Effect of fair trading laws on the commercialization of data held by the public sector

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a. Commercial secrecy in common law countries

Outside the statutory monopolies, there is little use of the criminal law to protect commercial information in common law countries. The law in both England and Ireland is that information cannot be stolen. [14] An action for breach of confidence is a civil action. The basic requirements are that the information concerned be of a confidential nature (that is, not generally known); that the information be communicated under an express or implied obligation of confidentiality; and that there has been or is likely to be a breach of that obligation of confidentiality by someone who knows or should know of the obligation. The judicial remedies are injunction to prevent a breach, damages after a breach, and an accounting for profits after a breach.

b. Commercial secrecy in civil law countries

Commercial secrecy apart from the statutory monopolies in civil law countries seems to be almost entirely a matter of criminal law. Belgium provides a criminal offence of disclosing an industrial secret of an employer or former employer. [15] The civil code on unfair competition establishes a civil action in unfair competition concerning industrial and commercial secrets. French law protects industrial secrets in the criminal law. [16] The German Criminal Code makes it an offence for anyone who has been formally obliged to keep secrecy to breach the obligation. [17] The Italian Penal Code makes it an offence to disclose scientific or industrial secrets in breach of confidence for unfair advantage. [18] The Italian Civil Code also imposes an obligation on employees not to disclose information to their employer's detriment, [19] and a further obligation not to use information for unfair competition. [20] Luxembourg has a general criminal offence of disclosing commercial secrets for purposes of causing competitive harm. [21] Article 273 of the Dutch penal code protects secrets relating to a commercial or industrial undertaking.

14 *Oxford* v. *Moss* (1978) Cr. Law Rep.
15 Article 309 Penal Code.
16 Article 418 Penal Code.
17 s. 353b StGB.
18 Art. 623 Codice Penale.
19 Art 2105 Codice Civile.
20 Art 2598 Codice Civile.
21 s, 309, Code Penal et Code d'Instruction Criminelle.

Effect of Fair Trading Laws on the Commercialization of Data Held by the Public Sector

C. de Terwangne

The commercialization of its information resources leads the public sector to intervene in an information market which the private sector most likely already plays a role in. The government is a major producer of information. It is also a privileged and essential one, given the frequently obligatory character attached to its data collection and the exclusivity of the resources in its possession. Its entry into the open market may either derive from its own initiative or be imposed upon it within the context of its public service mission.

The public sector's presence on the open market takes different forms, ranging from government offices (such as the Ministry of economic affairs or the National Institute of Statistics), public institutions charged with a particular mission to disseminate information of general interest to the public (the national Bank is an example), State-owned companies (*Belgacom, France T l com, Deutsche Bundespost*, among whose functions is the distribution of a telephone directory), through to partnerships between a government office and a private company (the commercialization of the Dutch Motor Vehicle Register via the intermediary of the *RAI Data Centrum*, a private company, or the creation, by the Italian Chambers of Commerce, of the private company *CERVED* charged with setting up an automated register of companies, or the association of a German Chamber of Commerce with a private company offering an information research service, ...).

The rules of the game that define and organize relations between the various actors on the market are equally varied. The prerogatives associated with the exploitation of a dominant position, or the interplay of free and fair competition, such different regimes are justified by the existence or non-existence of a public service mission to inform.

I - TO WHAT DEGREE MAY THE PUBLIC SECTOR INTERVENE ON THE OPEN MARKET AS A COMMERCIAL OPERATOR ?

The majority of States currently permit the presence of the public sector on the open market. If this presence was only authorized in a restricted context originally, today it tends more and more to overflow the strict boundaries of the pursuit of public interest to which it was, in the past, limited.

As to the question of the extent of the public sector's participation in the development of an information market, two opposing conceptions arise.

— The first, enunciated in the Commission of the European Communities' *8th Guideline for improving the synergy between the public and private sectors in the information market*, indicates a liberal philosophy coupled with a prudent

vision of the role of the State. This conception includes offering privileged status to a private sector intermediary while confining the intervention of the public sector to those situations that demonstrate a private sector deficiency. The *8th Guideline* is quite explicit in this regard, when it says that

> 'before establishing a new electronic information service or continuing an existing one, public administrations should consider whether an existing private sector service can be used or adapted to meet their requirements'.

This conception is inspired by the policy practised during the eighties in the United States in conformity with the directives contained in the Circular A-130 issued by the Office of Management and Budget, particularly :

> 'Agencies shall (...) (9) disseminate such information products and services as are (a) specifically required by law, or (b) necessary for the proper performance of agency functions, provided that the latter do not duplicate similar products or services that are or would otherwise be provided by other government or private sector organizations; (...) (11) disseminate such government information products and services : (...) (b) in the manner most cost effective for the government, including placing maximum feasible reliance on the private sector for the dissemination of the products or services.'.

In recent years, American policy has changed and the government is today guided by a totally different current more allied to the second conception, dealt with below.

The example of the *INSEE*, the French National Institute of Statistics and Economic Studies, illustrates this philosophy of role-sharing in the marketplace. The Institute disposes of resources, both technical and human, and of such experience in the field as to confer upon it a *de facto* monopoly (without going into the legal obligation deriving from the definition of its public service mission) by virtue of the sheer extent of its research and enquiries for the numerous statistical studies on the French society and the French economy that it has undertaken. The costs involved in such a broad census of the population could not be assumed by a private company, still less by several private companies in competition. On the other hand, these studies, used either by the government or by local authorities, represent a collective utility which can justifiably be financed out of taxes. The commercial exploitation of the results of these diverse statistical studies is made on the basis of the diffusion by *INSEE* of a certain number of standardized products. *INSEE* does not consider that designing a study concept to suit a client forms part of its mission (although the possibility is left open for exceptional cases). The limit imposed by the *INSEE* on the commercialization of its products is twofold : the information concerned must be of interest to the public or a particular community, and the cost of establishing such an information product must be high, that is to say, it must be unsuitable for exploitation by the private sector. Commercialization outside these parameters is not entirely excluded, but would be more selective.

This tendency arouses entirely different reactions.

On one hand, care must be taken to see that the possible right of access of all citizens to information held by the public sector, a right established under general

or specific laws, be not endangered by private sector appropriation of that information. Private sector agents having control of public files may not inhibit public access where such access is legally guaranteed.

On the other hand, the public sector is itself interested in profiting from the resources it holds. In France, with regard to the example of the *INSEE* given here, certain voices have been heard raised on behalf of private sector suppliers of information services, denouncing the *INSEE*'s attitude as tending to over commercialize itself. One factor can be regarded here as incentive : budgetary restrictions imposed on the public sector. The production of information involves high costs. Consequently the public sector endeavours to draw revenue from this activity and to profit from the market thus opened by organizing at least a partial return on the investments it has made.

Finally, this first conception of the opportunity to be gained by entering the open information market can also present a danger to the free and fair development of competition. If already existing private structures — which the government is invited to entrust with the commercialization of its information — are limited, or if a single private service satisfies the requirements, this tends to grant exclusivity or quasi-exclusivity for commercialization to a single private company or small minority of the same.

— The second conception, the very opposite of that which we have just described, accords complete freedom to the public sector to commercialize its information products, but on the condition that this is done on an equal footing with the private sector.

Such a commercialization policy imposes a strict distinction between public service (with a prerogative regime) (II) and any competitive activity (under conditions of equality) (III) pursued by the government concerned.

II - PUBLIC INFORMATION SERVICES

A. Definition and Organization of Public Information Services

The public sector is required to diffuse the information it has gathered in certain areas of activity. This is understood in terms of making a public service available (commercial registers open to everyone, distribution by clerks of the courts of judicial decisions, placing electoral lists at the disposal of the public, ...). Within the framework of legislations to regulate the right of public access to administrative information, these texts are seen as conferring upon civil services a general mission to inform the public. The object of that mission, far from limiting itself to the minimal obligation of enabling documents to be consulted on site, consists rather more in the duty of assuring general access to governmental information products. This implies that, even if such access can be assured by the consultation of document originals on paper, it should be available through telematic means in all situations where such means have been set up to serve the needs of the administration concerned. [1] Furthermore, this access bears upon the

1 s.Y.POULLET, The Commercialization of Data held by the Public Sector, Legitimacy and

administration's information products and not merely on the raw data.

To accomplish its public service mission, an administrative department may arm itself with prerogatives, justified by the concern to permit general access to the information products released by the public sector and to guarantee the quality of the data furnished by them.

Such a regime, lying as it does outside the scope of common laws of fair trade, finds its justification in paragraph 2 of article 90 of the EEC Treaty. According to this disposition, once a proposed information service can be described as serving the *general economic interest*, the authorities charged with managing such a service are no longer required to respect Community rulings on fair trade where these pose a legal or *de facto* barrier to the accomplishment of their mission.

At this point we might pause to reflect on the recent legislative and judicial definition of the theory of 'obligatory licences'. This theory stands at the cross-roads of intellectual copyright laws and the laws of fair trade with regard to the implications it has for the information market. Mention should be made of it here, even if the discussion it merits must be reserved for the chapter of this study that specifically concerns copyright.

Under the terms of article 8 of the draft Directive on the legal protection of data bases, [2] it is obligatory to grant exploitation licences in all cases where the information contained in a data base accessible to the general public is not available elsewhere. This arrangement was first addressed directly to those authorities who disseminate information within the framework of a legal obligation. It was aimed essentially at cases of commercialization of data products deriving from a public service. [3] In the second version of the draft Directive, the system of 'obligatory licences' applies not only to public authorities, but also to private entities benefiting from a legal or *de facto* monopolistic position.

B. A Narrow Determination of Markets

It is advisable to reveal one characteristic of the application of the laws of fair trade to the information market. The latter takes the form of a collection of particularly strictly defined markets (a market for every category of information, an information market to respond to a particular public need, ...). This leads in turn to a restrained circumscription of the scope of the derogatory ruling justified by the public service mission, which in parallel leads to the identification of such markets as are beyond the range of such a ruling. The French example in the case of meteorology perfectly illustrates the situation. The French *Conseil de la Concurrence* (Fair Trade

conditions, 'Computer Law and Security Report', 1993, vol. 9, n°5, pp. 227 ff. Contrary to the argument of Mr. Gaudrat (Ph. GAUDRAT, 'Commercialisation des données publiques', Paris, La Documentation Française, 1992), consultation by telematic means does not run more counter to the principle of equality than consultation on site. Some people have access to a Minitel module at home, others do not. A flagrant difference exists similarly, in the case of on site consultation, between those who live close to the central authority and those much farther afield, a diffence measurable in terms of both time and expense. Respect for the principle of equality implies that access to technical means necessary for the exercising of a right be made equally available to all.

2 J.O.C.E., n° C 156, 23 June 1992, p. 4.

3 We shall see that European jurisprudence has applied the theory of obligatory licences to information services which go beyond public service (see below).

Council) was recently occupied with an affair involving the *Direction de la M t orologie Nationale* (*D.M.N.*). [4] This latter had developed two information services : one, a commercial exploitation of its data in the form of a telephone service offering meteorological information to the general public, the other, a service of aerial navigation information destined for the airline companies. In the market of meteorological information by telephone, the *D.M.N.* enjoyed a dominant position. The *Soci t du Journal T l phon* (publisher of the phone directory), a private company wishing to create a rival service, asked the *D.M.N.* for permission to use their coded aeronautical messages. The government was opposed to this demand and refused it, a refusal viewed as legitimate by the *Conseil de la Concurrence* on the grounds of security connected to certain international State obligations (aeronautical information is reserved by international conventions for aircraft operators). In retrospect, the refusal would not have been justified had it been a matter of providing information of a general meteorological nature. This would have represented an abuse by the *D.M.N.* of its dominant position, depriving a competitor, directly or indirectly, of all sources of meteorological information that would enable him to stay in business.

Two markets were therefore identified in this affair, liable to two different rulings. In the first, the dominant position of a government institution was found to be justified, while in the second the administration would have been constrained to supply data for commercialization to the private sector, even if the latter had thereby become a direct competitor.

C. Conditions of Offer in Public Information Services

An analogy with the rules of the Open Network Provision (ONP) defined by the European Community within the framework of the public telecommunications service, [5] enables us to clarify the conditions of offer in a public information service. These rules concern questions of pricing, publicity, normalization and non-discrimination. [6]

a. Pricing

As far as pricing is concerned, governments must respect the principle of gratuity so often enunciated by national legislations (and principally by the laws of access to administrative documents). This principle does not mean that the entire cost of making such an information service available to the public must be assumed by the government. The authorities are authorized to charge *a costs-based price*. In the case of a minimal information service, the costs that could be charged to the person who wishes to consult a document, would be those of reproduction of the document

4 Décision n° 92-D-35 du Conseil de la Concurrence, 13 mai 1992, relative à une saisine de la Société du Journal télévisé à l'encontre de la Direction de la Météorologie Nationale, B.O.C.C.R.F., 6 juillet 1992, p. 224.

5 Particularly the Council Directive n° 90/387 CEE from the 28 June 1990 relative to the establishment of an interior market in telecommunication services through the setting-up of an open telecommunications network, J.O.C.E., L 192/1 24 July 1990, p. 1.

6 Y. POULLET, *op.cit.*

concerned and a standard charge for the research necessary to locate it. On the other hand, once the public service carries an enhanced value designed either to assure its availability to everyone (such as the setting-up of a service centre, the renting of lines, the establishment of public terminals), or to improve a data product that was first designed strictly to serve the needs of the administrative department (such as the addition of an expert system with a view to aiding understanding of the information provided), then the costs to be taken into account when establishing rates for increased access may include supplementary charges designed to cover any extra administrative costs.

Such a tariff policy assumes that, in any case, all charges involved in the collecting and elaboration of the product, which are necessary to fulfil the internal needs of the department concerned, should be covered only by the latter and should in no wise be reflected in the price charged to external users of the service. This corresponds to the policy recommended by the *4th Guideline*, which stipulates that

> 'a price should be established which reflects the costs of preparing and passing (the information) to the private sector, but which does not necessarily include the full cost of collecting and handling (the information) in the course of routine administration'.

A differentiation in the rates of charges may occur. Certain governments may choose to distinguish between the final user and the commercial user who intends to exploit the information for profit. Such is the case with the *INSEE* in France [7] and the operators of legal data bases in Italy. However, tariff principles are currently undergoing review and this distinction may well be abandoned in future, even though it may seem legitimate to make the person who intends to commercially re-use the information pay more (notably by charging a royalty for each use of the data). In any event, it is difficult at the outset to monitor the personal or commercial finalities of private sector use.

b. Publicity and non-discrimination

In order to guarantee the equal footing of companies desirous of using the economic opportunity thus presented to establish commercial services on the basis of government data, the *4th Guideline* invites the public sector to take the necessary publicity steps to inform the private sector of

> 'the availability of basic data and information, and (...) of the procedures by which it can be obtained and used or exploited'.

The principle of publicity is to be understood as a corollary to the principle of non-discrimination. The tariff and user conditions of such an information service must be the subject of a publication in order that they may become generally known to everyone. The choice of method or medium for such publicity is left to the discretion of the public authority concerned, so long as the potential users are

7 See in this respect J.HUET and H. MAISL, 'Droit de l'informatique et des télécomunications', Paris, Litec, 1989, pp. 596 ff.

thereby made aware of the information sources on offer by the government, the characteristics of the products available and the terms of access.

It is equally by applying the principle of non-discrimination that the *5th Guideline* insists that

> 'when public sector information or data is released for exploitation by the private sector, restrictions should not normally be placed on the types of customers (...).'

This accords with the principle of general and equal public access to information enunciated in the laws of access.

In the same way, access to data must not be solely by way of advanced technologies. The information should be equally accessible both for large and small companies. This implies that data be made available to the public in different formats rather than only being accessible by means of top of the line technology such as on-line consultation or the acquisition of CD-Rom. One must observe however, that while it is desirable to give the same chance to all potential operators, the exploitation of information can only be rendered viable and feasible when the data is available on electronic support media.

c. Normalization

The conditions of use for information services may be 'normalized'. Normalization here is not only technical — a description of conditions for interconnecting with the broker centre, for example — but equally organizational — fixing the opening times of offices, ...

D. Tendering of a Public Information Service by a Third Party

The case envisaged here is when public authorities have recourse to a private operator or create a subsidiary, either with or without external capital, to assure that the information service is made available to the general public. Examples are not lacking and are largely explained by the desire of the government to take advantage of specialized abilities that cannot be found internally, or to move the financing of certain activities outside the State budget.

a. Selection of partners

If the commercialization of public information services makes use of private enterprise intermediaries, the selection of partners by the public authority must take place in conformity with the regulations governing public service concessions or the assigning of public markets. Thus, some people were upset recently in France by the system under which the national register of stolen cheques was commercialized by the Bank of France. A law passed on 30 December 1991 [8]

8 Law n° 91 - 1382 of 30 December 1991 relative to the security of cheques and credit cards,

places the responsibility of assuring the regularity of a cheque on the Bank of France. Currently the commercialization of this register is restricted to a single private operator, without the latter having passed through the standard procedure of tendering an offer. In reply to a senator's question, the minister responsible affirmed that the decree of application of the law, currently being drawn up, would redefine the parameters for the commercialization of this register [9].

Furthermore, according to the terms of articles 59 *et seq.* of the Treaty of Rome, the public sector may not in any degree discriminate on the basis of the nationality of companies tendering an offer of commercialization.

In cases where more than one private company is chosen to commercialize a service, no privilege and no discriminatory clause may be permitted to restrict or dissolve the equality that must exist between partners within the same category.

Finally, Community law (article 92 §1 of the Treaty of Rome) condemns direct or indirect aid wherewith the State 'falsifies competition to the benefit of certain companies', whether such companies are public or private.

b. Exclusive rights

In principle therefore, no company may benefit from a competitive advantage which is denied to others. However, the public sector has the right to support certain sectors of the economy, which can mean certain companies. A private company could, as a result, find itself holding, by exclusive clause, a monopoly in the diffusion of public information. In any event, the creation of differentiated treatment for companies is only permissible, to adopt the terms of the Court of Appeal of Brussels, [10] if the decision rests on legal and reasonable criteria (such as economic justification). [11] The inroads made on the equality of treatment must be justified either by differences in situation or by reasons of public interest. [12] It was because such criteria were not respected, and notably because the exclusivity of the concession was founded upon no major consideration of public interest, that the monopoly granted by the Belgian ministry of transport to a professional association for the commercialization of the national motor vehicle register has been declared illegal by the Brussels jurisdiction. An administrative court in Germany was called upon to pronounce on the legitimacy of the exclusivity reserved by a competent tribunal for fiscal matters for a professional financial newspaper. This newspaper was alone in being informed of the tribunal's decisions. The court, appealed to by a rival publication, ordered that an end be put to this state of affairs, as it jeopardised the function of the judicial system in its entirety, inasmuch as this functions on the basis of freedom of information, discussion and

J.C.P. 1992, III, 65289.

9 Reply to written question n° 20227, J.O.Sénat (Q), 9 April 1992, 872.

10 Brussels, 17 September 1981, J.T., 1982, p.412, note P. QUERTAINMONT.

11 The judicial instances in Strasbourg have specified the conditions that admit discriminatory practice : provided thatthe destinction has a legitimate goal, that is to say that it can be reasonably and objectively justified, taking into account the goal and the effects of the measure in question; and provided that a reasonabble and proportional relationship exists between the means employed and the end envisaged (E.C.H.R., judgement of 23 July 1968, *certain aspects of the linguistic regulations in Belgian schools case,* 'Yearbook of the European Convention of Human Rights', 1968, p.833 et seq.)

12 P.QUERTAINMONT, note under Brussels, 17 September 1981, J.T., 1982 p.415.

criticism of judicial decisions. The court found that the task of publicizing judicial decisions could well be entrusted to private sector agents, but only on condition that the fundamental constitutional principles of press freedom and equality be respected. [13]

Two French examples illustrate, on the other hand, hypotheses of legitimacy in the granting of monopolies. In one case, a private data service has recently been granted the rights to diffusion of all legal texts, rulings and jurisprudence. Exclusivity is here based on the minimal financial viability of the market and the heavy responsibility of taking in charge the exhaustive distribution of legal texts. In another case, one of the *INSEE*'s first partners, operating a genuine commercial exploitation of census data for marketing purposes (developed on the basis of local data drawn from *INSEE* data), benefited at the outset from an exclusivity clause in the form of a public service concession. Upon expiry however, the contract was not renewed under the same terms. the company in question still works with the *INSEE*, but as one partner among others, since, due to the expansion of the market, exclusivity was no longer seen as justified.

The *6th Guideline* agrees entirely with the position described above. It says that

> 'contracts or other arrangements with private sector data base providers or host services should not grant exclusive rights if they lead to distortion of competition'.

It specifies further that

> 'if, for reasons such as the penetration of a new market or provision of a service in the public interest, an exclusive right is deemed necessary, it should be subject to regular review.'

When a civil service does not take in hand the commercialization of its own data, but refers to a private sector intermediary, the principle of general access to the public instituted by certain legislations justifies the imposition of particulars of sale on the company enjoying exclusive rights. Such specifications would guarantee the respect by private enterprise of the conditions of the concession imposed on its administration (conditions of price, accessibility of even non-viable data, conditions regarding the language in which the information is available ...).

13 OberVerfassungsGericht Bremen, in 'Neue Juristische Wochenschrift' 1989, pp. 926 et seq.

III - SUPPLEMENTARY INFORMATION SERVICES

A. The Position of the Public Sector on the Supplementary Service Market

Beyond the commercialization of basic information services, the government has the right to provide supplementary services. This may however lead to serious problems of competition, given the fact that the activities of the private sector are principally occupied with the provision of such services.

Before setting-up a new electronic information service or operating an already existent one, the *8th Guideline* calls on governments to 'consider whether an existing private sector service can be used or adapted to meet their requirements'. An administrative department wishing to introduce a secondary information service must undertake preliminary investigations to ascertain whether the service could not as well be offered by a private sector operator or whether it may not be desirable that the private sector co-operates in production or distribution. This step may lead to the establishing of partnerships with the private sector, the technique of *joint ventures* developed in particular in the Netherlands. [14]

B. Tendering Conditions for Supplementary Information Services

Since the provision of a supplementary information service does not fall within the area of public service, no privilege can be accorded within this framework to the public sector beyond those accorded to private operators (a). Indeed, the government must take care not to falsify or restrict the free play of competition on the market (b).

a. Public sector on equal footing with private sector

Here again, the analogy with the telecommunications sector seems pertinent. [15] On no account may an administration commercialize supplementary services on the basis of cross-subsidisation, whereby the extension of its activities is financed by the profits resulting from its public service mission. On the other hand, complete equality in conditions of access to the public information service should be observed with regard to the private sector. This means that the government must apply to itself the same pricing regulations and interface norms as are binding on its competitors. [16]

14 C.I.Th. BIERLAAGH, 'Produkten, diensten en distributie van overheidsinformatie : een inventarisatie', in opdracht van de RABIN, Den Haag, 1992, unpublished.

15 s. Y. POULLET, *op.cit.*

16 This conceivably implies, at the very least, the setting-up of profit centres or branches with separate accounting procedures.

b. Limitations of unfair trading practices

The majority of Member States of the European Community explicitly submit the commercial activities of public bodies to the same limitations with regard to unfair trading practices as apply to the private sector. Similarly, restrictive practice and, principally, the abuse of a dominant position are firmly countered.

The matter is equally subject to the essential provisions of the Treaty of Rome. Under the terms of article 90 of the EEC Treaty, no specific regulatory framework that runs counter to the rules of fair trade may be accorded to public sector companies. To the degree that a government intervenes directly as an agent on the information market, it is obliged to observe articles 85 *et seq.* of the Treaty, which condemn practices restrictive to the free exercise of competition, and principally article 86, under which the abuse of a dominant position is forbidden. A dominant position is then considered abusive when it

> 'acts as an obstacle (...) to the maintenance of the current degree of competition in the market or to the development of the same'. [17]

On that basis the London Stock Exchange was lead to review its policy. The L.S.E. regulations required British companies to forward, as a first priority, any information that could effect prices. Only after publication of such information by the L.S.E. companies were permitted to communicate the information to the various press agencies. The London Stock Exchange, taking advantage of its dominant position in the financial information market, had thereby given itself an appreciable advantage as regards access to such information. It thus handicapped any press agency which might choose to set-up a rival service. Following an enquiry and a Department of Trade and Industry report on the facts of the case, the L.S.E. agreed to modify its ruling to permit U.K. companies to simultaneously transmit such price related information to press agencies. [18]

1. Dominant position and obligatory licences

Similarly, a position of market dominance can result in exclusive rights attaching to intellectual property. Here we find once again, in the case of derived services, the theory of *obligatory licences* already encountered within the framework of public data services. This theory found an application in the Magill case, recently submitted to the Court of First Instance of the European Community. [19] The Court, basing its judgement on the interdiction against abuse of a dominant position, condemned the BBC to grant a reproduction licence for its television programme information to the rival Magill company. It considered that to make use of a monopoly deriving from copyright to prevent the diffusion of a new product in a neighbouring market, constituted an abuse of the dominant position resulting from that monopoly.

The European Community Court of Justice has previously argued in terms

17 E.C.J., Case 85/76 *Hoffmann-La Roche*, (1979) E.C.R. 141.

18 Reuters gains from LSE Backdown on Company News, 'Dealing with Technology', 3/22, 8 November 1991, 2.

19 See the full development of this case in the section devoted to copyright.

of the abuse of a dominant position with regard to the exploitation of rights of intellectual property. It has thus established as indefensible the granting of licences for exorbitant rental fees, or the prevention of a third party from providing a service when one is oneself not responding to consumer demand for the service in question. [20]

2. Dominant position and essential facilities

The European Communities Commission has, also on the basis of abuse of a dominant position, introduced the doctrine of *essential facilities* recently developed in the United States. The Commission's decision [21] concerned a dispute between Sealink and a rival company, B&I, regarding a regulation imposed by Sealink on the use of a port belonging to them but used by both rivals. B&I argued that the schedule laid down by Sealink was gravely prejudicial to their business. The Commission agreed and, seeing in the port an example of *essential facilities*, ruled that EEC article 86 imposes that both competitors be permitted access to it under equal conditions.

The doctrine of *essential facilities* is but new-born, but its application to the information market could oblige a government, under threat of falling foul of the laws on abuse of a dominant position, to permit private sector operators access to its information resources, inasmuch as these constitute a sort of *essential facility*. The first criteria for such a judgement would certainly consist in the fact that the information being considered is not available from any other sources. The American courts have already been led to argue in favour of *essential facilities* in cases of litigation concerning access to information carried in telephone directories. It seems, however, that in the American understanding of the term, the data resource concerned must be vital to the competitiveness of the entity making the demand, [22] which is not the case if the information can be obtained elsewhere, no matter at what cost, if the argument is to be carried to the point of forcing the communication of information.

3. Dominant position and neighbouring market

Finally, it is once again through applying EEC article 86 that using one's dominant market position to attempt to dominate a neighbouring market has been judged illegal. [23] A government wishing to extend the position of dominance it has gained, by reason of a legitimate public data service mission, to a market of complementary services, does so in contravention of Community law. This rule, combined with a strict definition of markets, as mentioned above, enables a

20 Case 238/87, *Volvo AB* v. *Eric Veng (UK) Ltd.*, (1988) ECR 6211. See also C-41/90, *Hoeffner & Elsner* v. *Macrotron*, (1992).

21 *Sealink*, 'Commission Press Release' IP (92) 478, June 1992. This ruling is commented by B. AMORY and P. SANDLER, Telephone Directories : the role of competition, 'Droit de la concurrence et services d'information', XIVth annual meeting of the Institute of the CCI, 27th and 28th November 1992, Paris, to be published.

22 *Rural Telephone Service Co, Inc* v. *Feist Publications*, Inc, 957 F.2d 765 (10th Cir 1992).

23 Case C - 18/88, *RTT* v. *GB-INNO SA*, (1991) ECR 5941.

dominant position to be kept within the limits of a restricted market and encourages the development of competition in neighbouring ones.

To conclude, on the basis of EEC article 86, a government may not take advantage of a *de facto* dominant position deriving either from the reality of the situation or connected to certain exclusive and legitimate rights, whether to refuse to grant licences of exploitation, to grant them for exorbitant sums, to refuse the private sector access to its information resources in the event of these not being elsewhere available, or in order to extend its position to a neighbouring market.