

# THE APPLICATION OF THE DOCTRINE OF ESSENTIAL FACILITIES IN THE EUROPEAN RAIL TRANSPORT SECTOR: HAS THE 7<sup>TH</sup> CAVALRY FINALLY ARRIVED?

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*1. Once upon the time in the Far West.- 2. The attempts of the 91/440 EC Directive to revitalize railways.- 3. The development of the doctrine of essential facilities.- 4. The application of the doctrine of essential facilities to the rail sector.- 5. Placing the GVG/FS decision in the context of EC competition law: It is the right approach for regulation of exclusionary conducts in the rail sector?- 6. The latest developments.- 7. Conclusion.*

## 1. ONCE UPON THE TIME IN THE FAR WEST

In the halcyon days of Far West Redskins assaulted trains that carried supplies to farmers with the aim of protecting their native territories. This scenario of Western movies can be also used to describe the historical situation of the European rail industry. Redskins can be likened to incumbent national rail operators which do not hesitate to exercise their market power against the new operators that pioneer in the rail market.

Because of the high costs necessary to build rail network rail industry is seen as a natural monopoly. So in many countries rail services are provided by state-owned firms under a legal monopoly regime.<sup>1</sup> These firms have a vertically integrated structure, which included ownership of rail infrastructure and rolling stocks and enjoy substantial economies of scale and scope. But the flipside of this market organization is new operators' difficulty for launching rail transport services. Not only they have to face high start-up costs to enter the market;<sup>2</sup> entry of new competitors is also hindered by different national technical standards adopted by Member States, namely safety standards and electric voltage.<sup>3</sup> Therefore, a given class of locomotives may not freely circulate on national rail networks of Member States. Inevitably, the regime of legal monopoly and these technical differences affect how international rail services are provided. National railway undertakings

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<sup>1</sup> L Idot, 'L'ouverture des transports ferroviaires à la Concurrence', [1998] *Cahiers de Droit Européen* 263, at 264.

<sup>2</sup> L Affuso, 'Il servizio ferroviario nell'esperienza britannica e internazionale', [2003] *Mercato, Concorrenza e Regole* 99, at 103.

<sup>3</sup> The Member States of the European Economic Area and Switzerland have adopted as six as many different standards of electric supply. Such standards are as follows:

a) 15 kV 16 2/3 Hz by Austria, Norway, Sweden and Switzerland;

b) 15 kV 16.7 Hz by Germany

c) 25 kV 50 Hz by Bulgaria, Czech Republic, Denmark, France, Finland, Greece, Hungary, Italy (high speed lines) Lithuania, Portugal, Romania, Spain, Turkey and United Kingdom;

d) 3000 V C.C by Belgium, Czech Republic, Estonia, Italy, Latvia, Luxembourg, Poland, Spain, Slovakia and Slovenia;

e) 1500 V C.C. by France and Ireland;

f) 750 V C.C (third rail) by the United Kingdom for the rail network of Southern England.

Source: < <http://www.railfaneurope.net> > (visited 2 October 2006).

have entered into a web of cooperation agreements which regulate international rail services. Under this regime each railway undertaking provides rail traction for an international link only within its national territory as a result of which there exist no competition between railway undertakings for the provision of traction to international rail services.<sup>4</sup>

A train operator planning to offer an international service may have to face a number of problems, the first of which is to gain access to railway infrastructure. This facility is normally controlled by national railway undertakings, which may not wish to grant new operators access to it for fear of letting new competitors to their rail operations enter the market. The second problem is the different technical standards existing in each Member States. As anticipated above, a locomotive class which has obtained the regulatory approval to circulate on a given national rail network may not be authorized to work in another national network. A new operator in theory should purchase as many locomotive classes as the national rail networks on which it plans to operate its services. Because national railway undertakings are likely to be the only provider of rail traction, new operators cannot but resort to these undertakings in order to obtain the necessary rail traction.<sup>5</sup> As a result, new entrants may be at the mercy of the incumbent regarding the conditions of access to the railway infrastructure and traction.

The Commission decision of the *GVG/FS*<sup>6</sup> case should herald the long-awaited decisive victory of the Blue Jackets over the Redskins alias-national incumbents. With this decision the Commission has ensured to all rail operators equal access to rail networks and to rail traction. This result is achieved with a broad interpretation of the concept of essential facilities that comprehends rail network and locomotives. Consequently, the Commission has imposed on national railway undertakings the obligation to share to third parties their rail network and locomotives.

However, this paper argues that the *GVG/FS* decision, though inspired by laudable intentions, may lead to anti-competitive effects. An excessively broad meaning of the concept of essential facility may reduce the incentives of rail operators, especially the incumbents, to innovate and invest in new productive assets and, ultimately, may lessen competition between the incumbents and the new operators. While the qualification of the rail network as essential facilities is generally accepted and unproblematic, it is precisely the qualification of locomotives as essential facilities to seem unconvincing. Indeed, such a qualification with the following imposition of the obligation to share locomotives with new operators may lead to anti-competitive effects.

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<sup>4</sup> For example, the traction for a train connecting Amsterdam to Hamburg is supplied by the Dutch operator (NS) till the German-Dutch border and then by the German operator (DB) to Hamburg.

<sup>5</sup> However national railway undertakings may sometimes be unhappy to supply their potential competitors with traction services. As evidence of the unwillingness of national railway undertaking to provide rail traction, it can be said that some of them even prefer scrap their redundant locomotives rather than rent them out to new rail operators.

<sup>6</sup> Commission Decision, *Georg v Ferrovie dello Stato Spa*, <[http://www.europa.eu.int/comm/competition/antitrust/cases/decisions/37685/final\\_en.pdf](http://www.europa.eu.int/comm/competition/antitrust/cases/decisions/37685/final_en.pdf)> (visited 2 October 2006).

The structure of the paper is as follows. The second part evaluates the impact of the EC Directive 91/440 on rail industry. The third part gives a short account of the application of the doctrine of essential facilities by the EC judicature. The fourth part looks at the application of the doctrine in the rail sector, namely in the *GVG/FS* case. The fifth part evaluates the consequences of the decision on competition in rail transport markets. The sixth part deals with the latest developments on the EC rail policy as well as the most recent advancements in the rail traction industry. The seventh part draws a conclusion.

## **2. THE ATTEMPT OF THE 91/440 EC DIRECTIVE TO REVITALIZE RAILWAYS**

### ***2.1 The strategies of the 91/440 EC Directive to modernize rail industry***

With the 91/440 EC Directive the EC intended to improve the efficiency and competitiveness of railways. The directive provides a number of organizational and behavioural principles to which railway undertakings have to abide;<sup>7</sup> it also re-shapes the structure of the rail transport market by introducing competition in a sector where before hardly any rivalry existed amongst operators. This objective is pursued with two instruments: firstly, with the separation between the management of railway infrastructure and the operation of rail services; secondly, with granting rail operators the right of access to railway infrastructure.

The main purpose of the principle of separation is to enhance *intermode* competition between rail operators and other transport carriers. Since national railways undertakings own railway infrastructures and bear the ensuing costs they are at competitive disadvantage to other transport carriers which do not bear the costs associated to infrastructures they use. The principle of separation prescribes that the accounts of train operators and of managers of railway infrastructure shall be kept separated.<sup>8</sup> Thus, national governments shall retain the responsibility for the management of railway infrastructure while the provision of rail transport services shall be open to all the undertakings that meet the statutory requirements. The rationale underlying this principle is to relieve national railways undertakings from the financial burdens imposed by construction and maintenance of railways infrastructure. This should ensure a level playing field between railways undertakings and other transport carriers regarding the coverage of infrastructure costs.<sup>9</sup>

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<sup>7</sup>Railway undertakings shall be managed according to the principle of independence and shall observe the same principles followed by commercial companies; they shall also determine their business plans, which have to include investment and financing programmes, and achieve the objective of financial equilibrium. See Articles 4 and 5 of the Directive 91/440.

<sup>8</sup> “Member States shall take the measures necessary to ensure that the accounts for business relating to the provision of transport services and those for business relating to the management of railway infrastructure are kept separate. Aid paid to one of these two areas of activity may not be transferred to the other”, Article 6 of the Directive 91/440.

<sup>9</sup> F Munari, *Il Diritto Comunitario dei Trasporti*, (Giuffrè Editore Milan, 1996), 244; A Alexis, ‘Transports ferroviaires et concurrence. Les principaux apports de la Directive N.91/440’, [1993] *Transport Law Review* 499, at 500.

The principle of right of access should strengthen *intramode* competition between rail operators. Article 10(1) of the directive lays down that the right of access shall be granted exclusively to international groupings. Article 3 of the directive defines international groupings as “any association of at least two railways undertakings established in different Member States for the purpose of providing international transport services between Member States”.<sup>10</sup> The scope of the right of access is restricted to the railway infrastructures of the Member States in which the members of the international grouping are established. In the other Member States rail operators have only the right of transit.<sup>11</sup>

## ***2.2 The impact of the Directive 91/440 EC on the competitive structure of the EC rail transport market***

As a whole the directive failed to dent the market power of the incumbents and only a few operators decided to exercise the right of access. So disappointing an impact may be imputed to the inappropriateness of the directive measures to open up the rail industry to competition. The requirement to establish an international grouping is a serious obstacle for new rail operators. Indeed at this stage of the implementation of the policy for liberalization of rail services national railway undertakings may be the only entities that can be qualified as railway undertakings under Article 3.1 of the directive.<sup>12</sup> A firm planning to launch an international rail services has no other choice but to seek cooperation from a national railway undertaking for the establishment of an international grouping. So, the international grouping requirement may be perceived as a sort of legal straitjacket on the projects of new competitors to enter the market.

Another issue that has been ill-addressed by the directive is the link between the management of railway infrastructure and the operation of rail services. The principle of separation embraced by the directive is limited to the idea of financial separation. This is quite a soft solution, which accommodates the liberalization thrust of the Commission with the conservative stance of national railway undertakings.<sup>13</sup> But, under this regime Member States still retain the possibility to entrust the management of railway infrastructure to a national railway undertaking.<sup>14</sup> The latter face conflict of interests as they are empowered

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<sup>10</sup>A firm to be qualified as a railway undertaking, has to fulfil two basic requirements: its main business must be the provision of rail transport services for goods and/or passengers and must be also able to provide traction. See Article 3 of the Directive 91/440 EC.

<sup>11</sup>Article 10 (1) of the Directive 91/440 EC. The right of transit is narrower than the right of access, as it does not allow rail operators to carry out commercial services. So Trenitalia of Italy and SJ of Sweden plan to establish an international group for the provision of a direct passenger services between Italy and Sweden. In the light of Article 10 the above group has the right of access to the rail network of Sweden and Italy, but, it has only a right of transit on the German rail networks. That means that the proposed service cannot pick up passengers on the Germany territory.

<sup>12</sup> M Maier, ‘Libéralisation du fret ferroviaire après le Premier Paquet Ferroviaire Européen’, *Europe* Juillet 2003, at 4.

<sup>13</sup> D Gérardin, ‘L’Ouverture à la concurrence des entreprises de réseaux. Analyse des principaux réseaux des processus de libéralisation, [1999] *Cahiers de Droit Européen* 13, at 24.

<sup>14</sup>Article 7.2 of the Directive 91/440 EC rules “*Member States may assign to railway undertakings or any other manager the responsibility for managing the railway infrastructure*”.

to set the conditions under which their competitors have access to the railway infrastructure and to regulate the conduct of the competitors on the market.<sup>15</sup>

Similar concerns are also shared by the former EC Competition Commissioner Mario Monti. A vertically integrated national railway undertaking, which owns the network over which it carries out its commercial activities, may apply discriminatory conditions to the activities carried out by its competitors to the benefit of its own services. The risk is that “such a company is able to act as both a judge and jury in its own clause”.<sup>16</sup> Accordingly, Professor Monti advocates a structural separation between the management of the railway infrastructure and the operation of rail services as the only possible approach to erase the risk of discriminatory practices.<sup>17</sup>

The importance of genuine structural separation is also stressed in *GVG/FS*. The Italian legislation assigns the functions of the operation of rail services and of the management of railway infrastructure to two distinct companies, Trenitalia and Rete Ferroviaria Italiana, whose equity shares are wholly held by FS. Because of this vertically integrated structure, FS may find itself in a situation of conflict of interest as suggested by its refusal to grant track access to GVG.<sup>18</sup> Interestingly, the Commission compares the position of an allocation body, which is ideally independent of any railway undertaking with that of FS. The former “would certainly have actively considered all possible means, in terms of availability of time slots and other practical and technical issues, of granting GVG access to the infrastructure on fair and non discriminatory terms”.<sup>19</sup> Instead, “an allocation body that is also active in the market for providing services on its own infrastructure is likely to prefer an arrangement which will minimise inconvenience to itself, especially in relation to its own operations as a user”.<sup>20</sup> The vertical links existing between Rete Ferroviaria Italiana and Trenitalia may explain the weak marketing strategy of FS. The manager of the rail network should have played a more active role in promoting its railway infrastructure capacity to GVG with the purpose to maximise revenue from infrastructure charges. Only a complete structural separation of the two functions is capable of eliminating any possible risk of conflict of interests.<sup>21</sup>

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<sup>15</sup> R Greaves, *EC Transport Law* (Longman Harlow, 2000) at 38.

<sup>16</sup> M Monti, ‘Effective Competition in the Railway Sector: A Big Challenge’, UNIFE Annual Reception, (Brussels, 21 May 2002), <<http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/02/216&format=HTML&aged=0&language=EN&guiLanguage=en>> (visited 2 October 2006).

<sup>17</sup> Monti, above n 16. See also P Crompton and B Facey, ‘Revisiting, Regulation and Deregulation through the Lens of Competition Policy. Getting the Balance Right’, (2002) 25(1) *World Competition* 25, at 48.

<sup>18</sup> O Stehmann and I Mackay, ‘Liberalisation and Competition Policy in Railways’, *Competition Policy Newsletter*, Autumn 2003 (European Commission), at 25.

<sup>19</sup> *GVG/FS*, above n 5, at para. 125.

<sup>20</sup> *Ibid.*, at para. 125.

<sup>21</sup> Stehmann and Mackay, above n 18, at 25; see also, O Stehmann and G Zellhofer, ‘Dominant Rail Undertakings under European Competition Policy’, [2004] *European Law Journal* 327

### 3. THE DEVELOPMENT OF THE DOCTRINE OF ESSENTIAL FACILITIES

Liberalization measures would have scarce value if the incumbents were still free to exercise their economic power inherited from the monopolist era in deregulated markets to the detriment of their competitors.<sup>22</sup> It is therefore necessary to supplement the ex-ante intervention of liberalization policies with the ex-post regulation ensured by the enforcement of competition law.<sup>23</sup> The doctrine of essential facility is a possible response to the abuses of national railways undertakings and it may be invoked when a monopolist that controls a facility, which is indispensable for competition, refuses to grant its competitors access to the above facility.<sup>24</sup>

The Commission has consistently applied the doctrine since the trilogy of port cases.<sup>25</sup> Instead, the EC Courts have never expressly endorsed the doctrine, though some judgments contain an implicit reference to it. In *Magill*,<sup>26</sup> three dominant British and Irish television broadcasters refused to sell their weekly television programme listings to a third party planning to publish a weekly television guide. The Court of Justice found that this conduct violated Article 82 of the EC Treaty. It considered the television programme listing as essential for the plaintiff in order to offer to the market a new product (weekly television guides) for which there were no actual or potential substitute.<sup>27</sup> By refusing to sell the programme listings the dominant firm reserved to it the downstream market and it impeded the entry of new competitors.<sup>28</sup> In other words, if a dominant firm cuts off, without any objective justification, supplies of an upstream product when such item is an indispensable compound for the manufacturing of derived products in the downstream market infringes Article 82 of the EC Treaty.<sup>29</sup>

Another seminal case in which the doctrine of essential facilities was invoked is *Bronner*.<sup>30</sup> Mediaprint had refused to distribute Bronner's newspapers through its home-delivery service. As any possible alternative

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<sup>22</sup> Luca Radicati Di Brozolo, *Il Diritto Comunitario delle Telecomunicazioni* (Giappichelli Editore Turin 1997) 11; Idot, above n 1, at 268.

<sup>23</sup> Richard Whish, *Competition Law* (OUP Oxford 2005) at 669.

<sup>24</sup> G McCurdy, 'Intellectual Property and Competition: Does the Essential Facilities Doctrine Shed Any New Light?', [2003] *European Intellectual Property Review* 472, at 472.

<sup>25</sup> Commission decision, *B&I/Line v Sealink Harbours and Sealink Stena* [1992] 5 CMLR 255; Commission decision, *Sea Containers/Stenalink* [1994] OJ L15/ 8; Commission decision, *Port of Rødby*, [1994] OJ L55/52. The gist of these cases is the qualification of port facilities as essential facilities with the following imposition on the owner or manager of these facilities of the obligation to grant maritime operators access to them. So, firstly, the Commission defined essential facility as facility or infrastructure without access to which competitors cannot provide services to their customers. Secondly, it stated that "undertaking that owns or manager 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 (86) 82 of the EC Treaty."

<sup>26</sup> Cases C-241/91 and C-242/91 *Radio Telefis Eireann and Independent Television Publications Limited v EC Commission* [1995] 4 CMLR 718.

<sup>27</sup> *Ibid*, para 54.

<sup>28</sup> *Ibid*, paras 54-56.

<sup>29</sup> Whish, above n 23, at 665.

<sup>30</sup> Case C-7/97 *Oscar Bronner GmbH v Mediaprint Zeitungs und Zeitschriftenverlag GmbH* [1999] 4 CMLR 112.

was less effective than the home-delivery system of Mediaprint, Bronner argued that such a refusal infringed Article 82 of the EC Treaty and sought for an order requiring Mediaprint to share its delivery facilities. The Court of Justice has restrictively reformulated the conditions under which the owner has to grant access to the facilities. Firstly it is necessary that the refusal to supply be deprived of any objective justification. Secondly it must be also likely to eliminate all the competition in the downstream market. Finally the required service must be indispensable for carrying out the downstream activity because there exists no actual or potential substitute.<sup>31</sup> In the view of the Court of Justice alternative methods of distribution exist, though less advantageous. It is insufficient for the plaintiff seeking access to the defendant's facilities to prove the economical non-viability to set up any alternative system due to the small circulation of its newspaper.<sup>32</sup> Instead, it is necessary to demonstrate "that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspaper with a circulation comparable to that of the daily newspaper distributed by the existing scheme".<sup>33</sup>

Legal writers have summarised the concept of essential facilities developed by the Court of Justice into a two-pronged test: not duplicability and importance of access.<sup>34</sup> The first limb of the test requires the impossibility for any competitor to duplicate the facility, regardless of the economic unattractiveness of the project.<sup>35</sup> As has been clarified by the Commission, the duplication of the facility must be impossible or extremely difficult. This is the case either because the duplication is physically or legally impossible or because a second facility is not economically viable since its revenues would not be sufficient to cover its costs.<sup>36</sup> So, as a non-duplicable facility is close to a natural monopoly, the doctrine applies only when the structure of relevant markets is that of a natural monopoly, where two or more firms cannot be economically viable on their own without access to the essential facility.<sup>37</sup>

The second limb of the test regards the access of competitors to the facility, which must be indispensable for them in the sense that the absence of access may seriously affect the feasibility of their economic activities. This aspect was illustrated by the Commission in its *Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector* where it states that in order to apply the doctrine of essential facilities it is necessary to establish that "the refusal of access must lead to the proposed activities being made either impossible or seriously and unavoidably uneconomic".<sup>38</sup>

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<sup>31</sup>Ibid, para 41.

<sup>32</sup> Ibid, para 45.

<sup>33</sup> Ibid, para. 46.

<sup>34</sup> Whish, above n 23, at 674.

<sup>35</sup> Antonio Capobianco, 'The Essential Facilities Doctrine: Similarities and Differences between the American and the European Approach', [2003] *European Law Review* 548, at 559.

<sup>36</sup> European Commission, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, para 229.

<sup>37</sup> M Bergman, 'The Bronner Case- A Turning Point for the Essential Facility Doctrine?', [2000] *European Competition Law Review* 59, at 61.

## 4. THE APPLICATION OF THE DOCTRINE OF ESSENTIAL FACILITIES TO THE RAIL SECTOR

### 4.1 *The early cases*

The first case in which the Commission explicitly tackle the question whether locomotives can be considered as essential facilities and whether national railway undertakings are obliged to share them with new entrants is *European Night Services (ENS)*.<sup>39</sup> In this case the Commission examined an allegedly anti-competitive agreement concluded by national railway undertakings (BR, SNCF, SNCB and NS) which had established a joint venture, European Night Services, with the aim of providing rail transport services between the UK and mainland Europe via the Channel Tunnel. Because the parent companies had a dominant position in the provision of rail services in their national markets, European Night Services had direct access to these services through the operating agreements concluded with the parent companies. As a result, competitors might be discriminated in the downstream markets against the parties while seeking for access to necessary rail services.<sup>40</sup>

The Commission conditionally cleared the agreement by imposing on the parties the obligation to supply to new entrants the same rail services as those the parties have undertaken to sell to their subsidiaries. This obligation applies only when the new operators are unable to provide themselves the necessary rail service.<sup>41</sup> It is worth noting that the relevant rail services are identified as “the provision of the locomotive, train crew and path on each national network and in the Channel Tunnel”.<sup>42</sup> The Commission seems ready to categorize locomotives as essential facilities since the availability of suitable locomotives is essential to enable new operators to provide rail transport services. The parties have therefore the duty to rent out their locomotives to a new competitor if the latter is unable to obtain rail traction by itself.

The decision in question was then annulled by the Court of First Instance because the Commission did not adequately demonstrate the anticompetitive effects of the contested agreement.<sup>43</sup> In the judgment the Court also dealt with the issue of the qualification of locomotives as essential facilities. Consistently with the previous case law, the Court made it clear that locomotives can be regarded as essential facilities if they are essential for the ENS’ s competitors. This occurs when ENS’ s competitors are unable to enter the relevant market or remain in it because ENS refusal to share its locomotives with them. However, such foreclosure

<sup>38</sup>European Commission, *Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector* *Ibid*, [1998] 5 CMLR 82, para. 91(a).

<sup>39</sup>Commission Decision, Re: *European Night Services Limited* [1995] 5 C.M.L.R. 75.

<sup>40</sup>*Ibid*, para 46.

<sup>41</sup> *Ibid*, para 80.

<sup>42</sup> *Ibid*, para 81.

<sup>43</sup>Cases T-374/94, T-375-94, T-384/94 and T-388/94 *European Night Services et al v Commission* available at <http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=&datefs=&datefe=&nomusuel=european+night+services&domaine=&mots=&resmax=100>

effects are unlikely to materialize when the firm which refuses to provide rail traction has small market shares as ENS.<sup>44</sup> Furthermore, the Court is also unconvinced by the line of reasoning followed by the Commission regarding the qualification of locomotives as essential facilities. Firstly, the Commission did not demonstrate that the locomotives are essential for ENS's competitors. Secondly, from the decision it is not possible to conclude that the ENS's competitors had to resort only to ENS in order to obtain the locomotives they need. Indeed, any firm, which intends to launch a rail transport service competing with those of ENS could freely rent or purchase the locomotives in the market.<sup>45</sup>

From the reading of the judgment it seems that the Court of First Instance has embraced a stricter scope of application of the obligation to supply locomotives than the Commission. The Court made it clear that this obligation can be imposed only in Article 82 cases. Only in these cases the refusal to supply locomotives due to the dominant position of the wrongdoer may lead to foreclosure effects. However, it is also necessary for the Commission to furnish the proof that the dominant firm is the sole supplier of locomotives in the market and that new competitors cannot find any alternative supplier of rail traction

#### ***4.2. The decision of the Commission in the GVG/FS case***

GVG is a Germany-based private rail operator planning to launch a passenger rail service on the Basle-Milan route. It addressed to FS with the view of setting up the international grouping as required by EC Directive 91/440. It also asked FS for access to the Domodossola-Milan section of the Italian rail network and rail traction. FS, which incidentally had already set up a joint-venture with SBB in order to provide passenger rail services on the same route, did not meet the GVG's requests. So the Germany operator filed a complaint with the Commission alleging that FS had breached Article 82 of the EC Treaty.

The Commission identified three different markets affected by the FS conduct: the market for access to railway infrastructure, the market for traction and the market for international rail passenger services. In the market for access to railway infrastructure FS had a dominant position, because it had a statutory monopoly to operate the Italian railway infrastructure. Moreover, as infrastructure manager and allocation body, FS was also responsible for establishing and maintaining the Italian railway infrastructure and assigning train paths to railway operators in return for a fee.<sup>46</sup> Finally, there existed no alternative infrastructure that GVG could use for the provision of the planned service.<sup>47</sup> In the analysis of the alleged anti-competitive effects of the contested conduct the Commission expressly applied the doctrine of essential facilities. The FS national rail

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<sup>44</sup> Ibid, para 212. From the judgement it may be argued that the Court would have differently decided the case should ENS have had a dominant position. Indeed, if the supply of rail traction is refused by a dominant railway undertaking this conduct may amount to a breach of Article 82 EC Treaty.

<sup>45</sup> Ibid, para 215.

<sup>46</sup> *GVG/FS*, above n 6, para 82.

<sup>47</sup> Ibid, para. 84.

network was qualified as an essential facility since it met the two conditions of the essentiality test. Firstly, the access to the network was indispensable for GVG because if FS had refused access to its tracks competition from the plaintiff would have been eliminated. Secondly, due to the extremely high cost and the impossibility of getting the necessary rights of way no competitor would have been able to duplicate the FS long-distance railway network.<sup>48</sup>

The anti-competitive conduct the Commission contested to FS was the refusal to supply GVG with the technical information on the conditions of access to the rail network.<sup>49</sup> The right of obtaining the above information has not expressly mentioned by EC Directive 91/440. Notwithstanding that, the Commission has recognized the importance of these data because they enable rail operators to exercise the right of access to rail infrastructure awarded by the directive. The availability of information allows rail operators to draft the business plan regarding the planned rail service and to assess the viability of these services.<sup>50</sup> Moreover since article 10 (1) of the directive has direct effects it may be invoked by rail operators with the purpose of exercising the right of access.<sup>51</sup> In the light of above, FS had the duty to provide information regarding access to its rail network to GVG. The FS refusal to give the requested information to GVG impeded the latter from entering the market for international rail transport passenger and infringed Article 82 of the EC Treaty. In other words, the effect of the FS conduct was to retain to itself this market by leveraging its dominant position towards the downstream market for international rail services.<sup>52</sup>

FS had also a dominant position in the market for rail traction because it was the only entity capable of supplying the type of locomotives whose technical characteristics met the operational needs of GVG.<sup>53</sup> The Commission addressed the question whether GVG could obtain the necessary traction from other sources, such as by renting or purchasing the locomotives directly from manufacturers. However, it must take into consideration the poor interoperability of locomotives belonging to different national railway systems and the Italian regime on rail transport then in force, which disallowed railway undertakings of other Member States to operate cabotage or purely domestic services in free competition.<sup>54</sup> These factors, especially the limitations imposed by Italian law, would prevent GVG from efficiently exploited its own pools of Italian locomotives on the Italian rail network. This would make the creation of a pool of its own locomotives economically unfeasible.<sup>55</sup> The terms of the problem would not change should GVG rent its pool of Italian locomotives. The different training requirements and language barriers would have obliged GVG to set up an own pool of Italian drivers. But, the ensuing costs would have not been covered by revenue generated by the

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<sup>48</sup> Ibid, para. 120.

<sup>49</sup> Ibid, para 124.

<sup>50</sup> Ibid, para 126.

<sup>51</sup> Ibid, para 128.

<sup>52</sup> Ibid, para 124.

<sup>53</sup> Ibid, paras 86-91.

<sup>54</sup> Ibid, paras 95, 98 and 100.

<sup>55</sup> Ibid, para 100.

only international passenger transport services and/or from Italy. So the creation of a pool of Italian drivers would be uneconomic for any firm.<sup>56</sup>

Unsurprisingly, the Commission concluded that “an investment by GVG, or any other railway undertaking, in locomotives solely for the purpose of operating on the Domodossola-Milan route would be prohibitively expensive and would not make any commercial sense”.<sup>57</sup> The FS refusal to provide rail traction prevented GVG from entering the market for international rail services on the Domodossola-Milan link, which amounts to a foreclosing conduct which is prohibited by Article 82 of the EC Treaty.<sup>58</sup>

It is worth noting that in this part of the decision the Commission did not expressly apply the doctrine of essential facilities. However, it employed two elements that are part of the concept of essentiality, such as the indispensability and the not duplicability at reasonably costs of the assets to which the plaintiff claimed access in order to assess whether the FS refusal to supply GVG was compatible with Article 82. In this respect, it can be said that the Commission confirmed its position in *European Night Services* and also in *GVG/FS* considered locomotives as essential facilities.<sup>59</sup>

Finally the Commission found that FS had a dominant position in the downstream market for rail passenger transport service. It was the only firm to have the licence for the provision of intercity rail passenger transport and, accordingly, FS was “so far the only Italian railway undertaking that can enter into an international grouping with GVG for the particular service that the latter wants to provide”. Even though the Commission did not expressly applied the doctrine of essential facilities its line of reasoning echoed it. Under EC Directive 91/440 the formation of international groupings is a necessary pre-condition for the exercise of the right of access and for the provision of international rail services. The only possible way for GVG to meet this requirement was to form a grouping with FS.<sup>60</sup> Therefore, the FS refusal to form a grouping prevented GVG from entering the market for international rail passengers service and violated Article 82 of the EC Treaty.<sup>61</sup>

The case was settled when FS accepted to take on the necessary undertakings to eliminate all the claims brought forward by GVG. It committed to enter into international grouping agreements with any railway undertakings with the statutory rail operator licence and which has a reasonable project for an international

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<sup>56</sup> Ibid, para 95.

<sup>57</sup> Ibid, para 102.

<sup>58</sup> Ibid, paras 140-141.

<sup>59</sup> Ibid, paras 98-110.

<sup>60</sup> Ibid, para 114.

<sup>61</sup> Ibid, paras 150-152

rail service. It has also committed to provide traction services on a non-discriminatory basis to other railway undertakings planning to provide cross-border passenger services.<sup>62</sup>

FS was not the only national railway undertaking to frustrate the activism of GVG, which also filed a complaint with the Commission alleging abuse of dominant position by DB. Having established a grouping with SJ in order to carry out an international rail passenger service between Malmö and Berlin GVG asked DB to provide traction between Berlin and Sassnitz. Initially DB asked for a considerable high price, but one month later it outright refused to provide traction. In the following investigation the Commission found that DB had a dominant position in the market for traction since it was the only operator in the position to provide the necessary locomotives and back-up service. In the Statement of Objection the Commission stated that DB breached Article 82 of the EC Treaty for the following reasons:

- It discriminated against the plaintiff because it charged on GVG a significantly higher price than that requested to other operators for the provision of the same traction service;
- It refused to provide traction;
- It asked GVG to hire its own staff, which would raise GVG's costs to the detriment of the commercial viability of its service.<sup>63</sup>

## **5. PLACING THE *GVG/FS* DECISION IN THE CONTEXT OF EC COMPETITION LAW: IS IT THE RIGHT APPROACH FOR REGULATION OF EXCLUSIONARY CONDUCTS IN THE RAIL SECTOR?**

### **5.1 Arguments for the Commission's Decision**

The *GVG/FS* case can be considered as a landmark decision, since it addresses many important issues regarding the application of competition law in the rail sector.<sup>64</sup> Firstly, it refines the methodology for the definition of relevant markets in the rail sector: it distinguishes between downstream markets for the provision of transport services and upstream markets for access to rail network and for the provision of rail tractions. Secondly, it sets the limits of the scope of duties imposed upon national railway undertakings.<sup>65</sup> The Commission believes that the commitments assumed by FS “will considerably facilitate entry into the market in international rail passenger services into Italy”, since they will “eliminate the most significant market access barriers for start-up companies”. After *GVG/FS* “new entrants will be able to obtain in a

<sup>62</sup> Ibid, para 160.

<sup>63</sup> Commission Press Release IP/01/1415, Commission warns against DB about discriminating against a private competitor, (15 October 2002), <<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/01/1415&format=HTML&aged=0&language=EN&guiLanguage=en>> (visited 2 October 2006).

<sup>64</sup> Stehmann and Mackay, above n 18, at 25.

<sup>65</sup> O Stehmann, ‘Applying “Essential Facilities” Reasoning to Passenger Rail Services in the EU-The Commission Decision in the Case *GVG*’ [2004] *European Competition Law Review* 390, at 394.

timely manner all necessary information as regards train paths” and will be also “able to enter into an international groupings”; moreover “they will obtain the necessary traction services to start their services”.<sup>66</sup>

The Commission decision also underlines the importance of the interaction between competition law and liberalization policy, namely with respect to those industries where liberalization policies are still in progress or where the achievements of liberalization process are weak. An authoritative voice of the Commission argued: “These measures would be of little value if the companies concerned, most of which are dominant in their own areas, were free to integrate forward and to discriminate in favour of their own downstream operations”.<sup>67</sup> Competition law becomes thus an indispensable tool to counterbalance the market power of incumbents that can thwart the attempts of competitors to enter the newly liberalized markets.<sup>68</sup> In fact “Regulated or state-owned companies often own facilities that are essential for all or most of their downstream competitors”.<sup>69</sup> The doctrine of essential facilities may be helpful to preserve the market opportunities for new entrants opened by the EC liberalization measures, especially when sector specific regulations fails to provide access to facilities; or when the access remains impossible or unreasonably difficult.<sup>70</sup>

The intention of the Commission is therefore to use the doctrine as a tool to inject competition in monopolistic markets. Article 82 of the EC Treaty subjects the commercial freedom of firms controlling essential infrastructure to two limitations. Firstly, it imposes a *non facere* obligation: a dominant firm has to refrain from carrying out the business practices that fall within the scope of prohibition of Article 82 of the EC Treaty. Yet, such an obligation is still inadequate in order to shield competitors from the market power of dominant players. Thus, Article 82 of the EC Treaty also imposes a positive obligation on dominant firms to promote competition by sharing their own assets with potential competitors.<sup>71</sup> This pro-active approach is epitomized by the *GVG/FS* decision. The Commission was worried about the difficulties that new train operators may encounter to obtain the necessary rail traction. Incumbents might not wish to lease or sell their locomotives to rivals and with the secondary market for traction still at its infancy new operators might not easily find alternative suppliers of rail traction. Thereby, the Commission was adamant to extend the range of essential facilities to locomotives in order to facilitate the entry of new competitors. As the Commission said in the press release regarding *GVG/Deutsche Bahn* “a more dynamic and appealing railway sector can only

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<sup>66</sup> *GVG/FS*, above n 6, para 161.

<sup>67</sup> J Temple Lang, ‘Defining Legitimate Competition: Companies Duties to Supply Competitors and Access to Essential Facilities’, [1994] *Fordham Corporate Law Institute* 245, at 281

<sup>68</sup> M Siragusa and M Beretta, ‘La dottrina delle Essential Facilities nel diritto comunitario ed Italiano della concorrenza’, [1999] *Contratto e Impresa* 260, at 298.

<sup>69</sup> Temple Lang, above n 67, at 281.

<sup>70</sup> P J Slot, ‘A View From the Mountain: 40 Years of Development in European Communities Competition Law’, [2004] *Common Market Law Review* 443, at 453.

<sup>71</sup> Capobianco, above n 35, at 559.

be achieved if there is more competition in the sector. New operators will provide new services and a different price/quality mix, key ingredients for winning back passengers to rail”.<sup>72</sup>

## 5.2 Arguments against the Commission’s Decision

### a) *Balancing the promotion of competition with the protection of proprietary interests*

it is uncertain whether such an extensive interpretation of the doctrine can effectively enhance the competitive structure of markets. This issue is clearly illustrated by Advocate General Jacobs in *Bronner*. He stated that the doctrine requires “a careful balancing of conflicting considerations.”<sup>73</sup> The interests of the firms seeking access to the facilities must be weighted against the proprietary interests of the owner of the facilities. An approach that is mainly sensitive to the needs of new competitors would have undoubtedly pro-competitive effects, especially in the short term. Granting new competitors the access to infrastructure would result in the presence of more firms in the market, which may enhance consumer welfare. Yet, from a long-term perspective this strategy might have a negative impact on competition, because it might reduce the incentives of the dominant firms to invest in efficient facilities.<sup>74</sup>

As has been recognized by the Commission itself, a very close scrutiny of the factual and economic context is needed before imposing obligation to share essential facilities.<sup>75</sup> Guidance on this issue is provided by the purpose of Article 82 of the EC Treaty, which is the prevention of “distortion of competition-and in particular to safeguard the interests of consumers-rather than to protect the position of particular competitors”.<sup>76</sup> This point has been further elaborated by the Commission in its discussion paper on Article 82. The essential objective of Article 82 is “the protection of competition on the market as a mean of enhancing consumer welfare and of ensuring an efficient allocation of resources”.<sup>77</sup> The statement that Article 82 protects competition rather competitors must be read in the sense that competition law ensure that every firm is able to enter the market and compete therein on the merits without competition conditions being distorted or impaired by dominant firms.<sup>78</sup> Article 82 prohibits foreclosing conducts which may lead to actual or likely anti-competitive effects and which harm consumers’ interests. In this respect, not only short term harm, but also medium and long term arising from foreclosing conducts are of relevance.<sup>79</sup>

<sup>72</sup>Commission Press Release IP/01/1415 of 15 October 2002, available at <<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/01/1415&format=HTML&aged=1&language=EN&guiLanguage=en>> (visited 2 October 2006).

<sup>73</sup> Case C-7/97, above n 30, Opinion of Advocate General Jacobs, para.56. For an account of the factors that need to be taken into consideration before granting access to an essential infrastructure, see also Massimo Motta, *Competition Policy, Theory and Practice* (Cambridge University Press Cambridge 2004), at 67.

<sup>74</sup> Ibid, para57.

<sup>75</sup> Commission discussion paper, above n 36, para 214.

<sup>76</sup> Case C-7/97, above n 30, Opinion of Advocate General Jacobs Ibid, para 58.

<sup>77</sup> Commission discussion paper, above n 36, para 54.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid, para 55.

Sensible limits should be accordingly placed on the scope of application of the doctrine in order to ensure its consistency with the underlying rationale of competition law and avoid the risk of free riding.<sup>80</sup> This problem arises when competitors seeking access to facilities intentionally propose an overstated definition of the term of essential infrastructure, with the ill-concealed goal to have a free ride on such assets.<sup>81</sup> The possibility that rivals would be able to “free ride” on the fruit of the investments made by the dominant firm may eventually discourage the latter from planning and making investments.<sup>82</sup>

The extensive interpretation of the doctrine in *GVG/FS* is probably inconsistent with *Bronner*, which pointed out that essential facilities only exist “where duplication of the facility is impossible or extremely difficult owing to physical, geographical or legal constraints or is highly undesirable for reason of public policy”.<sup>83</sup> Only under these circumstances the refusal to grant access to the facility may have anti-competitive effects. More attention is paid to the protection of private investments, the protection of private property and incentives to innovation. The European Court of Justice implicitly ruled out that competition law could be used to level the playing field between more successful and less successful firms. Competitors cannot perceive the application and enforcement of competition law as a more convenient alternative to the efforts to develop better products than their rivals. Such a use of competition law may lead to reduction of competition and loss of consumers’ welfare.<sup>84</sup>

This cautious stance was confirmed by Advocate General Tizzano in its opinion in *IMS Health*. He outlines the necessity of a careful assessment whether the access to a facility is essential for the development of a new product. Such assessment entails weighing the interest in the protection of copyright and the economic freedom of its holder with the interests in the protection of free competition. Article 82 of the EC Treaty should prohibit the refusal to grant licence to copyright only when such refusal would prevent the developments of a secondary market to the detriment of consumers.<sup>85</sup> Advocate General Tizzano warns against the hazard related to an aggressive application of the doctrine. On the one hand, dominant firms would have less incentive to invest in essential facilities if their competitors were allowed to share the benefits of their investments; on the other hand, competitors would have also little or no incentive to develop their own infrastructure.<sup>86</sup> In the following judgment the Court of Justice lays down the condition upon which the dominant firm has the duty to licence its intellectual property rights to its rivals. Besides the

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<sup>80</sup> Whish, above n 23, at 670.

<sup>81</sup> Capobianco, above n 35 at 558.

<sup>82</sup> Whish, above n 23 at 670; Capobianco, above n 35, at 558.

<sup>83</sup> Case C-7/97, Opinion of Advocate General Jacobs, above n 30, para 65.

<sup>84</sup> Capobianco, above n 35, at 559.

<sup>85</sup> See C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, Opinion of Advocate General Tizzano  
<<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=&domaine=&mots=ims+health&resmax=100>> (visited 2 October 2006) para.48.

<sup>86</sup> D Aitman and A Jones, ‘Competition Law and Copyright. Has the Copyright Owner Lost the Ability to Control his Copyright?’, [2004] *European Intellectual Property Review* 137, at 139.

conditions already set out in *Magill*, it is also necessary that the dominant's assets are indispensable to enable the plaintiff to offer new products. However, because the judgment concerned copyright is not clear whether it would apply to essential facilities which are not intangible assets.<sup>87</sup>

Professor Areeda pointed out that on some circumstances general policy considerations justify the refusal of the firm controlling essential facilities to rent its assets to competitors. These conditions are met when such firm would have never built an infrastructure of that size and character if it had been forced to share it with its rivals. In his view “required sharing discourages building facilities such as this, even though they benefit consumers”.<sup>88</sup> In any case the duty to deal should be imposed only on the condition that it is likely to substantially improve competition in the market by reducing prices or by increasing output or innovation. Instead, it cannot be imposed when it would chill desirable activities.<sup>89</sup>

A strict approach regarding the application of the doctrine of essential facilities is also embraced by the US Supreme Court. In the *Trinko* case, *Verizon*, the owner of a telephone network operator, which under the US Telecommunication Act of 1996 is obliged to share its network with competitors, refused to grant its competitors the access to its operation support system. This facility is necessary to enable competitors to fill the orders of their customers. A complainant alleged that the denial of negation of access to operation support system infringed section 2 of the Sherman Act.<sup>90</sup> The Court pointed out that the doctrine of essential facilities could be invoked only when access to infrastructure is unavailable.<sup>91</sup> The Court acknowledged that the firm which has built an infrastructure enjoys some advantages over its rivals. The decision to compel this firm to share its facility and advantages with its competitors contradicts the underlying purpose of antitrust law. More precisely, the risk is that such a decision “may lessen the incentive for the monopolist, the rival or both to invest in those economically beneficial activities”.<sup>92</sup> As made it clear by the Court, a monopolist violates the Sherman Act if its monopoly power is accompanied by an anti-competitive conduct. In *Aspen* this further element was found in the fact that the monopolist decided to terminate an agreement to supply at its own retail price.<sup>93</sup> This indicates an anti-competitive intent of the monopolist, which is ready to accept a loss of profits in the short-term period in order to be able to charge higher monopoly prices in the long-term. But in *Verizon*, unlike in *Aspen*, the service requested by the plaintiff were not otherwise marketed or available to the public; furthermore, the refusal of *Verizon* to interconnect at the statutory cost-based of compensation is uninformative about whether this firm is pursuing a monopolisation strategy. Since the facts

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<sup>87</sup> C-418/01, above n 85. For a comment on the case see Christopher Strothers, 'IMS Health and Its Implication for Compulsory Licensing in Europe', [2004] *European Intellectual Property Review* 467.

<sup>88</sup> P Areeda, 'Essential Facilities: An Epithet in Need of Limiting Principles', (1989) 58 *Antitrust Law Journal* 843, at 851.

<sup>89</sup> *Ibid*, 852

<sup>90</sup> *Verizon Communications v. Law Offices of Curtis Trinko, LLP*, 157 L.Ed. 2d 823 (2004).

<sup>91</sup> *Ibid*, 881.

<sup>92</sup> *Ibid*, 879.

<sup>93</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 86 L.Ed.2d 467 (1985).

of *Verizon* do not fit within the *Aspen* ruling the Court concludes that the conduct of *Verizon* is not in breach of the Sherman Act.<sup>94</sup>

In *Trinko* the dilemma between the promotion of competition with granting new operators access to the incumbents' infrastructure and the protection of the proprietary interests of monopolists was resolved unlike *GVG/FS*, in favour of the latter. The theoretical foundations of the position of the US Supreme Court can be found in the work of Schumpeter, who claims that monopoly power promotes competition, investment, innovation and economic growth.<sup>95</sup> The obligation imposed on a monopolist to rent out its facilities to competitors, as suggested by the US Supreme Court, may have negative effects on competition: it may reduce the incentives of incumbents and new operators to invest in economically profitable facilities. Therefore the US Supreme Court calls for cautious approach regarding the illegality of the refusal of a monopolist to deal with competitors. This refusal is prohibited by section 2 of Sherman Act only when the existence of a further voluntary anti-competitive conduct is proved as in *Aspen*.<sup>96</sup> The US Supreme Court has also minimised the relevance of the doctrine of essential facilities by observing that the doctrine has been so far developed and applied only by lower courts and that, in any event, the doctrine should not apply when access is already ensured by regulation.<sup>97</sup>

*b) The problems associated with the qualification of locomotives as essential facilities*

In an opinion on the regionalisation of local rail transport services given in its capacity as advisor to the Italian Parliament, the Italian Competition Authority did not subscribe to the Commission's extensive interpretation of the doctrine. Facing the question whether locomotives should be qualified as essential facilities, the Authority has recognised that locomotives are necessary for the provision of regional rail transport services and cannot be easily found on the market. However, since locomotives can be duplicable at reasonable costs, they do not meet the first limb of essentiality test. Moreover, the Authority considered which consequences the qualification of locomotives as essential facility would have on competition in rail transport market. Firstly, such a qualification would place on the incumbent rail operator the duty to provide traction to its competitors with the likely result that new competitors might carry out free ride practices. Secondly, new operators would be compelled to follow the choices made by incumbents regarding locomotives without developing their own classes of engine powers. All these negative likely consequences should therefore counsel against the qualification of locomotives as essential facilities.<sup>98</sup>

<sup>94</sup> *Verizon*, above n 90, at 880. For a comment on the case, see Eleanor Fox, 'Is There Life in *Aspen* After *Trinko*? The Silent Revolution of Section 2 of the Sherman Act. (2005) 73 *Antitrust Law Journal*, at 153.

<sup>95</sup> R Van Den Bergh and P Camesasca, *European Competition Law and Economics - A Comparative Perspective*, (Intersentia-Hart Antwerpen -Groningen-Oxford, 2001) at 36.

<sup>96</sup> N Petit, 'Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US Supreme Court Ruling in *Trinko*', (2003/2004) 6 *Utilities Law Review* 185, at 187.

<sup>97</sup> D Gérardin, 'Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court's Judgement in *Trinko* in the Wake of *Microsoft*, *IMS* and *Deutsche Telekom*?', [2004] *Common Market Law Review* 1519, at 1523.

<sup>98</sup> Segnalazione AS 262 of 8 July 2003, 'Reperimento del Materiale Rotabile Ferroviario Necessario per l'Espletamento delle Gare di Aggiudicazione dei Servizi Ferroviari di Competenza Regionale', ex Art 21 L.287/1990 <[www.agcm.it](http://www.agcm.it)>

Some legal scholars distinguish the obligation to grant access to rail network from the obligation to share locomotives with competitors. Whereas the former is now commonly accepted, it is less certain whether the latter can be justified upon the basis of Article 82 of the EC Treaty. The obligation to share locomotives with competitors would place serious constraints on the operative capacity of national railway undertakings. These would be forced to make all the assets that are normally required to carry out rail transport services available to their competitors.<sup>99</sup> Critical views are also endorsed by professional organisations. The Community of European Railways expressed its disfavour against the obligation of national railways undertakings to provide traction to new entrants. Such an obligation is likely to influence technical and economical aspects of rail industry, which may ultimately adversely affect competition.<sup>100</sup>

In sum, major fear in the aftermath of *GVG/FS* is that national railways undertakings may be discouraged from committing financial resources to the development of new locomotives classes. The technical characteristics of locomotives, such as reliability, traction effort, maximum speed, are all competitive factors on which train operators rely in order to attract and keep customers. Thus, why should national railway undertakings be still willing to invest for the development of locomotives if competitors are entitled to exploit the fruit of their efforts? Equally, *GVG/FS* does not give new operators strong incentives to set up their own pool of locomotives. Why should they worry about developing their own locomotive classes when they could opt for the more comfortable option to rent locomotives from incumbents?

As explained above, the application of the doctrine of essential facilities implies the balancing of preservation of competition with protection of proprietary interests. In *GVG/FS* the Commission has reshaped the pattern of such balancing exercise in a manner that is more attentive to the interests of new competitors. But, this contravenes what Advocate General Jacobs said in *Bronner* where he emphasized that while assessing the different interests at stake it is necessary to bear in mind that the goal of Article 82 of the EC Treaty is to protect competition rather than competitors.

The Commission claims that *GVG/FS* will have a pro-competitive effect on rail industry. The obligation of national railway undertakings to share their railway infrastructure and locomotives with competitors will lower the entry barriers to the rail transport market. Accordingly, more operators will be able to enter the market, which will enhance the consumers' welfare, at least in the short run. But in the medium and long term *GVG/FS* is likely to have anti-competitive effects. The award of an extensive right of access to essential facilities, instead of promoting competition, may stiffen the technological progress in the field of rail

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(visited 2 October 2006).

<sup>99</sup>Idot, above n 1, at 320.

<sup>100</sup>Community of European Railways, Position on Passenger Liberalization <[http://www.cer.be/files/Passenger\\_Liberal-111838A.pdf](http://www.cer.be/files/Passenger_Liberal-111838A.pdf)> (visited 2 October 2006).

transport. The resulting scenario leading to the decrease in the quality of products and in incentives to innovation is so less favourable than that envisaged by the Commission.<sup>101</sup>

The drawbacks springing from a broad application of the doctrine of essential facilities are of such magnitude to set off the expected benefits. Solutions other than the doctrine should be therefore explored in order to ensure a level playing field for every rail operator as for access to traction. In this regard it may be noteworthy to underscore that in the aviation sector airlines normally do not resort to the doctrine of essential facilities in order to obtain the planes they need to operate their routes. Indeed, they can easily find the planes for sale or lease on the well-developed second hand market.

To a certain extent, the United Kingdom has embraced this contractual approach in the rail sector. With the 1993 Railway Act it separated the ownership of rolling stocks from the operation of rail passenger transport. The ownership of rolling stocks is given to a particular category of firms, the rolling stocks companies. These companies compete with each other in order to supply the train operator companies through leasing agreements. The great advantage ensured by this model is to keep initial costs for new entrants low.<sup>102</sup> However, as emerges from the recent Railway Packages, the EC seems to favour different approaches.

## 6. RECENT DEVELOPMENTS

While *GVG/FS* was debated before the Commission, the EC was pondering on how to further open the rail industry to competition. In 2001 it gave birth to the First Railway Package which includes Directives 2001/12<sup>103</sup>, 2001/13<sup>104</sup> and 2001/14.<sup>105</sup> The First Package introduced further market liberalisation and the reshuffling of the regulatory framework in a more sympathetic manner towards the needs of new train operators.<sup>106</sup>

Directive 2001/12 EC lays down a timetable for the gradual opening of international rail freight services to competition, while international passenger services are still regulated by Directive 91/440 EC. Starting from 15 March 2003 railway undertakings are granted the right of access to particular sections of the Trans-European Rail Freight Network identified by the annexes to the directive.<sup>107</sup> When the transitory period is

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<sup>101</sup> Capobianco, above n 35, at 559

<sup>102</sup> Affuso, above n 2, at 101.

<sup>103</sup> Directive 2001/12 EC amending Directive 91/440 EC [2001] OJ L75/ 1.

<sup>104</sup> Directive 2001/13 EC amending Directive 95/118 EC [2001] OJ L75/26.

<sup>105</sup> Directive 2001/14 EC on the allocation of railway infrastructure capacity and the levying of charges for use of railway infrastructure and safety certification [2001] OJ L 75/29.

<sup>106</sup> Maier, above n 12, at 4.

<sup>107</sup> The Trans-European Rail Freight Network is defined by Article 10 (a) of the Directive 91/440 EC, as amended by the Directive 2001/12 EC and by Annex 1 to the Directive 2001/12 EC. About 50,000 km will be initially subject to the open access regime. Commission Press Release IP/02/18, *Revitalising the Railways: The Commission Makes Proposals to Speed Up Establishment of an Integrated Railways Area*, *Establishment of an Integrated Railway Area*, (23 January

expired the complete liberalization of cross-border freight services across the EC will be achieved and railway undertakings will have the right to access to the whole network.<sup>108</sup> The First Railway Package also improves and strengthens the regulatory framework for the allocation of railway infrastructure capacity. Article 14 of the Directive 2001/14 EC confirms the principle that the infrastructure manager is required to allocate the infrastructure capacity on a fair and non-discriminatory basis and in accordance with Community Law.<sup>109</sup> The Directive 2001/14 EC also introduces the concept of a regulatory body with the aim of drawing a clear separation between the decision-making functions regarding capacity allocation and operation rail services. This body must be “independent in its legal form, organization and decision-making from railway undertakings”.<sup>110</sup> It is also entrusted with the task to protect rail operators from any anti-competitive behaviour that might discourage the entry of new competitors in the rail market.<sup>111</sup> In order to improve the transparency of the allocative function, the directive imposes on the manager of the railway infrastructure the duty to publish a network statement document. This document indicates the elements of the infrastructure to which rail operators have access, the procedures for the allocation of capacity and the access fees.<sup>112</sup>

Successively the Commission has proposed the Second Railway Package, whose objective is to revert the continuous decline of the rail industry by providing an efficient regulatory framework, capable to attract the necessary investments to revitalize the rail transport business.<sup>113</sup> The Second Package includes the Directive 2004/50 EC, which extended and increases interoperability between the national rail systems of Member States,<sup>114</sup> the Directive 2004/49 EC for the harmonization of safety standards,<sup>115</sup> the Directive 2004/51 EC,<sup>116</sup> and EC Regulation 881/2004 that creates the European Rail Agency. This body is entrusted with promotional and advisory functions in the field of interoperability and rail safety; it coordinates the groups of experts seeking common solutions on safety and interoperability and cooperates with the Commission and Member States towards the development of a common set of rules, which will be the cornerstone of the future common railway area.<sup>117</sup>

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2002)

<<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/118&format=HTML&aged=0&language=EN&guiLanguage=en>> (visited 2 October 2006).

<sup>108</sup> Article 10.3 of the Directive 91/440 EC, as amended by the Directive 2001/12 EC. See also the COM (2002) 25 final of 23 January 2002, for the anticipation of the end of the transitory period.

<sup>109</sup> Article 14.1 of the Directive 2001/14 EC.

<sup>110</sup> Article 14.2 of the Directive 2001/14 EC.

<sup>111</sup> I Scherp, ‘The New Framework for Access to the Railway Infrastructure in the EU’, <<http://www.europa.eu.int/comm/transport/rail/overview/doc/ri-10js-en.pdf>> (visited 2 October 2006).

<sup>112</sup> Article 3 of the Directive 2001/14 EC. The function of the document is similar to the obligation to disclosure of the information that *G/G/FS* imposes on dominant firms.

<sup>113</sup> O Silla, ‘Le second paquet ferroviaire: Vers une régulation européenne des chemins de fer’, [2002] *Revue de Marche Commun et de l’Union Européenne* 516, at 517.

<sup>114</sup> Directive 2004/50 EC amending Directive 96/48 and Directive 2001/16 which have already regulated interoperability with regards respectively to conventional rail network and high-speed lines, [2004] OJ L164/114.

<sup>115</sup> Directive 2004/49 EC amending Directive 95/48 and Directive 2001/14, [2004] OJ L164/44.

<sup>116</sup> Directive 2004/51 EC amending Directive 91/440 [2004] OJ L164/164.

<sup>117</sup> Regulation No. 881/2004 of the European Parliament and Council Establishing a European Railway Agency, [2004] OJ L164/1.

The latest attempt of the Commission to modernise the rail industry is the Third Railway Package. The Commission fears that the increasing competitive pressure exerted by low-cost airlines on international passengers rail services may seriously affect the commercial viability of rail industry. Therefore it advocates the complete liberalization of international rail passenger transport since January 2010 in order to strengthen the competitiveness of rail transport.<sup>118</sup> Since this date on, a railway undertaking with the required licence and safety certificate should be entitled to provide cross-borders services across the EU. The Commission is also committed to ensure realistic economic conditions under which railway undertakings can offer commercial services. Railways undertakings should be allowed to pick up and set down passengers at any stations on international routes, even on those stations located in the same Member State.<sup>119</sup> The Third Railway Package, as it stands now, innovates the legal framework for rail passenger transport shaped by the Directive 91/440 EC on two important aspects. First it abolishes the international grouping requirement that constitutes a significant obstacle to the launch of new international rail services. Secondly, it removes any distinction between the right of access and the right of transit. So, a rail operator, admitted to the open access regime, will be able to operate commercial services to and from any point along an international route without any restriction.<sup>120</sup> The Third Railway Package also contains some measures regarding the certification of locomotives drivers.<sup>121</sup> The Commission through the harmonization of skills and training requirements intends to promote a system for the mutual recognition of certification of locomotives drivers. This regime should render less problematic for new operators hiring necessary qualified locomotives drivers, which is another barrier to the entry of new operators identified by *GVG/FS*.

Finally, it is worth bearing in mind the newest technological developments in rail industry which may facilitate the entry of new operators in the market. Rolling stocks manufacturers are now capable of offering locomotives equipped with multiple technology that are able to work under the different voltages of national

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<sup>118</sup> The European Parliament, instead, has asked to open up international passenger services to competition by January 2008 and to liberalise national passenger services by January 2012. European Parliament Press Services, Community Railways, <[http://www.europarl.europa.eu/news/expert/infopress\\_page/062-672-269-09-39-910-20050921IPR00565-26-09-2005-2005-true/default\\_en.htm](http://www.europarl.europa.eu/news/expert/infopress_page/062-672-269-09-39-910-20050921IPR00565-26-09-2005-2005-true/default_en.htm)> (visited 2 October 2006).

<sup>119</sup>For a complete overview on the third railway package see Communication from the Commission, *Further Integration of the European Rail System Third Railway Package*, <<http://www.europa.eu.int/comm/transport/rail/package2003/doc/com140-en.pdf>> (visited 2 October 2006).

<sup>120</sup> See, Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 91/440 on the Development of the Community's Railways, Brussels 3 March 2004, COM (2004) 139, <<http://www.europa.eu.int/comm/transport/rail/package2003/doc/com139-en.pdf>> (visited 2 October 2006). The above proposal has been also agreed by the Council of Ministers, European Commission, Press Release, Préparation du Conseil Transport of 5 December 2005, Memo 05/464 (2 December 2005) <<http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/464&format=HTML&aged=0&language=FR&guiLanguage=en>> (visited 2 October 2006).

<sup>121</sup> Directive of the European Parliament and of the Council on the Certification of Train Crews Operating Locomotives and Trains on the Community's Rail Network, Brussels, 3 March 2004, COM (2004) 142 final <<http://www.europa.eu.int/comm/transport/rail/package2003/doc/com142-en.pdf>> (visited 2 March 2006). See also European Commission, Directorate General for Energy and Transport, *Le troisième Paquet Ferroviaire: Une nouvelle étape de l'intégration du système ferroviaire européen* <<http://www.europa.eu.int/comm/transport/rail/package2003/doc/memo-fr.pdf>> (visited 2 October 2006).

rail networks.<sup>122</sup> These multi-voltage locomotives are an alternative source of traction to the pool of engine powers owned by national railway undertakings. The proposals advanced by the Commission, together with the technological developments in the area of traction, are expected to bring about remarkable consequences in the market for rail traction. The increasing technical harmonisation and the availability of multiple locomotives should boost the activities of companies that lease out rolling stocks. It will be more profitable for leasing companies to establish a fleet of locomotives, capable of working in the different national rail system of the EC and rent them to train operators.<sup>123</sup> New entrants should welcome such developments which should alleviate the difficulties they may encounter while seeking for suitable traction services. More specifically, leasing companies will release new operators from the risk of being at the mercy of national railways undertakings regarding to the conditions of access to traction. In sum, the role of the doctrine of essential facilities should be re-considered. New operators seeking for traction services will resort to the market for leasing out traction services and negotiate the most convenient solution for their needs instead of invoking the doctrine.<sup>124</sup>

## 7. CONCLUSION

*GVG/FS* dealt a serious blow to the dominant position enjoyed by national railway undertakings. The outlook of the rail transport sector before the *GVG/FS* decision was quite gloomy: the continuous hesitancy of Member States regarding to the implementation of the Directive 91/440 EC; the steadfast decline of rail transport compared with the other modes of transport; the never ending talks on which measures should be taken in pursuance of the goal to modernize rail industry. All these elements contributed to weaken the future perspectives of rail industry. As an attempt to revert such a discouraging scenario, the Commission decides to take a resolute stance towards all the impediments that obstacles the creation of a genuine EC-wide rail transport market. It is with such an objective in mind that the Commission decided the *GVG/FS* case and placed two limitations on the commercial freedom of national railway undertakings. On the one side, they are requested to grant potential competitors access to their railway infrastructure. On the other side, they have to share their locomotives to new operators. It is the second obligation that has attracted the harshest critical remarks. By imposing the obligation to rent locomotives on the incumbent rail operator, the Commission intended to trigger a virtuous circle leading to the creation of the market for rail traction. Such a market should work as the forum in which rail operators can fulfil its traction requirements on not discriminatory basis. However commendable its efforts are, it seems that in *GVG/FS* the Commission has taken a *faux pas*. The obligation at issue, instead of promoting competition, might bring about in the medium and long run anti-competitive effects. In fact, it is likely to have a chilling effect on the technological

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<sup>122</sup> For an insight into the multiple traction technology see [www.siemens.com](http://www.siemens.com), [www.alstom.com](http://www.alstom.com) and [www.bombardier.com](http://www.bombardier.com). For example, class E.402B of FS can equally work on the Italian and French rails.

<sup>123</sup> As an example of the services offered by leasing companies, see [www.dispolok.com](http://www.dispolok.com). Dispolok offers an all-inclusive package including rent of locomotives, maintenance services and regulatory approval.

<sup>124</sup> Community of European Railways position, above n 95.

progress in the field of rail traction and it might also encourage new operators to carry out free ride behaviours.

While *GVG/FS* was debated before the Commission a plethora of legal, commercial and technical developments occurred. Firstly, the advancements in the field of multiple rail traction technology have favoured firms which lease out locomotives. These firms may place competitive pressure on national railway undertakings and challenge their dominant position in the market for the provision of rail traction services. The ultimate result is that new operators can obtain traction via leasing arrangements with the above firms, instead on exclusively relying on the doctrine of essential facilities.<sup>125</sup> Secondly, one of the expected outcome of the harmonization plans pursued by the EC Railway Packages is the establishment of a system for the mutual recognition of certification of locomotives classes and of driving licences of locomotives drivers. This should facilitate the task of new operators to find the necessary traction on the market without the constraint to have to resort to national railway undertakings.

It is therefore possible to hypothesize that the application of the doctrine of essential facilities as a tool to ensure not discriminatory access to traction has a restricted time-horizon. The doctrine may play a relevant role at the initial stages of the liberalization of rail transport at least until the point of the complete implementation of the Railway Packages. But from this moment on, the contractual approach of leasing agreements should be preferred to the regulatory approach epitomized by the doctrine.

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<sup>125</sup> The possibility of rail operator to obtain rail traction services through contractual arrangements was already hinted by the Court of First Instance in the ENS judgment. See above at para 4.1.