation for the existing set of facilities, that there may be a point in their decision process when any investment above a certain amount will have a negative impact and is contributing to the amount of supply on the market. In this case the agency will relax its regulation over those new investments. An LNG terminal is a particular example and it is now gone even further in that FERC recently decided that it would not apply any price regulation to new LNG terminals and it also applied the same reasoning to new gas terminal storage investments.

The Chairman asked if the LNG terminal was on the coast line and if they would be equally distributed on both coast lines.

The delegate from the United States pointed out the extraordinarily sensitive matters of environmental policy and local land use control. While most citizens enjoy the fruits of developing these facilities, no one

wants one constructed close to their home, which makes the situation of these facilities and their expansion quite difficult. They tend to be concentrated in areas that already have accepted these types of risks in the past. Competition Authorities suggest that land use, environmental control and safety goals can be achieved in ways that are less disruptive to the competitive process. It is not to suggest that these controls be overridden, but simply to offer a manual of alternatives of how to take them into account. This has been increasingly important not simply for the siting of these facilities, but in the setting of air quality standards that affect sectors such as the refining of petroleum products.

The Chairman then moved to the European Commission where a very recent European Court of Justice case ruled on an allocation system of interconnection capacity based on historic reservation of capacity. The case originated in the Netherlands and was referred to the European Court of Justice by a Dutch judge who was hearing an appeal against a decision by the energy regulator in the Netherlands. It was a Competition Authority decision and the European Court of Justice said indeed that these historical reservation systems were not to be respected. It is certainly a case in which the objective justification for a refusal to access is extended. Was the decision of the Court he asked, based on competition provisions or on internal market provisions?

The delegate from the European Commission replied that the Commission rejected the complaints of the firms complaining about the allocation of transport capacity in the Dutch electricity inter-connectors. But the case before the Court of Justice was treated more as an internal market question even though it concerned the same allocation of transport capacity because it was the interpretation of the second electricity directive.

The Chairman then questioned whether this would imply that the case could not be used in general as a competition case and whether it would be a case related to the interpretation of the electricity directive and, therefore, limited to that area and based on internal market, or on free movement provisions.

The delegate from the European Commission replied that in the European Union area many of the access issues are dealt with in sectoral regulations; there are directives, especially in the energy fields of electricity and gas. The aforementioned issue was indeed raised on the basis of those directives. It was a question that had a competition policy implication because the directives promote competitive condition in the markets. Therefore, we would tend to look at that to see how we can interpret it for other competition cases, but, of course, it has to be tested. It is a new judgement and there has not been a situation where it could have been used, but it is not excluded.

The Chairman then referred to the Swiss submission and the grid case that originated in the decision of the seven biggest Swiss electricity companies to create a single company that would exploit the single long distance transmission network. In general, the chairman noted, the problem with club ownership is that it does not usually restrict competition among the club owners, i.e. these seven generators, although competition may be reduced by outsider entry. The chairman went on to ask whether the competition authority took up the question of interconnection capacity and how it might ensure that the club owners would indeed not abuse their position by strategically reducing interconnection capacities with neighbouring countries.

The delegate from Switzerland pointed out that the Swiss grid was in the process of being established. In the past, capacity was allocated with long term contracts. The Competition Commission did not impose a condition of guaranteeing sufficient interconnection capacity with neighbouring countries because it examined only the effects of the concentration on the Swiss market.. Moreover. this would be the task of a sector regulator, for example. However, in Switzerland the sector regulator does not yet exist so this question is not solved for the moment, except through long term contracts and bilateral negotiations between the companies. There were some delays in Switzerland with the electricity law, he concluded.

The Chairman then turned to Germany, where there is a provision that makes access mandatory for essential facility owners. Deutsche Bahn, the German monopoly railway company has an affiliate company that provides electricity for running trains. A case originated from the request by a new entrant freight company in rail to be supplied with electricity from a competitor of Deutsche Bahn, the German rail monopolist. The case was eventually closed because legislation changed. The Chairman went on to ask what 'abusive pricing' meant in German law and what was the legal situation in Germany with respect to essential facility access issues?

The Delegate from Germany responded that the essential facility doctrine was introduced in German law in 1999 as a part of the general abuse control provisions. The provision in the law is largely modelled after the essential facility doctrine developed in the U.S.. The particularity in the case was that the competitor of Deutsche Bahn already had an agreement with Deutsche Bahn Energy for the supply of energy for a certain period of time. After some time, the competitor claimed that the prices charged by Deutsche Bahn Energy were abusive and it claimed that there were two ways to solve that problem: either to be supplied by a third party or DBE would lower the price. In the examination of the Federal Cartel Office, it turned out that the supply by a third party was very difficult for technical reasons. So finally, the examination and the case focused on the question whether the price charged by DBE was abusive. That question placed the FCO in a difficult position because at that time in Germany there were still association agreements on third party access to the net. The examination came to the conclusion that the prices charged by DBE were still below the prices that would have come out from a very stringent application of that association agreement. The Higher Regional Court that is responsible for appeals against decisions of the FCO had set a very high standard of proof in terms of what price was abusive or not, therefore the FCO decided to close the case.

It was a difficult case because the competitor went through civil proceedings and the court held that the price system of DBE was abusive because of the rebate system which resulted in the fact that only the firm DB Railion, which is the cargo part of DB, could get the biggest rebate. They came to the conclusion that that rebate system was abusive. The FCO was greatly criticised due to the fact that we were under some pressure by the Higher Regional Court at that time. The decision of the Higher Regional Court in terms of standard of proof has been overruled by the Supreme Court now.

The Chairman then turned to Japan and their reference to guidelines for a proper gas trade. These guidelines, revised in August 2004, encourage partiality and transparency in the gas transmission service, including the use of liquefied natural gas terminals by competitors. The chairman then asked if there had been complaints and whether these complaints would have been lodged to the JFTC or to the regulator. Who would be in charge in that particular instance.

The delegate from the Japanese Ministry of Economy, Trade and Industry responded that this ministry serves as the energy regulatory body. The current system began in 2004. Since that time there have been no complaints from new entrants. However if complaints were received from new entrants they would deal with them in coordination with JFTC, the Japan Fair Trade Commission.

The Chairman concluded that in general liquefied natural gas terminals are the only way by which gas can enter into Japan and that there are no direct pipelines. He then turned to the delegate from Portugal to ask if there had been any cases or problems with access to the pipeline infrastructure in the gas sector referred to the Competition Authority. What type of relationship exists between the energy regulator and the competition authority?

The delegate from Portugal explained that natural gas is relatively new in Portugal. It was a greenfield operation, a guaranteed monopoly, and the EEC derogation was introduced until 2007. At this stage, he pointed out; a considerable corporate restructuring process is on going to prepare the sector for the post

liberalisation stage. Under this restructuring, there will be an unbundling process in which the high pressure transmission system is unbundled and redeployed under the control of the transmission systems operator (TSO) which will become a holding company with two subsidiaries legally separated: one for power and one for gas.

The next stage, he continued, is for a concession contract to be awarded covering the TSO and the gas high pressure transmission system for storage. As it is usual in Portugal, third party access contracts are supposed to be guaranteed and clearly stated in the contract. The third element is that the existing power regulator will have new functions as a gas regulator. So it will become an energy regulator and it will have interests specifically over and above its current regulatory functions in the power sector with supervisory functions of the concession contracts including third party access. The relationship between the Portuguese Competition Authority and the existing power regulator has been excellent, be it under specific antitrust activity, or merger control activity. We have not had any complaint or any case.

During the discussion, the Portuguese Competition Authority acknowledged the important role that national competition authorities can play in enabling competitive structural reform in the utilities. In this regard, sustained advocacy efforts have an important role to play, through the timely preparation of economic studies and the public dissemination of their recommendations thereof

The Chairman asked if the unbundling would be within the vertically integrated firm

The delegate from Portugal replied that it would be proprietary unbundling; that is, the gas storage, transport infrastructure and the terminals would be redeployed and sold to the existing TSO, which is the owner of the high voltage electricity grid transmission system. All of this would operate under a concession contract with third party access.

The Chairman pressed as to whether there would be any vertical integration either with suppliers or with final distributors.

The delegate from Portugal replied that there would not and that the electricity and gas TSO would be shareholdings, but any type of operator will be limited to a very small and residual type of share.

The Chairman then opened the floor for comments.

Mr. Sean Ennis, Senior Economist in the Secretariat addressed a question to the delegates for their comments. He had spoken with a commercial company with concerns regarding regulations or competition law obligations they might face if they built a liquid natural gas terminal. Their concern was that access would be required to the LNG terminal for other importers of liquefied natural gas. But if they built a terminal they would build it to a specific capacity level that would be based on long term contracts which they would form with a supplier. If, after building the terminal, they faced an obligation to provide access, they would have to breach their long term contract for supplying in some way. The result was that they were very reluctant to build a terminal without certainty that they would have adequate capacity to serve the long term contract. What methods might jurisdictions actually or potentially use to addressing this kind of concern by a company arising from regulatory uncertainty.

The delegate from the United States responded that a set of disputes that have made their way into the courts is whether change in regulatory policy and adjustment in the rules can be challenged on grounds that it constitutes an appropriation of a property right. This question has been raised extensively in the U.S. where, ex post, access is mandated to a facility. There have been a series of cases in which property owners assert that a 'taking', an appropriation of a property right, for which compensation is owed to the company. These cases have at times produced some very positive results for those asserting these rights; in

others they have failed. It has been the principal mechanism by which private entities decide to push back against what they consider to be a renegeing on initial regulatory commitments.

Mr. Ennis expanded that an interesting feature in this company's argument was that they were willing open the building project to partners to increase the capacity of the LNG terminal as an alternative to having some access requirement placed upon them after the terminal had been constructed, at which point increasing capacity would be extremely expensive. They wanted comfort that, if they opened the project to potential bidders and nobody else chose to enter at the investment stage, then there would be no access requirements imposed after that point.

The delegate from the United States replied that the energy regulator in the U.S. tried to signal to investors that arrangements would not be challenged if companies made expansions. However, there is always the general question of whether regulatory commitments are credible. There is a long history of renegeing on such commitments. That is where the larger question of how the regulator bonds itself not to renege becomes very important.

The Chairman then addressed the Dutch case where historic, long-term contracts were signed by the incumbent with the transmission company and then the regulation was changed because of the new directives of the new regulatory environment. The European Court decided that the regulatory framework had changed so much that these contracts could no longer be valid. The differences, the chairman pointed, out between Europe and the U.S. is that incumbent operators in Europe were often state-owned companies with legal protections in their investment, so that indeed the elimination of the incentive to invest is almost non-existent in this particular instance. The problem that is faced in Europe is far access can be required when you have a private company that takes risk and makes investments for its own profit and loss account, not because the investments are directed by government or protected by government.

The Chairman then turned the discussion to airports and ports. The competition problems in these sectors, he stated, include:

- The difficulty airlines face in entry,
- Entry to provide complementary services, for example stevedoring companies, handling or catering.

Both the U.S. and the EC, he commented, make reference to the question of slots and how, by reforming the slot allocation mechanism, entry is made easier into fully coordinated airports. This is an airport where there is no excess capacity and where existing airlines take up all possible commercial slots. The propriety rights for slots are often not clear. Since slots have been used by established airlines for years and originally were not paid for, it may not be clear to whom these slots belong. This is an additional reason why a market for slots is difficult to develop. The most, in fact, that regulators were able to do was to impose a weak form of use-it-or-lose-it rule; if slots are not used more than 80% of the time, then they have to be given back to the airport. The U.S. submission outlined a detailed description of a recent development and suggests that the market for slots did not develop because of lack of transparency and excessive market power by incumbents. As property, they lack liquidity in secondary markets. The U.S., he continued, suggested a slot auction as a solution. Firstly the chair asked whether that would imply giving the property back to airports; and if so, how to manage that. The second question was how to make sure with an auction that pairs of slots are really given to airlines that require them.

The delegate from the United States replied that when the regulator in the U.S., the Federal Aviation Administration (FAA), first began the slot programme in 1969 for airports, it was never intended to be a property right as such; it was always what it was referred to as an "operating privilege." At that time, the FAA

provided slots for the incumbents at each airport. The initial hurdle, he explained was getting over the thought that this was a windfall profit to the airlines that received these slots. In considering this he continued, one does not need to worry about how they were given out in the past; the question is how they should be distributed in the future, in a market-based system. If you have a market, assuming the transaction costs are not too great, the market will lead to an efficient allocation and one should not be concerned with past fairness or distribution issues.

Due to previous difficulties with an unsure market and an inactive secondary market in the allotment of slots, the auction system could be a controversial solution. Creating a fixed proportion of slots (say 20%) which become available every year, is a way to create some certainty in property rights. In this way a company would be able to gauge that its slot would be valid for approximately 5 years as it would eventually recycle through a 5 year period. In this way a new entrant who needs to put together a more substantial package of slots will be able to compete with existing hub carriers in any particular congested airport. There are only 4 airports in the U.S. right now which are subject to slots.

Transparency must be taken into account, he suggested. One of the problems in the past had been that it was clear to participants in an auction or in a sale who was buying or who wanted to buy a particular slot. If an incumbent wants to protect its very strong position, its market power, it could find out who was bidding and therefore be able to outbid the new entrant. To create a structured auction in such a way that this type of transparency is not available and the bidders do not know who the other bidders are, is essential, he pointed out. Even though transparency in general is a good thing, in this particular circumstance it could hamper new entrants. Finally, as to the question of whether the property rights would be returned to the airports, he concluded that it would likely be more an operating privilege, not a property right returned to the airport.

The Chairman then inquired whether the payment for the slot would go to the incumbent that had the slot before and whether the company would pay the airport or some other authority.

The delegate from the United States responded that payments would go back to the Treasury much as the auction in the spectrum of telecommunications.

The Chairman asked how the airlines would think about the loss of this "property".

The delegate from the United States replied that under this system, it is not property but a privilege.

The Chairman asked for further clarification between the relationship between slot access and gate access under this system and if they run in tandem.

The Delegate from the United States agreed that the auctions must end up allowing a system to actually work in practice and access to the gates would be essential and should be factored into the decision of how the auction is structured.

The Chairman then went on to state that by having auctions separately, airport by airport, a secondary market would indeed be created, as pairs of slots are required. If an airline has a take off slot, of course a landing slot will be required as well. So some mechanism by which this is ensured is necessary. The issue of slot allocation, he said, is a general issue related to access by airlines to airports, but it is not necessarily an essential facility doctrine problem because there is usually no vertical integration by airports to airlines. So the issue is to enlarge the possibility of airlines entering into fully coordinated airports. The major problem in airports and ports, besides when they are vertically integrated, is that an airport controls the access to all providers of competing services within the airport or within the port; so there is a sort of local market power exercised by the airport or port. The incentive to extract monopoly rent from these providers, either through vertical integration or through exclusive contracts, is high. Slovenia, he went on to say,

discusses a joint venture between an airport operator and a logistic company providing services to cargoes in their submission. The Competition Authority blocked the joint venture because of fear that the logistic market would be monopolised since the airport in question was the main airport in Slovenia. The chair asked who makes the decision about the purchase of logistic services and asked what the types of issues were involved in the case.

The Delegate from Slovenia responded that the airport in question was one of three but the only one providing international service. Secondly, the logistic service operators, after the accession to the EU, had lost a lot of business. The decision was made by the airport, which is directly or indirectly state owned, together with the logistic operator who holds approximately 30% of market share. The intention was to raise the market in aero logistics and the other goal was not to open the market for the second international airport, so the so-called real business would only go through one airport.

The Chairman then turned to the Russian Federation which described the situation in Moscow and other cities where different airports compete for customers, whilst all having spare capacity. This is a very positive development because in most other city airports, competition tends to be very limited as airports tend to specialise for example in only national flights and others in only international flights. It is rare for a city to have fully competing airports. He went on to ask if the competition was real or whether all airports are owned by the same entity and to what type of regulation they were subject.

The Delegate from the Russian Federation responded that indeed the competition was not only between the three largest airports but among different smaller airports situated in the Moscow region. One, he stated, was state-owned, the second owned by the municipality and the third private. All of them are regulated and compete on price.

The Chairman then turned to Romania where in their submission they give a detailed and interesting description of rules governing access on all sectors, where access has been mandated in rail, ports, airports, road transport and other sectors. The Competition Council has never been involved because usually there are two reasons for the lack of antitrust cases in sectors: healthy competition or no competition at all. The Chairman then asked the delegate from Romania to comment on the lack of cases by the Competition Council.

The delegate from Romania responded that the Competition Council of Romania was very involved in the process in all steps on ex ante assessment, and this is why participation with new legislation was very active. Romania is different in the respect that it has developed very up-to date legislation in this field and has been able to introduce all the necessary mechanisms in order to avoid having discriminatory treatment for different operators concerning access to the infrastructure. At the same time, concerning the criteria for establishing tariffs, it has introduced very transparent criteria for having equal treatment for operators. Romania has split the infrastructure activity and operational activity in the sector. Following that, it tried to develop close cooperation with different regulators on the market and, in this respect, has negotiated administrative cooperation protocols with all regulators in the sector. Regular meetings are held on different levels in order to discuss differences existing in the sector and to reduce risk of anticompetitive behaviour.

Some obstacles could be the high investment cost for infrastructure and the reduced interest, under these conditions, to invest in the field. Administrative authorisations in the sector might constitute obstacles so that it is not possible to develop clear and transparent criteria for having access to the administrative act. However, the delegate stated that periodical assessment on the market is performed and the Authority is ready to intervene if anticompetitive practices are present.

The Chairman then turned the discussion to ports. The Dutch submission outlined that competition for services within the port is important only when competition between ports is lacking and concludes that, in the Netherlands, there is healthy competition between ports so entry requirements for port service providers would not be necessary. The chairman agreed that for Cargo services, for example, it might be true that it would be relevant to land in one port or another. However he asked about services that are specific to a particular destination, for example ferry services to Amsterdam and whether the statement that competition between ports is healthy enough to make competition within port irrelevant, could be generalised.

The Delegate from the Netherlands responded that, for instance in Rotterdam, there is fierce competition between ports, and there is also competition within the ports. Pleased with these developments, the government is reluctant to regulate where there seem to be no concerns regarding competition. He continued that the statement is not to imply that there could not be any problems within ports regarding competition, but it is believed that one should first look at the possible problems that could occur and then look for the most effective solution for them. As for ferries, in general, as the paper states, there is more competition than people would suspect and few markets bound to one harbour. Of course, he went on, where long-term investments bind certain private companies to certain ports or the depth of the ports permits certain large ships to enter only certain ports, there may be problems but it is not clear that this requires stringent regulation, for example on tariffs. The government is looking at that aspect now and investigating the need for sector-specific regulation on top of already existent market abuse regulation for all the sectors.

The Chairman then turned to the European commission to enquire about the considered new strict regulations regarding port directives and the competition challenges that the port directive would try to address.

The Delegate from the European Commission replied that indeed, the Commission came forward with a second proposal to try to introduce access to the port services market and this second proposal was recently rejected by the European Parliament. Now the Commission is studying various options. In fact, the directive is, to some extent, complementary to competition enforcement. To ensure liberalisation in the transport sector, there is specific sector legislation for all modes of transport except for ports; and it is partly because that is the way it is foreseen in the treaty and also because each transport mode is very different from another. With sector-specific legislation, it is possible to take into account the particularities of each mode. What the directive would have ensured is market access. Service providers would have been selected through tender procedures. This would also help to ensure the functioning of the internal market. Only some countries, he pointed out follow tender procedures but not all of them. In the case where a service provider is not selected, there may always be the suspicion that it may have been faced with discrimination and the criteria on the basis of which the service provider could be selected are not always clear. The draft directive would have made it more transparent.

The port services directive was mainly targeted at ensuring access to the market, he stressed, whereas, the antitrust provision articles 81-82 and sometime 86, in the case of public companies, is to ensure proper functioning of competition in the market. The purpose of the directive was to stimulate more cross-border trade which would also have had implications on ensuring competition in the market. Currently the Commission continues to apply the existing antitrust provision in the Treaty as it would have done even if the port services directive would have been adopted.

The Chairman enquired when the directive was rejected.

The delegate from the European Commission replied that it was recent but that the initial rejection took place in November 2003, with a very narrow majority. Recently a lot of the focus on the directive was

directly on the issue of self-handling. However, the main purpose of the directive was really to foresee public tendering procedures. The idea of self-handling was part of the directive, but it was not the main issue. The Chairman asked for clarification on the reasons for the rejection.

The delegate from the European Commission stated that there was concern among trade unions over the provision on self-handling. Self-handling, basically means shipping companies would be able to load and unload cargo with their own personnel instead of having recourse to the existing cargo handling companies which employ the dock workers. Firstly one has to distinguish between different types of cargo because not all cargo can be unloaded by the ship's crew. The second issue, he stressed, was whether a shipping company would be interested in investing in a cargo handling company in the port to which it calls, as that would require quite a lot of investment in order to be able to load and unload the cargo itself. The trend we can see in the cargo handling sector, particularly now, is that ever more shipping companies are buying up terminals in order to do some of these activities themselves. So, to some extent, the market has already developed in that direction. A fear existed that this would lead to the influx of extra labour into ports and that would take away jobs from the existing dock workers. Clearly the main purpose of the directive was to try to have clear procedures for the selection of service providers and also to limit the duration of these authorisations, in order to stimulate cross-border trade and have more competition. It is true that the diversity of the sector is such that in some European countries, competition is already functioning well, whereas in other countries it is not. When you need to develop a common rule in a certain sector which is already much dispersed and very diverse, it is difficult to please everybody. The broad idea, he concluded, was to set some common basic standards in order to have the same authorisation system in place, which also foresaw possibilities to make appeal in case a service provider was not selected.

The Chairman pressed further as to whether the rejection was binding or consultative.

The delegate from the European Commission responded that it was a co-decision procedure which requires the approval of the Parliament and the Council. Concerning the first proposal by the Commission, it led to what is called a "conciliation procedure," so there were a lot of amendments made to the text. It was the result of a compromise that was rejected with a narrow majority by the Parliament. The second proposal was put forward according to some critics too soon after the rejection of the first one, which already led to some resistance.

The Chairman thanked the delegate from the European commission for the elaborate description and moved to Mexico and to the situation of the port of Vera Cruz where the Commission Federal de Competencia (CFC) got involved in a controversy between the port and the exclusive cargo operator of the port. He posed the question of why there was a single cargo operator and why there was exclusivity in that port. He went on to ask why the services in question could not have been supplied in a competitive manner and what the role of the CFC was in this case.

The delegate from Mexico replied that the current market structure is characterised by vertical separation between the infrastructure administration and the service provision. This structural design was adopted to ensure efficient access to harbours and other key facilities. It was intended to eliminate entry barriers so that all companies that wished to operate terminals or provide port services could do so subject to space restrictions. The original market design was aimed at introducing competition between port terminals within a port, and between operators within general purpose terminals. Within a terminal, there are no restrictions to vertically integrate port services. The strongest structural limitations are horizontal, he clarified. The same economic agent is not allowed to participate directly or indirectly in operating the same facility or service along the same coast line. In the case of Vera Cruz there was an auction for a contract to solely operate a specialised terminal for container cargo, and in this case the CFC participated in the auction process. The arguments that were used for exclusivity were, firstly, there was a minimum scale needed and competition came first from other ports. Secondly, there were other operators of general cargo,

though not container, within the port; and, thirdly, the auction itself was a competitive one, which also generated a positive result in terms of competition in Vera Cruz.

The Chairman moved then to Chinese Taipei where the focus of the submission was telecommunications and asked whether this implied that there had not been any access issue in other sectors like rail, ports, airports or energy and if so whether these access issues were solved by the regulator

The delegate from Chinese Taipei explained that because of its small size and the fact that a lot of the public utilities in question are traditionally operated and run by the government, most of them are actually public monopolies. There are some concerns about the government being the sole operator of all the infrastructures and also there are some concerns about national security. In our submission, we chose telecommunications, which actually is the only real case of access to essential facility in Chinese Taipei. Many private enterprises in Chinese Taipei pushed for privatisation in the telecommunication sector in the first place, and, secondly, pushed for more equal access to the essential facility in the telecommunication sector.

There may be some access issues in for example the petroleum enterprise where it was previously a state-owned monopoly and the second player was in the private sector. The second player tried to push the former state monopoly to open up the pipeline but later the new entrants dropped the issue because they figured out that perhaps the pipeline was not that essential, in the sense that private companies could transport petroleum in oil tanks on the highway.

He concluded by saying that to break the mould of public monopolies was the principal concern followed by the creation of a commercially viable environment so that there are potential competitors who push for access. For example, the state-owned railroad system has been running on a huge deficit for many years, so, under these circumstances, no potential competitor would really want to enter the market and it is vitally important to create a better environment which is conducive to more competitive business activities.

The Chairman then opened the floor to discussion and called on Ireland.

The Irish delegate asked what, in the opinion of his colleague, would be the reaction of the US FTC and the Department of Justice to claims of property rights to airport slots given the likely displeasure of currently held slots being taken from existing airlines and whether compensation would be considered as a solution.

The delegate from the United States responded that the regulatory agency was very careful not give out a property right when it created the slot system; had they created a property right, they certainly would be running into trouble because of the takings issues that were mentioned earlier.

The Chairman then asked if the earlier mentioned 20% of slots to be taken away annually would be proportionally removed from both the incumbent and the minor airlines. And if this is the case how would the problem of the smaller operators share be solved given that they could be in a situation of not having a viable amount of slots remaining in order to function, verses the incumbent.

The delegate from the United States replied that this issue had not yet been fully resolved and was still being worked out.

The Chairman then turned to Canada

The delegate from Canada offered the Canadian perspective that in general they rely on industry-specific regulators to ensure access to essential facilities in the transportation field. This is the case in rail,

with respect to interswitching and running rights, and airlines, with respect to the allocation of slots. Access issues can potentially be addressed under a number of provisions in the Competition Act, including for example by adding access conditions to a merger remedy or under the abuse of dominance provisions. Subsection 78(1)(e) defines an anticompetitive practice to include pre-emption of scarce facilities or resources required by a competitor for the operation of a business with the object of withholding the facilities and services from the market. However, competition laws are not necessarily as well suited to perform this function. Industry-specific regulators may have both superior technical knowledge and the ability to set access fees. In addition, their processes may be timelier and provide a greater degree of flexibility than do those which exist with due process under competition law. Notwithstanding this fact, when it comes to pure antitrust issues, the Competition Bureau does play a very active role, through both its formal statutory power of intervention and less formal inter-departmental meetings, to influence policy makers and regulators to open markets to competition and regulate in a manner that fosters competition. For example, on October 6th, 2000, the Commissioner of Competition made a submission to the Canada Transportation Act Review Panel regarding rail access and related issues. In this submission, the Commissioner made recommendations aimed at improving the effectiveness of the rail competitive access provisions including those related to running rights. The Commissioner recommended that any person, either provincial or federal entity, may apply for running rights as long as the person meets a fitness test. The Commissioner also recommend that a reverse onus public interest entry test, whereby, the onus would be on the host railway to show that it would not be in the public interest to grant the running rights sought by the applicant. The Commissioner's first proposal was accepted by the panel, but not the second. While the Commissioner's specific views will change to match evolving circumstances and experience, the issues remain important. There are cases where the Competition Bureau has included access by entrants to facilities or services as part of a remedy to potential anticompetitive conduct. For example, when the Air Canada-Canadian Airlines merger in 2000 was allowed, it was subject to Air Canada providing a number of enforceable undertakings. It had to relinquish counters, gates and slots at certain airports. This led directly to a low cost carrier establishing a competitive service at Hamilton, close to Toronto. Access to facilities has not been a problem post merger and Air Canada does not, in fact, directly control airport access.

The Chairman then moved to the Netherlands.

The delegate from the Netherlands posed a question concerning the U.S. case of airport slot auctions. In the European directive for rail, a system has been introduced which also allows auctions for railroad slots. It is based on the fact that the income of that auction is used to take away the capacity constraints--to enlarge the infrastructure or modify the system so you can enlarge the capacity---so there is no more need to auction. If the income would go to the Treasury how would such a system would make economic sense.

The delegate from the United States agreed that it would make sense to devote revenues to enhancing airport infrastructure because the slots in the U.S. are concentrated in a few airports that have a particular congestion problem. Relating to the earlier question on the 20% he suggested that the auction is open to all bidders including the airlines who have had slots removed and put up for auction, therefore the slots go to the bidder with potentially the highest benefit from the slots.

He continued that The Netherlands comment underscores, in some ways, the real root of the difficulty, which is capacity constraints related to the quantity of the airport facilities themselves and air traffic control systems. Maybe this is a frontier for advocacy and discussion as well. If you are looking at how public authorities might invest resources to deal with bottle necks, one possibility is simply to make more capital investments in these areas. There is a great deal of research dealing with aviation now which suggests that in highly congested airport hubs – such as Heathrow or the New York–Washington corridor on the East Coast of the U.S. – improvements in the air traffic control infrastructure would permit, with a considerable margin for safety, the shortening of both the vertical and horizontal separation for aircrafts,

and better resistance to difficulties that arise in inclement weather conditions. Infrastructure investment would greatly alleviate a number of congestion problems. The problem of having gates as suggested, i.e. of having the right to land without a place to put your passengers, is a real difficulty. In many instances, the solution – because public authorities will not invest in facilities – has been to turn to the incumbents and ask them to build or expand the terminal and the gates, which leaves the government back in the position it was before. Whether talking about the siting of LNG terminals or the development of public assets that determine in many respects how much traffic the system can handle, one area for advocacy as an extension of the work that agencies do, is to suggest that public institutions consider making exactly those kinds of investments.

The Chairman commented as a follow up, that the problem is when an incumbent, fully coordinated airport is privatised, for example, the fully coordinated airport does not want that full coordination to go away because it can extract monopoly rents either by primary slot allocation mechanism, if there are any or by high tariffs both for landing and take off or for other services. There is an inherent conflict between public service and the interest of the incumbent airport. In this case, an extra effort on the part of the regulator may be helpful to ensure that the property of this airport is not controlled by a single entity. For example, in Rome there are two airports, both owned by the same airport authorities; so there is a competition in the sense that you can choose but there is no real competition.

Indeed, he continued, there are differences in the way essential facilities are treated across jurisdictions, especially with respect to what ‘essential facility’ actually means in terms of accessing downstream markets and what constitutes an ‘indispensable need’. Does it mean that there is no other way to enter or that it is very costly to enter? I think this is a question that has been addressed in most jurisdictions. What is the acceptable justification for refusing entry and what is a business justification? The submissions suggest that some jurisdictions accept business justification; others accept only objective justification. Of course, the two are not the same: objective justification relates mostly to capacity or space, while business justification has a wider implication.

There was, he concluded, a very brief discussion on duties that are imposed on essential facility owners over granting access. Certainly in the early EC cases on ports, where access was required, many critics have suggested that the requirement of access was indeed associated with investments also to be made by the port facility in order to accommodate access. Slowly we have moved away from that with some of the EC case law, but in other countries there has been some further effort to limit or understand better what obligations should be imposed on the essential facility owner.

RÉSUMÉ DE LA DISCUSSION

Introduction

Le président de la réunion, M. Alberto Heimler, ouvre la discussion en déclarant que, d'une manière générale, le droit de la concurrence n'impose pas d'obligation de traiter. Lorsqu'une entreprise – même dominante – refuse de vendre à un client, et pas à un concurrent, l'intervention de l'Autorité de la concurrence n'est pas justifiée dans la plupart des circonstances. L'hypothèse sous-jacente consiste à dire qu'il n'est pas rationnel de rejeter une occasion de faire un bénéfice, même pour une entreprise dominante. Cette décision étant généralement motivée par d'autres considérations, il convient d'adopter une attitude relativement positive eu égard au refus de vendre à des clients. Toutefois, souligne le président, il peut arriver que le refus de traiter avec un concurrent procède d'un comportement abusif. Par exemple, lorsqu'une entreprise dominante verticalement intégrée refuse de fournir à un concurrent en aval un facteur de production essentiel qu'elle contrôle, ce refus est susceptible d'entraver le développement de la concurrence sur le marché en aval et peut relever d'une pratique abusive. La Table ronde portera principalement sur les questions d'accès dans le secteur du transport où, très souvent, l'accès à une installation à forte intensité de capital implantée sur un site sans équivalent est nécessaire pour entrer sur le marché en aval et où l'installation est dite rigide dans la mesure où il serait difficile de l'agrandir pour répondre à l'augmentation de la demande, que ce soit par de nouveaux investissements ou autrement. Le document de référence rédigé par John Hilke dresse une liste précise des catégories d'installations essentielles dont il sera question, à savoir les ports, les pipelines, les aéroports, les réseaux ferrés et électriques.

Tout d'abord, il fait observer que bien souvent, sauf quand il existe une forme quelconque d'intégration verticale, l'accès à une installation de clients comme les navires ou les avions est assuré de manière efficiente et opportune, étant donné que ces clients ne sont pas en concurrence avec le propriétaire de l'installation essentielle. Toutefois, les marchés de services complémentaires peuvent se trouver indûment protégés contre la concurrence : ainsi, les entreprises d'acconage, de manutention, de traitement de bagages, de restauration, etc. De plus, le fait d'imposer une obligation d'accès pose systématiquement la question de savoir quelle est la nature exacte des devoirs imposés à l'entreprise dominante et jusqu'à quel point les autorités de la concurrence peuvent aller pour imposer des investissements nécessaires à l'entrée. Les entreprises concernées doivent-elles investir, se réorganiser ? Que doivent-elles faire ou que sont-elles tenues de faire ? Enfin, le président souligne que la théorie des installations essentielles tire son origine de la jurisprudence aux États-Unis et qu'elle se caractérise dans ce pays par quatre éléments, à savoir :

- L'installation essentielle en question est sous le contrôle d'un monopoleur,
- Il est techniquement ou raisonnablement impossible au concurrent de dupliquer cette installation essentielle,
- Le concurrent se voit refuser l'accès à l'installation,
- Il n'existe aucun argument économique légitime pour en refuser l'accès.

On constate un certain nombre de variations de cette définition d'un pays à l'autre, en particulier sur la question de savoir ce que l'on entend par la notion d'argument économique légitime pour refuser l'accès.

Le président se tourne alors vers la Commission européenne, qui présente la définition de la notion d'installation essentielle utilisée par la Cour européenne de justice dans sa contribution relative à l'affaire Oscar Bronner de 1999. Dans cette affaire, la Cour européenne avait clairement indiqué que le refus de traiter constituait une pratique abusive et qu'il était assujéti aux mêmes critères que ceux des affaires MCI et AT&T. La différence tient au fait, selon la Cour, que le refus s'apparente à une violation s'il est susceptible d'éliminer la concurrence sur le marché et s'il ne peut être objectivement justifié. Il existe une obligation de fournir une justification objective, et non une justification économique, mais il faut aussi que le service refusé en lui-même soit « indispensable » à l'activité dans la mesure où il n'a aucun substitut réel ou potentiel. Dans le cas du gaz, le président demande à la Commission européenne si le gaz naturel liquéfié serait considéré comme un substitut du gaz naturel et si, en l'occurrence, un pipeline ne serait pas considéré comme une installation essentielle dans la mesure où il existe un substitut et qu'il n'est pas indispensable à l'entrée. Comment la CE envisage-t-elle d'interpréter ces critères de l'affaire Oscar Bronner ?

Le délégué de la CE répond en déclarant qu'au sein de l'UE, le gaz naturel liquéfié ne représente encore qu'une toute petite part du marché et que le secteur de l'énergie est actuellement suivi avec intérêt.

Le président poursuit en précisant que ces critères sont peut-être trop stricts pour s'appliquer au domaine et qu'ils ont été formulés expressément dans le cadre de l'affaire en cause, à savoir l'accès au principal réseau de distribution détenu et contrôlé par le plus grand journal autrichien. Il explique qu'une requête a été adressée à la Cour autrichienne demandant si l'éditeur de ce journal était ou non tenu d'accorder l'accès à un concurrent ; la Cour a répondu qu'il n'était pas contraint de le faire ; c'est alors que les quatre critères en question ont été définis.

Le président se tourne ensuite vers la Corée, en indiquant que la théorie des installations essentielles n'y est pas appliquée étant donné qu'elle n'est pas explicitement mentionnée dans la législation antitrust. En fait, on peut lire dans la contribution que le fait pour la Corée d'adopter officiellement une disposition analogue à la théorie des installations essentielles dans sa législation antitrust constituerait un important pas en avant. En fait, est-il correct de dire que si la Koges, en tant que propriétaire monopoleur de pipelines, refuse d'accorder l'accès, rien ne peut l'obliger à revenir sur sa décision? En supposant que les quatre critères MCI et AT&T soient réunis, il demande au délégué de la Corée, dans la mesure où l'on est effectivement en présence d'une installation essentielle, quelle est la raison pour laquelle les dispositions antitrust ne peuvent pas s'appliquer pour abus de position dominante ?

Le délégué de la Corée répond que, même si la réglementation sectorielle ne prévoit pas de règle prévoyant l'ouverture de l'accès à l'installation, il va sans dire que la législation antitrust peut être applicable en l'occurrence. L'Autorité de la concurrence peut contraindre l'opérateur de l'installation gazière à donner au nouvel entrant accès à son installation. Dans ce cas, la législation antitrust coréenne comporte des critères permettant de déterminer quelles sont les installations essentielles ou pas. Le premier de ces critères consiste à dire qu'il serait impossible au concurrent de poursuivre son activité économique sans cette installation. Le deuxième tient au fait que le monopoleur doit contrôler l'installation en question. Troisièmement, il doit être concrètement impossible de construire une nouvelle installation de ce type.

Le président aborde ensuite la situation des droits de propriété en Hongrie et le fait qu'ils doivent être correctement définis pour que la théorie des installations essentielles puisse s'appliquer ; faute de quoi, il est impossible de connaître les véritables motivations du refus, et il est difficile d'engager une procédure. Deuxièmement, si le refus d'accès direct est facile à identifier dans la mesure où l'entreprise se voit répondre par la négative directement, la contribution de la Hongrie montre qu'il est beaucoup plus difficile de prouver qu'une politique de tarification élevée équivaut à un refus d'accès. Comment expliquer cette situation ?

Le délégué de Hongrie répond qu'il est effectivement possible de se retrouver dans ce cas de figure et qu'il existe des moyens de savoir si la politique de tarification d'une entreprise historique intégrée est abusive. À ce moment-là, l'autorité hongroise n'avait pas les moyens d'évaluer tous les facteurs pertinents ou de réaliser différentes études de coût. Compte tenu de notre expérience, les cas dans lesquels le propriétaire de l'installation en autorise l'accès mais où c'est une question de tarification qui se pose deviennent des affaires de tarification excessive, très difficiles à trancher vu qu'une autorité de la concurrence n'est pas nécessairement disposée à déterminer si un prix est concurrentiel ou pas. Les affaires passées ne sont pas vraiment liées à une infrastructure de transport, mais plutôt à des services de cimetièrè ; enfin, le délégué explique que l'autorité n'a pas pu évaluer correctement les coûts de ces entreprises ou se prononcer sur le caractère excessif des prix pratiqués sans les moyens de faire ce qu'une instance de réglementation peut faire dans d'autres secteurs.

Le président demande si l'autorité a eu recours à un test de compression de marge.

Le délégué de Hongrie poursuit en ajoutant qu'à l'époque, l'autorité ne connaissait même pas la pratique de la compression des prix ; il n'en reste pas moins que les cas de compression des prix peuvent être difficiles si l'infraction n'est pas très claire et si l'entreprise intégrée ne commet pas vraiment d'excès s'agissant de sa politique de tarification.

Le président en vient alors à la contribution de l'Indonésie, où les entreprises détenues par l'État sont perçues comme faisant partie de l'État, alors qu'en réalité, elles sont des entreprises à but lucratif cherchant à maximiser leurs bénéfices et se comportant comme des sociétés privées. Il estime d'ailleurs que cette réalité pourrait concerner également un certain nombre d'autres délégations. Il passe ensuite à la description figurant dans la contribution indonésienne des problèmes de réglementation dans le secteur du pétrole et du gaz et demande pourquoi l'autorité de la concurrence n'a été saisie d'aucune affaire de refus de vendre opposé par des monopoles historiques verticalement intégrés.

Le délégué de l'Indonésie fait observer que l'Indonésie s'est dotée depuis novembre 2001 d'une nouvelle Loi n°122 relative au pétrole et au gaz. Ce texte prévoit l'obligation de donner accès à une installation dans le cadre de son utilisation conjointe sur les marchés en aval ou en amont. Il existe par ailleurs une instance de réglementation, appelée BPH Migas, qui édicte des règlements relatifs aux droits d'accès et au prix du transport du gaz par pipeline. Toutefois, cet organisme est récent et aurait besoin de renforcer ses capacités pour faire appliquer les lois.

Le président demande à l'Australie d'expliquer en quoi son système se différencie des autres, puisqu'une installation doit y être *déclarée* essentielle avant qu'on puisse en imposer l'accès. La question consiste à savoir si, pour être déclarée essentielle, une installation doit réunir les quatre critères précédemment évoqués. Deuxièmement, les dispositions antitrust pourraient-elles néanmoins s'appliquer à un refus de vendre opposé par une entreprise dominante propriétaire d'une installation essentielle ? Enfin, le fait qu'une installation soit *déclarée* essentielle suppose-t-il qu'il existe des restrictions en matière de tarification d'accès ? Cette tarification peut-elle être libre ou doit-elle être raisonnable ? En quoi consistent les mesures d'encadrement des prix ?

Le délégué de l'Australie explique que le NCC (Conseil national de la concurrence) fixe lui-même les critères qu'il utilise pour déclarer qu'une installation est « essentielle ». On recense principalement quatre critères appliqués dans cette situation particulière : l'accès à l'installation doit être nécessaire pour promouvoir la concurrence sur les marchés annexes ; il ne serait économique pour aucune autre entité d'aménager une autre installation ; l'installation serait utilisée pour fournir des services revêtant une importance nationale ; enfin, le service n'est pas déjà couvert par un autre régime d'accès.

En réponse au deuxième point évoqué, le délégué précise qu'il n'y a pas de théorie particulière des installations essentielles aux termes du droit des pratiques commerciales qui est la législation antitrust en Australie ; il existe bien une disposition relative au recours abusif au pouvoir de marché ou à l'abus de position dominante, qui peut être invoquée dans certaines circonstances où les tribunaux ont la possibilité de traiter de l'accès aux installations essentielles. Le dispositif australien, explique le délégué, a été mis en place pour éviter l'incertitude dans les milieux d'affaires et empêcher la multiplication des contentieux devant les tribunaux, tout en contribuant à une certaine clarté dans cette situation particulière.

Enfin, le délégué conclut en précisant que l'accès aux installations essentielles n'est pas gratuit. En substance, lorsqu'il existe des dispositions en matière d'accès, ce dernier doit être assuré dans des conditions justes et raisonnables. Les modalités et les conditions de cet accès peuvent donner lieu à un arbitrage.

Le président répond en posant deux questions, à savoir si la période pendant laquelle l'installation est déclarée essentielle est limitée dans le temps et ce que l'on entend par « importance nationale ».

Le délégué de l'Australie répond qu'effectivement, il peut arriver qu'une installation ne soit déclarée essentielle que pendant une certaine période, et il existe des exemples que l'on peut citer à cet égard. Dans le domaine des services aéroportuaires, notamment, une installation a été déclarée essentielle pendant une durée de 5 ans. Deuxièmement, la notion d'« importance nationale » concerne surtout les principales infrastructures et l'analyse objective de l'importance de l'installation dans l'économie australienne. Le NCC est tout à fait en mesure de procéder à cette évaluation.

Le président passe alors à la question des obligations de l'entreprise dominante. Il s'interroge sur la nature exacte des obligations imposées à une entreprise dominante tenue d'accorder l'accès à ses installations et demande ensuite à la délégation d'Israël quelle définition a été donnée dans la contribution nationale à l'adjectif « possible » s'agissant de la possibilité d'accorder l'accès à une installation.

Le délégué d'Israël répond en indiquant que le terme « possible » est utilisé ici pour signifier « possible » du point de vue technique et réglementaire, c'est-à-dire, la possibilité de faire appliquer l'obligation d'accès par les règles édictées. Toutefois, l'aspect le plus pertinent de la notion tient véritablement à la question de la capacité. Que faut-il faire lorsque l'entreprise historique utilise déjà toute la capacité de l'installation essentielle? Faut-il la contraindre à réduire son usage de l'installation pour permettre à un nouveau concurrent d'entrer et également d'utiliser l'installation essentielle? L'étude présentée dans la contribution concerne les gares routières centrales dans les villes, avec le cas de l'entreprise historique prétendant déjà utiliser en totalité tous les points d'embarquement de la gare routière centrale ; dans la mesure où il s'agissait de la plus grande entreprise, exploitant la majorité des liaisons par autobus, cette entreprise était aussi celle qui faisait l'utilisation la plus efficace des points d'embarquement de la gare. Elle prétendait qu'il n'était pas efficient d'autoriser de petites entreprises n'exploitant qu'une ou deux liaisons à utiliser la totalité d'un point d'embarquement dans la mesure où cette solution serait moins efficiente. Un compromis a été trouvé ; les entreprises plus petites et les nouveaux entrants sur le marché n'utiliseraient les points d'embarquement de la gare routière centrale qu'à certaines heures, comme les créneaux horaires dans des aéroports. Cette solution était non seulement efficiente, mais permettait également aux nouveaux concurrents et entrants de payer moins pour avoir accès aux points d'embarquement. La question se pose toutefois de savoir ce qui serait arrivé si aucun compromis n'avait pu être trouvé ? Il faudrait apparemment envisager la question du tort que l'installation essentielle fait à la concurrence. Si le préjudice à la concurrence est sérieux, il aurait peut-être fallu contraindre l'entreprise en place à autoriser un concurrent à utiliser l'installation essentielle, même si celle-ci utilise déjà l'installation au maximum de sa capacité.

Le président pose alors la question de savoir si un concurrent a déposé plainte contre le monopoleur.

Le délégué d'Israël répond que le ministère des Transports et le ministère des Finances, en collaboration avec l'autorité, ont voulu introduire la concurrence sur le marché et autoriser l'entrée de nouveaux acteurs afin de stimuler la concurrence dans le secteur des autocars/autobus. L'on n'a enregistré aucune plainte dans la mesure où il n'y avait pas de concurrents dans le secteur.

Le président rappelle aux délégués cette manière d'aborder la question de l'accès sous l'angle de la nécessité de promouvoir la concurrence et tient à mettre en exergue cet exemple particulier. Il se tourne alors vers l'Italie, dont la contribution fait référence à une affaire qui n'est pas encore terminée ; en effet, la décision doit intervenir d'ici quelques semaines. En Italie, les plaintes déposées contre les entreprises faisant l'objet d'une procédure en justice sont rendues publiques ; ainsi, dans ce cas particulier, les revendications sont connues de tous et, en fait, l'affaire n'a pas seulement été évoquée dans la contribution italienne, puisqu'elle est également reprise brièvement dans la contribution de la CE au titre d'une infraction à l'article 82 du traité de la CE. Il s'agit d'un dossier très controversé, concernant la décision prise par ENI, ancien monopoleur gazier en Italie, de mettre un terme sans justification objective à un projet de renforcement de la capacité d'un gazoduc. Etant donné les multiples subtilités de l'affaire, la présidence demande à l'Italie de l'exposer brièvement, de présenter succinctement les plaintes déposées et d'en évoquer de manière générale les répercussions.

Le délégué de l'Italie commence par préciser que l'affaire concerne non seulement un refus d'accès à une capacité existante, mais aussi à une capacité future. Il poursuit en expliquant que la capacité en question concerne celle du transport de gaz par pipeline entre l'Algérie et l'Italie. Les prix du transport par gazoduc sont fixés par la Trans Tunisian Pipeline Entreprise, contrôlée par ENI, entreprise dominante sur le marché italien du gaz, à la fois en tant que producteur et distributeur. En 2002, la TTPC a annoncé son intention d'agrandir le pipeline, actuellement saturé, d'affecter la capacité future à un certain nombre de chargeurs et de conclure avec eux un accord de prise ferme. Puis, alors qu'elle s'employait à réunir quelques-unes des conditions en vue de faire appliquer les contrats, la TTPC a d'abord annoncé un report puis, près de 2 ans après la première annonce d'agrandissement, une résiliation des contrats. Par conséquent, la spécificité de l'affaire réside dans le fait qu'il ne s'agit pas d'un cas typique de refus de vendre dans la mesure où il s'agit plutôt de savoir si ENI avait l'obligation de prendre une décision d'investissement concernant le renforcement des capacités existantes. Au moment d'engager la procédure, il a été estimé que, même s'il n'existait aucune obligation de cette nature, l'attitude de la TTPC et de ENI, qui contrôle TTPC, avait en fait retardé l'entrée de concurrents sur le marché italien du gaz, vu que les chargeurs avaient été liés par des accords prévoyant une expansion de capacité ; par conséquent, cette période d'attente avait conditionné leurs stratégies commerciales et la possibilité qu'ils avaient de rechercher d'autres solutions. L'absence de toute raison valable susceptible de justifier la résiliation des contrats est l'un des points qui a été mis en avant.

Le président explique que le problème tient au fait que les entreprises en question sont de toutes petites sociétés, et non de grandes entreprises comme ENI. Il invite ensuite M. John Hilke à poser un certain nombre de questions.

M. Hilke s'adresse à l'Italie pour indiquer qu'il s'agit peut-être d'une question de dégroupage et demander s'il existe une difficulté inhérente à surveiller les éventuels agrandissements si l'on sait que ces expansions risquent de nuire à l'entreprise intégrée verticalement et à ses efforts de vente en aval. Il demande si le délégué de l'Italie estime que les choses vont évoluer dans cette direction ou s'il pense que l'autorité italienne de la concurrence va plutôt pencher vers un dégroupage vertical, au lieu de tenter d'encadrer par des règles la manière dont les agrandissements sont pris en compte dans le système.

Le délégué de l'Italie reconnaît que l'ensemble de cette affaire pose un problème d'intégration verticale, par conséquent, un problème susceptible d'être réglé par une méthode de dégroupage, mais il

pense que le dossier ne débouchera pas sur une demande de dégroupage, mais que l'on considérera plutôt que l'entreprise a eu un comportement de nature à retarder l'entrée sur le marché de concurrents.

M. Hilke se tourne alors vers l'Australie pour lui demander dans quelle mesure l'opposition entre coûts sociaux et coûts privés pourrait intervenir dans la question de savoir s'il est économique ou pas de dupliquer des installations ; il demande de quelle manière ce facteur pourrait être pris en compte si le détenteur de l'installation de réseau estime qu'il existe une possibilité d'expansion, alors qu'un intervenant ne souhaite pas cet agrandissement.

Le délégué de Australie répond que le cas ne s'est jamais posé. Il ajoute que le coût des infrastructures est très élevé en Australie, vaste continent sillonné de très longues routes de transports, que l'on a assisté à de multiples bouleversements économiques dans des domaines tels que les ressources et que les conséquences s'agissant de la duplication des installations sont assez importantes. Le dispositif prévoit également des exceptions par autorisation pour raison d'intérêt général afin que des aspects sociaux puissent entrer en ligne de compte s'agissant de la question de l'accès aux installations.

Le président passe alors aux questions d'accès dans le secteur du gaz et donne la parole aux États-Unis. Il ressort clairement de la contribution des États-Unis, déclare-t-il, que la FTC (Commission fédérale du commerce) veille à ce que les fusions entre entreprises gazières ne réduisent pas de manière substantielle la concurrence et, si possible, à ce que l'on opte pour une cession structurelle de gazoducs concurrents et de pipelines faisant double emploi, en préservant la concurrence au niveau des infrastructures. La FTC a mis en place des mesures comportementales visant à garantir l'accès des concurrents. Le président demande si ces solutions sont respectées d'une manière générale et ce qui arrive dans le cas contraire. Comment peut-on forcer l'entrée et par qui serait résolu le problème ?

Le délégué des États-Unis répond que la question s'est souvent posée dans le cadre d'affaires relatives à des installations essentielles, qu'il s'agisse d'abus de position dominante ou d'exams consécutifs à des fusions. L'une des solutions retenues consiste à ordonner la nomination d'une tierce partie indépendante chargée de surveiller l'administration de la mesure correctrice. Du point de vue conceptuel, il s'agit de créer une « libération de capacité » auquel l'accès serait contrôlé par une tierce partie vérificatrice. L'accord de règlement prévoit la nomination de cette tierce partie. Il contient des dispositions détaillées traitant du règlement des différends et du respect des modalités contractuelles. Un point assez important tient au fait que, dans la mesure où l'accord devait s'appliquer pendant 20 ans, il comportait un certain nombre de mécanismes d'ajustement relatifs aux paiements d'entretien des gazoducs, aux éventuelles expansions de capacité et autres aspects liés à la pérennité de la gestion de l'accord dans le temps. Jusqu'à présent, le dispositif semble avoir assez bien fonctionné. En d'autres termes, le vérificateur indépendant peut servir d'intermédiaire pour les plaintes émanant à la fois de la partie à laquelle l'accès a été octroyé et des autres parties susceptibles d'avoir des objections. Les voies de recours (et, à ce stade, il n'y aurait pas eu de demande de recours) seraient au nombre de deux. Premièrement, le vérificateur indépendant peut saisir la FTC et signaler une violation des termes de l'ordonnance. Deuxièmement, on pourrait envisager une tutelle locale régionale exercée par la commission de service public de l'État concerné, qui approuve les modalités sous-jacentes de la convention de servitude. La démarche consiste essentiellement à déléguer la fonction d'administration et de tutelle à une tierce partie qui ferait ensuite rapport à la FTC.

Le président demande alors par qui est réglé le coût du vérificateur indépendant.

Le délégué des États-Unis répond qu'il est externalisé aux parties à la fusion.

Le président demande alors aux États-Unis d'expliquer ce que l'on entend par « tierce partie indépendante ».

Le délégué des États-Unis répond qu'il s'agirait d'une personne dont les services n'ont pas été retenus à ce moment-là par l'une ou l'autre des parties au règlement lui-même. Le plus souvent, il s'agirait d'un expert dans le domaine dont la pratique ou le mandat actuels n'ont rien à voir avec l'objet du règlement lui-même.

Le président poursuit en demandant des précisions sur la relation entre l'instance de réglementation et la FTC ou le ministère de la Justice dans l'exemple des droits imposés pour l'accès aux installations de gaz naturel liquéfié. Dans les années 1990, en effet, des droits d'accès avaient été imposés puis, en 2002, avec l'évolution du marché, un certain nombre d'installations de «regazéification» ont été construites. L'instance de réglementation de l'énergie a modifié ses politiques et, à l'heure actuelle, ces installations sont assimilées à des installations de production gazière non réglementées. Le président souligne qu'il est important que les organismes de réglementation prennent de temps en temps un peu de recul pour avoir une vue d'ensemble du marché qu'ils réglementent et se posent la question de savoir si la réglementation est réellement nécessaire. Il pose alors la question de savoir pourquoi cette politique a évolué. Est-ce le propriétaire de cette installation de gaz liquéfié qui a défendu sa position devant l'instance de réglementation ? Y a-t-il eu une quelconque intervention de la part des autorités de la concurrence ?

Le délégué des États-Unis répond que cet exercice de plaidoyer est le fruit de la relation bâtie avec le temps entre l'autorité de la concurrence et la FERC (Commission fédérale de réglementation de l'énergie). Il poursuit en indiquant que les efforts de John Hilke, en collaboration avec plusieurs autres collègues et les deux organismes concernés ont permis de fournir des orientations. En réponse à la question sur la relation de cause à effet, il indique qu'un certain nombre de facteurs extérieurs à la décision de la Commission fédérale de réglementation de l'énergie sont intervenus ; mais il est certain que le message fondamental consistant à dire que le processus d'élaboration des politiques doit être attentive aux incitations à investir pour augmenter la capacité totale va dans le même sens que les conseils fournis. Accessoirement, l'intérêt de la FTC pour cette question a conduit la Commission à ouvrir un dossier d'examen de fusion pour dénouer une transaction s'étant traduite par la consolidation des capacités de production dans la construction de réservoirs et d'installations de stockage indispensables à la création de ces installations. Ainsi, l'interaction entre les uns et les autres a non seulement permis à la FERC d'orienter sa décision quant à la marche à suivre, mais elle a également permis à la FTC de réunir des connaissances importantes en vue de surveiller les fusions susceptibles en dernière analyse de retentir sur les coûts de développement de ces installations.

M. Hilke ajoute qu'il se pose une question plus générale concernant le traitement à réserver aux investissements nouveaux et aux investissements complémentaires. Dans un certain nombre de cas, la FERC a décidé que, tout en continuant d'œuvrer à une réglementation raisonnable des prix pour l'ensemble des installations existantes, elle pourrait en arriver à un stade, dans son processus de décision, où elle estimerait que tout investissement supérieur à un certain montant aura un impact négatif et contribue au volume de l'offre sur le marché. Dans ce cas, la FERC assouplira sa réglementation sur ces nouveaux investissements. Un terminal de GNL constitue un exemple particulier à cet égard, et la FERC a même décidé récemment qu'elle n'instaurerait aucune réglementation des prix pour les nouveaux terminaux de GNL et de suivre par ailleurs le même raisonnement pour les nouveaux investissements dans les installations de stockage dans les terminaux gaziers.

Le président demande si le terminal de GNL est situé sur le littoral et si la distribution de gaz sera assurée de manière égale sur les deux rives.

Le délégué des États-Unis insiste sur le caractère extraordinairement sensible des questions de politique environnementale et de contrôle de l'aménagement local. Si la plupart des habitants profitent du développement de ces installations, aucun ne souhaite particulièrement en voir se construire près de chez eux, ce qui rend la situation de ces installations et leur expansion assez difficiles. Elles sont généralement

concentrées dans des zones où l'on a déjà accepté des risques de cette nature par le passé. Les autorités de la concurrence semblent indiquer qu'il existe des méthodes pour atteindre les objectifs en matière d'aménagement du territoire, de respect de l'environnement et de sécurité qui ont moins d'incidences perturbatrices sur le processus de la concurrence. Il ne s'agit pas de passer outre les réglementations imposées, mais simplement de proposer un catalogue de moyens dont elles peuvent être prises en considération. Il s'agit d'un point devenu de plus en plus important, non seulement pour la localisation de ces installations, mais aussi pour la détermination des normes applicables en matière de qualité de l'air qui touchent des secteurs comme le raffinage des produits pétroliers.

Le président passe alors à la Commission européenne ; dans une très récente affaire, la Cour européenne de justice a statué sur un dispositif d'affectation de capacités d'interconnexion reposant sur les réservations historiques de capacités. L'affaire a débuté aux Pays-Bas, pour être ensuite déférée à la Cour européenne de justice par un juge néerlandais saisi d'un appel formé contre une décision de l'organisme néerlandais de réglementation de l'énergie. Il s'agissait d'une décision de l'autorité de la concurrence, et la Cour européenne de justice a effectivement déclaré que ces dispositifs de réservations historiques n'avaient pas à être respectés. Il s'agit indubitablement d'un cas dans lequel le refus d'accorder l'accès donne lieu à la présentation d'une justification objective. La décision de la Cour, demande le président, était-elle fondée sur des dispositions du droit de la concurrence ou sur des dispositions relative au marché intérieur?

Le délégué de la Commission européenne répond que la Commission a rejeté les plaintes des entreprises concernant l'affectation des capacités de transport au niveau des interconnecteurs électriques néerlandais. Mais l'affaire dont la Cour de justice a été saisie a été traitée davantage sous l'angle marché intérieur, même si elle concernait la même affectation de capacités de transport, et ce en raison du fait qu'il s'agissait de l'interprétation de la deuxième Directive sur l'électricité.

Le président pose alors la question de savoir si cela suppose que l'affaire ne peut pas être citée d'une manière générale dans le domaine de la concurrence et s'il s'agit plutôt d'un dossier concernant l'interprétation de la Directive « électricité » et, par conséquent, limité à ce seul domaine et basé sur le marché intérieur ou sur les dispositions en matière de libre circulation.

Le délégué de la Commission européenne répond que, dans la zone de l'Union européenne, un grand nombre des questions d'accès sont abordées dans des réglementations sectorielles ; il existe des directives, en particulier dans les domaines énergétiques de l'électricité et du gaz. La question susmentionnée a effectivement été soulevée au titre de ces Directives. Il s'agissait d'une question ayant des répercussions sur la politique de la concurrence, dans la mesure où les directives encouragent la concurrence sur les marchés. Par conséquent, il conviendrait de voir dans quelle mesure cette affaire pourrait faire l'objet d'une interprétation pour d'autres affaires de concurrence mais, bien entendu, il faudrait que des tests puissent être réalisés. Il s'agit d'un jugement nouveau, et il ne s'est pas présenté de cas dans lequel il aurait pu être utilisé, mais cela n'est pas exclu.

Le président passe alors à la contribution de la Suisse et à l'affaire Swissgrid concernant la décision prise par les sept plus grandes entreprises d'électricité nationales de créer une entreprise unique qui exploiterait un seul réseau de transport sur de longues distances. D'une manière générale, relève le président, le problème de la copropriété tient au fait qu'il ne limite habituellement pas la concurrence entre les copropriétaires, en l'occurrence les sept producteurs, même si la concurrence peut être limitée par l'arrivée d'acteurs extérieurs. Le président poursuit en demandant si l'autorité de la concurrence s'est penchée sur la question de la capacité d'interconnexion et sur la manière dont on pourrait veiller à ce que les copropriétaires n'abusent effectivement pas de leur position en réduisant de manière stratégique les capacités d'interconnexion avec les pays voisins.

Le délégué de la Suisse souligne que le réseau électrique suisse est en cours de mise en place. Par le passé, les affectations de capacité faisaient l'objet de contrats à long terme. La Commission de la concurrence n'a pas imposé comme condition de garantir une capacité d'interconnexion suffisante avec les pays voisins dans la mesure où elle s'est strictement intéressée aux effets de la concentration sur le marché suisse. De plus, cette tâche reviendrait plutôt à un organisme de réglementation sectoriel, par exemple. En Suisse, toutefois, il n'existe pas encore de régulateur sectoriel, et la question n'est donc pas encore résolue, si ce n'est dans le cadre de contrats à long terme et de négociations bilatérales entre les entreprises. Il conclut en indiquant que l'on constate en Suisse certains retards eu égard à l'application de la loi sur l'électricité.

Le président se tourne alors vers l'Allemagne, où il existe une disposition obligeant les propriétaires à donner accès à leurs installations essentielles. La Deutsche Bahn, monopoleur allemand dans le domaine du transport ferroviaire, a une filiale qui alimente en électricité les trains en circulation. Un nouvel entrant, une entreprise de transport de marchandises, a voulu se faire alimenter en électricité par un concurrent de la Deutsche Bahn, le monopoleur ferroviaire allemand. Il a finalement été décidé de clore l'affaire du fait d'une évolution de la législation. Le président demande ensuite ce que l'on entend par « tarification abusive » en droit allemand et quelle est la situation juridique en Allemagne eu égard aux questions d'accès aux installations essentielles.

Le délégué de l'Allemagne répond que la théorie des installations essentielles a été introduite en droit allemand en 1999, dans le cadre des dispositions générales de lutte contre les pratiques abusives. La disposition prévue par la loi est largement inspirée de la théorie des installations essentielles élaborée aux États-Unis. La particularité de l'affaire tient au fait que le concurrent de la Deutsche Bahn avait déjà conclu un accord avec Deutsche Bahn Energy pour l'alimentation en énergie pendant une certaine période. Au bout d'un moment, le concurrent a prétendu que les prix facturés par Deutsche Bahn Energy étaient abusifs, et il a estimé qu'il y avait deux manières de résoudre ce problème : soit se faire approvisionner par une tierce partie ou demander à la DBE de baisser ses prix. Dans le cadre de l'examen auquel a procédé le FCO (Office fédéral contre les ententes), il s'est avéré que l'alimentation en électricité par une tierce partie est très difficile pour des raisons techniques. C'est ainsi qu'en fin de compte, l'examen et l'affaire ont surtout porté sur la question de savoir si le prix facturé par la DBE était abusif. Cette question a mis le FCO dans une position délicate car à l'époque en Allemagne, il existait encore des accords d'association sur l'accès des tiers au réseau. L'examen a conclu que les prix facturés par la DBE étaient encore inférieurs aux prix qui auraient résulté d'une application très stricte de cet accord d'association. La Haute Cour régionale saisie des appels formés contre les décisions du FCO étant très exigeante sur le niveau de preuves à fournir pour prouver qu'un prix est abusif, le FCO a décidé de clore l'affaire.

Il s'agit d'un cas difficile, dans la mesure où le concurrent a engagé des procédures civiles et où le tribunal a estimé abusif le régime de tarification de la DBE du fait du dispositif de rabais conçu de telle sorte que seule l'entreprise DB Railion, qui assure le transport de marchandises pour la DB, était susceptible de bénéficier du rabais le plus important. Le tribunal avait conclu que ce mécanisme de rabais était abusif. Le FCO a été vivement critiqué en raison du fait que nous avons été soumis à certaines pressions de la part de la Haute Cour régionale à cette époque. La décision de la Haute Cour régionale relative au niveau de preuves à apporter a été renversée par la Cour suprême depuis.

Le président se tourne alors vers le Japon, pour faire allusion à sa référence à des lignes directrices applicables au négoce de gaz. Ces lignes directrices, révisées en août 2004, préconisent l'impartialité et la transparence dans le transport du gaz, y compris l'utilisation de terminaux de gaz naturel liquéfié par les concurrents. Le président demande alors s'il y a eu des plaintes et si ces plaintes auraient été déposées auprès de la JFTC (Commission japonaise de la concurrence) ou de l'organe de réglementation. Quel serait l'organisme responsable en l'occurrence?

Le délégué du ministère japonais de l'Économie, du Commerce et de l'Industrie répond que ce ministère fait office d'organisme de réglementation de l'énergie. Le système actuel a été mis en place en 2004. On n'a enregistré depuis aucune plainte de nouveaux entrants. Toutefois si de nouveaux entrants devaient déposer plainte, ces plaintes seraient traitées en coordination avec la JFTC.

Le président conclut que, règle générale, les terminaux de gaz naturel liquéfié constituent le seul moyen de faire entrer le gaz au Japon et qu'il n'existe aucun gazoduc direct. Il se tourne alors vers le délégué du Portugal pour demander si l'autorité de la concurrence a été saisie d'une quelconque affaire ou problème d'accès à l'infrastructure de pipelines dans le secteur du gaz. Quelle est la nature des relations entre l'organisme de réglementation de l'énergie et l'autorité de la concurrence?

Le délégué de Portugal explique que le gaz naturel est relativement récent au Portugal. Il s'agit d'une opération entièrement nouvelle, un monopole garanti, et la dérogation de la CEE a été introduite jusqu'en 2007. À ce stade, souligne-t-il, un important processus de restructuration d'entreprise est en cours en vue de préparer le secteur à l'après-libéralisation. Dans le cadre de cette restructuration, il est prévu un processus de dégroupage du système de transport à haute pression, qui sera redéployé sous le contrôle du gestionnaire du réseau de transport (GRT). Ce dernier deviendra une société holding, avec deux filiales juridiquement distinctes, l'une pour l'énergie et l'autre pour le gaz.

L'étape suivante, poursuit-il, concerne l'attribution d'un contrat de concession couvrant le GRT et le système de transport à haute pression de gaz pour le stockage. Comme il est d'usage au Portugal, les contrats d'accès des tiers au réseau sont censés être garantis et clairement énoncés dans le contrat. Le troisième élément tient au fait que l'instance actuelle de réglementation de l'électricité va assumer de nouvelles fonctions de réglementation dans le domaine du gaz. Elle va donc devenir instance de réglementation de l'énergie, et aura des intérêts qui iront plus particulièrement au-delà de ses fonctions réglementaires actuelles dans le secteur de l'énergie, notamment une fonction de surveillance des contrats de concessions et de l'accès des tiers. La relation entre l'autorité portugaise de la concurrence et l'organe actuel de réglementation de l'énergie est excellente, que ce soit dans le cadre de leurs activités spécifiques antitrust ou au titre du contrôle des fusions. Nous n'avons eu aucune plainte ou affaire à signaler.

Durant la discussion, l'autorité portugaise de la concurrence a reconnu le rôle important que les autorités nationales de la concurrence peuvent jouer pour favoriser la réforme structurelle concurrentielle dans les sociétés assurant des services collectifs. À cet égard, il est important de pouvoir déployer des efforts réguliers de sensibilisation, par la préparation en temps opportun d'études économiques et la diffusion publique des recommandations qu'elles contiennent.

Le président demande si le dégroupage concernerait l'entreprise intégrée verticalement.

Le délégué du Portugal répond qu'il y aurait un dégroupage exclusif ; c'est-à-dire, que le stockage de gaz, l'infrastructure de transport et les terminaux seraient redéployés et vendus au GRT existant, qui est le propriétaire du système de transport à haute pression du réseau électrique. Tout ceci se ferait dans le cadre d'un contrat de concession avec accès des tiers au réseau.

Le président insiste pour savoir s'il y aurait une quelconque intégration verticale, soit avec des fournisseurs, soit avec des distributeurs finaux.

Le délégué du Portugal répond que non et ajoute que le GRT d'électricité et le GRT de gaz auraient des participations, mais que tout opérateur quel qu'il soit serait limité à une catégorie d'actions très limitée et résiduelle.

Le président ouvre alors la discussion à d'éventuels commentaires.

Mr. Sean Ennis, économiste en chef au Secrétariat, pose une question aux délégués afin d'obtenir leurs observations. Il a eu l'occasion de discuter avec une entreprise commerciale qui lui a fait part de ses préoccupations concernant les règlements ou les obligations au titre du droit de la concurrence auxquels elle s'expose en construisant un terminal de gaz naturel liquéfié. Son inquiétude tient au fait qu'il lui faudra nécessairement donner accès au terminal aux autres importateurs de GNL. Mais si elle décide de bâtir un terminal, elle le fera à un niveau de capacité donné, qui serait déterminé par les contrats à long terme qu'elle conclura avec un fournisseur. Or, si une fois le terminal construit, elle est assujettie à l'obligation d'accorder l'accès, elle devra manquer à son contrat à long terme pour fournir d'une manière ou d'une autre. C'est la raison pour laquelle elle hésite à construire un terminal sans avoir la certitude de pouvoir honorer le contrat à long terme. Quelles sont les méthodes auxquelles les différents pays ont recours ou pourraient avoir recours pour répondre à ce genre de préoccupations émanant d'une entreprise du fait de l'incertitude de la réglementation ?

Le délégué des États-Unis répond qu'une série de différends ont été portés jusque devant les tribunaux, qui concernent la question de savoir si une évolution de la politique réglementaire et un ajustement des règles peuvent être contestés au motif qu'ils relèvent de l'appropriation d'un droit de propriété. Cette question a été longuement débattue aux États-Unis où, à posteriori, l'accès à une installation est rendu obligatoire. Dans une série d'affaires, des propriétaires d'installations ont invoqué l'appropriation d'un droit de propriété, pour laquelle un dédommagement serait dû à l'entreprise. Ces affaires ont parfois débouché sur des résultats très positifs pour ceux qui ont fait valoir leurs droits ; dans d'autres cas, elles ont échoué. Tel a été le principal mécanisme utilisé par des entités privées pour se défendre contre ce qu'elles assimilent à un manquement à des engagements réglementaires initiaux.

Mr. Ennis poursuit en indiquant que l'une des caractéristiques intéressantes de l'argumentaire de cette entreprise tient au fait qu'elle était disposée à ouvrir le projet de construction à des partenaires pour augmenter la capacité du terminal de GNL et éviter de se faire imposer une quelconque obligation d'accès une fois le terminal construit, stade à partir duquel une augmentation de capacité aurait été extrêmement coûteuse. Cette société voulait avoir la certitude, qu'en ouvrant le projet à des soumissionnaires potentiels et dans l'hypothèse où aucun autre protagoniste n'aurait décidé d'entrer au stade de l'investissement, aucune obligation d'accès ne lui serait imposée au-delà de ce stade.

Le délégué des États-Unis répond que l'organisme américain de réglementation de l'énergie a voulu faire comprendre aux investisseurs que les arrangements ne seraient pas remis en cause si les entreprises décidaient de procéder à des agrandissements. Toutefois, il se pose toujours la question générale de savoir si les engagements réglementaires sont crédibles. Il est arrivé très souvent que les autorités reviennent sur ces engagements. C'est ici que la question plus vaste consistant à savoir comment l'organisme de réglementation s'engage à ne pas se dédire devient très importante.

Le président passe alors au cas des Pays-Bas, où des contrats historiques à long terme ont été signés par l'entreprise en place avec l'entreprise de transport ; puis, la réglementation a été modifiée en raison des nouvelles directives du nouvel environnement réglementaire. La Cour européenne a décidé que le cadre réglementaire avait évolué à tel point que ces contrats ne pouvaient plus être valables. Les différences, souligne le président, entre l'Europe et les États-Unis tiennent au fait que les exploitants historiques en Europe sont souvent des entreprises détenues par l'Etat, qui bénéficient de protections juridiques de leurs investissements, de telle sorte que, effectivement, la suppression de l'incitation à investir est presque inexistante dans ce cas particulier. Le problème auquel on est confronté en Europe concerne le fait que l'on peut exiger d'une entreprise privée qui prend des risques et fait des investissements pour son propre compte de résultat qu'elle donne l'accès, et non parce que les investissements sont dictés par le gouvernement ou protégés par lui.

Le président passe alors la discussion à la question des aéroports et des ports. Les problèmes de concurrence qui se posent dans ces secteurs sont notamment les suivants, déclare-t-il :

- La difficulté que rencontre les compagnies aériennes à entrer sur le marché,
- L'entrée sur le marché des services complémentaires, par exemple, les entreprises d'acconage, de traitement des bagages ou de restauration.

Les États-Unis comme la CE, fait-il observer, font référence à la question des créneaux horaires et à la manière dont, en réformant le mécanisme d'affectation de ces créneaux, on facilite l'entrée dans des aéroports entièrement coordonnés. Il s'agit d'un aéroport sans capacité excédentaire et où les compagnies aériennes existantes utilisent tous les créneaux horaires commerciaux disponibles. Les droits de propriété s'agissant des créneaux horaires sont souvent peu clairs. Etant donné que les créneaux ont été utilisés par les compagnies aériennes en place depuis des années et, qu'à l'origine, ils n'étaient pas payés, on ne sait pas nécessairement très bien à qui ils appartiennent. C'est une raison supplémentaire pour laquelle il est difficile de développer un marché des créneaux horaires. En réalité, les instances de réglementation ont simplement réussi à d'imposer une forme atténuée de la règle du retrait en cas de non-utilisation ; tout créneau horaire non utilisé au moins 80 % du temps doit être restitué à l'aéroport. La contribution des États-Unis contient une description détaillée d'une évolution récente et donne à penser que le marché des créneaux horaires ne s'est pas développé par manque de transparence et du fait de la trop grande puissance de marché des entreprises en place. En tant qu'actif, les créneaux horaires manquent de liquidité sur les marchés secondaires. Les États-Unis, poursuit-il, ont proposé comme solution une sorte d'adjudication aux créneaux horaires. Premièrement, le président demande si cette formule supposerait de restituer la propriété des créneaux aux aéroports ; et dans l'affirmative, comment pourrait-on gérer cette situation ? La deuxième question consiste à savoir comment s'assurer, lors d'une adjudication, que des paires de créneaux horaires sont effectivement attribuées aux compagnies aériennes qui en ont besoin.

Le délégué des États-Unis répond que, lorsque la FAA (Administration fédérale de l'aviation, organisme américain de réglementation, a lancé le programme de créneaux horaires pour les aéroports en 1969, il ne s'est jamais agi d'en faire un droit de propriété en tant que tel ; il a toujours été question de « privilège d'exploitation ». À ce moment-là, la FAA fournissait des créneaux horaires aux entreprises en place à chaque aéroport. L'obstacle initial, explique-t-il, consistait à surmonter l'idée selon laquelle ces créneaux horaires constituaient un bonus exceptionnel pour les compagnies aériennes qui en bénéficiaient. A cet égard, poursuit-il, il n'est pas nécessaire de se préoccuper de savoir comment ces créneaux étaient attribués par le passé ; la question consiste à savoir comment il convient de les distribuer à l'avenir, dans le cadre d'un système fondé sur le marché. Sur un marché et en supposant que les coûts de transaction ne sont pas trop élevés, le marché permet une allocation efficace, et il n'y a pas à se soucier des questions d'équité passée ou de distribution.

Du fait des difficultés qui se sont posées jadis en raison du caractère incertain du marché et de l'inactivité d'un marché secondaire d'affectation des créneaux horaires, le système des adjudications pourrait constituer une solution controversée. En libérant chaque année un pourcentage fixe de créneaux horaires (par ex., 20 %), on pourrait instituer un certain degré de certitude s'agissant des droits de propriété. Ainsi, une entreprise serait en mesure de savoir que son créneau horaire sera valable pendant une durée d'environ 5 ans, puisqu'il va finir par se recycler sur une période de 5 ans. Ainsi, un nouvel entrant qui a besoin de se doter d'un ensemble plus important de créneaux horaires pourra rivaliser avec les compagnies aériennes en place disposant de plaques tournantes dans n'importe quel aéroport congestionné. Actuellement, on ne recense aux États-Unis que 4 aéroports assujettis au système des créneaux horaires.

Le délégué poursuit en indiquant qu'il convient de tenir compte de la transparence. L'un des problèmes qui s'est posé par le passé tient au fait que les participants à une adjudication ou à une vente

savaient parfaitement qui achetait ou souhaitait acheter un créneau donné. Si une entreprise en place voulait protéger sa très forte position, sa puissance de marché, elle pouvait savoir qui soumissionnait et, par conséquent, surenchérir par rapport au nouvel entrant. Il est essentiel de mettre en place une adjudication structurée de manière à ce qu'une telle transparence soit impossible et à ce que les soumissionnaires ne sachent pas qui sont les autres, souligne-t-il. Même si la transparence en général est une bonne chose, en l'occurrence, elle pourrait nuire aux nouveaux entrants. Enfin, quant à la question de savoir si les droits de propriété seraient restitués aux aéroports, il conclut qu'il s'agirait plus vraisemblablement d'un privilège d'exploitation, et non d'un droit de propriété restitué à l'aéroport.

Le président demande ensuite si le créneau horaire est payé à l'entreprise historique qui le détenait jusque-là et si l'entreprise rémunère l'aéroport ou une quelconque autre autorité.

Le délégué des États-Unis répond que les sommes versées sont restituées au Trésor, au même titre que l'adjudication dans le domaine des télécommunications.

Le président demande comment les compagnies aériennes risquent de percevoir la perte de cette « propriété ».

Le délégué des États-Unis répond que, dans le cadre de ce système, il ne s'agit pas de propriété, mais d'un privilège.

Le président demande alors un complément d'information sur la relation entre l'accès aux créneaux horaires et l'accès aux portes d'embarquement dans ce système et s'interroge sur la question de savoir si les deux vont de pair.

Le délégué des États-Unis reconnaît que les adjudications doivent finir par déboucher sur un système qui fonctionne effectivement dans la pratique, que l'accès aux portes d'embarquement est essentiel et qu'il doit être pris en compte dans la décision de savoir comment structurer l'adjudication.

Le président poursuit alors en déclarant que, en organisant des adjudications séparément, aéroport par aéroport, on va effectivement créer un marché secondaire, puisqu'il faut des paires de créneaux horaires. Si une compagnie aérienne dispose d'un créneau de décollage, il lui faudra bien entendu disposer aussi d'un créneau d'atterrissage. Par conséquent, il est nécessaire de prévoir un mécanisme qui autorise cet appariement. La question de l'affectation des créneaux horaires, indique-t-il, est une question d'ordre général, liée à l'accès des compagnies aériennes aux aéroports, mais qui ne relève pas nécessairement de la théorie des installations essentielles, dans la mesure où il n'y a, le plus souvent pas, d'intégration verticale de la part des aéroports vis-à-vis des compagnies aériennes. Par conséquent, il s'agit de multiplier les possibilités données aux compagnies aériennes d'entrer dans des aéroports aux services entièrement coordonnés. Le plus grand problème dans les ports et les aéroports, outre le cas dans lequel ils sont intégrés verticalement, tient au fait qu'un aéroport contrôle l'accès à tous les prestataires de services concurrents au sein de l'aéroport (même chose dans l'enceinte du port) ; ainsi, le port ou l'aéroport exerce une sorte de puissance de marché locale. Il existe une forte incitation à tirer une rente monopolistique de ces prestataires, soit par l'intégration verticale, soit par des contrats d'exclusivité. La Slovénie, poursuit-il, évoque dans sa contribution le cas d'une co-entreprise entre l'exploitant d'un aéroport et une entreprise logistique fournissant des services à des avions-cargos. L'autorité de la concurrence a bloqué la co-entreprise par crainte que le marché logistique ne soit monopolisé étant donné que l'aéroport en question était le principal aéroport de Slovénie. Le président s'interroge sur la question de savoir qui décide des achats de services logistiques et demande quels types de questions se sont posées dans l'affaire.

Le délégué de Slovénie répond que l'aéroport en question est l'un des trois aéroports du pays, mais qu'il est le seul à assurer des liaisons avec l'international. Deuxièmement, les exploitants de services

logistiques, après l'accession du pays à l'UE, ont perdu énormément d'affaires. La décision concernant l'achat des services logistiques est prise par l'aéroport, détenu directement ou indirectement par l'État, avec l'opérateur de services logistiques qui détient approximativement 30 % de part de marché. L'intention est de développer le marché de la logistique aérienne, l'autre objectif consistant à ne pas ouvrir le marché à un deuxième aéroport international, afin que l'activité véritable ne passe que par un seul aéroport.

Le président se tourne alors vers la Fédération de Russie, qui décrit la situation à Moscou et dans d'autres villes du pays, où différents aéroports se disputent la clientèle, tous ayant des capacités excédentaires. Il s'agit-là d'une évolution très positive dans la mesure où, dans la plupart des autres aéroports urbains, la concurrence tend à être très limitée, puisque certains aéroports ont tendance à spécialiser, par exemple, dans les vols nationaux uniquement et d'autres, dans les vols internationaux seulement. Il est rare qu'une ville possède des aéroports en concurrence totale. Il poursuit en demandant si la concurrence est réelle, si tous les aéroports sont détenus par la même entité et à quel type réglementation ils sont assujettis.

Le délégué de la Fédération de Russie répond qu'effectivement, il existe une concurrence, non seulement entre les trois plus grands aéroports nationaux, mais aussi entre d'autres aéroports de dimensions plus réduites situés dans la région de Moscou. L'un d'entre eux, précise-t-il, est détenu par l'État, l'autre appartient à la municipalité et le troisième est privé. Tous sont réglementés et se livrent une concurrence par les prix.

Le président se tourne alors vers la Roumanie qui, dans sa contribution, fait une description détaillée et intéressante des règles régissant l'accès à tous les secteurs, où l'accès a été rendu obligatoire dans le domaine du transport ferroviaire, des ports, des aéroports, du transport routier et dans d'autres secteurs. Le Conseil de la concurrence n'est jamais intervenu dans la mesure où il existe le plus souvent deux raisons à l'absence d'affaires de concurrence dans les secteurs : la concurrence est saine, ou il n'y a aucune concurrence. Le président demande alors au délégué de Roumanie de commenter l'absence d'affaires portées devant le Conseil de la concurrence.

Le délégué de Roumanie répond que le Conseil de la concurrence de Roumanie a été très impliqué dans le processus à toutes les étapes dans le cadre d'une évaluation ex ante ; c'est la raison pour laquelle sa participation à l'élaboration de la nouvelle législation a été très active. La Roumanie a ceci de particulier qu'elle s'est dotée d'une législation très à jour dans ce domaine et a pu mettre en place tous les mécanismes nécessaires pour éviter un traitement discriminatoire selon les opérateurs s'agissant d'accès aux infrastructures. En même temps, concernant les critères de détermination des tarifs, la Roumanie a adopté des critères très transparents pour garantir l'égalité de traitement entre les exploitants. La Roumanie a séparé l'activité d'infrastructure de l'activité d'exploitation dans le secteur. Après quoi, elle a tenté de nouer une coopération étroite avec diverses instances de réglementation sur le marché et, à cet égard, a négocié des protocoles de coopération administrative avec toutes les instances de réglementation dans le secteur. Des réunions ont lieu régulièrement à différents niveaux afin de discuter des différences existant dans le secteur et de limiter les risques de comportements anticoncurrentiels.

Certains obstacles pourraient tenir au coût élevé des investissements d'infrastructure et à l'intérêt limité que présente, dans ces conditions, un investissement dans ce domaine. Les autorisations administratives dans le secteur pourraient également constituer des obstacles, à tel point qu'il est impossible de définir des critères clairs et transparents s'agissant de l'accès à l'acte administratif. Toutefois, le délégué déclare qu'une évaluation périodique sur le marché est réalisée et que l'autorité est prête à intervenir en cas de pratiques anticoncurrentielles.

Le président passe alors à la discussion sur les ports. La contribution néerlandaise souligne que la concurrence entre les services au sein du port n'est importante qu'en l'absence de concurrence entre les

ports eux-mêmes et conclut qu'aux Pays-Bas, la concurrence entre les ports est saine, de telle sorte qu'il ne serait pas nécessaire d'imposer des critères d'entrée aux prestataires de services portuaires. Le président admet que, pour les services de transport de marchandises, par exemple, il est possible qu'il soit plus intéressant d'opter pour un port plutôt que pour un autre. Toutefois, il s'interroge sur les services propres à une destination particulière, par exemple, les services de transbordeur à Amsterdam et demande si la déclaration selon laquelle la concurrence entre les ports est suffisamment saine pour rendre la concurrence au sein du port non pertinente pourrait être généralisée.

Le délégué des Pays-Bas répond qu'à Rotterdam par exemple, les ports se livrent une âpre concurrence, de même qu'il existe une concurrence au sein même des différents ports. Satisfait de ces évolutions, le gouvernement hésite à réglementer là où il ne semble pas y avoir de souci particulier de concurrence. Il poursuit en indiquant que la dite déclaration ne signifie pas qu'il n'y a aucun problème de concurrence au sein des ports, mais on estime qu'il faut d'abord d'envisager les problèmes possibles susceptibles de se poser et rechercher ensuite la manière la plus efficace de les régler. Quant aux transbordeurs, en général, comme on peut le lire dans le document, la concurrence est plus réelle qu'on pourrait le penser, et rares sont les marchés qui sont liés à un seul port. Bien entendu, poursuit-il, lorsque des investissements à long terme lient certaines entreprises privées à certains ports ou lorsque les gros navires doivent s'orienter uniquement vers certains ports pour des questions de profondeur, il peut effectivement y avoir des problèmes, mais il n'est pas certain que cette situation nécessite une réglementation stricte des tarifs, par exemple. Le gouvernement se penche actuellement sur la question et étudie la nécessité d'une réglementation propre au secteur qui s'ajouterait à la réglementation relative aux pratiques commerciales abusives qui s'applique à tous les secteurs.

Le président se tourne alors vers la Commission européenne pour se renseigner sur les nouveaux règlements relativement stricts envisagés concernant les directives portuaires et les problèmes de concurrence que la Directive sur les ports s'efforcerait de régler.

Le délégué de la Commission européenne répond qu'effectivement, la Commission a fait une seconde proposition pour tenter d'introduire l'accès au marché des services portuaires, mais cette deuxième proposition a été rejetée dernièrement par le Parlement européen. À présent, la Commission étudie diverses possibilités. En fait, la directive est, dans une certaine mesure, complémentaire de l'application du droit de la concurrence. Pour garantir la libéralisation dans le secteur du transport, il existe une législation spécifique au secteur pour tous les modes de transports sauf pour les ports ; et cette situation est partiellement due au fait que les choses sont ainsi prévues dans le Traité, sans compter que tous les modes de transport sont très différents les uns des autres. Avec une législation sectorielle, il est possible de prendre en compte les spécificités de chaque mode de transport. La Directive aurait assuré l'accès au marché. Les prestataires de services auraient été sélectionnés dans le cadre de procédures d'appels d'offres, ce qui aurait également contribué à assurer le fonctionnement du marché intérieur. Quelques pays, souligne le délégué de la Commission européenne, ont mis en place des procédures d'appels d'offres, mais pas tous. Dans le cas où un prestataire de services n'est pas retenu, il peut toujours douter d'avoir été victime de discrimination, et les critères sur la base desquels le fournisseur de services aurait pu être choisi ne sont pas toujours clairs. Le projet de Directive aurait contribué à une plus grande transparence en la matière.

La Directive relative aux services portuaires avait principalement pour objectif d'assurer l'accès au marché, souligne-t-il, alors que la disposition antitrust, les articles 81 et 82, parfois 86, dans le cas des entreprises publiques, consiste à assurer le bon fonctionnement de la concurrence sur le marché. Le but de la Directive était de stimuler le commerce transfrontalier, ce qui aurait également permis d'assurer la concurrence sur le marché. A l'heure actuelle, la Commission continue d'appliquer la disposition antitrust existant dans le Traité, comme elle l'aurait fait si la Directive sur les services portuaires avait été adoptée.

Le président demande à quel moment la Directive a été rejetée.

Le délégué de la Commission européenne répond que ce rejet est récent, mais que le rejet initial est intervenu en novembre 2003, à une très courte majorité. Récemment, un grand nombre des débats relatifs à la Directive concernaient directement la question de l'auto-assistance. Toutefois, l'objectif principal de la Directive consistait en réalité à prévoir les procédures d'adjudication publique. Le concept d'auto-assistance fait partie de la Directive, mais là n'est pas le problème principal. Le président demande un éclaircissement sur les raisons du rejet.

Le délégué de la Commission européenne déclare que la disposition relative à l'auto-assistance suscite une certaine inquiétude de la part des syndicats. On entend en substance par « auto-assistance » le fait pour les transporteurs maritimes de faire charger et décharger leurs marchandises par leur propre personnel au lieu d'avoir à faire appel aux sociétés de gestion de marchandises qui emploient des dockers. Premièrement, il faut distinguer entre les différents types de marchandises, étant donné que l'équipage du navire ne peut pas assurer le déchargement de toutes les catégories de marchandises. Le deuxième aspect, souligne-t-il, consiste à savoir si un chargeur serait intéressé à investir dans une entreprise de manutention de marchandises dans le port où il fait escale, étant donné qu'il lui faudrait consentir un énorme investissement pour pouvoir charger et décharger la marchandise lui-même. La tendance que l'on constate dans le secteur de la manutention de marchandises, en particulier actuellement, est qu'un nombre sans cesse croissant de chargeurs achètent des terminaux pour pouvoir faire certains activités eux-mêmes. Ainsi, dans une certaine mesure, le marché s'oriente d'ores et déjà dans cette direction. D'aucuns redoutent que cette tendance ne se traduise par un afflux de main-d'œuvre supplémentaire dans les ports, ce qui enlèverait des emplois aux dockers. De toute évidence, la Directive visait principalement à établir des procédures claires s'agissant de la sélection des prestataires de services, ainsi qu'à limiter la durée des autorisations accordées, afin de stimuler le commerce transfrontalier et renforcer la concurrence. Il est vrai que la diversité du secteur est telle que, dans certains pays européens, la concurrence fonctionne déjà bien, ce qui n'est pas le cas ailleurs. Quand il faut élaborer une règle commune dans un secteur déjà très éclaté et diversifié, il est difficile de plaire à tout le monde. L'idée générale, conclut-il, consiste à fixer un certain nombre de normes élémentaires communes afin d'avoir un seul et unique système d'autorisations, qui prévoit également la possibilité pour le prestataire de services non retenu d'interjeter appel de la décision.

Le président revient sur la question du rejet pour demander s'il était contraignant ou consultatif.

Le délégué de la Commission européenne répond qu'il s'agissait d'une procédure de co-décision nécessitant l'approbation du Parlement et du Conseil. Concernant la première proposition de la Commission, on avait abouti à ce qu'on appelle une « procédure de conciliation », de telle sorte que de nombreuses modifications ont été apportées au texte. C'est le résultat d'un compromis qui a été rejeté à une courte majorité par le Parlement. La deuxième proposition a été présentée, de l'avis de certains commentateurs, trop tôt après le rejet de la première, qui avait déjà suscité une certaine résistance.

Le président remercie le délégué de la Commission européenne pour sa description détaillée et passe au Mexique et à la situation du Port de Vera Cruz où la Commission fédérale de la concurrence (CFC) est intervenue dans une controverse entre le port et la seule entreprise de manutention de marchandises du port. Il pose la question de savoir pourquoi il n'y a qu'une seule société et pourquoi elle a exclusivité dans ce port. Il poursuit en demandant pourquoi les services en question n'auraient pas pu être fournis de manière concurrentielle et quel a été le rôle de la CFC dans cette affaire.

Le délégué du Mexique répond que la structure de marché actuelle se caractérise par une séparation verticale entre l'administration de l'infrastructure et la fourniture de services. Cette conception structurelle a été adoptée pour assurer un accès efficient aux ports et autres installations essentielles. Elle avait pour but d'éliminer les barrières à l'entrée afin que toutes les entreprises souhaitant exploiter des terminaux ou fournir des services portuaires puissent le faire sous réserve des restrictions d'espace. La conception du marché à l'origine visait à introduire une certaine concurrence entre les différents terminaux portuaires au

sein d'un même port et entre exploitants au sein des terminaux généralistes. Au sein d'un terminal, il n'existe pas de restrictions à l'intégration verticale des services portuaires. Les limitations structurelles les plus importantes sont des restrictions horizontales, précise-t-il. Un même agent économique n'est pas autorisé à participer directement ou indirectement à l'exploitation de la même installation ou du même service le long d'un même littoral. Dans le cas de Vera Cruz, une adjudication a été organisée concernant un contrat d'exploitation exclusive d'un terminal spécialisé dans le transport de conteneurs et, dans cette affaire, la CFC a participé au processus d'adjudication. Les arguments utilisés en faveur de l'exclusivité ont consisté à dire, tout d'abord, qu'il existait une échelle minimale requise et que la concurrence provenait en premier lieu des autres ports. Deuxièmement, il existe d'autres sociétés de manutention de marchandises générales, mais pas de conteneurs, au sein du port ; troisièmement, l'adjudication elle-même était une enchère concurrentielle, ce qui a également eu un retentissement positif sur la concurrence à Vera Cruz.

Le président passe alors au Taipei chinois, dont la contribution met surtout l'accent sur le cas des télécommunications ; il demande s'il faut en déduire qu'il ne se pose aucune question d'accès dans d'autres secteurs comme le rail, les ports, les aéroports ou l'énergie et si ces questions d'accès ont été résolues par l'instance de réglementation.

Le délégué du Taipei chinois explique que, compte tenu de la petitesse du pays et du fait qu'un grand nombre des entreprises de services collectifs sont traditionnellement exploitées et gérées par le gouvernement, la plupart sont en fait des monopoles publics. D'aucuns ont quelques inquiétudes eu égard au fait que le gouvernement est l'unique exploitant de toutes les infrastructures, de même qu'il existe certaines préoccupations quant à la sécurité nationale. Dans notre contribution, nous avons choisi les télécommunications, qui sont en fait le seul véritable exemple d'accès à une installation essentielle au Taipei chinois. De nombreuses entreprises privées dans le pays ont d'abord insisté pour obtenir la privatisation du secteur des télécommunications, puis, dans un second temps, ont demandé un accès plus égal à l'installation essentielle dans le secteur des télécommunications.

Il peut se poser certains problèmes d'accès dans le secteur pétrolier par exemple, caractérisé jadis par la présence d'un monopole détenue par l'Etat alors que le deuxième acteur est dans le secteur privé. Ce deuxième acteur a tenté d'amener l'ancien monopole d'Etat à ouvrir le pipeline mais par la suite, les nouveaux entrants ont abandonné quand ils se sont rendu compte que ce pipeline n'était peut-être pas aussi essentiel que cela, dans la mesure où des sociétés privées pouvaient transporter le pétrole dans des réservoirs par l'autoroute.

Il conclut en déclarant que la principale préoccupation consiste à rompre avec les monopoles publics, puis à créer un environnement commercialement viable, afin qu'il existe des concurrents potentiels exigeant l'accès. Par exemple, le système ferroviaire détenu par l'Etat accumule un énorme déficit depuis de nombreuses années ; dans ces conditions, aucun concurrent potentiel ne tient vraiment à entrer sur le marché, et il est extrêmement important de créer un meilleur environnement, propice à des activités commerciales plus concurrentielles.

Le président ouvre alors la discussion et donne la parole à l'Irlande.

Le délégué irlandais demande quelle serait, de l'avis de son collègue, la réaction de la FTC des États-Unis et du ministère de la Justice face à des revendications de droits de propriété sur des créneaux horaires aéroportuaires compte tenu du mécontentement probable des compagnies aériennes auxquelles on les retirerait ; il demande aussi si la solution d'un dédommagement a été envisagée.

Le délégué des États-Unis répond que l'agence de réglementation a soigneusement veillé à ne pas donner de droit de propriété au moment où elle a créé le système des créneaux horaires ; si elle l'avait fait, elle aurait certainement eu des difficultés en raison des questions d'appropriation évoquées plus haut.

Le président demande alors si le pourcentage susmentionné de 20 % de créneaux horaires à prendre chaque année serait retiré proportionnellement à la fois à l'entreprise en place et aux compagnies aériennes plus petites. Dans ce cas, comment réglerait-on le problème de la part des plus petits opérateurs, étant donné qu'ils pourraient se retrouver dans une situation où il ne leur resterait pas, par rapport à l'entreprise en place, assez de créneaux pour fonctionner.

Le délégué des États-Unis répond que cette question n'a pas encore été entièrement résolue et qu'elle continue de faire l'objet de réflexions.

Le président se tourne alors vers le Canada.

Le délégué du Canada présente le point de vue de son pays qui, d'une manière générale, s'en remet aux instances sectorielles pour ce qui est de la réglementation de l'accès aux installations essentielles dans le transport. Tel est le cas dans le domaine du chemin de fer, s'agissant des droits de manœuvres terminales inter-réseaux et de circulation et dans celui du transport aérien, s'agissant de l'affectation des créneaux horaires. Les questions d'accès peuvent, le cas échéant, être traitées en vertu d'un certain nombre de dispositions de la Loi sur la concurrence, notamment et par exemple, par l'ajout de conditions d'accès à une mesure corrective en cas de fusion ou au titre des dispositions relatives à l'abus de position dominante. L'Article 78(1)(e) assimile à un agissement anticoncurrentiel la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors du marché. Toutefois, les lois de la concurrence ne sont pas nécessairement aussi adaptées pour remplir cette fonction. Les organismes de réglementation sectoriels peuvent disposer à la fois de connaissances techniques supérieures et de la capacité d'imposer des droits d'accès. En outre, leurs interventions peuvent être plus opportunes et offrir davantage de souplesse que celles qui sont prévues dans le respect des garanties prévues par la loi en droit de la concurrence. Indépendamment de ce fait, s'agissant des questions purement antitrust, le Bureau de la concurrence joue véritablement un rôle très actif, à la fois par son pouvoir d'intervention réglementaire officiel et des réunions interministérielles moins formelles, s'agissant d'influencer les décideurs et les instances de réglementation et de les amener à ouvrir les marchés à la concurrence et à réglementer d'une manière propice à la concurrence. Par exemple, le 6 octobre 2000, le Commissaire de la Concurrence a fait une présentation devant le Comité d'examen de la Loi sur les transports au Canada concernant les questions d'accès aux infrastructures ferroviaires et autres questions connexes. Dans cette contribution, le Commissaire a fait des recommandations visant à améliorer l'efficacité des dispositions relatives à l'accès concurrentiel aux infrastructures ferroviaires, y compris celles qui ont trait aux droits de circulation. Le Commissaire a recommandé que quiconque, entité provinciale ou fédérale, devrait pouvoir demander des droits de circulation tant que cette personne est en mesure de se soumettre à un test d'aptitude. Le Commissaire a également recommandé la mise en place d'un test en vertu duquel il appartient à l'entreprise ferroviaire hôte de démontrer qu'il ne serait pas dans l'intérêt général d'accorder les droits de circulation demandés par le requérant. La première proposition du Commissaire a été acceptée par le Comité, mais pas la seconde. Si les opinions particulières du Commissaire vont évoluer pour s'adapter à l'évolution des circonstances et de l'expérience, les questions posées restent importantes. Il existe des cas où le Bureau de la concurrence a fait de l'accès d'entrants à des installations ou à des services une partie des mesures correctrices adoptées pour lutter contre un agissement anticoncurrentiel potentiel. Par exemple, lorsque la fusion entre Air Canada et Canadian Airlines a été autorisée en 2000, elle a été assujettie à un certain nombre de conditions, notamment qu'Air Canada fournisse un certain nombre d'engagements exécutoires. Il a dû renoncer à des comptoirs, à des portes d'embarquement et à des créneaux horaires dans certains aéroports, ce qui a notamment permis à un transporteur à bas prix d'ouvrir immédiatement un service concurrentiel à Hamilton, près de Toronto. L'accès aux installations n'a pas posé de difficulté après la fusion et Air Canada, en fait, ne contrôle pas directement l'accès à l'aéroport.

Le président passe alors la parole aux Pays-Bas.

Le délégué des Pays-Bas pose une question concernant l'affaire survenue aux États-Unis relative aux adjudications de créneaux horaires dans les aéroports. Dans la Directive européenne sur le rail, un système a été introduit qui permet aussi des adjudications de créneaux horaires pour les voies ferrées. Il repose sur le fait que le revenu de cette adjudication sert à éliminer les contraintes de capacités--à agrandir l'infrastructure ou à modifier le système afin que l'on puisse renforcer les capacités--auquel cas, il n'est plus nécessaire d'encherir. Si les recettes étaient versées au Trésor, quelle serait la logique économique du système?

Le délégué des États-Unis convient qu'il est logique de consacrer des revenus à améliorer l'infrastructure aéroportuaire étant donné que les créneaux horaires aux États-Unis sont concentrés dans quelques aéroports qui ont un problème particulier d'encombrement. Concernant la question posée précédemment sur les 20 %, il indique que l'adjudication est ouverte à tous les soumissionnaires, y compris les compagnies aériennes ayant perdu des créneaux horaires mis aux enchères ; par conséquent, les créneaux horaires vont au soumissionnaire susceptible d'en faire le meilleur usage.

Il poursuit en indiquant que l'observation des Pays-Bas souligne, à certains égards, la véritable origine de la difficulté, à savoir les contraintes de capacités liées au nombre d'installations aéroportuaires elles-mêmes et aux systèmes de contrôle du trafic aérien. Peut-être qu'il s'agit-là d'un domaine dans lequel on pourrait agir et pas seulement discuter. Si l'on regarde la manière dont les autorités publiques pourraient investir pour résoudre les problèmes de goulets d'étranglement, elles pourraient simplement envisager de faire davantage de dépenses d'équipement dans ce domaine. Il existe désormais une quantité de travaux de recherche sur l'aviation qui donnent à penser que, sur des plaques tournantes aéroportuaires fortement congestionnées – comme Heathrow ou le corridor New York–Washington sur la côte Est des États-Unis – des améliorations de l'infrastructure de contrôle de trafic aérien permettraient, avec une considérable marge de sécurité, de raccourcir à la fois la séparation verticale et horizontale pour les avions et de mieux résister aux difficultés qui surgissent en cas de conditions climatiques défavorables. Les investissements d'infrastructure remédieraient dans une large mesure aux problèmes d'encombrement. Comme indiqué précédemment, le problème consistant à disposer de portes d'embarquement, c'est-à-dire à avoir le droit d'atterrir sans avoir d'endroit où laisser descendre les passagers, est une vraie difficulté. Dans bien des cas, la solution – étant donné que les autorités publiques ne veulent pas investir dans les installations – a consisté à s'adresser aux entreprises en place et à leur demander de construire ou d'agrandir le terminal et les portes, ce qui laisse le gouvernement dans la même position qu'auparavant. Qu'il s'agisse de l'emplacement des terminaux de GNL ou du développement d'actifs publics qui déterminent à de nombreux égards le volume de trafic que le système peut absorber, l'un des domaines dans lesquels les organismes compétents pourraient prolonger leur action de sensibilisation consisterait à suggérer que les institutions publiques envisagent de faire précisément des investissements de cette nature.

Le président fait observer, dans le même ordre d'idées, que le problème se pose lorsqu'un aéroport historique et entièrement coordonné, est privatisé, par exemple, l'aéroport entièrement coordonné ne veut pas perdre cette coordination totale parce qu'il veut pouvoir tirer des rentes monopolistiques, soit par un mécanisme d'affectation primaire de créneaux horaires, s'il en existe un, soit par des tarifs élevés, à la fois pour l'atterrissage et pour le décollage et pour d'autres services. Il existe un conflit inhérent entre la notion de service public et l'intérêt de l'aéroport historique. Dans ce cas, un effort supplémentaire de l'instance de réglementation peut contribuer à faire en sorte que la propriété de cet aéroport ne soit pas contrôlée par une seule entité. Par exemple, il existe deux aéroports à Rome, tous deux détenus par les mêmes autorités aéroportuaires ; ainsi, il y a concurrence dans la mesure où l'on peut choisir, sans qu'on puisse parler de véritable concurrence.

En fait, poursuit-il, il existe des différences dans la manière dont les installations essentielles sont traitées selon les pays, en particulier eu égard à ce l'on entend exactement par « installation essentielle » s'agissant de l'accès aux marchés en aval et à ce que constitue un « besoin indispensable ». Veut-on dire

par là qu'il n'existe pas d'autre moyen d'entrer ou qu'il est très coûteux d'entrer ? Je pense qu'il s'agit d'une question qui a été abordée dans la plupart des pays. Quelles sont les raisons que l'on peut valablement invoquer pour justifier un refus d'entrée et en quoi consiste une justification économique ? Les différentes contributions donnent à penser que certains pays acceptent la justification économique ; d'autres n'acceptent que les justifications objectives. Bien entendu, ce n'est pas la même chose : la justification objective concerne essentiellement la capacité ou l'espace, tandis que la justification économique a des répercussions plus vastes.

Il y a eu, conclut-il, une très brève discussion sur les obligations qui sont imposées aux propriétaires d'installations essentielles en matière d'accès. Il est certain que, dans les premières affaires traitées par la CE dans le domaine des ports, de nombreux critiques ont fait observer, au moment où l'accès aux installations a été ordonné, que cette obligation était effectivement liée à la nécessité pour l'installation portuaire de réaliser des investissements en vue de permettre cet accès. Peu à peu, la situation a évolué avec une partie de la jurisprudence de la CE mais, dans d'autres pays, un certain nombre d'efforts supplémentaires ont été déployés pour limiter ou mieux comprendre les obligations qu'il convient d'imposer au propriétaire d'une installation essentielle.