

Effective competition & the essential facilities doctrine

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Content

- Current legal framework of the essential facilities doctrine (EFD)
- Recent cases from the network industries



Current legal framework of the essential facilities doctrine

- ICN: Report on Refusal to Deal, April 2010
 - Few jurisdictions worldwide address essential facilities explicitly, but many endorse the concept
- The EU perspective
- The US perspective
- Common ground
 - access to the facility must be essential to reach customers, replication of the facility must be impossible or not reasonably feasible

“An undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (i. e. a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favourable than those which it gives its own services, infringes Article 86 if the other conditions of that Article are met.”
Commission, 94/19/EC: Commission Decision of 21 December 1993 (IV/34.689 - Sea Containers v. Stena Sealink).



Current legal framework of the essential facilities doctrine

- German Act Against Restraints of Competition
 - 11th anniversary of the essential facilities doctrine under the Act
 - energy grids exempt from the Act since 2005, no competence for the NCA
 - number of cases in the energy and telecoms sector; few cases outside the regulated industries (e.g. access to port infrastructure)
 - Stadtwerke Mainz – where to look for a dominant position

An abuse may be established where a dominant undertaking “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.” , Sec. 19 para. 4 No. 4 of the Act



Recent cases from the network industries

- EU Commission: COMP 39.317 - E.ON Gas grid
 - Commitments case – E.ON offered to release capacity booked long-term to ensure that 50% will be available to the market
- Düsseldorf Court of Appeals
 - 2010 Gas transportation cases: Ontras VNG et. alt. vs. Federal Network Agency
 - level of free capacity = benchmark for effectiveness of competition?
 - readiness of incumbent to switch own demand to competing infrastructure = benchmark for effectiveness of competition?
 - churn rate = benchmark for effectiveness of competition?
 - requirements of a contestable markets-test
 - Ontras VNG
 - Statoil Deutschland Transport
 - Thyssengas
 - DONG
 - ENI Gas Transport
 - Erdgas Münster Transport
 - Gasunie Deutschland
 - GRTgaz
 - WINGAS. vs. Federal Network Agency

versus

Federal Network Agency



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