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**The Constitutionality and Legality of Telecoms
Forced Access Mechanisms – A Comparative
Study of the EU and Taiwan**

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Abstract

Telecoms industry is a highly specialised industry and there is a general consensus that it requires a specially designed regulatory system. Besides the many technology-oriented regulations, this regulatory system not only integrates many economic theories and concepts taken from competition law, but also features several measures designed *ad hoc* to deal with the character of the industry, such as a natural monopoly, bottlenecks and a public service. A major category of these regulatory measures is forced access mechanisms. "Forced access" in this thesis refers to the forcing open of certain property – mostly telecoms networks and relevant facilities – to be accessed by others, especially other competitors in the market. While these mechanisms do indeed promote competition in the telecoms market and benefit the public, they also limit the fundamental rights of telecoms companies – mostly incumbents – as legal persons, especially concerning their property rights and freedom to conduct a business, and it does not need emphasising further that the protection of fundamental rights is a general principle in the European Union and a constitutional value in modern democratic states. This thesis aims to take three distinct telecoms forced access mechanisms (interconnection, local loop unbundling and separation), with different regulatory intensities, as examples to discuss the possible fundamental rights derogation issues of two targeted jurisdictions – the European Union and Taiwan. There are some substantial reasons for this comparative study. On the one hand, many of the regulatory concepts of the telecoms regulatory framework in the European Union, together with those in the United States, have been adopted by Taiwan; on the other hand, the protection of fundamental rights in the European Union is inspired by the constitutional traditions common to Member States, and the German Basic Law (*Grundgesetz*) plays an important role, while the Taiwanese Constitution and the constitutionality reviews system derive from Germany (continental law) and the United States (common law). The reasoning of Taiwanese constitutional review does not therefore just reflect the fundamental rights protection system but also introduces the constitutionality review system of the United States as a reference.

This thesis starts with an introduction to telecoms forced access mechanisms in the European Union and Taiwan, with a special focus on three selected forced access mechanisms. Then, fundamental rights protection system under the two jurisdictions will be discussed, followed by an in-depth discussion of the concepts of property rights and freedom to conduct a business. This thesis goes on to analyse how to

appraise the three telecoms forced access mechanisms in relation to the fundamental rights protection system and to discuss the reasonableness of such an analysis. The final part of the thesis will, by reviewing the legal frameworks of the two jurisdictions, offer answers to the questions raised in the analysis.

Declaration

I declare that this thesis has been composed by myself. It is my own work and it has not been submitted for any other degree or professional qualification.

You-Hung Lin
June 2016

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Abbreviations

- 3G: The third generation of developments in wireless technology, especially mobile communications.
- 4G: The fourth generation of developments in wireless technology, especially mobile communications.
- ADSL: Asymmetric digital subscriber line.
- BEREC: Body of European Regulators of Electronic Communications.
- BT: British Telecom.
- CATV: Cable television.
- CFR: Charter of Fundamental Rights of the European Union.
- CHT: ChungHwa Telecom.
- DGT: Directorate General of Telecommunications of Taiwan.
- ECHR: European Convention on Human Rights.
- ECtHR: European Court of Human Right.
- EOI: Equivalence of input.
- EOO: Equivalence of output.
- ERG: The European Regulators Group.
- EU: The European Union.
- FCC: Federal Communications Commission of the United States.
- FTC: Fair Trade Commission of Taiwan.
- Fundamental rights: May include fundamental rights and freedoms where applicable.
- GIO: Government Information Office of Taiwan.
- IBC: Infrastructure-based competition.
- IRG: The Independent Regulators Group.
- LTE: Long-Term Evolution, a standard for wireless communication.
- MOTC: Ministry of Transportation and Communications of Taiwan.
- MVNO: Mobile virtual network operator.
- NCC: National Communications Commission.
- NGN: Next Generation Networks.
- NRA: National Regulatory Authority.
- Ofcom: The communications regulator in the UK.
- ONP: Open network provision.
- POI: Point of interconnection.
- SBC: Service-based competition.
- SMP: Significant market power.

TEC: Treaty establishing the European Community.

TFEU: Treaty on the Functioning of the European Union.

Telco: Telecommunications companies or telecommunications operators.

Telecoms: Telecommunications.

TEU: Treaty on European Union.

VAN: Value-added network.

VDSL: Very-high-speed digital subscriber line.

VOIP: Voice over IP.

WTO: World Trade Organisation.

Chapter I Introduction

1. Background of the Research

Telecoms regulation is unique due to its many specific characteristics of the telecoms industry. First, it has a public-service nature, and in most countries telecoms services evolved from the liberalisation of the public telecoms department.¹ Secondly, it has to engage with innovative developments in telecommunications ("telecoms") technologies. Thirdly, the telecoms industry is usually regarded as a natural monopoly;² therefore, in addition to being a form of sector-specific regulation, many important concepts and ideas developed in the field of competition law are applied in telecoms regulations.³

Among these regulations, one kind of regulation, or mechanism, is forced access to telecoms networks. The term "forced access" is defined differently by agencies and individuals. This thesis adopts the broadest definition, which is considered to be obligatory access to a telecommunications company's ("telco") physical or virtual networks by other telcos. The main reason for such forced access is the natural monopoly found in the telecoms market, and this mechanism serves to eliminate or reduce competition difficulties caused by the advantages of owning key network

¹ The only exception is the United States, where telecoms services were first provided by private persons.

² See for example: Posner, R. A. (1999). *Natural monopoly and its regulation*, Cato Institute; Depoorter, B. W. (1999). "Regulation of natural monopoly." *Encyclopedia of Law and Economics, Part V-Regulation of contracts*. For an opposing opinion, see: Thierer, A. D. (1994). "Unnatural monopoly: critical moments in the development of the Bell system monopoly", *Cato J.* **14**: 267.

³ For a discussion of the relationship between competition law and sector-specific legislation, especially in the European Union, see European Commission (1998). "Notice on the application of the competition rules to access agreements in the telecommunications sector.", available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:C:1998:265:TOC> (accessed Apr 2016).

facilities.⁴

It is easy to imagine that the owners of networks – in most cases the incumbent telco – are subject to certain restrictions on the use of their networks by such obligations. As these networks are their property, exercising their right to property will be limited; at the same time, forced access to their networks means that their freedom to use such networks, and to negotiate their use, an important component of the freedom to conduct a business, will be limited as well.⁵ However, these forced-access mechanisms, as a form of sector-specific regulation, despite possible interference with or restriction on the fundamental rights and freedoms of telcos, are seldom challenged on the basis of their legality or constitutionality. This is because of the adherence to the principle of the separation of powers, and judicial respect for the decisions made by legislative and administrative departments. This is especially true in the field of sector-specific regulations or regulations about expert areas, to which telecoms forced access mechanisms belong.⁶

The judicial departments' seeming reluctance to exercise their power raises a question. As discussed later in this thesis, different telecoms forced access mechanisms may entail different levels of interference in fundamental rights and freedoms. The reluctance to conduct a review implies that this interference is legitimate or constitutional, an assumption which is not legitimate or constitutional in itself under the idea of separate powers. To be specific, the questions that should be asked here are:

⁴ For a detailed discussion of the meaning and functions of telecoms forced-access mechanism see Chapters Two and Three.

⁵ The meaning and scope of the right to property and freedom to conduct a business will be discussed in relevant chapters, such as Chapters Six to Nine.

⁶ See discussions in Chapters Ten and Eleven.

is it legitimate or appropriate to adopt a deferential approach when reviewing the legality of telecoms forced access mechanisms that severely interfere with or restrict fundamental rights and freedoms? And is it legitimate or appropriate to review the legality of telecoms forced access mechanisms that severely interfere with or restrict fundamental rights and freedoms in accordance with the same criteria employed when measures do not constitute such severe interference or restrictions? With regard to these questions, this thesis examines the legality and constitutionality of the three most commonly used telecoms forced access mechanisms – interconnection, local-loop unbundling and separation.⁷ It does so with reference to the constitutional and legal frameworks of the European Union and Taiwan, and focuses on two fundamental rights and freedoms that are most vulnerable to the implementation of telecoms forced access mechanisms: the right to property and the freedom to conduct a business.

2. Research Questions

According to the discussion above, this thesis proposes the following research questions.

- (1) How does the judicial review system work in the European Union and Taiwan, i.e. how is the legality or constitutionality of legislative or administrative regulatory measures reviewed by the court in these two jurisdictions?

- (2) To what kind of judicial review are telecoms forced access mechanisms subject in the two targeted jurisdictions, i.e. what are the criteria for judicial review of these mechanisms? Why?

⁷ The meanings of these telecoms forced access mechanisms will be explained in Chapters Two and Three.

- (3) Should the criteria for judicial review of telecoms forced access mechanism be distinguished, for example, by the intensity of the interference with fundamental rights and freedoms? In other words, should different telecoms forced access mechanisms be subject to different intensities of judicial review?
- (4) Are the current judicial review criteria for telecoms forced access mechanisms in the European Union and Taiwan reasonable? Why? And if not, how should they be improved or adjusted?

3. Methodology

The basic logic for this thesis is a two stage legal *Syllogism*. To be specific, in the first stage:

Major premise: What are the different criteria (A, B,...Z) for review of constitutionality and legality of different regulatory measures (a, b,...z), if there are more than one criterion?

Minor premise: Telecoms forced access mechanisms are a type of (a) regulatory measure.

Conclusion: Criterium A should be applied to review the constitutionality and legality of telecoms forced access mechanisms.

In the second stage:

Major premise: Criterion A

Minor premise: Telecoms forced access mechanisms

Conclusion: Applying criterion A to examine the constitutionality and legality of

telecoms forced access mechanism.

To give a better idea about telecoms forced access mechanism, and why the constitutionality and legality of telecoms forced access mechanisms is important, this thesis will discuss these telecoms forced access mechanism in the earlier chapters (see below (5)).

The methodology used in this thesis is primarily a literature review, with a supplementary methodology of empirical study. As for the European Union, the materials studied in this thesis include the case law of the European Court of Justice and European General Court, the Charter of Fundamental Rights of the European Union, European Union legal instruments such as regulations, directives and recommendations. Although the European Convention on Human Rights (ECHR) is not a European Union legal instrument, and the European Court of Human Rights (ECtHR) is not a European Union court, because of the importance of the ECHR in the protection of fundamental rights in the European Union, the connection made by the Treaty of Lisbon,⁸ and the mass of detailed case law, for the purpose of this study, they will also be included in the discussion.

As for Taiwan, the research materials include the Official Interpretations of the Constitution made by Grand Justices, legal instruments of telecoms regulation and scholarly discussions.

4. Contributions to the Field

⁸ See discussions in Chapter Four.

Fundamental or human rights issues which arise in sector-specific areas never draw significant scholarly attention. Ameye (2004)⁹ and Andreangeli (2012)¹⁰ have discussed the relationship between competition law and human rights, but focused on human right issues in the competition proceedings in Articles 101 and 102 TFEU, such as the right to a fair trial and to an effect remedy. Naser (2009)¹¹ also discussed the relationship between freedom of speech and trademarks. But these studies fell short of the discussions about the constitutionality and legality of economic rights such as the right to property and freedom to conduct a business.

This thesis chooses the European Union and Taiwan for comparative models for the following reasons:

- a. First, the European Union's telecoms regulatory framework is one regime that Taiwan has favoured as a source for regulatory approaches in recent years. However, Taiwan also adopts many regulatory ideas from the United States.¹² It is interesting to see how the regulatory ideas from these two jurisdictions integrate and interact with each other in a third jurisdiction, i.e., will a approach that is compromised with the considerations of those in the European Union or the United States be more reasonable than its precedents?
- b. Despite the different situations of telecoms markets, such as the development of telecoms technologies within Member States, the European Union is a supranational organization that aims to achieve a single market (internal market),

⁹ Ameye, E. M. (2004). "The Interplay between Human rights and competition law in the EU." *European Competition Law Review* **25**(6): 332-341.

¹⁰ Andreangeli, A. (2012). "Competition law and human rights: striking a balance between business freedom and regulatory intervention." *The Global Limits of Competition Law*, ed. Ioannis Lianos and D. Daniel Sokol: 22-36.

¹¹ Naser, M. A. (2009). "Trademarks and Freedom of Expression." *IIC-International Review of Intellectual Property and competition Law* **40** (2): 188-205.

¹² See discussion in Chapter Three.

and the European legal system – including the telecoms regulatory framework – features with doctrines of supremacy and direct effect. Taiwan, on the other hand, is a unitary country, and the adoption of regulatory measures only needs to consider the appropriation of the said measure within Taiwan. It is interesting to examine the different effects and applicability of legislation and its constitutionality and legality in these two jurisdictions.

- c. The third point concerns the judicial review of the legality and constitutionality of regulatory measures. Taiwan has traditionally adopted constitutional and legal theories from Continental European countries, such as Germany, but in recent years, the constitutional review system in the United States was also introduced in Taiwan.¹³ On the other hand, constitutional theories in Germany are also a major source from which the European Union has derived its general principles.¹⁴ It is interesting to see how the judicial review system in Taiwan, with modifications according to US law, can serve as a reference of theories for the legality review system in the European Union.

5. Outline of the Thesis

According to the research questions specified above, the structure of this thesis is set out as follows:

This first chapter is an introduction to the thesis. It explains the background to the research, specifies the research questions and outlines the structure of the thesis.

To examine the legality and constitutionality of telecoms forced access mechanisms, it

¹³ See discussion in Chapter Five.

¹⁴ See discussions in Chapters Four, Six and Eight.

is essential to have a clear understanding of these mechanisms, and how these mechanisms are situated in the entire telecoms regulatory framework. Therefore, Chapters Two and Three begin with a brief introduction to the telecoms regulatory frameworks in the European Union and Taiwan; the discussion goes on to introduce the concept and the content of the three forced access mechanisms targeted, and finally how these mechanisms are implemented in the European Union and Taiwan.

Before an in-depth discussion of the fundamental rights and freedoms targeted, it is essential to have a brief explanation of how these rights and freedoms are protected in the European Union and Taiwan. Therefore, Chapters Four and Five paint a brief picture of how fundamental rights protection regimes evolved in these two jurisdictions, and of the constitutional and legal instruments, and institutional designs that grant protection to these fundamental rights.

The next chapters – Chapters Six to Nine – discuss the two fundamental rights targeted by this thesis, i.e. the right to property and the freedom to conduct a business, in the European Union and Taiwan, respectively. In the European Union, this involves the protection granted in the provisions of the Union Treaties, including the Charter of Fundamental Rights of the European Union (CFR) and the case law of the European Courts. As specified above, due to their importance to the European Union, the provisions in the ECHR and the case law of the ECtHR will also be discussed. In Taiwan, discussion focuses on the Official Interpretations of the Constitution made by Grand Justices, and the content of the said rights and freedoms supplemented by scholarly discussions, as specified in Chapter Five.

Analyses of the legality and constitutionality of telecoms forced access mechanisms in the European Union and Taiwan are conducted in Chapters Ten and Eleven, respectively, based on the findings in previous chapters. To be specific, these two chapters discuss the judicial review criteria for telecoms forced access mechanisms, whether these criteria are reasonable, and finally the application of these criteria to examine the legality and constitutionality of the three targeted telecoms forced access mechanisms in the two jurisdictions.

The final chapter draws conclusions from the results in the two analytical chapters and the findings of all the previous chapters, and reflects on the research questions proposed in this thesis.

As such, the structure of this thesis is as follows:

Chapter I

Introduction

Chapter II

Telecoms Forced Access Mechanisms in the European Union

Chapter III

Telecoms Forced Access Mechanisms in Taiwan

Chapter IV

Fundamental Rights Protection Regime in the European Union

Chapter V

Fundamental Rights Protection Regime in Taiwan

Chapter VI

Protection of the Right to Property in the European Union and Taiwan

Chapter VII

Protection of the Right to Property in Taiwan

Chapter VIII

Protection of the Freedom to Conduct a Business in the European Union

Chapter IX

Protection of the Freedom to Conduct a Business in Taiwan

Chapter X

**Analysis (I)—Legality of Telecoms Forced Access Mechanisms in the European
Union**

Chapter XI

**Analysis (II)—Constitutionality of Telecoms Forced Access Mechanisms in
Taiwan**

Chapter XII

Conclusion

Chapter II

Telecoms Forced Access Mechanisms in the European Union

Preface

This thesis discusses the legitimacy and constitutionality of telecoms forced-access mechanisms, i.e. whether these mechanisms excessively restrict the fundamental rights of telcos. It is therefore important to understand the meaning and content of telecoms forced-access mechanisms, and how these mechanisms are implemented, in order to determine whether and how they interfere with telcos' fundamental rights, especially economic rights, such as the right to property and the freedom to conduct a business, discussed further in Chapters Six to Nine.

First, this chapter discusses telecoms forced-access mechanisms in the European Union. As telecoms forced-access mechanisms are a form of telecoms regulatory measure, to understand how these mechanisms originated and function, it is important to have an overall understanding of the telecoms regulatory framework. The first section (1) of this chapter is therefore of an introductory nature and gives a brief overview of the telecoms regulatory framework in the European Union, including regulatory authorities and the historical evolution of the European telecoms regulatory framework.

The second section (2) explains the various forced-access mechanisms that are recognized under the European telecoms regulatory framework, from a systematic perspective. Better to understand forced-access mechanisms, this section starts with a brief introduction to the structure of telecoms networks (2.1), which is common to and

thus will be referred to in the discussions of telecoms forced-access mechanisms in Taiwan. Since the Union proposed its common policy on telecoms in the late 1980s, there have been several reforms and amendments to the European telecoms regulatory framework. One of the most important of these reforms, especially for the purposes of this thesis, is probably the introduction of the 2002 Telecoms Package. This chapter will therefore take the 2002 Telecoms Package as a watershed moment and discuss telecoms forced-access mechanisms in section 2.2 and then in section 2.3 the 2002 Telecoms Package. Of course, each of these frameworks includes an extensive range of regulatory measures, and many of them are directly or indirectly related to telecoms forced-access mechanisms. However, a discussion of the overall telecoms regulatory framework is beyond the remit of this thesis, and thus this section will focus only on telecoms forced-access mechanisms, most notably interconnection, local-loop unbundling and separation. Other regulatory mechanisms that are related to forced-access mechanisms will be discussed where appropriate, but not emphasized.

Legal theories and disputes about telecoms forced access will be discussed in the last section (3) of this chapter. The discussion will start with the legal rationale for forced access, most notably the essential facilities doctrine, and proceed to the pros and cons of the aforementioned telecoms forced-access mechanisms. As this thesis aims to investigate the legitimacy and constitutionality of telecoms forced-access mechanisms, this section has no intention to conduct an in-depth discussion about the economic effects of these mechanisms, i.e. how effectively these mechanisms achieve their objectives; however, an overall look at their impact will serve to inform the discussion in the analysis chapter (Chapter Ten).

As discussed in Chapter One, both "electronic communications" and "telecommunications" are terms that have been used in the European telecoms regulatory framework, e.g. by the European Commission in its legal documents. While the concepts indicated by these two terms may not perfectly align, such small differences are not relevant to the discussion here. These two terms will therefore be used interchangeably in this chapter, especially when legal documents are cited. Likewise, the terms "operator(s)" and "undertaking(s)" will also be used interchangeably in the discussion when referring to telco(s).

1. The European Telecoms Regulatory Framework

1.1 Regulatory Authority

a. Independent Regulators Group

While the European Commission proposed a single-market scheme and several relevant Directives for the Community in the late 1980s, the responsibilities for policy-making and implementing telecoms regulations were first laid on the national regulatory authorities (NRAs) of Member States. It was not until the late 1990s with the strengthening of the European Union that cries for a more centralised regulatory body began to be heard.

The first move, however, was actually more about seeking the unification of regulatory mechanisms, instead of establishing a Union regulator. The Independent Regulators Group (IRG) was established in 1997 and comprised a group of European NRAs whose members shared experiences and points of views on important issues

relating to the regulation and development of the European telecoms market at the beginning of its liberalisation.¹

b. European Regulators Group

IRG's successor, the European Regulators Group (ERG) for electronic communications networks and services, was set up by the European Commission as an advisory group to the Commission when the 2002 Telecoms Package came into force. The ERG's mission was to provide a suitable mechanism to encourage cooperation and coordination between NRAs and the Commission so as to promote the development of an internal market for electronic communications networks and services, and seek consistent application of the provisions set out in the Directives of the new regulatory framework in all Member States.²

c. Body of European Regulators for Electronic Communications (BEREC)

In the drafting of the 2009 Telecoms Package (see 2.3), the European Commission proposed a more powerful regulator, the European Telecoms Market Authority, by replacing the ERG and overriding the NRAs. It was proposed that the Authority be able to issue opinions and recommendations to the Commission, concerning spectrum issues, market analyses not completed on time by national regulators, and the possible imposition of remedies such as price controls, accounting separation or functional separation. The Commission would have to take the utmost account of these opinions and recommendations, but would not be bound by them.

This proposal, however, was later not included in the 2009 Telecoms Package; instead,

¹ See: <https://www.erg.eu/> (accessed April 2016).

² Ibid.

the ERG was transformed into the Body of European Regulators for Electronic Communications (BEREC), with an enhanced role in the new regulatory framework. BEREC commenced its activities in 2010 and comprises a Board of Regulators made up of: the heads of NRAs, the Commission, the EFTA States (Switzerland, Norway, Iceland and Liechtenstein) and European Union candidate countries participate as observers to the Board of Regulators. BEREC's mission is to contribute to the development and better functioning of an internal market for electronic communications networks and services by aiming to ensure consistent application of the European Union regulatory framework and to promote an effective internal market in the telecoms sector.³ It also assists the Commission and NRAs in implementing the European Union regulatory framework for electronic communications. It provides advice on request and on its own initiative to the European institutions and complements at European level the regulatory tasks performed at national level by the NRAs.

The NRAs and the Commission have to take utmost account of any opinions, recommendations, guidelines, advice or regulatory best practice adopted by BEREC. In particular, BEREC is requested to:

- (a) develop and disseminate regulatory best practices among NRAs, such as common approaches, methodologies or guidelines on the implementation of the European Union regulatory framework;
- (b) on request, provide assistance to NRAs on regulatory issues;
- (c) deliver opinions on the draft decisions, recommendations and guidelines of the Commission as specified in the regulatory framework; and

³ See: BEREC (2015). "What is BEREC?" available at: http://berec.europa.eu/eng/about_berec/what_is_berec/ (accessed April 2016).

(d) issue reports and provide advice, upon a reasoned request from the Commission or on its own initiative, and deliver opinions to the European Parliament and Council, when needed, on any matter within its remit; on request, assist the European Parliament, the Council, the Commission and the NRAs in relations, discussions and exchanges of views with third parties, and assist the Commission and NRAs in the dissemination of regulatory best practices to third parties.⁴

d. European Commission and NRAs

Despite the IRG evolving into the current BEREC in the European Union, these groups or bodies were not really regulating the telecoms sector, but rather acting more in an advisory or reference capacity, and in fact they can hardly be called regulatory bodies or authorities. This raises the question of what makes a body qualify as a regulatory authority, especially within the scope of European Union law.

Drawing from the ideas of EU Member States and other jurisdictions, a regulatory authority should be responsible for designing policies and mapping out the development of the industry, proposing regulations to achieve those policies goals, and at the same time supervising the implementation of such policies and regulations or even implementing them itself. In this regard, there are two types of regulatory authorities for the telecoms sector in the European Union, the Commission and NRAs.

1.2 Development of the Telecoms Regulatory Framework in the European Union

The history of EU telecoms regulation essentially began in 1987, when the European Commission appeared to be an "early mover" in the design of an initial regulatory

⁴ Ibid.

framework established by various Community legislative initiatives.⁵ The framework set out in the Commission's first Green Paper,⁶ and a later White Paper⁷ and Directive,⁸ proposed to open up national European Union markets to telecoms equipment and services. Together with the idea of the creation of a single market in telecoms services, they paved the way for a common policy on telecoms, which was developed later in the 1990s. The common policy on telecoms was established around four axes: the creation of a single market for telecoms equipment and services; the liberalisation of telecoms services; technological development of the sector with the assistance of European research; and balanced development in the regions of the Union by means of trans-European telecoms networks.⁹

The European Commission did not pause in its efforts to pursue a better telecoms regulatory framework. In 1990, the European Commission published its first *Open Network Provision (ONP) Framework Directive*,¹⁰ the purpose of which was to harmonize the conditions for open and efficient access to and use of public telecoms networks. Such conditions must: be based on objective criteria; be transparent and appropriately published; guarantee equality of access; and be non-discriminatory in accordance with Community legislation.¹¹ Restrictions on access can be justified by

⁵ Tsatsou, P. (2010). "European Union Regulations on Telecommunications: The Role of Subsidiarity and Mediation." *First Monday* **16**(1).

⁶ Towards a Dynamic European economy, Green Paper on the Development of a Common Market for Telecommunications Services and Equipment, COM (87) 290, 1987.

⁷ Towards a competitive Community-wide telecommunications market in 1992. Implementing the Green Paper on the development of the Common Market for telecommunications services and equipment. State of discussions and proposals by the Commission. COM (88) 48 1988.

⁸ Commission Directive 88/301/EEC on competition in the markets for telecommunications terminal equipment, 1988, OJ L 131/73.

⁹ See: Nicholas, M. (1999). Industrial and Enterprise Policies. In *Access to European Union, law, economics, policies*.

¹⁰ Council Directive 90/387/EEC on the Establishment of an Internal Market for Telecommunications Services through the Implementation of Open Network Provision, 1990 OJ L 192/1 (hereinafter the ONP Framework Directive).

¹¹ *Ibid*, Article 3(1).

key requirements, such as the security of network operations and so forth.¹² The framework provided in this Directive, its later amendments and other related Directives is sometimes called the ONP framework.¹³

Later, in 1997, the European Commission published its "Green Paper on the convergence of the telecoms, media and information technology sectors and the implications for regulation – Towards an approach for the information society".¹⁴ The Green Paper was followed by consultation on reforms to the regulation of infrastructure and associated services which would be proposed as part of the 1999 communications review, and on actions concerning content services which would be covered either by adjustments to existing legislation in due course or by the introduction of new measures as appropriate.¹⁵

Later, in 1999, the European Commission also published a Communications Review, "*Towards a new framework for electronic communications infrastructure and associated services*".¹⁶ The Report provided an overview of European Union regulation of telecoms and also proposed a new framework for communications infrastructure and associated services.

¹² Council Directive 90/387/EEC on the Establishment of an Internal Market for Telecommunications Services through the Implementation of Open Network Provision, 1990 OJ L 192/1, as amended by Directive 97/51/EC of the European Parliament and of the Council on 6 October 1997, amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of the adoption of a competitive environment in telecommunications, 1997, OJ L 295/23, Article 3(2).

¹³ See: <https://www.irg.eu/> (accessed April 2016).

¹⁴ Commission of the European Communities, *Towards an Approach for the Information Society: Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors and the Implications for Regulation* by the Commission of the European Council, COM (97) 623 Final (not published in the Official Journal).

¹⁵ Ibid.

¹⁶ Commission Communication to *the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions* Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review, COM (99) 539.

The liberalisation in 1998 and the 1999 Communications Review resulted in the 2002 Telecoms package. With this package, the European Commission attempted to overcome the historic national fragmentation and diversity of European telecoms and information markets, which were seen as considerable barriers to "Europe" or "Europeanisation."¹⁷

2. Telecoms Forced Access Mechanisms in the European Telecoms Regulatory Framework

2.1 Telecoms Forced Access in the 2002 Telecoms Package

2.1.1 Structure of the 2002 Telecoms Package

There are two main new concepts in the 2002 Telecoms Package. The first is that to establish a unified regulatory framework in response to the trend towards convergence, the European Commission introduced the idea of "electronic communications" to replace "telecommunications". As stated in recital (5) of the Framework Directive: "The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework."¹⁸ The second concept is that besides maintaining *ex ante* regulation of markets with telcos with significant market power (SMP), it adopts *ex post* regulation of markets without SMP in order to coordinate with the European competition regulatory framework.¹⁹

¹⁷ Tsatsou, P. (2010). "European Union Regulations on Telecommunications: The Role of Subsidiarity and Mediation." *First Monday* **16** (1).

¹⁸ Recital (5) in the preamble to the Framework Directive, *supra* n 12.

¹⁹ *Ibid*, Recital (25).

The 2002 Telecom Package includes five Directives, and they are:²⁰

--Directive on a common regulatory framework for electronic communications networks and services (the "Framework Directive");

--Directive on the authorisation of electronic communications networks and services (the "Authorisation Directive");²¹

--Directive on access to, and interconnection of, electronic communications networks and associated facilities (the "Access Directive");²²

--Directive on the universal service (the "Universal Service Directive");²³

--Directive 97/66/EC on the processing of personal data and the protection of privacy in the telecommunications sector (the "Telecommunications Data Protection Directive").²⁴

The Telecommunications Data Protection Directive, although according to the Framework Directive included as part of the 2002 Telecoms Package,²⁵ actually came into force in 1997. It was, however, replaced by the Directive on privacy and electronic communications (Data Protection Directive)²⁶ later than the above

²⁰ See for reference, European Union (2015) "Regulatory Framework for Electronic Communications", available at: http://europa.eu/legislation_summaries/information_society/legislative_framework/124216a_en.htm (accessed April 2016).

²¹ Directive 2002/20/EC of the European Parliament and of the Council on the Authorisation of Electronic Communications Networks and Services, 2002 OJ L 108/21 (hereinafter Authorisation Directive).

²² Directive 2002/19/EC of the European Parliament and of the Council on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities, 2002 OJ L 108/7 (hereinafter Access Directive).

²³ Directive 2002/22/EC of the European Parliament and of the Council on universal service and Users' Rights Relating to Electronic Communications Networks and Services, 2002 OJ L 108/51 (hereinafter Universal Service Directive).

²⁴ Directive 1997/66/EC of the European Parliament and of the Council Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 1998 OJ L 24/1 (hereinafter Telecommunications Data Protection Directive).

²⁵ Recital (5) in the preamble to the Framework Directive.

²⁶ Directive 2002/58/EC of the European Parliament and of the Council Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 2002 OJ L 201/37 (hereinafter Data Protection Directive).

Directives in 2002. This new Directive, together with the Directive on competition in the markets for electronic communications networks and services²⁷ (which also came into force later in 2002) can be deemed to be included in the broad meaning of the 2002 Telecoms Package.

Thus, as per the reforms, combinations and updates of the previous Directives and Regulations, especially in the 1998 Telecoms Package, the subsequent relationship between the 1998 Telecoms Package and 2002 Telecoms Package can be illustrated as shown in the chart below:

1998 Telecoms Package	2002 Telecoms Package
ONP Framework Directive (90/387/EEC, 97/51/EC)	Framework Directive (2002/21/EC)
Licensing Directive (97/13/EC) GSM Directive (87/372/EEC) ERMES Directive (90/544/EC) DECT Directive (91/287/EEC) Satellite-PCS Decision (710/97/EC)	Authorisation Directive (2002/20/EC)

²⁷ Directive 2002/77/EC of the European Parliament and of the Council on Competition in the Markets for Electronic Communications Networks and Services, 2002 OJ L 249/21.

<p>UMTS Decision (128/1999/EC)</p> <p>European Emergency Number Decision (91/396/EEC)</p> <p>International Access Code Decision (92/264/EEC)</p>	
<p>ONP Leased Lines Directive (92/44/EEC, 97/51/EC)</p> <p>TV Standards Directive (95/47/EC)</p> <p>Interconnection Directive (97/33/EC)</p>	<p>Access Directive (2002/19/EC)</p>
<p>Voice Telephony Directive (98/10/EC)</p>	<p>Universal Service Directive (2002/22/EC)</p>
<p>Telecommunications Data Protection Directive (97/66/EC)</p>	<p>Data Protection Directive (2002/58/EC)</p>
<p>Service Directive (90/388/EEC)</p> <p>Satellite Directive (94/46/EC)</p> <p>Cable Directive (95/51/EC)</p> <p>Mobile Directive (96/2/EC)</p>	<p>Consolidated Directive (2002/77/EC)</p>

Full Competition Directive (96/19/EC)	
Cable Ownership Directive (99/64/EC)	

2.1.2 Content of Forced Access Mechanisms in the 2002 Telecoms Package

Despite forced access mechanisms, as the name suggests, being mostly stipulated in the Access Directive, many of the missions carried out by the Framework Directive, such as market definition and the identification of SMP, are crucial in deciding the obligations of telcos. Hence, this subsection will begin with a discussion about these aspects of the Framework Directive.

a. Framework Directive

The Framework Directive is probably the leading Directive of the 2002 Telecoms Package, and many important terms that were commonly used in the Package were defined in this Directive. Amongst these, one of the main missions of the Framework Directive is to redefine the scope of telecoms, with consideration given to convergence. The idea of telecoms is thus expanded, to cover "electronic communications networks", and as defined in the Framework Directive, electronic communications networks refer to the transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals,

networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.²⁸

At the same time, "electronic communications services", according to the same Article above, refer to services normally provided for remuneration which consist wholly or mainly of the conveyance of signals on electronic communications networks, including telecoms services and transmission services in networks used for broadcasting, but excluding services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include "information society services", as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.²⁹

After defining electronic communications services and networks, the European Commission reconsidered the relationship between electronic communications regulation and general competition law in order to achieve effective competition within the electronic communications market. In this regard, the European Commission made two decisions with regard to regulation of the electronic communications market in the Framework Directive. First, the European Commission asserted that there was still a need, but only under the circumstance when there is no effective competition--i.e. in markets where there are one or more telcos with SMP, and where national and Community competition law remedies are not sufficient to address the problem--that *ex ante* legal measures be maintained.³⁰

²⁸ Article 2 (a) Framework Directive, *supra* n 12.

²⁹ *Ibid*, Article 2 (c).

³⁰ Recital (27) in the preamble to the Framework Directive *supra* n 12.

The other decision of the European Commission was to reconsider the definition of SMP as it found that the original definition of SMP was unsuited to an increasingly complex and dynamic market, and therefore decided to introduce a new definition for SMP. Before the entry into force of the Framework Directive, the definition of SMP referred to telcos with a market share over 25%, as suggested by the Open Network Provision (ONP) Directive.³¹ The European Commission sought to co-ordinate that with the general competition regulatory framework and therefore adapted the concept of "dominant position" as defined in the case law of European Courts.³² As stated in Article 14 (2) of the Framework Directive, an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

In this regard, the European Commission further published a Recommendation on Relevant Product and Service Markets in 2003.³³ In this Recommendation, the European Commission considered the necessity for *ex ante* regulation and defined the market as per the requirements of Article 15(1) of the Framework Directive. It identified that there were still SMP in seven retail markets (markets for services or

³¹ Directive 1997/33/EC of the European Parliament and of the Council on Interconnection in Telecommunications with regard to Ensuring Universal Service and Interoperability through Application of the Principles of Open Network Provision, 1997 OJ L 199/ 32. Directive as amended by Directive 1998/61/EC of the European Parliament and of the Council Amending Directive 1997/33/EC with Regard to Operator Number Portability and Carrier Pre-selection, 1998 OJ L 268/ 37.

³² Recital (25) in the preamble to the Framework Directive, *supra* n 12.

³³ Recommendation 2003/311/EC of the European Commission on Relevant Product and Service Markets within the Electronic Communications Sector Susceptible to *ex ante* Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communication Networks and Services, 2003 OJ L 114/45 (hereinafter Recommendation on Relevant Product and Service Markets I).

products provided to end users) and 11 wholesale markets (markets for inputs which are necessary for telcos to provide services and products to end users) that are subject to *ex ante* regulation. The European Commission's considerations are:³⁴

--Whether there are high and non-transitory structural, legal or regulatory entry barriers present in the market.

--Whether the market has a structure which does not lend itself to effective competition within the relevant time horizon.

--Whether the application of competition law alone would adequately address the market failure(s).

Only if the answers to all these three questions were negative would that justify *ex ante* regulation. The European Commission therefore identified that the following markets are subject to *ex ante* regulation:

	(retail)	(wholesale)
Non-publicly available telephone services	Access to the public telephone network at a fixed location for residential customers	Call origination on the public telephone network provided at a fixed location.
	Access to the public telephone network at a fixed location for non-residential customers	Call termination on individual public telephone networks provided at a fixed location
	Publicly available local and/or	Transit services in the fixed public

³⁴ Ibid, Recital (9).

	national telephone services	telephone network Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services
Publicly available telephone services	Publicly available international telephone services provided at a fixed location for residential customers Publicly available local and/or national telephone services provided at a fixed location for non-residential customers Publicly available international telephone services provided at a fixed location for non-residential customers	
Broadband		Wholesale broadband access
Leased Line	The minimum set of leased	Wholesale terminating segments of

	lines	leased lines Wholesale trunk segments of leased lines
Mobile Networks		Access and call origination on public mobile telephone networks Voice call termination on individual mobile networks The wholesale national market for international roaming on public mobile networks
Broadcasting transmission services		Broadcasting transmission services to deliver broadcast content to end users

(Chart 2.1 Markets subject to *ex ante* regulation in Recommendation on Relevant Product and Service Markets I³⁵)

Another feature of the Framework Directive that is of special importance to this thesis is the stipulation of co-location and facility sharing.³⁶ The European Commission considered that facility sharing could be of benefit for town planning, public health or environmental reasons,³⁷ and thus NRAs should encourage the sharing of facilities or

³⁵ Chart cited from: Kao, K.-s. and P. Liu. (2005). "The Research of 2003 European Communications Law." *Socioeconomic Law and Institution Review* : 329.

³⁶ It covers *inter alia*: physical co-location and duct, building, mast, antenna or antenna system sharing. See: Recital (23) in the preamble to the Framework Directive, *supra* n 12.

³⁷ *Ibid*, Recital (22).

property where an undertaking provides electronic communications networks via the said facilities or property. Such sharing becomes an obligation in the case where undertakings are deprived of access to viable alternatives because of the need to protect the environment, public health, public security or to meet town and country planning objectives; thus, the NRAs may impose the sharing of facilities or property (including physical co-location) on an undertaking operating an electronic communications network or take measures to facilitate the coordination of public works after public consultation.³⁸

b. Access Directive

The aim of the Access Directive is to establish a framework to encourage competition by stimulating the development of communications services and networks, and also to ensure that any bottlenecks in the market do not constrain the emergence of innovative services that could benefit users.³⁹

The term "access", in the Access Directive, refers to the making available of facilities and/or services to another undertaking, under defined conditions, on either an exclusive or a non-exclusive basis, for the purpose of providing electronic communications services. It covers areas including: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop); access to physical infrastructure, including buildings, ducts and masts; access to relevant software

³⁸ Ibid, Article 12.

³⁹ See: European Union. (2015) "Access to Electronic Communications Networks", available at: http://europa.eu/legislation_summaries/information_society/legislative_framework/124108i_en.htm. (accessed April 2016).

systems including operational support systems; access to number translation or systems offering equivalent functionality; access to fixed and mobile networks, in particular for roaming; access to conditional access systems for digital television services; and access to virtual network services.⁴⁰

One of the main types of access is interconnection. Interconnection means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking.⁴¹

Interconnection is an essential mechanism in the electronic communications market, especially when there is SMP present in the market. New undertakings, as late market entrants, have to interconnect with the networks of the dominant or incumbent undertakings to share the network effect,⁴² and thus can compete in the market. On the other hand, to protect their vested interests and market dominance, dominant or incumbent undertakings tend to refuse interconnection, or use exclusive technologies to interfere with the procedure of interconnection. In this regard, interconnection obligations are usually imposed by NRAs in order to promote competition in the electronic communications market. The Access Directive therefore suggested that, in an open and competitive market where there are no large differences in negotiating power between undertakings, there should be no restrictions that prevent undertakings

⁴⁰ Article 2 (a) Access Directive, *supra* n22.

⁴¹ *Ibid*, Article 2 (b).

⁴² The network effect refers to the effect that one user of goods or services has on the value of that product to other people. When a network effect is present, the value of a product or service is dependent on the number of others using it. See: Shapiro, C. and H. R. Varian (2013). *Information Rules: a Strategic Guide to the Network Economy*, Harvard Business Press.

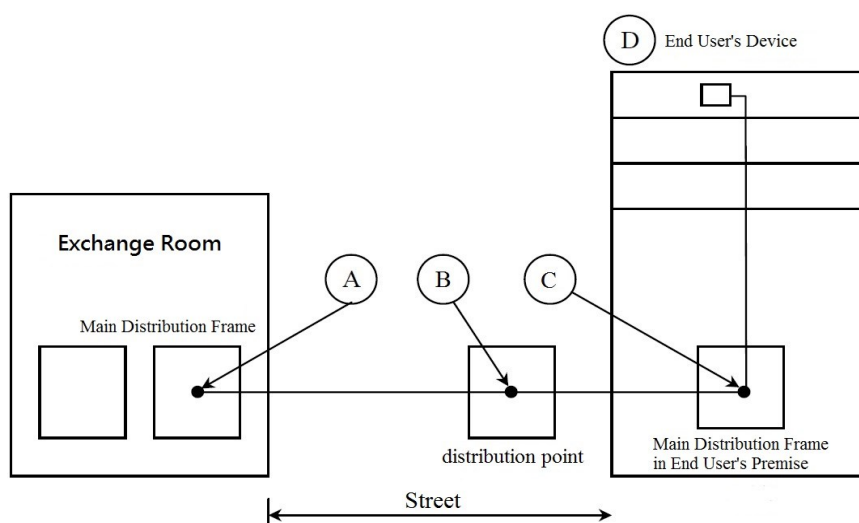
from negotiating access and interconnection arrangements between themselves, and undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith.⁴³ The Access Directive therefore asserted that, in principle, an undertaking without SMP status should negotiate interconnection but not other access to physical facilities, and only the undertaking with SMP bears an extensive access obligation.⁴⁴

Another important concept of access is unbundling, most notably unbundled access to the local loop (local-loop unbundling, LLU). Unbundling means the breakup of the whole package of network into elements, via which undertakings can interconnect with the networks of other undertakings, especially those of the incumbent undertakings, using their own network elements. Local loop, on the other hand, means the physical twisted metallic pair circuit connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network.⁴⁵ As shown in the figure below, the local loop includes three main sections: the first section is from the main distribution frame (A) in the local exchange room to the distribution point (B) at the street corner; the second section is from the distribution point to the main distribution frame in the end user's premise building (C, usually in the basement); and the third section is the vertical network from the main distribution frame in the end user's premise building to end user's device (D).

⁴³ Recital (6) in the preamble to the Access Directive, *supra* n 22.

⁴⁴ See for examples: Articles 5 (1), 6 (3) and 8(2) Access Directive, *supra* n 22.

⁴⁵ Recital (3) in the preamble to Council Regulation 2887/2000/EC on Unbundled Access to the Local Loop, 2000 OJ L 336/4 (hereinafter LLU Regulation).



(Figure 2.1 The structure of local loop.)

The key feature of this mechanism is that new entrants will not have to be able to afford the immense cost of investment in building its own local loop, which is arguably the most difficult network to deploy, and will not need to pay for network elements or facilities which are not necessary for the supply of its services, yet still be able to interconnect with existing networks to share the network effect.⁴⁶ Therefore, competition in the local loop may become effective only if competitors are able to have access to existing networks rather than being obliged to build their own.⁴⁷

Before the Access Directive, one of the main legal measures concerning local-loop unbundling was the Regulation on Unbundled Access to the Local Loop⁴⁸ (hereinafter local-loop unbundling Regulation), which aims to address the problem of the lack of competition on the local network where incumbent telcos continue to

⁴⁶ Ibid, Recital (7).

⁴⁷ See for reference: Buigues, P.-A. (2001). "European Policy on Local Loop Unbundling: Competition Law Background and Problems of Implementation". CPR Conference 2001.

⁴⁸ LLU Regulation, *Supra* n 45.

dominate the market for voice telephony services and high-speed Internet access.⁴⁹ It complements the regulatory framework for telecoms, in particular Directives 1997/33/EC and 1998/10/EC. The new regulatory framework for electronic communications should include appropriate provisions to replace this Regulation.

The local-loop unbundling Regulation gives explanations to different types of unbundled access to the local loop:

a. "unbundled access to the local loop" means full unbundled access to the local loop and shared access to the local loop; it does not entail a change in ownership of the local loop;⁵⁰

b. "full unbundled access to the local loop" means the provision to a beneficiary of access to the local loop or local sub-loop of the notified telcos authorising the use of the full frequency spectrum of the twisted metallic pair;⁵¹

c. "shared access to the local loop" means the provision to a beneficiary of access to the local loop or local sub-loop of the notified telcos, authorising the use of the non-voice band frequency spectrum of the twisted metallic pair; the local loop continues to be used by the notified telcos to provide the telephone service to the public;⁵²

d. "collocation" means the provision of physical space and technical facilities necessary reasonably to accommodate and connect the relevant equipment of a beneficiary, as mentioned in Section B of the Annex.⁵³

⁴⁹ See: European Union (2005) "Unbundled Access to the Local Loop", available at: http://europa.eu/legislation_summaries/information_society/internet/124108j_en.htm (accessed April 2016).

⁵⁰ Article 2(e) LLU Regulation, *Supra* n 45.

⁵¹ *Ibid*, Article 2(f).

⁵² *Ibid*, Article 2(g).

⁵³ *Ibid*, Article 2(h).

The regulatory ideas about local-loop unbundling in the Regulation on Unbundled Access to the Local Loop are basically contained in the Access Directive with its consideration of SMP status. As stated above, the presence of SMP status or not may incur different obligations. Articles 9 to 13 of the Access Directive have enumerated a series of obligations for NRAs to adopt. These obligations are summarised in Chart 2.2 below:

	SMP	Non-SMP
Obligations	<p>Obligations of access and interconnection, such as:</p> <p>Obligation of transparency⁵⁴</p> <p>Obligation of non-discrimination⁵⁵</p> <p>Obligation of accounting separation⁵⁶</p> <p>Obligations to grant access to, and use of, specific network facilities⁵⁷</p>	<p>Obligation for negotiation of interconnection</p>

⁵⁴ Article 9 Access Directive, *supra* n 22.

⁵⁵ *Ibid*, Article 10.

⁵⁶ *Ibid*, Article 11.

⁵⁷ *Ibid*, Article 11. These obligations include:

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, *inter alia* in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.

(Chart 2.2 Different Obligations between SMP and non-SMP in Access directive)

c. Directive on Competition in Markets for Electronic Communications Networks and Services

Another notable Directive in the 2002 Telecoms Package of special importance to this thesis is the Directive on Competition in Markets for Electronic Communications Networks and Services.⁵⁸ In this Directive, the Commission abolished the exclusive and special rights of electronic communications networks and services, by asserting that:

- (a) Member States shall not grant or maintain in force exclusive or special rights for the establishment and/or the provision of electronic communications networks, or for the provision of publicly available electronic communications

Operators may be required *inter alia*:

- (a) to give third parties access to specified network elements and/or facilities, including unbundled access to the local loop;
- (b) to negotiate in good faith with undertakings requesting access;
- (c) not to withdraw access to facilities already granted;
- (d) to provide specified services on a wholesale basis for resale by third parties;
- (e) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;
- (f) to provide co-location or other forms of facility sharing, including duct, building or mast sharing;
- (g) to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;
- (h) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;
- (i) to interconnect networks or network facilities. National regulatory authorities may attach to those obligations conditions covering fairness, reasonableness and timeliness.

2. When national regulatory authorities are considering whether to impose the obligations referred to in paragraph 1, and in particular when assessing whether such obligations would be proportionate to the objectives set out in Article 8 of Directive 2002/21/EC (*Framework Directive*), they shall take account in particular of the following factors:

- (a) the technical and economic viability of using or installing competing facilities, in light of the rate of market development, taking into account the nature and type of interconnection and access involved;
- (b) the feasibility of providing the access proposed, in relation to the capacity available;
- (c) the initial investment by the facility owner, bearing in mind the risks involved in making the investment;
- (d) the need to safeguard competition in the long term;
- (e) where appropriate, any relevant intellectual property rights;
- (f) the provision of pan-European services.

⁵⁸ Directive 2002/77/EC of the European Commission on Competition in the Markets for Electronic Communications Networks and Services, 2002 OJ L 249/21.

services.⁵⁹

- (b) Member States shall take all measures necessary to ensure that any undertaking is entitled to provide electronic communications services or to establish, extend or provide electronic communications networks.⁶⁰
- (c) Member States shall ensure that no restrictions are imposed or maintained on the provision of electronic communications services over electronic communications networks established by the providers of electronic communications services, over infrastructures provided by third parties, or by means of sharing networks, other facilities or sites without prejudice to the provisions of Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC.⁶¹

2.2 Telecoms Forced Access in Post-2002 Telecoms Framework Era and the 2009 Telecoms Reform Package

From 2007 onwards, the European Commission started to review the telecoms framework created by the 2002 Telecoms Package from various perspectives. One of the features involves reviewing the scope of *ex ante* regulation. The second version of the Commission Recommendation on relevant product and service markets⁶² was proposed in 2007, whereby the range of markets that have *ex ante* regulations for SMP that should be applied was vastly reduced (see Chart 2.3 below). The

⁵⁹ Ibid, Article 2(1).

⁶⁰ Ibid, Article 2(2).

⁶¹ Article 2(3) Directive on Competition in Markets for Electronic Communications Networks and Services, *Supra* n 58.

⁶² Recommendation 2007/879/EC of the European Commission on Relevant Product and Service Markets within the Electronic Communications Sector Susceptible to *ex ante* Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communication Networks and Services, 2007 OJ L 344/65 (hereinafter Recommendation on Relevant Product and Service Markets II).

Recommendation also proposed the creation of a new pan-European regulator which could identify SMP in pan-European services.

Retail Market	Wholesale Market
Access to the public telephone network at a fixed location for residential and non-residential customers	Call origination on the public telephone network provided at a fixed location
	Call termination on individual public telephone networks provided at a fixed location
	Wholesale (physical) network infrastructure access, including sharing or fully unbundled access at a fixed location
	Wholesale broadband access
	Wholesale terminating segments of leased lines
	Voice call termination on individual mobile networks

(Chart 2.3 Markets subject to *ex ante* regulation in Recommendation on Relevant Product and Service Markets II⁶³)

Also in 2007, the European Commission proposed a draft of a new telecoms package as it acknowledged that the vision to create a single European telecoms market still had a long way to go.⁶⁴ This reform had four objectives in total: more competition, better regulation, strengthening of the internal market and consumer protection.⁶⁵ The European Parliament and Council of Ministers agreed on reform to the 2002 Telecoms Regulations in November 2009, and the so-called 2009 Telecoms Package came into force in December of the same year. The 2009 Telecoms Package aims to "complete the internal market for electronic communications" and to push all national regulators towards stronger market competition through lifting regulation in markets where competition operates well,⁶⁶ and it introduced two new Directives, namely the Better

⁶³ Chart cited from Kao, K.-s. and L. Poli (2005). "The Research of 2003 European Communications Law." *Socioeconomic Law and Institution Review* : 335.

⁶⁴ See: Tsatsou (2010) *supra* n 5.

⁶⁵ *Ibid.*

⁶⁶ Recital (3) in the preamble to the Directive 2009/140/EC of the European Parliament and of the Council Amending Directives 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services, 2002/19/EC on Access to, and Interconnection of, Electronic

Regulation Directive⁶⁷ and the Citizen's Rights Directive,⁶⁸ to amend existing Directives. It also created the Body of European Regulators for Electronic Communications (BEREC) to promote cooperation between NRAs, aiming to ensure consistent application of the European Union regulatory framework to electronic communications.

The 2009 Telecoms Package includes five Directives:⁶⁹

- (1) the Framework Directive, which is based on the original Framework Directive and the new Better Regulation Directive;
- (2) the Access Directive, which is based on the original Access Directive and the Better Regulation Directive;
- (3) the Authorisation Directive, which is based on the original Authorisation Directive and the Better Regulation Directive;
- (4) the Universal Service Directive, which is based on the original Universal Service Directive and the Citizen's Rights Directive;
- (5) the Directive on Privacy and Electronic Communications, which is based on the Directive on Privacy and Electronic Communications, the Data Retention Directive⁷⁰ and the Citizen's Rights Directive;

Communications Networks and Associated Facilities, and 2002/20/EC on the Authorisation of Electronic Communications Networks and Services, 2009 OJ L 337/37 (hereinafter Better Regulation Directive).

⁶⁷ Ibid.

⁶⁸ Directive 2009/136/EC of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, 2009 OJ L 337/11 (hereinafter Citizen's Rights Directive).

⁶⁹ European Commission, (2015) Telecoms Rules, available at: <http://ec.europa.eu/digital-agenda/en/telecom-rules> (accessed April 2016).

⁷⁰ Directive 2006/24/EC of the European Parliament and of the Council on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Directive

and two Regulations:

(1) the Regulation establishing BEREC and the Office;⁷¹

(2) the Regulation on roaming on Public Mobile Communications Networks.⁷²

Of special interest to this thesis, one of the most important features of the 2009 Telecoms Package was the introduction of functional separation into the European Telecoms Regulatory Framework.⁷³ Functional separation refers to the separation of networks and facilities (especially access networks) of a telco (especially the incumbent telco) into an independent department; while such departments are still under the same ownership, the separated telco has imposed upon it a series of strict obligations, such as non-discriminatory treatment of other telcos and the telco's other departments, an independent accounting system and the establishing of "Chinese wall"⁷⁴ of personnel and information between the separated department and other departments.⁷⁵

To understand functional separation, it is important first to discuss the meaning of separation. Under economic theories, telecoms separation can be construed and practiced in two aspects (or two steps).⁷⁶ As to which assets are to be "cut" from the

2002/58/EC, 2006 OJ L 105/54.

⁷¹ Council Regulation 1211/2009/EC establishing the Body of the European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337/1 (hereinafter BEREC Regulation).

⁷² Council Regulation 531/2012/EC on Roaming on Public Mobile Communications networks within the Union, 2012, OJ L 172/10.

⁷³ Article 13(a) Access Directive as amended by Better Regulation Directive, *supra* n 66.

⁷⁴ In company law, a Chinese wall is an information barrier implemented within a company to prevent exchanges of information that could cause conflicts of interests. See: Greifender, E. and J. Bar Ilan (2008). *The History of Information Security: A Comprehensive Handbook*: 630.

⁷⁵ Ruhle, E.-O. and M. E. W. Reichl (2002). "Functional Separation: A new panacea in telecoms regulation?" *Journal*, OJ L **108**: 24.24; Curien, N. "Functional Separation: Pros and Cons, available at: http://www.arcep.fr/uploads/tx_gspublication/lettre55-eng.pdf (accessed April 2016).

⁷⁶ Cave, M. E. (2006). "Six degrees of separation operational separation as a remedy in European

incumbent, there are three methods of separation: retail, network (non-access), and network (access).

Retail	Marketing and selling services to end-users and managing the end-user relationship
Network (non-access)	Core network services Call origination, termination, transit etc Trunk segments of leased lines Some backhaul
Network (access)	Unbundled local loops Wholesale line rental Some backhaul Tail segments of leased lines

(Chart 2.4 The first category of separation models.)

As to the behaviours of the separated components, there are six schemes, or categories, of separation, between basic accounting separation and ultimate ownership separation (see Chart 5). It should be noted, first, that there is a mixture of terms for categories between (2) and (6). For example, the separation model of the incumbent British Telecom (BT) in the United Kingdom has been called both operational separation⁷⁷ and functional separation.⁷⁸ Second, in real practice, the categories into which separation falls into are sometimes difficult to define by judging the obligations imposed and the undertakings of the separated telcos, as these complex obligations are reflections of the actual needs of regulation.⁷⁹ It is therefore more sensible to focus on the content of the regulatory measure imposed instead of the terminology used when discussing functional/operational separation.

telecommunications regulation." *Communications & Strategies*(64): 89.

⁷⁷ Ibid, 98.

⁷⁸ BEREC Guidance on Functional Separation - Annex I, Functional Separation in Practice: European Union experiences: 2, available at: http://berec.europa.eu/files/documents/bor_10_44Rev1b.pdf (accessed April 2016).

⁷⁹ See, for example, BT's undertakings, available at: <http://www.ofcom.org.uk/telecom/btundertakings/btundertakings.pdf> (accessed April 2016).

Ownership separation(in whole or part)
6-Legal separation (separate legal entities under the same ownership)
5-Business separation with separate governance arrangements
4-Business separation with localised incentives
3-Business separation (BS)
2-Virtual separation
1-Creation of a wholesale division
Accounting separation

(Chart 2.5 Vertical separation models.⁸⁰)

The 2009 Telecoms Package was not the first time that the concept of separation was introduced into the European telecoms regulatory framework. A minor model of separation, accounting separation, was included in the Access Directive in the 2002 Telecoms Package and imposed an obligation for accounting separation on SMPs with regard to their interconnection and access activities, especially concerning the transparency of their wholesale and internal transfer prices, in order to meet the requirement for non-discrimination and to prevent unfair cross-subsidy.⁸¹ However, accounting separation functions mainly on the price aspect, and this can hardly tackle other discriminatory behaviour such as restrictions on the provision of wholesale products to competitors. The Commission therefore introduced more drastic functional separation to ensure the provision of fully equivalent access products (this may constitute either equivalence of input (EOI) or equivalence of output (EEO)⁸²) to all downstream telcos, including the telco's own vertically integrated downstream divisions.⁸³

⁸⁰ Source of Chart 4 and Chart 5: Cave, M. E. (2006). "Six degrees of separation operational separation as a remedy in European telecommunications regulation." *Communications & Strategies* 64: 93-94.

⁸¹ Article 11 Access Directive, *supra* n 22.

⁸² See: ITU, "ICT Regulation Toolkit--Functional Separation.", available at: <http://www.ictregulationtoolkit.org/en/toolkit/notes/PracticeNote/3286> (accessed April 2016).

⁸³ *Ibid.*

As suggested by the ERG, functional separation allows for the targeted separation of those enduring bottlenecks which are difficult for rival telcos to replicate commercially, but which provide vital inputs to a range of downstream products and services provided by both the vertically-integrated telco and its competitors. By creating a separate business unit with business incentives based on the performance of that unit (rather than the performance of the vertically-integrated telco as a whole), it is more likely that the business unit will deliver the services that its customers want.⁸⁴

For functional separation to be effective, however, it requires a number of key elements in order to ensure that sufficient incentives are in place for the designated telco to provide equal access to vital upstream inputs (while also ensuring greater transparency of activities, so that the whole market can have confidence in the effectiveness of the associated measures).

- (a) In order to prevent the employees running these bottleneck assets having the motivation and ability to favour the telco's own downstream affiliates, to the detriment of competitors, a functional separation remedy would require – as a minimum – that the same products and services that are provided to the telco's own downstream affiliates be provided equally to alternative providers, using the same ordering and handling processes.⁸⁵
- (b) The new separate business unit established to deliver these products and services must be responsible for the management of assets under its administration, staff, operational support systems (OSS) and Management Information Systems.⁸⁶
- (c) There will need to be governance arrangements to ensure the independence of the

⁸⁴ See: ERG (2007) ERG Opinion on Functional Separation, available at: <http://www.localret.cat/revistesinews/broadband/num25/docs/num4.pdf> (accessed Dec 2014).

⁸⁵ Ibid: 2.

⁸⁶ Ibid: 3.

staff employed by the separate business unit.⁸⁷

Functional separation should be considered an extreme measure and only applied where regular regulatory measures have failed to achieve effective competition.⁸⁸ As stated in the Better Regulation Directive, where NRAs conclude that appropriate obligations imposed under Articles 9 to 13 of the Access Directive have failed to achieve effective competition and that there are important and persisting competition problems and/or market failures identified in relation to the wholesale provision of access to certain products and markets, they may, as an exceptional measure,⁸⁹ impose an obligation on vertically-integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity.

3. Theories and Disputes Regarding Telecoms Forced Access Mechanisms

3.1 The Application of an Essential Facility Doctrine in the European Union

From the above analysis, we can conclude that all telecoms forced-access mechanisms aim to tackle the same competition problem – the incumbent's huge network advantages from its long-term monopoly, without access to which it is difficult for new entrants to compete in the market. Based on these characteristics, the *essential facility doctrine* must be taken into consideration when dealing with this competition problem.

The essential facility, or bottleneck, doctrine, is generally considered to originate in

⁸⁷ Ibid: 3.

⁸⁸ See for reference: Better Regulation Directive, *supra* note 66, Article 2 (10); see also: Kelly, T. and C. M. Rossotto (2011). *Broadband strategies handbook*, World Bank Publications.

⁸⁹ Ibid.

United States case law.⁹⁰ As determined in one of the earliest cases with regard to telecoms regulation, *MCI Communications v AT&T*,⁹¹ an essential facility is described as involving:

- a. control of an essential facility by a monopolist;
- b. a competitor's inability practically or reasonably to duplicate the essential facility;
- c. denial of the use of the facility to a competitor; and
- d. the feasibility of providing the facility.⁹²

At the same time, the World Trade Organisation (WTO) also defines an essential facility as a public telecom transport network or service that

- a. is exclusively or predominantly provided by a single or a limited number of suppliers; and
- b. cannot feasibly be economically or technically substituted in order to provide a service.⁹³

In the European Union, the concept of essential facilities was explicitly introduced by Commission decisions relating to access to harbour facilities.⁹⁴ Later, the Commission took an extensive range of decisions where recourse was made to the essential facilities doctrine, with or without expressly referring to it. These decisions

⁹⁰ It should be noted, however, that the essential facility doctrine has never been officially recognised by the Supreme Court of the United States.

⁹¹ *MCI Communications Corp. v AT&T*. (708 F.2d1081, 1132 (7th Cir.), cert. denied, 464 U.S. 891 (1983)).

⁹² Ibid, at 1132–33.

⁹³ WTO, "Telecommunications Services: Reference Paper.", available at: http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm (accessed April 2016).

⁹⁴ Examples see: Commission Decision No. 94/19/EC (*Sea Containers*), 1994 OJ L 15/8, and Commission Decision No.94/119/EC (*Rødby*), OJ L 55/52.

can be classified into four categories:⁹⁵ (a) harbours;⁹⁶ (b) airports;⁹⁷ (c) rail infrastructure;⁹⁸ and(d) intellectual property.⁹⁹

The concept of the essential facilities doctrine has also been adopted by the Court of Justice, despite the term often not being explicitly expressed. In the early years, in *Commercial Solvents* case, the Court of Justice stated that a refusal to supply raw material to a competitor in a downstream market was an abuse of a dominant position.¹⁰⁰ However, it was not until *Magill* that the Court of Justice found that, in "exceptional circumstances", third parties should be granted access to goods or services where the following conditions are met. By refusing to grant access, the right-holder:

- a. reserves for himself a secondary market (downstream market) and thus excludes all possible competition;
- b. renders impossible the emergence of a new product sought after in the market; and
- c. any objective justification should be absent.¹⁰¹

In *Oscar Bronner*, the Court of Justice further proposed, beyond the conditions in *Magill*, that two extra conditions should be satisfied:

⁹⁵ See: Hatzopoulos, V. (2006). "The European Union Essential Facilities Doctrine."

⁹⁶ Example decisions see: *Sea Containers* and *Rødby*, *supra* n 92.

⁹⁷ Example decisions see: Commission Decision No 92/213/EEC (*British Midland/Aer Lingus*), OJ L 96/34; Commission Decision No 98/190/EC (*FAG-Flughafen Frankfurt/Main AG*), OJ L 72/30.

⁹⁸ Example decisions see: Commission Decision No 94/663/EC (*Night Services*) OJ L 259/20; Commission Decision No 94/894/EC (*Eurotunnel*), OJ L 354/66.

⁹⁹ Example decisions see: Commission Decision COMP/C-3.37.792 (*Magill*) OJ L 78/43.

¹⁰⁰ Joined Cases C-6/73 and C-7/73, *ICI and Commercial Solvents v Commission* [1974] E.C.R. 223. However, it should be noted that the Court of Justice handled this issue with care, and indicated that a practice which *prima facie* appears to be abusive may not be so in the case that it is objectively justifiable, for example when discriminative practices are justified on grounds of public policy, public security or public health. See: Case C-260/89 *Elliniki Radiophonia Tileorassi AE v Pliroforissis* [1991] E.C.R. I- 2925.

¹⁰¹ Joined Cases C-241 and C-242/91 P *Radio Telefis Eireann v Commission* [1995] E.C.R. I-743.

- a. a refusal to deal is likely to eliminate all competition from the relevant market, on the part of the requesting party; and
- b. the facility is indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence.¹⁰²

In the later *IMS* case¹⁰³ the Court of Justice upheld the assessment in *Oscar Bronner* about the definition of "essential" that it should not be economically viable for a firm of comparable size to the right-holder to produce a similar facility and, despite accepting the Advocate General's opinion that regulation should balance the rights of the dominant firm with the need to ensure free competition in a derivative market, the Court of Justice reiterated that all the criteria of the "exceptional circumstances", as stated in *Magill*, must be fulfilled in order for a compulsory license to be granted.

Again, in *Microsoft*,¹⁰⁴ the Court of First Instance upheld the test in *Magill* and *IMS*, with a minor modification of the "new product" requirement to that the refusal limited technical development to the detriment of consumers,¹⁰⁵ although the Court, by reference to the Commission's reasoning in its decision, decided that this criterion should be widened to include all refusals that resulted in the limitation of technical development to the prejudice of consumers.¹⁰⁶

Besides the harsh conditions for applying the essential facilities doctrine in Court of Justice case law, the doctrine itself has drawn much criticism. It has been pointed out that the doctrine does not have a coherent rationale.¹⁰⁷ Areeda and Hovenkamp (2000)

¹⁰² Case C-7/97, *Oscar Bronner v Mediaprint Zeinungs- und Zeitschriftenverlag* [1998] E.C.R. I-779.

¹⁰³ Case C-481/01 P, *NDC v IMS* [2002] E.C.R. I-3401.

¹⁰⁴ Case T-201/04, *Microsoft v Commission* [2007] E.C.R. II-3601.

¹⁰⁵ *Ibid*, para. 665.

¹⁰⁶ *Ibid*, 647-649.

¹⁰⁷ See, for examples: Marquardt, P. D. and M. Leddy (2003). "The Essential Facilities Doctrine and

state that applying the essential facilities doctrine discourages firms from developing their own alternative inputs, and "[r]equiring a firm to share its monopoly with its competitors, as the essential facilities doctrine does, can be inconsistent with the fundamental, pro-competitive goals of the antitrust laws."¹⁰⁸ Motta (2004) also questions the effects of the doctrine, saying "... mandating access, or compulsory licensing, to the monopolized facility might dissuade the monopolist, the rival or both in investing in beneficial facilities in the future. From the monopolist's perspective, once it believes that its rivals will free-ride on its efforts, it will lose the incentive to innovate and invest, as it will not be rewarded for its risks and efforts. On the other hand, the rival will not be motivated to invest because he can be fairly sure that he will be granted access to the monopolist's facility. Consequently, the result is losses in efficiencies, and those most harmed in such a situation are the consumers."¹⁰⁹

The application of the essential facilities doctrine in the telecoms sector is especially questionable due to the market's innovative nature. As Sullivan & Grimes (2006) point out, "[c]ompelling a monopolist to grant competitors access to a facility that the monopolist has ... collides with ... commonplace propositions ... that innovation should be encouraged and rewarded",¹¹⁰ and in an innovative market such forced mechanisms are normally not welfare-enhancing.¹¹¹

Intellectual Property Rights: A Response to Pitofsky, Patterson, and Hooks." *Antitrust Law Journal*: 847-873.; Lipsky Jr, A. B. and J. G. Sidak (1999). "Essential facilities." *Stanford Law Review*: 1187-1248.

¹⁰⁸ Areeda, O.E. and H. J. Hovenkamp, (2000). "Antitrust Law: An Analysis of Antitrust Principles and Their Application."

¹⁰⁹ Motta, M. (2004). *Competition policy: theory and practice*, Cambridge University Press.

¹¹⁰ Sullivan, L. A. and W. S. Grimes (2006). *The law of antitrust: an integrated handbook*, West Academic.

¹¹¹ Kezsbom, A. and A. V. Goldman (1996). "No Shortcut to Antitrust Analysis: The Twisted Journey of the Essential Facilities Doctrine." *Colum. Bus. L. Rev.*: 1.; Gilbert, R. J. and C. Shapiro (1996). "An economic analysis of unilateral refusals to license intellectual property." *Proceedings of the National Academy of Sciences* **93** (23): 12749-12755.

3.2 Disputes in the Telecoms Market in the European Union

Amongst the three main telecoms forced-access mechanisms in the European Union, there are apparently more disputes about the application of local-loop unbundling and separation than interconnection. This is not only because of the ubiquitous service nature of interconnection, but also because of the interpretation of the aforementioned essential facilities doctrine.

As discussed above, the Court of Justice generally adopts a strict stance when applying the essential facilities doctrine, as some of the conditions that it has established, such as the refusal to deal, were likely to eliminate all competition from relevant markets, and the fact of a disputed facility being indispensable to carrying on a person's business, inasmuch as there is no actual or potential substitute in existence, is difficult to establish. Furthermore, this last condition, according to the Court of Justice, will only be fulfilled if:

- a. there are no plausible alternatives to the facility, even of an inferior quality; and
- b. the impossibility of duplicating the facility is objective, due to "technical, legal or economic obstacles", and not to the limited capacities (e.g. inadequate output) of the specific competitor requiring access.¹¹²

The Commission, on the other hand, has a relatively loose approach to the essential facilities doctrine, especially in the telecoms sector. As set out in the Commission's Notice on the application of competition rules to access agreements in the

¹¹² *Oscar Bronner, supra* n 102, para. 43.

telecommunications sector – framework, relevant markets and principles¹¹³ – when determining whether access should be ordered under competition rules, the Commission intends to consider whether the dominant telco has not fulfilled its duty not to discriminate, or the following essential facility test conditions are met:

- a. access to the facility in question is generally essential in order for telcos to compete in that related market;
- b. there is sufficient capacity available to provide access;
- c. the facility owner fails to satisfy the demand for an existing service or product market, blocks the emergence of a potential new service or product, or impedes competition for an existing or potential service or product market;
- d. the telco seeking access is prepared to pay a reasonable and non-discriminatory price and will otherwise in all respects accept non-discriminatory access terms and conditions; and
- e. there is no objective justification for refusing to provide access.

One of the most notable counter-arguments to applying the essential facilities doctrine in the European telecoms sector rests on whether the disputed networks are essential, e.g. if there are alternative access networks so that the refusal of access to the said networks should not be regarded as the exclusion of all possible competition. This question should be deemed crucial in today's trend towards convergence in the telecoms sector, as there are cable services, electricity lines (power lines) and even the latest developed Long-Term Evolution (LTE) services.

¹¹³ See: European Commission, "Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector – Framework, Relevant Markets and Principles, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998Y0822\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998Y0822(01)&from=EN) (accessed April 2016).

Besides, some of the criticisms of the "general" essential facilities doctrine can also be made about application of the said doctrine in the telecoms sector, or more precisely, local-loop unbundling or separation. Chris Doyle (2000), for example, raises the point about the difficulties in getting a clear economic evaluation of the benefits and costs of mandated local-loop unbundling, as he observes that there appears to be no reason to support mandated local-loop unbundling in densely populated urban areas, as competition among infrastructure providers is emerging. He further concludes that, "[w]hile policy makers have championed ULL [the author used "unbundled local loop" instead of "local-loop unbundling"] as a way to promote competition at the local level in telecom, applying mandated ULL across the whole of a country may be inappropriate and socially damaging."¹¹⁴

4. Conclusion

This chapter provided an overview of telecoms forced access in the European Union. It starts with an introduction to the European telecoms regulatory framework, to the meaning of telecom forced access mechanisms, and how these mechanisms are situated in this regulatory framework, including the changes to forced access obligations with the introduction of new Telecoms Packages; lastly, it examined theoretical and factual disputes concerning telecoms forced access mechanisms in the European Union.

There are several observations that can be made on the discussions in this chapter. First, one of the biggest changes brought by the new 2009 Telecoms Package was

¹¹⁴ Doyle, C. (2000). "Local loop unbundling and regulatory risk." *J. Network Ind.* 1: 33.

greatly reduce the markets that are subject to *ex ante* regulation. This change is regarded as in line with the global trend away from sector-specific regulation to competition regulation. While it is unknown how much further this trend will evolve in the future, this gradually lighter-touch regulatory idea suggests that the need for intense regulation of the telecoms market is reducing, and this will play an important role when reviewing the legitimacy of telecoms forced access mechanisms.

This trend, however, is in contrast to the introduction of functional separation, which is a relatively strong regulatory measure. The reason why the European Union introduced a regulatory measure that is in such contradiction to its loosening of the regulatory framework is unknown, but probably due to politics within Member States, As suggested by Keegan (2011), this might be due to the fact that when there was a dispute about the functional separation implemented in the United Kingdom, the United Kingdom then took this proposal to the European Union.¹¹⁵

The essential facilities doctrine, as discussed in the last section of the chapter, serves as an important rationale for telecoms forced access mechanisms. However, the implementation of this doctrine, according to the Court of Justice, requires a strict assessment of "essential", and the results of incautious implementation may have drawbacks in the form of economic and social welfare damage, such as reducing the incentive to invest in new and better technologies. These will be examined later, in Chapter Ten.

¹¹⁵ Keegan, S., European Commission, Directorate-General for the Information Society, personal communication.

Chapter III

Telecoms Forced Access Mechanisms in Taiwan

Preface

Like Chapter Two, to understand whether telecoms forced access mechanisms constitute an unconstitutional restriction on the fundamental rights of telcos under Taiwan's constitutional and legal framework, it is important to understand the meaning and content of telecoms forced access mechanisms and how these mechanisms are implemented in Taiwan. This chapter thus comprises three sections: the first is an introduction to the telecoms regulatory framework in Taiwan, which starts with an introduction to the regulatory authority (section 1.1). As the telecoms market in Taiwan has many unique features, and much of it was gradually added to the regulatory design over the years,¹ the next part of the section is a brief introduction to the historical development of telecoms regulations in Taiwan (section 1.2). Because Taiwan's telecoms regulations did not have major, fundamental amendments such as the introduction of the new Telecoms Package in the European Union, but had several modifications over the years instead, the second part of this section gives an overall view of telecoms regulation in Taiwan from a scholarly perspective (section 1.3). According to Taiwanese scholarly discussions, telecoms regulations can be categorised into four groups: (market) entry regulations; structural (asymmetric) regulations; behavioural regulations; and competition law regulations.² For the purposes of this chapter, the emphasis of this section will be on structural and behavioural regulations, as most forced access regulations fall into these two

¹ Y.L.Liu, Ed. (2004). *Telecommunications*. SunYei Publishing: 170.

² Huang, M.-J. (2010). *Research of Telecoms Regulations*:95.

categories.

The second section is a discussion of telecoms forced access mechanisms in Taiwan. As per the discussion and limitations set out in previous chapters, this section will focus on the three targeted telecoms forced access mechanisms--i.e. interconnection, local-loop unbundling and separation--that are stipulated in Taiwanese telecoms regulations, such as in the Regulations Governing Network Interconnection among Telecommunications Enterprises.³ It should also be noted that as there are no active laws or administrative orders regulating separation, this section will include discussion of a draft bill to amend the Telecommunications Act.⁴

Finally, as the review of the constitutionality of a regulatory measure involves a synthetic consideration and a weighing of all the interests and possible harms (see Chapters Seven, Nine and Eleven), the final section 3 examines the current situation of the Taiwanese telecoms market and some notable disputes between telcos, concerning telecoms forced access, that are occurring in the market, especially between the incumbent and competing telcos, to analyse what interests are at stake and potential harms resulting from implementing telecoms forced access mechanisms in Taiwan.

It should be noted that as this chapter focuses on the regulatory framework in Taiwan, the materials cited are mostly in Chinese. As such, it will not be further specified individually that the terms and content are translations from Chinese but they will be

³ It should be noted that customarily, the statutes and regulations in Taiwan do not specify their amended date in their names; therefore, when an act or regulation is mentioned, it refers to the latest version or amendment.

⁴ Article 25 of draft amendment bill of Telecommunications Act.

categorised as such in the Bibliography.

1. Telecoms Regulatory Framework in Taiwan

1.1 Regulatory Authorities

a. Sector Regulator: National Communications Commission

The telecommunications sector regulatory authority in Taiwan is the National Communications Commission (NCC). There are several laws and regulations regulating communications affairs, such as the Telecommunications Act, Radio and Television Act, Cable Radio and Television Act and Satellite Broadcasting Act; and the power to regulate communications affairs belonged to the Ministry of Transportation and Communications (MOTC), the Government Information Office (GIO) and the Directorate General of Telecommunications (DGT), respectively, according to their nature. Although this multi-authorities pattern was applied in Taiwan for decades, such arrangements ran the risk of lower efficiency and ambiguity in responsibilities. There are two noteworthy issues: first, the GIO served as a government spokesperson regarding the supervision of broadcasting and the propaganda of the Taiwanese government to international society, diluting each of these roles that it played. Second, with the DGT being an institute under the MOTC, the communications affairs operated and supervised by these two bodies led to confusion over the organisation in charge and, much more importantly, a conflict of interests.

This ambiguous situation changed greatly with the movement towards reorganisation of government and the requirements of joining the World Trade Organisation

(WTO),⁵ and hence the creating of a single united regulator in the telecommunications sector. Thus in 2002, a new regulator, the NCC, was established to imitate the design of the FCC in the United States. With the later enactment of the Fundamental Communications Act and the National Communications Commission Organization Act, the NCC was reaffirmed as the single regulatory authority in the telecommunications sector by design.⁶

b. Competition Regulator: Fair Trade Commission

The national authority for unfair competition, the Fair Trade Commission (FTC), also plays a role in telecoms regulation with regard to the anti-competitive behaviour of telecoms companies via the application of the Fair Trade Act. At the same time, because of the character of regulatory policies in the telecoms sector, the ideas of competition law have also been integrated into some provisions in sector regulations, e.g., the asymmetrical regulation on SMP in Type I telecommunications operators in Article 26-1 of the Telecommunications Act, such that the SMPs (termed as DMP, dominant market player) bear the obligation not to: obstruct a request for interconnection; refuse to release the calculation methods of its interconnection fees; or improperly determine or change the tariffs of telecoms services.⁷

⁵ See: TWDRWP (2005). Transparency Discipline for Domestic Regulation in the Transparency Discipline for Domestic Regulation in the Telecommunications Sector.

⁶ It should be noted that in Article 3 Telecommunications Act, the regulatory authority of the telecommunications sector remains unamended and is still the MOTC. However, there is no doubt that the NCC has replaced the MOTC (DGT) as the regulatory authority, as stated in Article 2 of The National Communications Commission Organisation Act: "Effective on the NCC inception date, the competent government agency and pertinent communications laws and regulations, including the Telecommunications Act, the Radio and Television Act, the Cable Radio and Television Act, and the Satellite Broadcasting Act, that once had fallen under the purview of the Ministry of Transportation and Communications, the Government's Information Office, Executive Yuan, and the Directorate General of Telecommunications, Ministry of Transportation and Communications, shall fall under the purview of the NCC. The same also applies to those stipulated by other pertinent laws and regulations that concern the competent responsibilities of the NCC."

⁷ Article 26-1 Telecommunications Act reads:

A Dominant Market Player (DMP) of Type I telecommunications enterprises shall not engage in the

The responsibilities borne by the NCC and FTC sometimes overlap, despite the different roles played and tasks undertaken by the two regulatory authorities. For example, both regulators are competent in dealing with telecoms mergers. The FTC has also issued an "Explanation of the Fair Trade Commission's Regulations of Telecommunications Operators",⁸ which explains the relationship between competition law and telecoms regulations and, of special importance to this thesis, the application of an essential facilities doctrine to local loops. This will be further explored later in this chapter (1.3.2).

1.2 Historical Development of Telecom Regulation in Taiwan

Telecoms services in Taiwan, as in most other countries, were first offered by the government. With the global trend towards liberalisation, Taiwan also took steps to liberalise and open up the telecommunications market. Telecoms regulation evolved

following conducts:

1. to obstruct, directly or indirectly, the request of interconnection of networks proposed by other Type I telecommunications enterprises with its proprietary techniques;
2. to refuse to release to other Type I telecommunications enterprises the calculation methods of its interconnection fees and other relevant materials;
3. to improperly determine, maintain, or change its tariffs or methods of offering telecommunications services;
4. to reject the request of leasing network component by other Type I telecommunications enterprises without due cause;
5. to reject the request of leasing circuits by other telecommunications enterprises or users without due cause;
6. to reject the request of negotiation or testing by other telecommunications enterprises or users without due cause;
7. to reject the request of co-location negotiation by other telecommunications enterprises without due cause;
8. to discriminate against other telecommunications enterprises or users without due cause; or
9. to abuse its DMP status, or to engage in other unfair competition acts.

The aforementioned DMP shall be identified by the DGT.

⁸ FTC "Explanation of the Fair Trade Commission's Regulations of Telecommunications Operators", available at: <http://www.ftc.gov.tw/internet/main/doc/docDetail.aspx?uid=211&docid=275> (accessed April 2016).

with the liberalisation process, and can be divided into the following three stages:⁹

1.2.1 Initial liberalisation in the Monopoly Era

The first stage of liberalisation began in 1987 with the opening up of end users' devices (home telephone sets). The DGT was then not the only source of telephone sets anymore, and end users could get and use telephone sets from private sellers as long as these telephone sets were approved by the DGT. Other important progress in this stage was the opening up of electronic circuits and value-added network (VAN) services.

1.2.2 The Opening up of Mobile Communications Services

The second stage began in 1989, as the DGT opened up several more telecoms services, amongst which primitive mobile communications services were the most important. The reason why these services were opened up earlier was because they only involved opening up the spectrum, not the installation of network infrastructure. With the opening of said services, the mobile phone market developed very rapidly. In 2002, the penetration rate for mobiles in Taiwan reached 108% which had been reported as the highest rate in the world at the time.¹⁰ Also in this stage, the DGT started to categorise telecommunications operators into Type I and Type II telecommunications operators, and differentiated its regulatory approaches.

1.2.3 Opening up of the Fixed Network and Full Liberalisation

⁹ For these historical developments, see: Liu, K.-C. and J.-j. Shih (2001). *Revolutional Regulation*, Social Science Research Centre, Academic Sinica; Jen, T.-Y. (2001). *A Study on the Regulation for the Telecommunications Industry*, Shay & Partners; Y.L.Liu, Ed. (2004). *Telecommunications*. SunYei Publishing.

¹⁰ TNIC (2002). "Report of Internet Population", available at: http://www.myhome.net.tw/2002_09/articl/articl_0102.htm (accessed April 2016).

With the fundamentals established in the second stage and the opening up of more telecoms services, such as the leasing of international submarine cables, the Taiwanese telecoms market was developing prosperously. To promote the development of broadband networks, the DGT further opened up fixed network services in 2000, which might be one of the most important steps in the third stage of liberalisation. With the later opening up of services such as Voice over IP (VOIP),¹¹ third-generation (3G) mobile services and mobile virtual network operators (MVNOs),¹² all telecoms services were opened and the Taiwanese telecoms market could be said to be entirely liberalised. In this stage, the NCC also replaced the DGT as the independent regulator of the telecoms sector.

1.3 Current Telecoms Regulatory Framework---A Scholarly Perspective

1.3.1 Telecoms Sector Regulations

It should be noted first that in the Telecommunications Act, telcos, terms as telecommunications, are classified into two categories: Type I telecommunications and Type II telecommunications. "Type I telecommunications" means an enterprise that installs telecommunications line facilities and equipment in order to provide telecommunications services,¹³ and "Type II telecommunications" means telecommunications other than Type I telecommunications.¹⁴ The regulations for different intensities and obligations imposed are often designed according to the

¹¹ VOIP refers to the telecommunications technology that delivers voice communications and multimedia packets over Internet Protocol (IP) networks such as the Internet, see: Goode, B. (2002). *Voice over internet protocol (VoIP)*:13; Yeung, J. (2015). *Voice Over Internet Protocol - A Practical Guide for the Non-telephone Engineer*.

¹² MVNO refers to a wireless communications service operator that does not own wireless network infrastructure to provide services to its customers, see for reference: Korhonen, J. (2003). *Introduction to 3G mobile communications*, Artech House: 300.

¹³ Here, telecommunications line facilities and equipment refer to network transmission facilities connecting sending and receiving terminals, switching facilities installed to be integrated with network transmission facilities, and the auxiliary facilities of both. See: Article 11 Telecommunications Act.

¹⁴ Ibid.

different nature of the two types of telecommunications.

According to the consensus of Taiwanese scholars, telecommunications sector regulations can be classified into the following three categories:¹⁵

1.3.1.1 Entry Regulations

a. Limitation on the Organisation of Telecommunications

A Type I telecommunications operator shall be a company limited by shares incorporated pursuant to Company Law.¹⁶ There is no limitation on the organization of Type II telecommunications operators.

b. Limitation on Foreign Capital

A limitation on foreign capital in the early development of privatisation of telecommunications sector has been adopted by many countries, including Taiwan, in order to ensure steady development of the national telecommunications industry.

However, with the convergence of telecommunications technologies and the need for new products and services, the limitations were loosened as the introduction of foreign capital also brings in new technologies and better management. This situation was further enhanced by the eagerness to join the WTO and the requirement to lift restrictions on foreign capital. Nowadays, the limitation on foreign capital is 49% for direct shareholdings and 60% for direct and indirect shareholdings combined, an

¹⁵ See: Li, C.-J. (2007). *The Research on the Regulatory Classification of Telecommunications Enterprises under the Telecommunications Act: Take Internet Telephony Service as Example*, TungHwa University School of Law: 131-132.

¹⁶ Article 12 (2) Telecommunications Act.

increase from the original 20% for direct and indirect shareholdings combined.¹⁷

c. Special Licenses and Permissions

There are different designs and requirements for company establishment and registration in Taiwan according to the nature of the company,¹⁸ and as the operation of Type I telecommunications operators involves scarce resources, such as the spectrum and the use of land, the establishment of said telecommunications operator has to have permission from the national regulator. At the same time, the types of business, their scopes and timeframes and the overall quantity of Type I telecommunications operators should also follow special orders and regulations. On the other hand, the regulations on Type II telecommunications operators are not as strict and are not very different from those for companies in other industries.

d. Limitation on Overall Capital

The current limitation on overall capital mainly focuses on Type I telecommunications operators: they should be financially competent to install telecommunications facilities.¹⁹

1.3.1.2 Structural Regulations

"Structural regulations" refers to regulations aiming to adjust the structure of the industry, especially the competition status of markets within the industry. The most important and typical structural regulations in the telecoms industry are asymmetric

¹⁷ Article 12(3) Telecommunications Act.

¹⁸ Article 17 Company Law.

¹⁹ For examples, see: Article 8(1) Regulations for the Administration of Fixed Network Telecommunications Businesses, Article 13 Regulations for the Administration of Mobile Communications Businesses, Article 4 Regulations for the Administration of Third Generation Mobile Communications Businesses.

regulations. As in most countries, telecoms markets were once a monopoly with a single (incumbent) operator, giving the incumbent the edge in competition after markets were opened up. In order to introduce competition into this once monopolised industry and achieve the proposed policy goals,²⁰ regulators usually impose stronger obligations or a heavier burden on one or some of the market participants, especially the incumbent or companies with significant market power (SMP).

There are two main types of asymmetric regulations in the telecoms sector. The first concerns the regulations applied to the relationship between telcos and consumers, such as tariff regulations. The second type is found in the regulations on the relationship between telcos, such as the obligations of interconnection.²¹ The reason for asymmetric regulation of interconnection is because of the imbalance of economic power between the incumbent and new entrants, especially during the early process of privatisation, as the incumbent inherits and controls most of the resources (such as existing networks and customers) and deploying networks is difficult (especially for networks in a city). It is therefore essential to apply asymmetric regulation in order to protect new entrants and facilitate their competence to compete.²²

One of the most noteworthy asymmetric regulation provisions in Taiwanese telecoms regulation is Article 26-1, which elaborates the prohibition on nine kinds of abuse of

²⁰ Shyr, H. S. H. (2009). *Legal Analysis of the Opening of Local Loops in Taiwan--The Switching of the Legal Framework of Communication Convergence toward Competition*, Angle Publish: p.193.

²¹ Liu, Y.-F. C. C.-J. (2000). "Asymmetric Regulation in the Telecommunications Industry." *Socioeconomic Law and Institution Review* 26: 64.

²² It has been commented that the application of asymmetric regulations, like the infant industry argument in economics theory, will not be justified unless it satisfies the following conditions: (1) when the prescribed protection period is over, the original asymmetric regulations should be removed, or consumers cannot enjoy the benefits of competition; (2) when a new market player survives the competition, the positive effects this brings to the competition market should surpass the social costs during the protection period; (3) the protection period should be set in advance and include the provision that all protective approaches will be ended when the protection period ends. *Ibid.*:70-71.

Type I telecommunications SMP. Eight of these nine behaviours are related to interconnection affairs, such as the prices of and requests for interconnection or co-location (termed as collocation in Taiwan telecoms regulation) . It has been said that this article is a typical or *prima facie* asymmetric regulation and can be called a "competition provision within sector (regulation)."²³

Asymmetric regulation is regarded as an effective regulatory method in the telecoms sector and has been ubiquitously adopted; however, an important (especially in the early stages of this thesis) question to ask is: where should we draw the line on asymmetric regulation? This leads to a second and more straightforward question concerning the aims of integrating competition law mechanisms into sector regulation. If we think that the answer to the second question is to create an environment for new entrants so that they are more capable of competing, resulting in more choices in the market with regard to products and services instead of depressing SMP, the scope of asymmetric regulation should, understandably, be limited to the encouragement of competition in terms of efficiency and innovation. In other words, excessive asymmetric regulation mechanisms, such as rates and arrangements for interconnection that lavishly favour new entrants, may greatly diminish their incentive to develop or deploy their own infrastructures.²⁴

1.3.1.3 Behavioural Regulations

Here, we enumerate several important regulatory mechanisms that are classified by Taiwanese scholars as behavioural regulation:

²³ Shyr (2009), *supra* n 20: 133-134.

²⁴ *Ibid*: 196.

a. Interconnection

In telecoms, interconnection means the physical or functional linking of one or more telecoms networks in order to let the users of each network be able to communicate with each other, or let the users of a network use the services offered by other networks.²⁵ The principle of interconnection is the basis for setting up the technological interface and commercial arrangements.²⁶

b. Tariff Control

Tariff control means a regulatory policy that allows the regulator to control the tariffs that telcos apply to their end customers. Tariff control is an important regulatory mechanism, especially during the early stage of telecoms privatisation, as it has a twofold function: first, it enables telcos to operate and develop steadily by ensuring a sufficient rate of return to cover their operation costs; second, it prevents exorbitant telecoms prices as public utilities can be used at a fair rate. Despite the Taiwanese telecoms market having been liberalised and developing rapidly, there still exist some conditions or entry barriers, such as the number of telco licences, which tend to lead to an oligopoly (see the above discussion on Special Licenses and Permissions in section 1.3.1.1). To prevent anti-competitive practices in an oligopoly, such as cartel pricing (concerted pricing), it is necessary to retain a certain amount of tariff control.²⁷

Before telecoms services were privatised, the mechanism for tariff control was rate-of-return regulation. In other words, the telecoms department (DGT) was allowed to set tariffs to achieve a certain range of rate of return in order to keep profits at a

²⁵ Jen (2001), *supra* n 9:76.

²⁶ MOTC (1997). White Paper on the Liberalisation of Telecommunications Policies:17.

²⁷ Huang (2010), *supra* n 2:107.

reasonable level.²⁸ When the telecoms market was later privatised, however, defects in the rate-of-return regulations emerged, as they did not allow the margin of profit to exceed a proposed range and might reduce the incentive for telcos to enhance their efficiency and lower costs.²⁹ In many countries, telecoms regulators have adopted price-cap regulations to replace rate-of-return regulations.³⁰ Price-cap regulations adjust the tariffs charged by telcos according to a price-cap index that reflects the overall rate of inflation in the country and are usually presented as "CPI – X", with CPI being the consumer price index and X the adjusting index. Price-cap regulation was also included in the 1999 amendment to the Taiwanese Telecommunications Act.

c. Universal Service

An issue in the privatisation of the telecoms market was how to maintain the universal service. Universal service means maintaining a certain degree of telecoms services throughout the country, especially in areas where the free market function fails, e.g. deploying telecoms infrastructure in remote rural areas where the return on investment cannot meet the costs of deployment. Since the telecoms market has been privatised, telcos, in pursuit of profit, usually pay more attention to more profitable services and areas, and neglect uneconomic services and areas (creaming). However, citizens in these areas should retain at least a basic level of telecoms services in order to engage in daily economic life. Therefore, regulators usually impose a universal service

²⁸ It has been commented that the rate of return regulations adopted by the DGT were very strict, as the upper limit was very low but the lower limit very high. See Wang, W.-Y. (2000). "Transformation of the Concept of Public Utilities Regulations and competition – A Case Study of Telecommunications and Electricity." *National Taiwan University Law Review* 4:138.

²⁹ Another issue is that, at this rate, asset values have to be considered when calculating tariffs. Therefore, when telecommunications operators' assets values are being revalued, tariffs will have to be adjusted as well. See: Huang (2010), *supra* n 2: 107.

³⁰ See: OECD (1995), Price Caps for Telecommunications—Policies and Experiences, available at: <https://www.oecd.org/sti/ieconomy/1909801.pdf> (accessed April 2016).

obligation on telcos.³¹ Universal service is one of the most vivid characteristics of modern telecoms services as public utilities.

1.3.2 Competition Law Regulations

As stated in the early part of this chapter, the NCC is the regulator for the telecoms sector and regulates telecoms affairs by applying sector regulations, such as the *Fundamental Communications Act* and the *Telecommunications Act*. On the other hand, the FTC is the regulator for general anti-competitive behaviour and emphasises the economic dimension. As made clear in the FTC's "Explanation of the Fair Trade Commission's Regulations of Telecommunications Operators": "[t]he current Telecommunications Act also has several regulations for certain competition behaviours of telecommunications operators. Compared to the Fair Trade Act, the Telecommunications Act implements sector-specific regulations and emphasizes *ex-ante* regulation. In other words, it lowers the chances of anti-competitive behaviour via such mechanisms as tariff control, interconnection, equal access and accounting separation. On the other hand, the Fair Trade Act plays the role of a general competition law and emphasises *ex-post* regulation. It prevents and deters anti-competitive behaviours via the investigation and punishment of enterprises that violate the Fair Trade Act".³² In its explanation, the FTC further specifies several anti-competitive behaviours of telcos that it aims to target. These include: predatory pricing; vertical price squeezing; cross-subsidies; abuse of essential facilities; improper special and differential treatment; improper long-term contracts; and

³¹ One of the common approaches is where regulator charges all the telecoms companies in the market a certain amount of money to establish a telecoms universal services fund and forces certain companies (usually the incumbent) to ensure their physical deployment.

³² See Article 3 FTC "Explanation of the Fair Trade Commission's Regulations of Telecommunications Operators", *supra* n 8.

limitations on transfers.

Despite these two regulators being responsible for different matters, sometimes their duties overlap, as when two telcos merge. The relationship between the functioning of the NCC and the FTC is similar to that between the Federal Communications Commission (FCC) and the Antitrust Division of the Department of Justice (DOJ) in the United States. However, the two regulators may sometimes have different or even conflicting views. Many of these cases occur because of the *ex ante* or *ex post* stances that the two regulators adopt. For example, in the case of essential facilities, the FTC does not specify which facilities or devices are essential but will make a judgement when a case is brought before the FTC.³³ On the other hand, the NCC can specify certain facilities or devices and apply different regulations, such as deciding that local-loop unbundling is an essential facility (termed alternatively a "bottleneck facility") in the fixed-line market in 2006,³⁴ as per the provision in Regulations for Administration on Fixed Network Telecommunications Business: "During the construction of network infrastructure facilities for its fixed telecommunication network, where the bottleneck facilities in the telecommunications network cannot be self-constructed or substituted for by other available technologies within a reasonable period of time, an operator or an applicant who has received the approval for establishment may request for sharing of network infrastructure facilities with operators of fixed network telecommunications business who have the possession of bottleneck facilities".³⁵

³³ See for reference, *ibid*.

³⁴ NCC (2006). Metallic Local Loop as Bottleneck Facility.

³⁵ Article 37(1) Regulations for Administration on Fixed Network Telecommunications Business.

2. Telecoms Forced Access Mechanisms in Taiwan

2.1 Introduction

In this subsection, the regulations for the three main kinds of telecoms forced access mechanisms in Taiwan will be discussed: interconnection, local-loop unbundling (local-loop access) and separation. It should first be noted that, in some scholarly discussions, local-loop unbundling is classified as a type of interconnection.³⁶ However, as the Taiwanese regulators follow different paths to deal with these two mechanisms, they will be discussed separately in this chapter.

Except for accounting separation, there have not been active laws or regulations for separation in the telecommunications sector. However, the idea of separation, especially functional separation, has been introduced to Taiwan and it has been discussed whether it should be included in law (see discussion in 2.4, below). As expectations are that this thesis will serve not just as the basis for the present but also future scholarly discussions, this chapter will include separation in the discussion of the forced access mechanism, especially the proposed provision of draft amendments.

2.2 Interconnection

2.2.1 Meaning and Limitations

Interconnection means the connection of two or more network systems so that the users of those systems can communicate with each other. As discussed earlier in this chapter, telcos can be classified as Type I and Type II. Interconnections are necessary between Type I operators and are arguably necessary between telecommunications

³⁶ For examples, see: Chuang, Y.-F. and C.-J. Liu (1998). "Network Interconnection and the Development of the Telecommunications Industry." *Socioeconomic Law and Institution Review* **21**; Chou, Y. (2001). *The Third Revolution in Telecommunications Regulations. Policy Analysis: Theory and Practice*. Shih-Hsin University Department of Administration: p.3; Liu (2004) *supra* n 1: 203.

operators that are not all Type I telecommunications operators, i.e. between Type I and Type II operators, and between Type II operators inter se (henceforth non-Type I telecommunications operators or non-Type I interconnection). DGT, the Taiwanese regulator, and the succeeding NCC hold the same opinion and distinguish the regulations for interconnection depending upon these two kinds of operators. Simply put, only Type I telecommunications operators have an obligation to interconnect with each other, while non-Type I telecommunications operators do not have such an obligation.³⁷

As Type I and non-Type I interconnections are basically different--i.e. Type I interconnections emphasise the physical connections between two networks while non-Type I interconnections refer to the arrangements for IP transmission--the regulatory principles for these two kinds of interconnection also differ. A comparison of the regulatory principles for Type I and non-Type I telecommunications operators and interconnection is shown in the chart below:

	Type I Telecommunications	Non-Type I Telecommunications
Licensing	Special and limited	Fully open and no restrictions
Regulations	Strong and asymmetric	Less strict
Interconnection	Legally obliged	Voluntary interconnection by negotiation

³⁷ See below discussion in 2.2.2.

Principle of Interconnection Fees	Cost-based (Long-Run Average Incremental Cost)	By negotiation
Calculation of Interconnection Fees	Per-call based, time- and class-sensitive	Three different ways: 1. Mutually waived 2. Consumer mode 3. Traffic-flow mode
Calculation of Consumer Charges	Per-call based, time- and class-sensitive	Monthly flat rate

(Chart 3.1 The interconnection obligations of Type I and Type II telcos³⁸)

There is no doubt that non-Type I interconnections play an important role in the telecoms industry, and there are no fewer disputes surrounding it than Type I interconnections, most notably concerning interconnection fees, especially in Taiwan.³⁹ However, this thesis focuses mainly on physical forced access to telecoms networks; disputes about non-Type I interconnections will be discussed where appropriate, but not emphasised, as discussions about non-Type I interconnections go well beyond the scope of this thesis.

³⁸ Lien, Y.-N. (2009). "Analyses of Regulations and Techniques of IP Interconnection", available at <http://www.cs.nccu.edu.tw/~lien/Pub/c80ip.pdf> (accessed April 2016).

³⁹ It should be noted here that the NCC has a regulatory philosophy whereby telecommunications operators that have operated Type I telecommunications businesses should be regulated and abide by Type I regulations (which are generally considered stricter), even when they are offering Type II (non-network related) products or services. According to Mei-Hwui Chui, head of the legal department of CHT, the NCC asserted that this regulatory philosophy is not just customary but came from an administrative order that it published. However, the said order could never be found (and therefore was never able to be challenged in judicial review) (Chui, personal communication). The application of the said regulatory philosophy, however, is not just arbitrary but impairs the principle of the rule of law, as it lacks a legal source, and also nullifies the legislative designs distinguishing Type I and Type II telecommunications regulations.

2.2.2 Background

In the history of telecoms liberalisation, different countries adopted different stances toward the regulation of interconnection, i.e. some countries have made interconnection a legal obligation, while others respect the negotiations between telcos and so regulators do not intervene until negotiations fail.⁴⁰ However, it should be noted that even if agreement has been reached in the negotiation of interconnection arrangements, as the competition situation in the market is ever-changing, it is essential for interconnecting telcos to have updated arrangements and regulatory frameworks should be adjusted accordingly.⁴¹

Currently, only Type I telecommunications operators have an interconnection obligation. The principal provision of this obligation in Taiwan is Article 16(1) of the Telecommunications Act, which states:

"Requests for network interconnection between or among Type I telecommunications enterprises shall not be rejected, unless the law specifies otherwise."

This provision was the result of an amendment in 1999 as the terminology used in the original version was not clear. In an explanation of the said amendment, the term "interconnection" is identified as a "network connection between Type I telecommunications operators in order to enable subscribers to communicate with subscribers to other telecommunications operators or to access services provided by

⁴⁰ See Huang (2010), *supra* n 2:133.

⁴¹ It may be questioned whether interconnection agreements should be regarded as cartels. In this regard, the FTC points out in its Explanations of the Fair Trade Commission's regulations on Telecommunications Operators that since interconnection agreements benefit customers who can use telecommunications services and this will promote competition, therefore, generally they will not be regarded as cartels. However, were interconnecting parties purposely to set excessively high interconnection charges in order to restrict the competition between tariffs, this might be regarded as an illegal cartel.

other telecommunications". However, if there are technical infeasibilities inherent in the said interconnection or where such interconnection will affect the safety of telecoms facilities, the requested telco should have the right to reject the said interconnection with the approval of the regulator.⁴²

The idea that requests for interconnection shall not be rejected in principle was reaffirmed in later published administrative orders, Regulations Governing Network Interconnection among Type I Telecommunications Operators⁴³ and Regulations for the Administration of Fixed Network Telecommunications Business.⁴⁴

In the same Article, the Telecommunications Act announces principles for interconnection arrangements, as it states:

"The arrangement of network interconnection mentioned in the preceding paragraph shall follow the principles of transparency, reasonableness, non-discrimination, network unbundling and cost-based pricing. The DGT shall designate the telecommunications enterprises to which the said principles shall apply."⁴⁵

With technological developments and international trends, e.g. Taiwan joined the WTO and had to abide by the WTO's Agreement on Basic Telecommunications, the scope of interconnection is not limited to Type I telecommunications operators. The

⁴² See: Article 4 of the Regulations Governing Network Interconnection among Telecommunications Enterprises.

⁴³ As stated in Article 4(1) of the Regulations Governing Network Interconnection among Type I Telecommunications Companies: "Among Type I telecommunication enterprises, when one enterprise demands network interconnection with another enterprise, the other party is not allowed to refuse".

⁴⁴ As stated in Article 43(1) of the Regulations for Administration of the Fixed Network Telecommunications Business: "By and between any two operators, when one requests network interconnection with another, except as otherwise provided by the laws and regulations, the other cannot refuse".

⁴⁵ See: Article 16(2) of the Telecommunications Act. It should again be noted that to rely on the "DGT" is legislative negligence as the regulatory authority should be the NCC instead.

said Article 16 of the Telecommunications Act was therefore amended in 2002 to open a gateway to interconnection between Type I and Type II telecommunications operators and to give a legal basis for a more detailed administrative order.⁴⁶ Accordingly, the aforementioned Regulations Governing Network Interconnection among Type I Telecommunications Operators was amended and became the Regulations Governing Network Interconnection among Telecommunications Enterprises, and this enlarged the scope of interconnection to interconnection between Type I and Type II telecommunications operators as well.

2.2.3 Current Framework of Interconnection

The early legislators of the Telecommunications Act and the DGT held the belief that, as the telecoms market had just been liberalised and there was one dominant player in the market which owned most of the resources, the market could not be expected to function fully without due regulation. In the case of interconnection, a failure to retain a suitable interconnection mechanism would lead to delays or poor quality in communications. It would also lead to excessively high costs for new entrants and low efficiency for the incumbent. Therefore, it was essential to maintain a workable legal framework for interconnection. The current regulator NCC holds the same opinion and has included such ideas in the law, and this is the reason why interconnection under the Taiwanese telecoms regulatory framework does not rely entirely on commercial negotiations but sometimes are legal obligations, and in some cases the

⁴⁶ As stated in Article 16 (VII) of the Telecommunications Act: "Type I telecommunications enterprises shall not reject a request for network interconnection by Type II telecommunication enterprises without due cause, unless the law specifies otherwise. The preceding paragraphs 3 and 6 shall apply, mutatis mutandis, to an agreement for network interconnection." Article 16 (VII) further states that the DGT shall enact rules with respect to network interconnection, tariff calculation, negotiation, mandatory terms within interconnection agreements, arbitration procedures and matters requiring compliance related thereto, between or among Type I telecommunications enterprises and other telecommunications enterprises.

regulator can intervene.

The current legal framework of interconnection can be analysed as follows:

2.2.3.1 Arrangements for Interconnection

- a. The arrangements for network interconnection mentioned in the preceding paragraph shall follow the principles of transparency, reasonableness, non-discrimination, network unbundling and cost-based pricing.⁴⁷ This idea is reaffirmed in the Regulations Governing Network Interconnection among Telecommunications Enterprises, which state that when a Type I telecommunications operator provides a network interconnection service, the price, quality and other interconnection conditions shall meet the principles of being just, reasonable and non-discriminatory.⁴⁸

- b. Network interconnection among Type I telecommunications enterprises shall be economically, technically and administratively efficient.⁴⁹

- c. The point of interconnection (POI) is the connecting point where the connecting telco's networks and facilities are installed into the connected telco's properties; thus, it involves issues of co-location. From the perspective of the interconnecting telco, the arrangements for interconnection affect their network status and the quality of interconnection,⁵⁰ and this is especially true when new market entrants interconnect

⁴⁷ Article 16 (2) Telecommunication Act.

⁴⁸ Article 6(1) Regulations Governing Network Interconnection among Telecommunications Enterprises.

⁴⁹ Article 5 Regulations Governing Network Interconnection among Telecommunications Enterprises.

⁵⁰ Wang, Z.-N. and W. Lin (1998). "A General discussion of Current Telecommunications Interconnection and Its Future Development." *Chunghwa Telecom Technical Quarterly* 2:121.

with the incumbent. Therefore, the settings and locations of POI should be established through negotiations⁵¹ and should be set up wherever technically feasible.⁵² When there is evaluation of technical feasibility, only the security or reliability of telecoms networks, not space, location and economic factors, should be considered.⁵³

2.2.3.2 Interconnection Charges

Another important issue regarding interconnection is the distribution of interconnection charges. There are many fees and charges in the interconnection process, and most of these fees are generally borne by the party that requires interconnection. This results in a costs increase for the other party unless the law specifies otherwise.⁵⁴ Amongst these fees, access charges⁵⁵ and transit charges⁵⁶ are usually the ones most disputed, as they are usually the largest costs for new entrants and one of the most important income sources for the incumbent.⁵⁷ It is especially true in Taiwan, as interconnection charges are where the regulator applies a lighter approach to interconnection matter. Access charges are paid by the party to which the

⁵¹ Article 7(1) Regulations Governing Network Interconnection among Telecommunications Enterprises. From the perspective of an effective network, the way in which new entrants interconnect with the incumbent will affect their network status and quality of interconnection; therefore, the best location for a POI should be decided by negotiation. For the incumbent, concerns about the location should be mainly decided in terms of efficiency and maintenance; for new entrants, the main considerations are lowering the cost of interconnection and the distance from their own exchange. See: *ibid*: 126.

⁵² Article 7(2) of the Regulations Governing Network Interconnection among Telecommunications Enterprises.

⁵³ Article 7(4) of the Regulations Governing Network Interconnection among Telecommunications Enterprises.

⁵⁴ Article 13(2) iii of the Regulations Governing Network Interconnection among Telecommunications Enterprises.

⁵⁵ An access charge refers to the cost calculated on the basis of the duration of network communications using network interconnection, see Article 13(1) Regulations Governing Network Interconnection among Telecommunications Enterprises.

⁵⁶ A transit charge refers to the charge paid to the other Type I telecommunications enterprise, through whose network the communication between networks of two Type I telecommunications enterprises will run for the networks of two enterprises which are only partly or not fully interconnected. *Ibid*.

⁵⁷ Melody, W. H. (1999) "Telecom Reform: Progress and Prospects." *Telecommunications Policy* **23**: 7-34.

tariff applies; nevertheless, a specific agreement will follow if there is any negotiation of the connection charge by the interconnecting enterprises, while transit charges are paid by the party that seeks the switching, and this shall be determined by negotiation if there is no reason for the switching.⁵⁸

2.3 Local Loop Unbundling

The local loop refers to the local loop network element which is defined as a transmission facility between a distribution frame (or its equivalent) in the incumbent's LEC central office and a loop demarcation point at an end-user customer's premises, including the wire inside owned by the incumbent LEC,⁵⁹ or simply put, the physical link or circuit that connects an end user's premises to the telecoms network.

As the local loop stretches into the premises of end users (subscribers), it is sometimes called a subscriber's line; at the same time, as the local loop constitutes the final section of the telecoms networks from an operator perspective, it is also sometimes called "the last mile". The local loop, amongst other sections of telecoms networks, is considered to be the most difficult section to install, and it is impractical for the new entrants to build their own local loops, especially in the early stage of liberalisation. Several reasons are given for such difficulties, and it can be concluded that since end users already have an existing and functioning network for them to connect and use telecoms services, they tend to avoid the inconvenience of letting another telco enter or even damage their premises to install another network which seems unnecessary to

⁵⁸ Article 13(2) i and ii of the Regulations Governing Network Interconnection among Telecommunications Enterprises.

⁵⁹ See the definition in U.S. federal regulations for telecommunications 47 C.F.R. §51.319(a) or the discussions in Chapter Two (2.1.2).

them.

It has been widely commented that the telecoms industry constitutes a natural monopoly, as despite the market being liberalised, it is difficult for new entrants to compete with the incumbent that owns networks that were installed when telecoms services were still offered by the government.⁶⁰

In many countries, the essential facilities or bottleneck doctrine has been adopted to deal with issues concerning the opening up of telecoms networks. The idea of an essential facilities doctrine was first seen in *The United States v Terminal Railroad Association*,⁶¹ and it has gradually developed its content over the years.⁶²

Despite it being arguable whether the essential facilities doctrine has general application to the opening up of the telecoms networks, because of the special nature of the local loop there is little debate about the said doctrine being used to deal with issues about the opening of local loops.

In the current Taiwanese telecoms regulatory framework, local-loop unbundling can be seen as a two-stage process. The first stage is where local loops and neighbouring infrastructures are forced to grant access. As stated in Article 31 of the Telecommunications Act:

"When a Type I telecommunications enterprise engages in the construction of infrastructure for the lines and pipes of its fixed networks, it may request co-location

⁶⁰ Chuang & Chorng (1998) *supra* n 34: 58; Liu (2005) *supra* n 1; Liu, K.-C. (2009). Initial Discussion of the Interconnection Regulatory Revolution. White Paper of Interconnection Policy.

⁶¹ *The United States v Terminal Railroad Association*, 224 U.S. 383 (1912).

⁶² See discussions in Chapter Two (3.1).

for its lines and pipes with the facilities at the bottleneck of telecommunications networks with the owners of such facilities for a charge.

With respect to a request to use the infrastructure described in the preceding paragraph, the party being so requested shall not reject such a request without due cause."

At the same time, Article 37 of the Regulations for the Administration of Fixed Network Telecommunications Business also states:

"During the construction of network infrastructure facilities for its fixed telecommunications network, where the bottleneck facilities in the telecommunications network cannot be self-constructed or substituted for by other available technologies within a reasonable period of time, an operator or an applicant who has received approval for the establishment may request sharing of the network infrastructure facilities with the operators of a fixed network telecommunications business who have possession of bottleneck facilities.

A request for the sharing of network infrastructure facilities pursuant to the preceding paragraph shall not be rejected by such other operator without due reason."

Since the NCC declared local loops to be bottleneck facilities in 2006, a telco that owns a local loop (the incumbent) has the obligation to open up the said network to access by other telcos.⁶³

The second stage of local loop unbundling (LLU) is to allow the circuits or networks

⁶³ It should be noted that the facilities identified as bottleneck facilities only include telecommunications rooms, ducts and the vertical and horizon cables in buildings and do not included the circuit between the buildings and the exchange room. See *supra* n 33.

of the local loop to be accessed, which takes the form of the said circuits or networks being separated into network elements. A telco that requests access can lease or purchase only those combinations or amounts of those elements that they consider economically feasible. The requesting telco therefore does not have to pay for network elements and thus can reduce its costs to offer services. LLU is therefore considered an important regulatory mechanism to lower entry barriers.

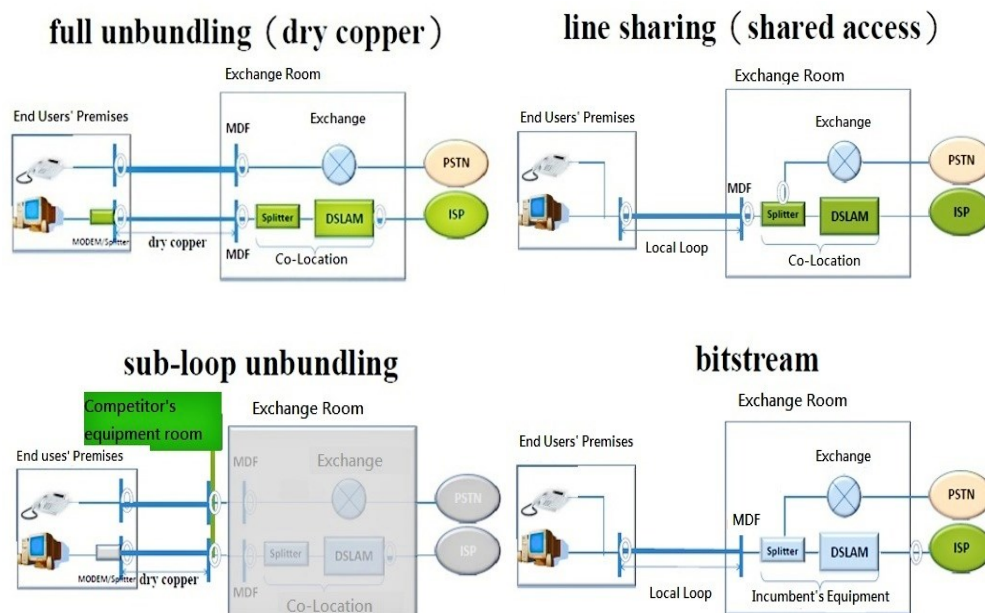
The unbundling of networks is not only seen in local loop regulations. As aforementioned, the arrangements for network interconnection shall follow the principles of transparency, reasonableness, non-discrimination, network unbundling and cost-based pricing.⁶⁴ However, this provision is just a proclamation of policy principles for interconnection negotiations between telcos. On the other hand, it is a legal obligation for a company with SMP in a fixed network market to unbundle local loops for access by other telcos.⁶⁵ The idea to separate local-loop unbundling from general interconnection somehow also reflects on the tariffs of those companies granting forced access, as stated in Article 18(2) of the Regulations Governing Networks Interconnection among Telecommunications Enterprises:

"The tariff of unbundled network elements leased by other Type I telecommunications enterprises, unless otherwise provided for by laws or regulations, shall be determined by negotiations between both parties, provided that the tariff for network bottleneck facilities shall be charged on a cost basis."

⁶⁴ Article 16(2) Telecommunications Act.

⁶⁵ Article 17 Regulations Governing Networks Interconnection among Telecommunications Enterprises.

It should be noted that, technically, there can be four types of local-loop unbundling, as shown in the following figure:



(Figure 3.1 Different Local Loop Unbundling Arrangements)

Amongst these local-loop unbundling arrangements, full unbundling, line-sharing and sub-loop unbundling should be deemed a physical co-location⁶⁶, and bitstream unbundling should be deemed a virtual co-location.⁶⁷ Unlike those in the United States,⁶⁸ the local-loop unbundling provisions in Taiwan do not explicitly limit physical co-location as a principle, and this is similar to the situation in the European

⁶⁶ Physical co-location refers to the incumbent sparing some space in its exchange room for new entrants to install the equipment necessary for interconnection. With regard to the management of personnel and the costs of such co-locations, these should be decided by negotiation. See: Wang & Lin (1998) *supra* n 49: 130.

⁶⁷ Virtual co-location refers to the co-location model whereby new entrants offer equipment to be installed into the incumbent's exchange room and let the incumbent operate such equipment. See: *Ibid*: 131.

⁶⁸ As 47 U.S.C. §251(c)(6) refers to, "The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."

Union.⁶⁹

2.4 Separation

In this thesis, "separation" is defined as the individualisation of business, operation or department of a telco. As discussed in the previous chapter, in scholarly analysis, there are different gradations of separation models, from fundamental accounting separation to the most extreme ownership separation. Amongst these separation models, accounting separation is not really a forced-access mechanism that this thesis aims to target, but rather a behavioural practice imposed by the regulator. Therefore, this chapter will only focus on other forms of separation, most notably functional separation and ownership separation.

Amongst the different separation models, the most discussed and widely adopted is functional separation. Functional separation refers to individualisation of the incumbent's access network department into an independent division. This newly established business unit is obliged to maintain strict equivalence between all its customers, i.e. the original telco and its competitors that wish to connect to the network. At the same time, many supplementary measures have to be applied to the new business unit, such as creating a Chinese wall⁷⁰ between the said business and other business offered by the incumbent, and the independence of budgets, personnel and supervising board, to ensure non-discrimination for all customers.⁷¹

Structural separation is a next-step mechanism when functional separation fails to

⁶⁹ See Chapter Two (2.1.2).

⁷⁰ See Chapter Two (2.2)

⁷¹ Ibid

maintain non-discrimination. Structural separation means making a newly-created business unit into a subsidiary, in order to make the relationship between this business unit independent of the incumbent, and the relationship between this business unit and the incumbent's other divisions entirely transparent.⁷² As a next step or perhaps last resort there is ownership separation, which means ownership of the said subsidiary has to be transferred to other shareholders.

The Taiwanese regulator NCC is never shy of seeking innovative regulatory mechanisms from other jurisdictions. Since 2003, disputes between the incumbent ChungHwa Telecom (CHT) and new entrants, especially about interconnection charges, have gradually emerged, and these soon became difficult and ever-repeating tasks for the NCC to handle.⁷³ The case of BT or British Telecom's functional separation in 2005 and the later amendment of the 2009 telecoms package in the European Union inspired a new direction for telecoms regulation in Taiwan and cries to introduce separation into the Taiwanese telecoms regulatory framework have been heard.⁷⁴

The NCC has since started to integrate functional separation into a draft amendment to the Telecommunications Act. In 2010, an amended Article 22 of the Telecommunications Act was proposed, which states:

"To promote the substantial effective competition in the fixed network market, if a relevant effective competition cannot be achieved within a certain period of time after

⁷² In this regard, the BT Openreach separation model should be classified as structural separation. However, this categorisation is sometimes confusing as discussed in Chapter Two. Thesis will follow general practice and refer to it as functional separation where appropriate.

⁷³ See discussions in (3.2).

⁷⁴ For the 2009 Telecoms Package in the European Union, see discussion in Chapter Two (2.2).

the amendment of this Act, the regulator may impose necessary measures such as the structural or functional separation of the dominant operator in the fixed-line market.

The dominant operator cannot evade or reject such obligations.

The certain period of time, the assessment of relevant effective competition, the methods of implementing structural or functional separation and the obligations of the dominant operator in the first paragraph should be decided by the regulator."

(provisional translation by author)

This proposed provision was later incorporated into the Article 25 of the draft Telecommunications bill in 2011. The amendment that includes this article is still under consideration by Executive Yuan and has not yet been introduced to Congress.

3. Current Situation and Disputes in the Taiwanese Telecoms Market

As this thesis analyses the legality and constitutionality of telecoms forced access mechanisms, which involves the assessments and balancing the benefits gained and harms caused by the implementing of these mechanisms, it is important to have a brief understanding of the current situation in Taiwanese telecoms market, so that the benefits and harms caused by telecoms forced access mechanisms can be correctly assessed. Therefore, in this section we will discuss the current situation and disputes in the Taiwanese telecoms market. As this thesis aims to discuss forced access to telecoms networks, this section will emphasise the situation and issues in the fixed-line network market.

3.1 Current Situation in the Taiwanese Telecoms Market

The market for fixed network services was opened up in 2000. As aforementioned, the then regulator, DGT, set strict conditions for granting licences to new fixed-network service providers. These include each new entrant requiring a minimum capital of 40 billion new Taiwanese dollars (NTD) (around £800 million), to build a million local loops within six years,⁷⁵ and to make sensible proposals for a promising and innovative business operation plans (such as the installation of fibre-optic networks). In order to meet these conditions, three new entrants, Asia Pacific Telecom, Taiwan Fixed Network and New Century Infocom, raised a total of NTD 200 billion dollars (£4 billion),⁷⁶ amongst which Taiwan Fixed Network alone raised NTD 92.2 billion dollars (£1.84 billion). The three new entrants also promised they would soon have their fibre-optic networks installed.

The three new entrants have different strategies and lay different emphases on different fixed network products and services. The fixed network market in Taiwan can be further categorised into three sub-markets: local-call market, long-distance call market and international call market.⁷⁷ Because of the high capital threshold of NTD 40 billion dollars, the three new entrants were naturally eager to redeem their investments. It is understandable that the new entrants' operations put much emphasis

⁷⁵ Article 22 Regulations for the Administration of Fixed Network Telecommunications Business.

⁷⁶ At the same time, the capital of the incumbent CHT was NTD 96.4 billion (around £1.93 billion). Data from: ChungHwa Telecom (2001). "ChungHwa Telecom Annual Report", available at: http://www.cht.com.tw/ir/upload/content/CHT90_annual_report.pdf. (accessed April 2016); Taiwanmobile (2001). "Annual Report", available at: http://corp.taiwanmobile.com/files/investor-relations/financial/2001AR_all_c.pdf (April 2016).

⁷⁷ Because of the massive investment in and long pay-back period of fixed networks, to increase the incentive for long-term investment, the regulator, DGT, has allowed the fixed-network operator to operate a long-distance call and international call business. In other words, the fixed network license issued in 2000 was actually a complex license. The DGT and MOTC have also promised that the long-distance call and international call business will not be opened to other operators in order to prevent a "cream-skimming" effect and lead to a competition failure in the market. However, such promises have had to be changed, as they were regarded as violations of WTO entrance obligations. See: Hsieh, H.-C. and P.-H. Tsai "Directorate General of Telecommunications' Response to Issues about Opening Fixed Networks." *Communications* 70: 31-32.

on the far more profitable long-distance and international call markets and ignored the local-call market.⁷⁸ In other words, although the new entrants somehow built their own backbone networks, they were reluctant to deploy their own local loops because it was are much more difficult and costly to do so.

Similar to the situation in other countries, local loops are difficult to deploy in Taiwan for several reasons. First, as consumers already have existing local loops that are workable (ready to offer or already offering services), they are reluctant to let another telco install a duplicate network into their premises. Second, as aforementioned, local loops include the sections stretching from the local exchange room to end users' premises or, simply put, along the streets. To deploy networks in these sections may face some major regulatory and factual difficulties: local regulations for infrastructure deployment and the interference to local livelihoods and traffic. This is especially true in highly populated areas. Thus, local loops are sometimes described as being a "natural monopoly" or "bottlenecks".⁷⁹

As already mentioned, when first obtaining their operations licences, the three new entrants did not really focus on the deployment of their own networks, but rather on

⁷⁸ Amongst all the businesses of fixed network operators, the investment in local calls is immense and the return is relatively small. Take CHT for example, during 2014 and 2015, the investment in local calls constitutes about 60-70% of all its network investments, see: ChungHwa Telecom. (2001). "ChungHwa Telecom Annual Report", available at:

http://www.cht.com.tw/ir/upload/content/CHT90_annual_report.pdf, (accessed April 2016). As the Telecommunications Act prohibits cross-subsidies, and the tariffs for local calls may not be adjusted easily, the operation strategy of new entrants is to focus on more profitable long-distance calls, international calls and broadband services. At the same time, new integrated telecommunications operators also invest much more in mobile services than fixed network services. For example, Far EasTone's (see below) investment in fixed networks during the same time frame above only ranged from 11–30% of its investment in mobile services. See: EasTone, F. (2014). "FETNET Annual Report", available at: <https://www.fetnet.net/cs/Satellite/Corporate/coAnnualReport> (accessed April 2016).

⁷⁹ See: Correa, L. (2003). "Natural or unnatural monopolies in UK telecommunications?" *University of London Economics Working Paper*(501); Buigues, P. A. and P. Rey (2004). *The economics of antitrust and regulation in telecommunications*, Edward Elgar: 58.

redeeming the cost of acquiring the licences. One such redeeming practice was the sale of pre-empted certifications of stock, which is illegal under the Taiwanese Securities and Exchange Act. However, it was widely reported that many congressmen were involved in the purchase and resale of the said certifications.⁸⁰ Whether or not the redemption was helpful to the deployment of telecoms networks, it was not necessarily negative for the development of the Taiwanese telecoms industry; however, starting a fixed network telecoms company seemed to be a gateway for some owners among the three new entrants to fill their own pockets. Soon after the licences were granted, those owners were found to have committed financial crimes and asset-stripped the companies. This included the sum of NTD 17.1 billion dollars (£342 million) of assets of the major shareholder of Taiwan Fixed Network, Pacific Electric Wire and Cable Co., which were stripped by its owner Jack Sun, which led to a later transfer of ownership of Taiwan Fixed Network to Fubon Group, while the sum of NTD 27.2 billion dollars (£544 million) of assets of Asia Pacific Telecom were stripped by its owner You-theng Wang.⁸¹

With the transfers of ownership and further mergers, the telecoms market in Taiwan has gradually formed into a *balance à trois*, with CHT, the former incumbent, being slightly larger than the other two, Taiwan Mobile Fixed Network and Far EasTone Telecom, amongst which Taiwan Mobile merged with Taiwan Fixed Network in 2007,

⁸⁰ See: China Times Express (2000 April) "Congressmen Sell Certifications, Swimming in Bank Notes and Votes", China Times Express; United Daily News (2007 January). "Pacific's Certification Incident Was a Common Glitch of Both (Political) Parties" United Daily News. It has been commented as the "Worst Scam in Congress History" by congressman Wen-Zhong Li. It has been reported that the values of the certifications that were resold by Congress alone was around 5 to 8 billion (£100 m. to 160 m.), see: United Daily News (2007), *ibid*. Many of these certifications, with face value of 10 (£0.20) were acquired by congressmen with values as low as 3 (£0.06) and have a finale resale value of 24 (£0.48), see: China Times Express (2000), *ibid*.

⁸¹ Epochnews (2014 November). "Pacific Electric Wire and Cable Stripped to Hollow" Epochnews, available at: <http://www.epochtimes.com/b5/tag/亞太電信.2.html> (accessed April 2016).

and Far EasTone was originally a major shareholder of New Century Infocom. CHT, Taiwan Mobile and Far EasTone are generally called the three leading lights of the Taiwanese telecoms markets. Asia Pacific Telecom, the only other fixed network operator, does not have comparable scale in either the fixed-network, mobile or other service markets.

Despite the transfers of ownership and the expansion of business, the new entrants were still reluctant to invest in fixed network deployments. Not only did the goal of installing one million local loops for each new operator within six years fail to be reached, but their penetration rate of local loops remained low.⁸² The then newly established regulator, NCC, was keen to tackle this issue. One of the mechanisms that the NCC adopted was to try to increase the profits from local calls in order to create an incentive for the new entrants to invest in the deployment of local loops, by changing the tariff-charging mode.⁸³ In the beginning of the opening up of the mobile market, in order to make it profitable for the new mobile operators, no matter whether calls were made from mobile to home or vice versa, the tariffs were priced and charged by the mobile operators, and the only home phone or local call operator at the time was CHT, which only charged the mobile operators transit fees. Since the mobile market matured (see section 1.2.2: The Opening up of Mobile Communications Services), the NCC planned to reverse the situation and adopt a caller-end pricing mode in order to encourage the relatively weak competition in the fixed-network

⁸² To this day, the combined penetration rate of local loops for the new entrants is still less than 1% of that of the incumbent CHT. The low penetration rate for network construction has resulted in sardonicism and suggestions that these new entrants were "fake telcos", see: China Times Forum (2002 January). "Private Telcos, Fake Telcos". Commercial Times, available at: <http://www.ctwu.org.tw/short/gif/user.htm> (accessed April 2016).

⁸³ See un-Ji, S. (2001). Fixed-Line Market is not Really Liberalised. 2001 International Telecom Conference.

market. This mechanism was, however, predictably opposed by Taiwan Mobile and Far EasTone, as they had larger shares in mobile markets, and relatively much smaller shares in the fixed network market, and their concern was that their profits from the mobile market would flow to the fixed network monopoly CHT.⁸⁴

If the new entrants ever cared about the fixed network business, it was because they were expecting to deploy their own new technology fibre-optic networks. Therefore, in 1996 when CHT was transformed from a public department to a company and the government was deciding on the arrangements for the then copper-based local loops, the new entrants showed very little interest. It has been reported that it was proposed that a new network company should be established to operate the said networks, and the operation of the said company and the maintenance costs of networks should be shared by all the fixed network operators.⁸⁵ Such a proposal was rejected by the new entrants, as they were concerned that the costs would be very high. Eventually, the privatised CHT had to follow its largest shareholder – a government order – and purchase all the local loops from the government at a price of NTD 300 billion dollars (£6 billion).⁸⁶

The three new entrants' dismissive attitudes to local loops changed with the rise of the Asymmetric Digital Subscriber Loop (ADSL), a technology that can use existing copper-based local loops to transmit higher speed Internet services. ADSL (and the

⁸⁴ The caller-end pricing mode was eventually adopted in 2011; however, the NCC has imposed an "interim fee" that the fixed network operators have to pay to the mobile operators to this day. This interim fee is generally considered to cover the profits lost by the mobile operators because of the adoption of a caller-end pricing mode. However, just like many of the NCC's policies, the imposition of such an interim fee is without legal foundation and arbitrary.

⁸⁵ In this regard, such a design is actually similar to separation arrangements.

⁸⁶ For a detailed report, see: Etoday News (2012 July). CHT: "No Other Telco was Deploying New Networks". Etoday News, available at: <http://www.ettoday.net/news/20120727/79725.htm> (accessed April 2016).

later VDSL, Very High Bit-Rate DSL) uses Frequency-Division Multiplexing (FDM) technology and can utilise frequencies that are not used by voice transmissions to offer broader bandwidth for Internet usage. Before the prevalence of fibre optics, ADSL was very competitive, and thus made the local copper loops that once seemed obsolete very sought after. However, the new entrants still hesitated to deploy their own local loops,⁸⁷ and even to lease local loops from the incumbent.⁸⁸ In 2005, the three new entrants began to lobby and try to influence the government to force the CHT to open up its local loops or, more specifically, to have the local loops declared "bottlenecks" by either the FTC or NCC, so that they could lease the local loops at a cost-based rate.⁸⁹ Eventually, the NCC did declare local loops "bottlenecks" at the end of 2006 (see section 1.3.2: Competition Law Regulations).

The declaring of local loops to be bottlenecks did not really stop the disputes between CHT and its competitors, as the new entrants turned their attention to the actual cost of local loops. The new entrants claimed that CHT's costs for operating local loops were minimal, if any, as most local loops were deployed when telecoms services were provided by the State, while CHT argued that, as the copper-based local loop networks were deployed decades ago, the costs for maintenance and replacements were significant. The reasons for such parallel arguments were not just because both parties only stressed their advantageous arguments and ignored the others, but to an extent because the low-intensity accounting separation that was at the time imposed

⁸⁷ According to NCC, before the local loops were declared bottlenecks, the total number of local loops of the three new entrants was less than 100 subscribers. See: NCC (2006) "Consultation Paper on Declaring Local Loops to be Bottleneck Facilities."

⁸⁸ After the CHT opened up the leasing of local loops to new entrants in June 2004 and until the NCC planned to declare local loops to be bottlenecks, there were only 220 such applications, see NCC's consultation paper in *supra* n 86.

⁸⁹ See Article 18 (2) of the Regulations Governing Network Interconnection among Telecommunications Enterprises.

on the incumbent CHT was not able to reveal all the relevant costs of the incumbent.⁹⁰ With lobbying and the introduction of functional separation into the "Telecoms Package" in the European Union,⁹¹ calls for more drastic approaches, such as different separation models to promote competition in the fixed network market, have arisen.

3.2 Disputes Related to Forced Access in the Taiwanese Telecoms Market

As discussed in the previous section, there have been several major disputes concerning forced-access practices in the Taiwanese telecoms market. These disputes are actually related to each other, as local-loop unbundling can be regarded as a special type of interconnection, and the proposed separation models are mainly aimed at tackling the dilemma in local-loop access.

In this section, two topics will be discussed: the pros and cons of local-loop unbundling and those of functional separation. As aforementioned, at the very beginning, this thesis does not aim to apply economic theories to analyse telecoms policies, but rather to consider possible fundamental rights infringements that occurred during the application of the telecoms forced access mechanism; therefore, the scope of the discussion here will be limited to offering relevant background information about a discussion of further fundamental infringements. Especially as most of the regulatory concepts for applying such forced mechanisms have been discussed in this chapter, this section will therefore focus on the counter-arguments in order to provide information to assess and consider constitutionality tests, because a

⁹⁰ See: Ni, T.-C. (2010). "The Policy Consideration of Splitting the Incumbent's Fixed line Network: The Case of BT's Functional Separation." *National Chung Cheng University Law Journal*.

⁹¹ See the discussion in Chapter Two (2.2).

key element of assessing the legality and constitutionality is the balancing between the benefits and harms (see Chapter Eleven).

3.2.1 Local Loop Unbundling

As discussed earlier in this chapter, the sharing of facilities in local-loop unbundling can lower the uncertainty of market entry, and at the same time constrain the incumbent from abusing its competitive advantage. However, there are some questions over the application of local-loop unbundling.

a. Costs of Regulation

Not only are the costs of local-loop unbundling regulation very high (especially for the discovery of the actual costs of local loops, as discussed above), but the risks of erroneous regulation are high as well. With such high regulatory costs, whether the local-loop unbundling approach can be executed by the relatively inexperienced Taiwanese regulator may be an issue.⁹²

b. Not necessarily beneficial to NGN

The essence of local-loop unbundling policy is not whether competitors can share facilities, but how to share the facilities and at what cost. When considering the deployment of newer technologies, such as Next Generation Networks (NGN), such costs will play an important role in market players' decisions, i.e. such costs involve build-or-buy decisions in economic theories. Simply put, where the local-loop unbundling is applied, and new entrants find the cost of leasing local loops is lower than deploying NGN, they will not have sufficient incentive to deploy their own NGN.

⁹² Lee, R. C. (2006). "Response to NCC's 'Consultation Paper on Declaring Local Loops as Bottleneck Facilities.'"

At the same time, local-loop unbundling may also cause a chilling effect from the regulations. Even if there is no dispute about the costs of local-loop unbundling, for the incumbent all that it can have in return is the fees calculated from the costs of a successful set of local loops. Were it to fail in an NGN investment (such as fibre-optic networks), such loss will not be shared by the new entrants. Another aspect is that the message given out by local-loop unbundling policy to potential NGN investors is that the more successful the first movers in the market, the likelier it will be that their facilities will be declared to be bottlenecks.⁹³ All these factors may restrain the incumbent's, and even other operators', incentives to invest in NGN.⁹⁴

c. The Intentions of New Entrants

As discussed in section 2.3 of this chapter, the Regulations for the Administration of Fixed Network Telecommunications Business have adopted the concepts of contemporary essential facilities (bottlenecks) theory and enumerate the conditions for bottleneck facilities as ones which "cannot be self-constructed" or "cannot be substituted for by other available technologies" within a reasonable period of time. The telecoms market in Taiwan, or more specifically the new entrants' deployment of their own networks, as discussed earlier in this section, seems to be decided more by their inclination instead of actual difficulties. This situation leads to the question of

⁹³ Hausman, J. and J. G. Sidak (1999). "A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks." *Yale Law Journal* **109** (3): 417-505.

⁹⁴ This issue also involves disputes over service-based competition (SBC) and infrastructure-based competition (IBC). Simply put, in the early stages of telecommunications market privatisation, to facilitate market entry and promote competition in the market, SBC is simpler and more efficient, and it can avoid unnecessary investment in duplicate facilities. However, with the development of telecommunications technologies, SBC cannot encourage investment in more advanced technologies. Therefore, it has been commented that IBC is the future for countries with highly developed telecommunications industries. See: OVUM (2006). "Regulation in Asian markets – Which Approach is Right?", cited from NCC, "Accumulated opinions for declaring local loops as bottleneck facilities", available at: http://www.ncc.gov.tw/chinese/files/07052/54_1099_070521_1.doc (accessed April 2016).

whether it is justifiable to apply a local-loop unbundling policy.

d. Non-Substitutability

Non-substitutability is another questionable issue related to the justification of local-loop unbundling, as there are in fact several technologies that can substitute for traditional copper networks. From the global perspective of broadband development, when time local-loop unbundling was applied in Taiwan in 2006, DSL (copper-based networks) had a share of 66%, while that of cable modems was 24% and FTTx (a different type of fibre-optic network) was 9%. Nowadays, the share of DSL has fallen to 59% and cable modems to 19%, while FTTx has grown to 22%.⁹⁵ Despite copper-based broadband services maintaining the highest share, such a lead is not absolute and keeps falling. In other words, technologies such as cable modems and fibre optics can be regarded as substitutes for copper networks.

The substitutability of copper networks has significance in the Taiwanese telecoms market, as fibre-optic networks and cable-modem broadband services are becoming relatively strong. The cable modem is a technology that transmits broadband services via a cable TV (CATV) network and is considered one of the most mature broadband technologies.⁹⁶ As CATV networks stretch into users' premises to offer services just like traditional copper local loops, they can serve well as substitutes for the latter, as whenever a CATV service is subscribed to, the network that provides CATV services can also be used to offer broadband services. In 2014, the total number of

⁹⁵ PointTopic (2014). "World Broadband Statistics Q1 2013", available at: <http://point-topic.com/wp-content/uploads/2013/02/Point-Topic-Global-Broadband-Statistics-Q1-2013.pdf>. (accessed April 2016).

⁹⁶ CHT (2006). "CHT's Response to NCC's 'Consultation Paper on Declaring Local Loops as Bottleneck Facilities'".

subscriptions to CATV in Taiwan included 4.99 million households and had a penetration rate of 59.9%.⁹⁷ It is noteworthy that in 2009, one of the leading lights in the Taiwanese telecoms market, Taiwan Mobile, merged with the CATV operator KPBO, acquired its 1.1 million subscribers and used the co-operation between CATV operators to constitute a so-called "Mega Net" to offer telecoms services, together with another fixed network operator, Asia Pacific Telecom.

Fibre optic networks are another way to substitute for copper-based local loops, but in reality this is a more complicated issue. Since 2007, the incumbent, CHT, has activated a NTD 60 billion dollars (£1.2 billion) five-year "Optic Generation Project" and started to replace its copper local loops with fibre optics. Today, fibre-optic based broadband in Taiwan is regarded as one of the best performers around the world, with a penetration rate of 37%,⁹⁸ within which CHT alone has more than 3 million household subscriptions.⁹⁹ Despite all the fibre-optic local loops having been deployed after CHT was fully privatised, and the local loops that were declared bottlenecks being copper-based networks, the new entrants still argue that all local loops constitute bottlenecks and should be opened up. In fact, with the high market share of CHT in fibre-optic local loops, the incumbent has difficulties in persuading the NCC that fibre optics can substitute for copper-based local loops.

There are some possible substitutions for copper-based local loops. One possible

⁹⁷ See: NCC (2014). "Statistics of Cable Subscriptions."

http://www.ncc.gov.tw/chinese/files/14081/1979_32567_140813_1.xls (accessed April 2016).

⁹⁸ See: FTTH Council Europe (2014). "Fibre broadband flourishes as Switzerland joins the league of FTTH leaders" available at:

http://www.ftthcouncilmena.org/documents/PressReleases/2014/PR2014_EU_Ranking_Stockholm_Feb2014.pdf (accessed April 2016).

⁹⁹ See: CHT (2015). "CHT Operation Report" available at:

<http://www.cht.com.tw/aboutus/related/ope-condition-0.html> (accessed April 2016).

substitution is power-line communications (PLC). As the name suggests, it uses existing electric power lines to provide Internet services. As power lines stretch into end-users' premises, such technology can be regarded as having great potential to substitute for the current copper local loops. Furthermore, with the convergence of technologies, different services can now be provided and operated on different platforms and devices. For example, smartphones or other handheld devices are now able to deliver Internet services. In this regard, if we do not restrict the traditional market definition, third-generation (3G) and fourth-generation (4G, such as Long-Term Evolution technology, LTE) mobile phone services can be seen as strong substitutes for fixed-network Internet services to premises.

3.2.2 Functional Separation

As a vertically integrated telco, the incumbent in the telecoms market may take advantage of its market power to engage in unfair competition by discriminating between the incumbent's own retail departments and other operators. Functional separation and other separation models aim to increase the transparency between the network department and other departments in the incumbent telecoms company and eliminate the said discrimination. If functional separation – separating the network department into an independent unit – fails to achieve the goal, more drastic structural separation and ownership separation may be adopted as a last resort to complete the mission.

However, separation exhibits some drawbacks, and here we take functional separation as an example:

- a. The actual costs of functional separation are much higher than other mechanisms,

such as accounting separation. Such costs include the restructuring of the company, the expense of duplicating engineering personnel and extra expenses incurred due to the lack of current integrating effects. These costs may eventually lead to increases in the costs of network access for all operators.

- b. Functional separation cannot react to the rapidly developing telecoms market and new technologies. As the telecoms market is developing vigorously, the regulations should be reviewed and amended at regular intervals,¹⁰⁰ and this is apparently in conflict with functional separation which has long-term effects.
- c. The experience of separation in the energy industry cannot be entirely applied to the telecoms industry. The movement to adopt separation in the gas and electricity industries began in the early 2000s and has been taken as a reference point for applying separation in the telecoms industry. However, the situation in the telecoms industry is rather different, e.g. some parts of the networks will have to be replicated during the process of accessing telecoms networks; at the same time, how to decide on which point of a network should be a realm of separation may well be an issue that was not seen in the energy industry.
- d. The intentions of all the operators for their future investments in separated networks are unknown.
- e. The regulations to eliminate discrimination may lead to the incumbent's

¹⁰⁰ For example, the European Commission suggested that the functioning of Directives should be reviewed periodically on a first occasion not later than three years after the date of application, see Article 25 Framework Directive.

unwillingness to provide quality products and services.

- f. Separation cannot substitute for other regulatory mechanisms. The experiences of countries that have applied functional separation (such as the United Kingdom) show that even if functional separation is applied, others matters such as tariffs and quality of service should still be regulated. On the other hand, it is not impossible to impose some of major obligations and concepts under functional separation, such as the separation of information between network and retail departments and regulations on employees without really applying functional separation.

4. Conclusion

This chapter gave an overview of telecoms forced access in Taiwan. It started with an introduction to the Taiwanese telecoms regulatory framework, to the meaning of telecom forced access mechanisms, and how these mechanisms are implemented in Taiwan. With this regulatory background established, the last section of this chapter, which discussed the current situation and disputes in the Taiwanese telecoms market, provided important information to be used in the analysis engaged in later in this thesis. Simply put, while Taiwan adopts several regulatory approaches from the United States, such as the categorisation of Type I and Type II telcos, it also adopt many of those from the European Union, such as the proposed functional separation. However, the telecoms market in Taiwan is unique for the following reasons: despite being a small island country (which makes it relatively easier to deploy new networks), it has relatively advanced telecoms technology, and a high penetration rate for broadband Internet services provided via traditional telecoms networks, but also a

high penetration rate for cable services. These special characteristics, together with the regulator's (NCC) not just legal but usually factual partiality towards competing telcos, make the Taiwanese telecoms market unique, or at least quite different from those in other jurisdictions, such as the European Union. Such a complex regulatory framework design, including the combination of elements of those in the United States and the European Union, the somehow dictatorial attitude of the regulator, and the many special characteristics in the telecoms market will play important roles in the assessment of the constitutionality of telecoms forced access mechanisms (see Chapter Eleven).

Chapter IV

Fundamental Rights Protection Regimes in the European Union

Preface

After identifying the "facts", i.e. what telecoms forced access mechanisms are, and how they are implemented in the two jurisdictions targeted, the following four chapters (Chapters Four to Seven) seek the "norms", i.e., the standards by which the legality or constitutionality of these telecoms forced access mechanisms should be reviewed. These two chapters, Chapters Four and Five, are of a general nature, they discuss the overall fundamental rights protection regimes in the two targeted jurisdictions, the European Union and Taiwan. These general discussions are important to the later analyses of this thesis, for they include: (a) the reasons why fundamental rights are protected in these jurisdictions; (b) identifying the sources of law and the relationships between them; (c) identifying the reviewing bodies (courts) and their different inclinations; and thus observations can be made, on (d) how fundamental rights protection regimes have evolved over time to make an estimation of future development.

As such, this chapter, regarding the fundamental rights protection regime in the European Union, is structured as follows: it starts with a discussion of the history and development of fundamental rights protection (1), including the situation in earlier years (1.1), and how fundamental rights began to draw attention in European Union law (1.2) (1.3) and other European Union or non-European Union legal instruments began to protect fundamental rights (1.4). The second section (2) discusses the current

fundamental rights protection regimes in the European Union. It first identifies the sources of law (2.1) and the nature (2.2), scope and limitations (2.3) of fundamental rights, and then goes on to examine how fundamental rights are protected under different legal instruments, and especially the relationship between these instruments (2.4) (2.5).

1. History and Developments of Fundamental Rights Protection in the European Union

1.1 Early Years

Article 2 TEU proclaims that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, but the protection of fundamental rights was not integrated into the European Union (European Union) at least on the Community law level until later. During its first years, the focus of the European Economic Community (EEC) was on creating a common market and the efforts for integration were largely of an economic nature only. The original EEC Treaty did not mention the protection of human rights as an objective of the Community. There were many discussions regarding this, but it is generally believed that the European institutions held the belief that economic integration could not lead to violations of human rights, and where human rights issues really happened, they would be dealt with by the Council of Europe.¹ Thus the then EEC together with OEEC (the antecedent of the OECD) focused only on the economic restoration of the Europe after the World War II.

1.2 Introduction of Fundamental Rights into Court of Justice Case Law

¹ See: Douglas-Scott, S. (2002). *Constitutional law of the European Union*, Pearson education: 432.

It was not until the late '60s that the EEC began formally to recognize fundamental rights as a part of the great European integration project. The first move was made by the European Court of Justice (Court of Justice).² The earliest attempts to introduce fundamental rights into Court of Justice case law, however, were not successful. Fundamental rights issues were first brought to the Court of Justice in *Stork*,³ in which the Court held it was only required to ensure that the law (in this case, the decisions made by the High Authority of the European Coal and Steel Community [ECSC]⁴) was observed in the interpretation and the application of the Community Treaties, and could not normally rule on provisions of national law. Thus, the Court of Justice refused to annul the decisions due to their incompatibility with the German Basic Law (*Grundgesetz für die Bundesrepublik Deutschland*), the Constitution of the then West Germany. Again in *Geitling*,⁵ the Court of Justice held it could not examine whether the national constitution and laws had been respected, and that Community law "does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights." In *Sgarlata*,⁶ the Court of Justice held that being express provisions of the Treaties, regulations made by the Commission cannot be overridden by the fundamental rights in the Italian Constitution.

The consensus is that it was in *Stauder*⁷ and *Solange I*⁸ that the Court of Justice first held that it had jurisdiction to rule on human rights matters. As the Court of Justice

² Lenaerts, K. (2011). *European Union Law*: 826.

³ Case C-1/58 *Stork v High Authority* [1958] E.C.R. 17.

⁴ The ECSC was joined by two other similar communities in 1957, the European Economic Community and European Atomic Energy Community. In 1967 all its institutions were merged with that of the European Economic Community (EEC), but it retained its own independent legal personality. After the Treaty of Paris expired in 2002, all the ECSC activities and resources were absorbed by the European Union.

⁵ Case C-13/60 *Geitling v High Authority* [1962] E.C.R. 423.

⁶ Case C-40/64 *Sgarlata v Commission* [1965] E.C.R. 215.

⁷ Case C-26/69 *Stauder v City of Ulm* [1969] E.C.R. 419.

⁸ Case C-11/70 *Internationale Handelsgesellschaft v Einfuhr* [1970] E.C.R. 1125.

stated in *Stauder*, fundamental rights are enshrined in the general principles of Community law.⁹ In *Solange I*, the Court of Justice held that respect for human rights forms an integral part of the general principles of law; the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. The Court further noted that the possible infringement of fundamental rights by Community measures can only be assessed by Community law itself but not national legislation.

The reason why the Court of Justice changed its attitude and started to take fundamental rights into consideration is debated, but it is widely believed that it was because the Court of Justice was afraid that some Member States' constitutional courts, such as the German *Bundesverfassungsgericht* and Italian *Corte costituzionale della Repubblica Italiana*, would refuse to accord supremacy to EEC law if they found it inadequate to protect the fundamental rights in their constitutions.¹⁰ The Stuttgart court in the then West Germany, when referring to Court of Justice in *Stauder*, stated that if the Court of Justice failed to fulfil its duties of protecting fundamental rights that had previously been guaranteed by the German national courts, the latter would be compelled to reserve for themselves the power of examining the constitutionality of Community acts.¹¹ Indeed, Article 79 of German Basic Law states that no amendment of the Constitution may diminish fundamental rights protection, and Article 24 permits transfer of sovereignty to international organisations subjects to the rules of the first chapter of the Basic Law (fundamental rights protection). In the fear of losing

⁹ However, the Court of Justice used "general principles of law", rather than general principles of Community law in its later case law.

¹⁰ See: Douglas-Scott (2002), *supra* n 1: 434.

¹¹ *Stauder*, *supra* n7.

the supremacy of EEC law¹² and the possible adverse effects on the uniformity and efficacy of Community law, the Court decided in the *Solange I* that the validity of measures adopted by the Community can only be assessed in the light of Community law.¹³ Another reason might be because the European Convention on Human Rights (ECHR) had entered into force in 1953 with all the Member States of EEC being signatory parties. Considering the importance placed upon the protection of fundamental rights by the Member States, it would have been impossible for the Community legal order not to provide for similar protection.

1.3 Later Development of Fundamental Rights in the European Union

After *Stauder* and *Solange I*, the Court of Justice continued to incorporate fundamental rights into its case law, and further clarified the source of fundamental rights and gave clear explanations of the concepts of these rights. In *Nold*,¹⁴ Court of Justice reiterated that the inspiration for the fundamental rights protection, as part of the general principles of European Union law,¹⁵ came from the common constitutional traditions of EEC Member States and international human rights treaties on which the Member States have collaborated or to which they are signatories.

A notable further step is that in *Rutili*,¹⁶ the Court of Justice started to use the ECHR as guideline for interpretation of the limitations set out in Community law.¹⁷ Also in

¹² The principle of supremacy was established in Case C-6/64 *Costa v Enel* [1964] E.C.R. 1141 and later reaffirmed in many subsequent cases.

¹³ *Internationale Handelsgesellschaft*, *supra* n 8, para. 3.

¹⁴ Case C-4/73 *Nold v Commission* [1974] E.C.R. 491.

¹⁵ The relationship between the general principles and fundamental rights will be discussed below.

¹⁶ Case C-36/75 *Roland Rutili v Minister of the Interior* [1975] E.C.R. 1219.

¹⁷ It held that a particular provision of European Union law (in this case it is Article 48(3) EEC) was a “specific manifestation of the more general fundamental principles of [European Union] law which could be found in the ECHR”, *ibid*, para. 32.

Hauer,¹⁸ the Court of Justice looked into the ECHR for guidance in applying Community law, and when it could not find sufficient guidance, it turned to look into the constitutional principles of the Member States (Germany, Italy and Ireland). This approach of sourcing fundamental rights protection later gained Treaty status, as the Amsterdam Treaty (which entered into force in 1999) explicitly expressed that "[t]he Union is found on ... respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".¹⁹

By drawing from constitutional traditions common to the Member States and international human rights treaties (such as the ECHR, discussed below), over the years the Court of Justice (together with the Court of First Instance, CFI, now European General Court, EGC), have recognized numerous fundamental rights and general principles such as proportionality and equality before the law. Of particular importance for this thesis, it is worth noting that, for example, economic rights, such as rights to property, were considered by the Court of Justice in the above mentioned *Hauer* case. In *Baustahlgewebe*,²⁰ where the applicant requested a timely judgment, the Court of Justice started to consider the rights to fair hearing, a right under Article 6 ECHR. Rights to privacy were subjected to the Court of Justice's scrutiny in *X v Commission*²¹ where the applicant refused to take an AIDS test for his job application, and freedom of expression was considered by the CFI in *Connolly*,²² in which the applicant asserted his rights to show contempt for a certain political party in his book. The Court of Justice also granted the applicant rights to access to certain documents

¹⁸ Case C-44/79 *Liselotte Hauer v Land Rheinland Pfalz* [1979] E.C.R.3740.

¹⁹ See Article 8 (a) 1 of TEU, now Article 6(2) TEU.

²⁰ Case C-185/95P *Baustahlgewebe v Commission* [1998] E.C.R. I-8417.

²¹ Case C-404/92 *X v Commission* [1994] E.C.R. I-4737.

²² Joined Case T-34/96 and T-163/96 *Connolly v Commission* [1999] E.C.R. IA-87, II-463.

on the ground of protecting the rights to information in *Hautala*.²³

1.4 The ECHR, CFR and TCE

Here, several legal instruments that play important roles in fundamental rights protection will be introduced chronologically.

1.4.1 The European Convention on Human Rights (ECHR)

The European Convention on Human Rights (formally, the European Convention for the Protection of Human Rights and Fundamental Freedoms) is an international treaty to protect fundamental rights in Europe. The ECHR was drafted in 1950 by the Council of Europe and entered into force in 1953. The ECHR also established a court, namely the European Court of Human Rights (ECtHR), in Strasbourg to oversee and enforce the ECHR.²⁴

The original Convention consists of three parts: the main rights and freedoms are contained in Section I, which consists of Articles 2 to 18. Section II (Article 19) set up the Commission and the Court, Sections III (Articles 20 to 37) and IV (Articles 38 to 59) included the high-level machinery for the operation of the Commission and the Court, and Section V contained various concluding provisions. This structure changed significantly with the entry into force of Protocol 11 of the Convention, as the current Section II (Articles 19 to 51) sets up the Court and its rules of operation, and Section III contains various concluding provisions.

The ECHR also has a number of protocols, and they can be divided into two main

²³ Case C-353/99P *Council v Hautala* [2001] E.C.R. I-9565.

²⁴ See Section II (Articles 19 to 51) of the ECHR.

groups: those amending the framework of the Convention system, and those expanding the rights that can be protected. The former require unanimous ratification by Member States before coming into force, while the latter require a certain number of States to sign before coming into force. Up until today, thirteen protocols to the Convention have been opened for signature.

1.4.2 The Charter of Fundamental Rights of the European Union (CFR)

The Charter of Fundamental Rights of the European Union enshrines several political, social and economic rights for European Union citizens and residents. It was drafted and proclaimed by the Council of the European Union (Council), the European Parliament (Parliament) and the European Commission (Commission) as a political declaration in 2000, as the conclusions of the Cologne European Council indicated that the ECHR, the common constitutional traditions of the Member States as well as the European Social Charter and the Community Charter of Fundamental Social Rights of Workers should be the basis for the CFR. It does not formulate new rights within the Union's legal order but rather further solidifies the already existing obligation of the Union to respect fundamental rights. The CFR has sometimes been referred to as a "creative distillation" of rights, from different European and international agreements and national constitutions.²⁵

The CFR is divided into seven chapters, with the first six consisting of different categories of rights: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights and Justice, while the last chapter deals with general provisions for the interpretation and application of the CFR. As mentioned above, the first six chapters cover the classical

²⁵ See: Craig, P. and G. de Búrca (2015). *European Union law: Text, Cases, and Materials*, Oxford University Press: 396.

rights enshrined in the ECHR, but these are further extended to include rights covered by the European Social Charter, the Community Charter of Fundamental Social Rights of Workers, other international conventions to which the Union or its Member States are parties, and the constitutional traditions of Member States.

The legal status of the CFR, however, remained unclear due to the failure to ratify the Constitutional Treaty, as the latter had foreseen the CFR being fully incorporated into the Treaties. It was not until the Lisbon Treaty came into force in 2009 that the CFR finally acquired binding force. However, it was not incorporated directly into the Treaties as the Constitutional Treaty had intended; rather, it was stated in Article 6(1) TEU that the CFR has the same legal value as the Treaties.²⁶

1.4.3 The Treaty establishing a Constitution for Europe (TCE)

The Treaty establishing a Constitution for Europe was a treaty aiming to create a consolidated constitution for the European Union. The TCE was signed in 2004 by representatives of the then 25 Member States and was later ratified by 18 Member States. However, its ratification was rejected by the French and the Dutch, and thus failed to become a legitimate source of law in the European Union. Had the Treaty have been ratified, it would have unified and replaced the existing European Union treaties and given legal force to the CFR.

1.4.4 The Lisbon Treaty and European Union Accession to ECHR

Compared to the Court of Justice, fundamental rights protection appeared relatively late at the Community Law Treaty level. The Maastricht Treaty (TEU) which came

²⁶ See below discussion about the European Union accession to the ECHR (1.4.4) and the relationship between the CFR and the ECHR (2.5).

into force in 1993, was the first time that the Treaties explicitly expressed the protection of fundamental rights, as Article 6(2) of TEU stated: "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to Member States as general principles of Community law". However, this provision, as mentioned above, did not do more than draw from the ideas existing in Court of Justice case law.²⁷

On the other hand, the Court of Justice, while having gone ahead of the express wording of the Treaties, found the latter insufficient to provide fundamental rights guidelines. It is therefore easy to understand that, while looking to the ECHR when dealing with fundamental rights issues, the Court of Justice also considered its relationship with the ECHR. Despite all Council of Europe Member States being parties to the ECHR, neither the Community was nor the Union is a party to the Convention. Therefore, the ECHR itself should not be regarded as a direct source of law in the Union. The Court of Justice was of the same opinion. In its Opinion 2/94 on the Accession of the Community to the ECHR,²⁸ the Court of Justice reaffirmed the ECHR's special position among the international treaties, but ruled that accession to the ECHR was not possible, as the EC lacked competence to do that without first amending the European Community Treaties.²⁹

This situation changed when in December 2009 the Lisbon Treaty was ratified, which gave rise to a number of significant developments in the field of fundamental rights

²⁷ Lenaerts (2011), *supra* n 2: 828.

²⁸ Opinion 2/94 [1996] E.C.R. I-1759.

²⁹ The Court of Justice particularly pointed to the EC's lack of "general power to enact rules on human rights", see *ibid*, para. 27.

protection in the European Union. The Lisbon Treaty amended the TEU and the TEC. The TEU has kept its previous title. The TEC has been renamed the "Treaty on the Functioning of the Union" --TFEU. The Lisbon Treaty also introduced many important changes to the field of human rights law in the European Union. Above others, as stated in the amended Article 6 TEU, the Union recognises the rights, freedoms and principles set out in the CFR, which shall have the same legal value as the Treaties, and Protocol No. 14 to the ECHR further provides for the European Union to become a party to the ECHR. In other words, with the entry into force of the Lisbon Treaty, both the CFR and the ECHR gained the status of sources of law in the Union.

The main arguments for the Union acceding to the ECHR are that it improves the external accountability of the Union. Prior to accession, individuals cannot bring European Union institutions before the European Court of Human Rights (ECtHR) on the basis of breaches of the ECHR, it can only do so if the relevant provision has been implemented by a Member State which is a party to the Convention.³⁰

2. Current Regime of Fundamental Rights Protection in the European Union

2.1 Sources of Law

As the Lisbon Treaty has now entered into force, Article 6 TEU states that the Union recognizes three formal sources of human rights law: the Charter of Fundamental Rights of the European Union (CFR), the European Convention on Human Rights (ECHR) and general principles as they result from the constitutional traditions common to the Member States. It can be understood that the general principles

³⁰ Douglas-Scott, S. (2011). "The European Union and Human Rights after the Treaty of Lisbon." *Human Rights Law Review* 11(4): 659.

resulting from the constitutional traditions common to the Member States are the least tangible of the three, due to their unwritten nature, the diversity of constitutional backgrounds of Member States and the indistinct meaning of "common to". In fact, national constitutional provisions were rarely drawn upon in the case law of the European Courts.³¹ It is therefore questionable whether there is a need for a reference to the common constitutional traditions of the Member States as a source of fundamental rights, as the CFR is binding and the Union is about to accede to the ECHR.³² However, common constitutional traditions of the Member States in Article 6(3) TEU opens up the possibility for the Court of Justice to recognize and enforce rights that are not present in the CFR or in the ECHR.

On the other hand, the CFR and ECHR have been agreed to by all Member States,³³ so citing them may greatly simplify the debates in court. As both documents were drafted in broad terms, it is important to see how these fundamental rights are interpreted in the case law. In this sense, the ECHR plays a more important role in this thesis due to the amount of case law accumulated by the ECtHR when interpreting the ECHR. This is not just for the expediency of academic discussion, but also in accordance of the fact that ECtHR case law is substantively binding. As the Explanations³⁴ to the CFR (issued when the CFR was drafted) state, "the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the ECtHR."³⁵ (See also the below discussion

³¹ Craig & de Búrca (2015), *supra* n 25: 369.

³² In December 2014, however, the Court of Justice delivered a negative opinion on the drafted agreement on the accession of the European Union to the ECHR on the ground that the ECHR is incompatible with the founding EU treaties because it undermines the autonomy of the EU law. See: Opinion 2/13 [2014] OJ C 260/19.

³³ In the case of CFR, the signatories even include the Union institutes.

³⁴ http://www.eu2011.hu/files/bveu/documents/Explanations_to_the_CHFR.pdf (accessed Nov 2015)

³⁵ Explanation to Article 52 (3) by Explanation Relating to the Charter of Fundamental Rights (2007)

about the relationship between the CFR and ECHR.)

Another reason why this thesis will place more emphasis on the criteria developed by the ECtHR rather than those by the Court of Justice is that Court of Justice is relatively short and sometimes even peremptory in its analysis in fundamental rights cases compared to the more experienced ECtHR.³⁶ The low success rate of fundamental rights claims in the Court of Justice also draws much criticism.³⁷ As noted by de Witte (1999),³⁸ the cases where the Court of Justice found an actual breach of fundamental rights to have been committed by the EC were very rare, and as a consequence the standard of protection of fundamental rights in the Court of Justice has been lower than that of the ECHR and even the national constitutional courts of the Member States.

2.2 Relationship between Fundamental Rights and General Principles

This section only gives a brief introduction to the relationship between fundamental rights and general principles, and this issue will be further explored later in this thesis, especially in Chapter Eight. As discussed above, the Court of Justice regarded fundamental rights as general principles of (Community) law. The CFR, however, makes a distinction between rights and principles. The established definition of a right is that an individual can rely on a right when requesting judicial review of a legislative,

OJ C 303/02. Although the Explanation is not binding, Article 52(7) CFR states that the Explanations must be taken into account when the courts of the European Union and of the Member States interpret the CFR. Article 6(1) TEU also states that the CFR must be interpreted with due regard to the Explanations.

³⁶ Douglas-Scott (2002) *supra* n 1: 458.

³⁷ *Ibid*: 460.

³⁸ De Witte, B. (1999). "The past and future role of the European Court of Justice in the protection of human rights", in Alston P. (ed) *The EU and Human Rights* 877: 859.

executive or administrative norm before a court.³⁹ If, instead, a provision in the CFR is considered to be a principle, then Article 52(5) CFR states: "[t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality." In other words, issues purely regarding principles may not be brought before Courts by individuals.⁴⁰

2.3 General Limitations

Although it has been suggested that at least prior to the entry into force of the CFR there was nothing in case law that indicated what the scope of permitted limitations under this provision might be,⁴¹ the Court of Justice pointed out in *Wachauf* that "[t]he fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights (...) provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights."⁴² These criteria were upheld in subsequent cases such as *Germany v Commission*⁴³ and *Bosphorus*.⁴⁴

³⁹ Craig, P. (2010). *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford University Press: 216. In this regard, the "rights" here are similar to the concepts of German *Subjektiven öffentlichen Recht*.

⁴⁰ The CFR does not specify which provisions constitute principles and which constitute rights. However, the Explanations provide some guidance in interpreting which provisions are principles and which are rights.

⁴¹ Peers, S. and A. Ward, (eds). (2004). *The European Union Charter of Fundamental Rights*: 155.

⁴² Case C-5/88 *Wachauf v Germany* [1989] E.C.R. 2609, para. 18.

⁴³ Case C-62/90 *Germany v Commission* [1992] E.C.R. I-2575, para. 23.

⁴⁴ Case C-84/95 *Bosphorus v Ireland* [1996] E.C.R. I-3953, para. 60.

One of the key issues that should be considered concerning the balancing of fundamental rights and public interests or social functions is the principle of proportionality. As mentioned above, the Explanations provide some guidelines on the interpretation of the CFR. There are, at the same time, some provisions about the limitations of rights and freedoms, as stated in Articles 17–18 ECHR and Articles 51–54 CFR, respectively. These limitations are subject to, amongst others, proportionality and the prohibition of abuse of rights. The principles of these limitations are as stated in Article 52(1) CFR, i.e. that any limitation must be "provided for by law" and must respect "the essence" of those right and freedoms.

2.4 Relationship between the European Union and ECHR/ECtHR

The relationship between the European Union and ECHR/ECtHR can be observed in two perspectives. The first perspective is the meaning of ECHR/ECtHR to the European Union. Although in *Stauder* and *Solange I*, the Court of Justice started to recognize the importance of fundamental rights, and even started to introduce the ECHR to interpret Community Law in *Rutili*, the ECHR was not regarded as source of law in the European Union. This idea was reaffirmed in Opinion 2/94. Also in *Treuhand*,⁴⁵ the CFI thought that ECHR provisions did not form part of European Union law, despite saying that it had special significance since the ECHR forms part of the general principles of European Union law.⁴⁶ This situation, of course, will be changed as and when the European Union accedes to the ECHR. However, the ECHR does not bring changes to the European Union legal system; as stated in Article 6(2)

⁴⁵ Case T-99/04 *Treuhand v Commission* [2008] E.C.R. II-1501, para. 45.

⁴⁶ As observed in *Treuhand*, this view is confirmed by Article 6(3) TEU and is reaffirmed by the Recital (5) CFR's Preamble, as well as Articles 52(3) and 53 CFR. *Treuhand* also referred to Case T-112/98, *Mannesmannröhren-Werke v Commission* [2001] E.C.R. II-729, para. 59f and the case law cited therein. See also Jones, A. and B. Sufrin (2014). *EU Competition Law: Text, Cases, and Materials*, Oxford University Press (UK): 103.

TEU, the Union's accession to the ECHR shall not affect its competence as defined in the Treaties. Protocol No. 8 of the Lisbon Treaty also states that the agreement relating to accession must "make provision for preserving the specific characteristics of the Union and Union law" and that accession "shall not affect the competences of the Union or the powers of its institutions".⁴⁷

The second perspective is, on the contrary, how does fundamental rights protection in the European Union relate to the ECHR, or, more precisely, to what extent should the fundamental rights protection in the European Union adopt the ECtHR's point of view? The ECtHR established in cases such as *Bosphorus*⁴⁸ that the level of human rights protection within the European Union should be "equivalent"⁴⁹ or "comparable" to that of the ECHR, as it indicates that the European Union Member States – bound by European Union law – act within the scope of the ECHR.⁵⁰ The ECtHR only intervenes if it considers that the human rights protection has been "manifestly deficient".⁵¹

2.5 Relationship between ECHR and CFR

The biggest issue regarding the relationship between the ECHR and the CFR is the scope of the protection in these two documents. As Article 52(3) states: "In so far as

⁴⁷ Article 1 and Article 2 in No.8 Protocol annexed to Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

⁴⁸ Case *Bosphorus v Ireland*, (2005) App. no. 45036/98 ECHR 440.

⁴⁹ By 'equivalent' the ECtHR meant 'comparable'; see *Bosphorus*, *ibid*, paras. 155 and 165.

⁵⁰ The ECtHR made a presumption that, if the European Union provides equivalent protection, the European Union Member State applying European Union law, has not departed from the ECHR requirements; see *ibid*.

⁵¹ This has been called the "*Bosphorus* presumption" and has been the subject of much criticism. It is not entirely clear whether the presumption will still hold after the Union accedes to the ECHR, as it could undermine the scope of judicial review of the European Union legal order by the ECtHR. See: Douglas-Scott (2011) *supra* n 30: 667 - 668.

this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." Through this article the ECHR is incorporated into the CFR, and thereby into primary European Union law, but only to the extent that the rights in the CFR correspond to rights in the ECHR. The Union can provide more extensive protection than what is provided for in the ECHR, which means that the ECHR provides a minimum guarantee protection of fundamental rights in the European Union legal order.⁵² This is true also prior to the Union's accession to the ECHR.

As the rights in the ECHR are only incorporated into European Union law insofar as they correspond to rights in the CFR, it is important to know which rights in the ECHR and the CFR actually correspond to each other. The CFR does not make itself clear on this issue. However, the non-binding Explanations have provided helpful guidance in determining what rights in the CFR correspond to rights in the ECHR.⁵³

⁵² Weiss, W. (2011). "Human Rights and European Union Antitrust Enforcement: News from Lisbon." *Common Market Law Review* **32**(4): 188.

⁵³ Ibid.

Chapter V

Fundamental Rights Protection Regime in Taiwan

Preface

As with Chapter Four, this chapter contains a general discussion of the fundamental rights protection regime in Taiwan. This chapter is laid out as follows: first, it discusses the history and development of fundamental rights protection in Taiwan (1), most notably how the Taiwanese constitutional system was influenced by Germany; the second section sets out the current fundamental rights regime in Taiwan (2), including the sources of law (2.1) and the system for review of constitutionality. It thus considers the Official Interpretations made by the Grand Justices (2.2), and includes a general discussion about the scope of fundamental rights protection (2.3), as well as addressing an important issue in the fundamental rights protection regime that is of special importance to this thesis—legislative discretion (2.4). This chapter sums up with a brief comparison between the protection of fundamental rights in Taiwan and the situation in the European Union (3).

1. History and Developments of Fundamental Rights Protection in Taiwan

Compared to the rocky road that it went through in the European Union, the development of fundamental rights protection in Taiwan has been much less problematic. The reason for this is because it chose to follow a precedent. At the turn of the 20th century, the central government of the then newly established Republic of China (R.O.C.) chose the German constitution¹ as the main model when it proposed to introduce a constitutional system into the young democratic regime. The German

¹ The German constitution then was the Constitution of the German Empire (*Verfassung des Deutschen Reiches*), also known as the Bismarck's Imperial Constitution.

Constitution(s) remains the most influential source for the R.O.C and the latter Taiwanese Constitution.²

The idea of fundamental rights, or *Grundrechte*, did not appear right after China became a constitutional country. There were brief enumerations of people's rights and obligations in the second constitution, the Provisional Constitution of the Republic of China of 1912, but it was not until the enactment of the 1936 draft constitution (the so called "Five-Five Constitution Draft" as it was declared on 5 May 1936) that the fundamental rights protection enshrined in the then German Constitution³ really found reflection in this overseas country that had a long monarchic or rather dictatorial history.

It should be noted, however, that when the term *Grundrechte* was introduced, the Chinese legal scholars did not make a clear distinction between this concept and general "rights" (權利, such as the rights under civil law) when they translated the terms. Such ambiguity of terminology remained for decades, and only started to change in the 1980s when the young Taiwanese constitutional scholars returned from studying in the Federal Republic of Germany (West Germany). The literal meaning of the current term (基本權利) in Mandarin is however closer to the English "fundamental rights" than German "*Grundrechte*".⁴

² The history of the constitution model choosing process of R.O.C. and the relationship between the R.O.C. and the current Taiwan is beyond the scope of this thesis.

³ The German constitution that the Five-Five Constitution Draft mainly adopted from was the Constitution of the German Reich (*Die Verfassung des Deutschen Reichs*), also known as the Weimar Constitution.

⁴ It is arguable that the term fundamental rights did not appear in English, at least in a generally-recognized format, before Mrs. Roosevelt, the wife of ex-president of the United States gave her famous *The Universal Declaration of Human Rights* speech in the United Nations.

Besides Germany, Japan is another country whose constitutional theories have had a deep influence on those of Taiwan. This is understandable, as Taiwan was colonized by Japan for 50 years (1895~1945) until the end of World War II, and has been influenced by Japan in all aspects. Besides, during the colonization period, Japan was the only destination for elite Taiwanese scholars, especially legal scholars, and therefore the Japanese constitutional and legal theories were introduced into Taiwan. It is an interesting law-adopting case, because Japan itself also adopted many acts and constitutional and legal theories from Germany, but has developed its own theories on the basis of these adopted acts and theories.

In recent years, however, the constitutional theories in the United States, especially the rationales of the case law of the Supreme Court of the United States, have begun to play an important role when Taiwanese legal scholars are interpreting the constitution. This is due to the fact that more and more legal scholars have returned from studying in the United States, and many of these scholars have been appointed to serve as Grand Justices. It is safe to say that today US constitutional theories have exceeded those of Japan in influence and are now the second most influential force when interpreting the Taiwanese Constitution.

2. Current Fundamental Rights Protection Regime in Taiwan

Unlike the European Union, which is a supranational organisation, Taiwan is a single constitutional country and has not experienced the same difficulties regarding fundamental rights protection as the European Union.

2.1 Source of Law

2.1.1 The Constitution

The first source of law regarding the substantive⁵ fundamental rights protection in Taiwan is the Taiwanese Constitution (formally known as the Constitution of the Republic of China). The Taiwanese Constitution comprises 175 articles within its fourteen chapters,⁶ and the general fundamental rights protection provisions are situated in the second chapter, "Rights and Duties of the People". Since the Constitution came into effect in 1947, it has been amended several times by adding amending articles. These articles are called "The Additional Articles of the Constitution of the Republic of China", but most of these amendments were not about fundamental rights protection but about the restructure of the government.

The fundamental rights protection provisions in Chapter II of the Constitution can be further categorized into several different kinds of rights and freedoms: rights to equality (Article 7), freedoms (Article 8-14), rights to property (Article 15), rights to political participation (Article 16 and 17), rights of being public servants (Article 18), rights to education (Article 21), general provisions of rights and freedoms (Article 22), together with Article 23 being the general provisions on the limitations of fundamental rights and freedoms.

Besides the "traditional" fundamental rights noted above, there are some social rights in Chapter XIII, the "Fundamental National Policies". These rights, such as rights to

⁵ There are some other laws regarding the fundamental rights protection procedure, such as the Act of Ruling of the Grand Justices of the Judicial Yuan (see below).

⁶ These fourteen chapters are: (I) General Provisions, (II) Rights and Duties of the People, (III) The National Assembly, (IV) The President, (V) Administration, (VI) Legislation, (VII) Judiciary, (VIII) Examination, (IX) Control, (X) Power of the Central and Local Governments, (XI) System of Local Government, (XII) Election, Recall, Initiative and Referendum, (XIII) Fundamental National Policies, and (XIV) Enforcement and Amendment of the Constitution.

education (compulsory education), the protection of labour and the protection of minorities at frontier regions, are generally called "beneficiary rights" in scholarly discussions. However, Taiwanese constitutional scholars generally do not think that these rights enjoy the same status as the fundamental rights above; they are not *Subjektive Öffentliche Recht* and cannot be claimed directly from the state until the contents and conditions of rights have been legislated into enacted laws⁷.

2.1.2 Official Interpretations

The review of the constitutionality of statutes, regulations and administrative orders in Taiwan is monopolised by the Grand Justice of Judicial Yuan, similarly to the constitutional court in other countries. As Article 78 of the Constitution states: "[t]he Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders." These reviews are called the Official Interpretations of Grand Justices (hereinafter abbreviated as Official Interpretation/Interpretations). So far, the Grand Justices have made 733 Interpretations.⁸

As Article 78 of the Constitution did not mention the effects of the Official Interpretations, one may reasonably speculate on their position in the Taiwanese legal hierarchy. According to Official Interpretation No.185, "the Judicial Yuan is vested with the power to interpret the Constitution, and to provide uniform interpretations

⁷ Taiwanese constitutional scholars think the provision in the Fundamental National Policies, by their effects, can be further allocated into four categories: Guiding Clauses (*Programmsätze* or *Staatszielbestimmung*), Constitutional Authorization (*Verfassungsauftrag*), Institutional Guarantee (*Institutsgarantie*) and Subjective Public rights (*Subjektive Öffentliche Rechte*). Among these, only the right to education (Article 160[1] of the Section 5, Education and Culture of the Chapter XIII) is a Subjective Public Right. The content of these provisions is beyond the scope of this thesis, but Articles 144 and 145, limitations of the public utilities and monopolies, will be discussed in later chapters.

⁸ See: <http://www.judicial.gov.tw/constitutionalcourt/en/p03.asp> (accessed Nov 2015).

with respect to statutes and ordinances. The interpretations of the Judicial Yuan shall be binding upon every institution and person in the country, and each institution shall abide by the meaning of these interpretations in handling relevant matters."⁹ Some commentators thus conclude that the Official Interpretations have constitution-level effects.¹⁰ This view, however, cannot avoid critiques of being circular reasoning.¹¹

2.2 Constitutionality Review by Grand Justices—The Procedure

The Council of Grand Justices, or the Grand Justices of the Constitutional Court, is a council under Judicial Yuan comprised of 15 Grand Justices members who are charged with interpreting the Constitution. According to Act of Ruling of the Grand Justices of the Judicial Yuan (provisional translation), the Grand Justices rule on the following four kinds of cases:¹²

1. Interpretation of the Constitution;
2. Uniform Interpretation of Statutes and Regulations;
3. Impeachment of President and Vice President of the Republic of China; and
4. Declaring the dissolution of political parties in violation of the Constitution.

According to the same Act, the petitions of Interpretations can be filed under the following circumstances:

1. where a central or local government agency is uncertain regarding the application of the Constitution while exercising its powers, or, if the agency, while exercising

⁹ The official translations of Official Interpretations, until No.728, are available at: <http://www.judicial.gov.tw/constitutionalcourt/en/p03.asp> (accessed Nov 2015).

¹⁰ Same opinion, see: the partial dissenting opinion to No.374 Official Interpretation by Grand Justice Su, J-H. In some cases, the effects of the Interpretations are even higher than the Constitution. For example, No.499 Official Interpretation forfeited Article 1, Section 3 (4) of the Additional Articles of the Constitution as the Grand Justices held this provision unconstitutional.

¹¹ Weng, Y.-S. (2004). The Research of the Effects of Official Interpretations. *Public Law and Political Theories*. Y.-S. Weng; Peng, F.-Z. (2008). "The Effects of Official Interpretations--the General Effects and its comparison with Article 31 of German Constitutional Court Act."

¹² Article 4 Act of Ruling of the Grand Justices of the Judicial Yuan.

its powers, has disputes with another agency regarding the application of the Constitution, or if the agency is uncertain of the constitutionality of a particular law or order when applying the same;¹³

2. where an individual, a juristic person, or a political party, alleges that his or its constitutional right has been infringed and who has exhausted all judicial remedies provided by law, questions the constitutionality of the law or order applied by the court of last resort in its final decision;¹⁴
3. where the Members of the Legislative Yuan, in exercising their powers, are uncertain regarding the application of the Constitution or with regard to the constitutionality of a particular law when applying the same, and at least one-third of the total number of the Members of the Legislative Yuan have filed a petition;¹⁵ and
4. where any court believes that a particular law, which it is applying to a case pending with it, is in conflict with the Constitution.¹⁶

2.3 Scope of Fundamental Rights Protection in Taiwan

The Taiwanese Constitution was drafted in broad terms, in a similar manner to the Bill of Rights, the French Declaration of the Rights of Man (*Déclaration des droits de l'homme et du citoyen*), and especially the fundamental rights protection provisions in the German Basic Law. Statements of the principles of fundamental rights protection are not determinative and require extensive interpretation to bring out their meaning in particular factual situations. The Grand Justices' main efforts are therefore in trying to form the contents and outer frames of these fundamental rights, and at the same

¹³ Article 5 (1) (a) of Act of Ruling of the Grand Justices of the Judicial Yuan.

¹⁴ Ibid, Article 5 (1) b.

¹⁵ Ibid, Article 5 (1) (c).

¹⁶ Ibid, Article 5 (2).

time develop the criteria of how to examine their constitutionality.

As mentioned above, the fundamental rights that have been specified in the Taiwanese Constitution can be categorised into six main kinds of rights and freedoms.¹⁷

However, this enumeration is not an exhaustive list, and the scope of fundamental rights protection can be expanded with the development of society and culture. Indeed, as Article 22 of the Constitution, being a general provision, states: "[a]ll other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution." This article, which is said to have a "capture effect",¹⁸ not only opens the possibility of some interests being recognised as rights in the future, but also reaffirms the essence of being a democratic free country.¹⁹

The idea of the general protection in Article 22 is further enhanced in Article 23, which states "[a]ll the freedoms and rights enumerated in the preceding Articles shall not be restricted by law except by such as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare." This article, however, plays another important role, as it is the only article in the Constitution regarding the limitations of fundamental rights. Although there are some disagreements, the consensus of most Taiwanese constitutional scholars and commentators is that Article 23 is the application of the principle of proportionality in the Constitution, despite the fact that this principle cannot be perceived literally from the texts. The analysis and

¹⁷ See above discussion in p. 10.

¹⁸ Dong, B. and J.-p. Fa (2003). *New Commentary on Constitution*: 87.

¹⁹ *Ibid*: 89.

explanation of Article 23 and, more importantly, the application of the principle of proportionality will be further discussed in latter chapters.

Besides the Official Interpretations, scholarly discussions are another source (although not binding) of exploring the content of the fundamental rights in the Taiwanese Constitution. As the Grand Justices are the exclusive interpreters of the Constitution, their Official Interpretations are supposed to be the only official binding source when searching for the meanings of the ever concise Constitution texts.

However, the making of the Interpretations is a very conscientious procedure; the Council of Grand Justices is not a permanent council, and the Grand Justices only meet whenever a petition meets the requirements in Article 4 and 5 of the above mentioned Act of Ruling of the Grand Justices of the Judicial Yuan. Over the years, the Grand Justices have only made 733 Official Interpretations, not to mention that some of the Interpretations were not about fundamental rights protection but the structure of the government. It is understandable that there have been only a few Official Interpretations for each of the enumerated rights. Therefore, scholarly discussions are, and should be, much relied on when exploring the concept, content, and scope of fundamental rights in Taiwan, especially those that are not covered in existing Official Interpretations.

2.4 Constitutionality Review and its Intensity

Traditionally, constitutionality jurisprudence in Taiwan has adopted the German approach, which has two emphases: normative review and substantive review.

2.4.1 Normative Review

Normative review is conducted to assess whether the restrictions of fundamental rights meet the requirement of the principle of the rule of law. This requirement contains two further requirements: the statutory reserve and the principle of clarity.

2.4.1.1 Statutory Reserve

The first is "statutory reserve" (*Gesetzesvorbehalt*), i.e., whether the restrictions are provided for by law. The "law" here refers to the enacted laws that are passed by the parliament. The consensus is that this comes from Article 23 of the Constitution: "[a]ll the freedoms and rights enumerated in the preceding Articles *shall not be restricted by law except ... (emphasis added)*".

There are, however, theoretical disputes about whether all of the State's powers should meet this requirement:

- a. The Statutory Reserve of Interference: under this theory, where there is interference with people's fundamental rights, such regulatory measure should be provided for by law;
- b. Full Statutory Reserve: under full statutory reserve theory, any and all matters where the State's exercises its power should be provided for by law;
- c. Theory of Substantiality (*Wesentlichkeitstheorie*): under the theory of substantiality, as long as a substantial matter is involved, the regulatory measure should be provided for by law. As regards what constitutes a substantial matter, the consensus is that it refers to a matter involving the realisation of fundamental rights and which is of special importance to the public interest.²⁰

²⁰ Wu, G. (2015). *The Theories and Practices of Administrative Law*: 79-114.

This theory is generally agreed in judicial practices and scholarly commentaries.²¹

As in No.443 Official Interpretation, the Grand Justices held that: "*The determination of which freedom or right shall be regulated by law or by rules authorized by the law shall depend on regulated intensity. Reasonable deviation is allowed considering the party to be regulated, the content of the regulation, or the limitations to be made on the interests or freedom.* For instance, depriving people's lives or limiting their physical freedom shall be in compliance with the principle of definitiveness of crime and punishment and stipulated by law; limitations concerning people's other freedoms shall also be stipulated by law, in the case where there is authorization by the law to the administrative institutions to make supplemental rules, the authorization shall be specific and precise."²² (Emphasis added.)

Similarly, in Official Interpretation No.614, the Grand Justices held that: "The modern principle of a constitutional state is specifically manifested by the principle of legal reservation under the Constitution. Not only does it regulate the relations between the State and the people, *but it also involves the division of powers and authorities between the executive and legislative branches.* If the people's freedoms and rights are not restricted by a measure of *Leistungsverwaltung*, there should be no violation of the principle of legal reservation under Article 23 of the Constitution, which concerns the restriction of fundamental rights of the people. *If, however, any significant matter is involved, e.g., public interests or protection of fundamental rights of the people, the*

²¹ Tang, T.-C. (2014). *A New Commentary on the Separation of Powers*. Tien-Hung Publishing, Taipei; Luo, C.-H. (2004). *The Parliament and Legislation*, Wu-Nan Publishing, Taipei; Wu, G. (2015), *ibid.*

²² Official Interpretation No. 443. It should be noted that some commentators disagree that this interpretation is the realization of the theory of substantiality, but is to establish a "levelised statutory".

competent authority, in principle, should not formulate and issue any regulation without express authorization of the law." (Emphasis added.)

- d. Functionally-legal Approach (*funktionell-rechtlicher Ansatz*): under this theory, the assignment of a national task to a legislative or administrative department should depend on the assessment of the suitability of the organizations, procedural designs and regulatory structures of the said departments.

2.4.1.2 The Principle of Clarity

This requirement refers to the idea that the phrasing in the legislative provisions should not be vague, but should be concrete and specific. In Taiwanese constitutional jurisprudence, there are three conditions proposed for this requirement:

- a. the meaning of the provisions should be understandable;
 - b. the scope and objectives should be predictable to the opponents of the regulation;
- and
- c. can be confirmed in judicial review.²³

2.4.2 Substantive Review

The second element is substantive review, which is used to examine whether the restriction upon fundamental rights is excessive. Following the traditional approach which was adopted from Germany, this review is generally construed as the application of principle of proportionality.²⁴ In other words, the requirements of suitability, necessity and reasonableness of the said legislation should be assessed,

²³ See: Nos, 432, 445,602, 617, and 636 Official Interpretations.

²⁴ Chen (2002) *supra* n 125; Liao, Y.-H. (2008). "Unpredictable or an Inherent Order? The Constitutionality Review Criteria Proposed by Current Grand Justices " *Academia Sinica Law Journal* 2: 211.

while at the same time considering how intensely these requirements should be assessed. This so-called German "intensity of judicial control" system contains three categories:

- (1) in Evidence Control, the Constitutional Court (henceforth the Court) only reviews whether there exist apparent errors in the challenged legislation;²⁵
- (2) in Tenability Control, the Court reviews whether the decisions made by legislators are reasonable or tenable; and
- (3) in Intensive Content Control, the court has to review whether the legislator's assessments or predictions are highly accurate or reliable, and where there exist reasonable doubts about such accuracy or reliability, the challenged legislation should be deemed unconstitutional.²⁶

It has therefore been noted that the intensity of review is similar to the standard of proof for relevant government departments regarding how much effort they have to put in to certify that their decisions are legitimate.²⁷

It has been claimed, however, that the German approach is too abstract and cannot be easily applied in real cases. Therefore, in recent years, the American approach has been considered as more applicable,²⁸ and has been introduced by the Grand Justices and scholars with American legal backgrounds. The American approach also has three

²⁵ For example, a legislation made by an administrative department without statutory delegation.

²⁶ Hsu, T.-L. (2007). Investigation of Facts in Constitutionality Review Procedure. *Law and State Power*, Angle Publishing.

²⁷ Chang, Z.-W. (2008). "The Principle of Proportionality and Legislative Discretion--The Structure of Review Intensity from the View of Rule of Law." *National Chung cheng University Law Journal*(24): 38; Tang, T.-C. (2009). "Preliminary Construction of Constitutionality Review Criteria--A Levelised Principle of Proportionality " *The Theories and Practices of Constitution Explanation* 6(2): 612-.

²⁸ Hsu, Y.-H. (2005). "Criteria of Constitutionality Review of Criminal Legislation." *Democracy, Human Rights and Justice*: 369-; Huang, Z. (2013). "The development of Constitutionality Review Criteria in Official Interpretations (1996-2011): The Adoption and Localisation of the Principle of Proportionality." *National Taiwan University Law Review* 42(2): 215-258.

categories:

- (1) the Rational Relationship Test requires that the policy objective pursued should be a legitimate governmental interest, and there should exist a rational relationship between the policy objective and the measure adopted. Under this test, the challenged regulatory measure is basically assumed to be constitutional. In other words, the Court basically accept the validity of the decision made by legislative or administrative departments;
- (2) the Intermediate Scrutiny Test requires that the policy objectives should pursue an important governmental interest, and there should exist a substantive relationship between the policy objective and the measure adopted; and
- (3) the Strict Scrutiny Test requires that the policy objective should pursue a compelling governmental interest, and the measure adopted should be narrowly tailored to the policy objective.²⁹

The American approach of constitutional review is illustrated in below Chart 5.1.

²⁹ For more detailed Taiwanese scholarly discussions about the intensity of constitutionality review in the United States, see: Lin, T.-Y. (1997). The Limitations of Freedoms of Expression and the Two-Track Theory. *Modern States and Constitution*, Angle Publishing: 248-; Fah, Z.-B. (2003). "Equality in Judicial Review: A Study of the Construction of A Double Standard." *Rule of Law State and the Freedom of Expression* : 213-16; Huang, Z. (2004). "Judicial Review of Limitations to Constitutional Rights: A Comparative Analysis of the American Multi-dimensional Models." *National Taiwan University Law Review* **33**(3): 1-103; Liao, Y.-H. (2008). "Unpredictable or an Inherent Order? The Constitutionality Review Criteria Proposed by Current Grand Justices " *Academia Sinica Law Journal* **2**: 211.

Type of Review	Aim	Method/Aim Relationship	Objects of Review*
Mere rationality test; rational basis review	Legitimate/ permissible governmental end/interest	Rationally/reasonably related	Most social and economic legislation
Mid-level/ intermediate level review	A substantial/ significant/ important governmental end/interest	Substantially related	Gender-based discrimination, illegitimacy, commercial speech
Strict/heightened scrutiny	A compelling/ overriding governmental end/interest	Directly related to, necessary and narrowly tailored means	Fundamental right

Chart 5.1. The American approach to intensity of constitutional review.

2.5 Special Issue: Legislative discretion

2.5.1 Legislative Discretion and Sector-Specific Regulation

An issue regarding the current fundamental rights protection regime in Taiwan that is of special importance to this thesis is the legislative discretion in sector-specific regulation such as telecoms regulation. The term "discretion" has many meanings in Taiwan's constitutional jurisprudence. It mainly refers to the leeway in decision-making of administrative institutions, but is sometimes also used to refer to that of the legislator.³⁰ To avoid confusion, in recent years when referring to the freedom exercised by the legislator in its decision-making, Taiwanese scholars usually specify it as legislative discretion.³¹

Under the concept of the modern constitutional state, although the legislator should follow the procedures laid down in the Constitution to enact legislation, the content of legislation should reflect and align with public opinion and serve the needs of society,

³⁰ See: Lee, C.-L. (2000). "The Basic Constitutional Theory of Legislative Discretion" *Taipei University Law Review* 47: 57; Tang, T. C. (2000). *A New Commentary on Separated Powers*, 4-5; Li, C. c. (2007). "The Tension between Judicial and Legislative Powers--A Commentary Focused on the Restriction to Legislative Power by Constitutionality Review": 52.

³¹ Su, Y.-C. (2000). "Legislative Discretion and Judicial Review." 127-128; 144-145; Li, C. c. (2007). "The Tension between Judicial and Legislative Powers--A Commentary Focused on the Restriction to Legislative Power by Constitutionality Review": 53.

politics, the economy and technology. The legislator is therefore entitled to choose different approaches as appropriate to achieve constitutional principles and objectives.³² In other words, the legislator enjoys some leeway, in consideration of the social background and public opinion, to decide whether, when and how to enact legislation.³³ Thus, despite the establishment of a constitutional review system, it is important for modern constitutional states to realize the principle of constitutional supremacy; the judiciary should respect the decisions made by the legislator in order not to infringe upon such entitlement, and hence the legislator enjoys discretionary power in its decision-making.

Having such legislative discretion is of course not to say that decisions made by the legislator should not be subject to judicial review – as that would catastrophically nullify the function of the constitutionality review system – but the consensus is that a lighter-handed approach should be taken in reviewing constitutional legislation regarding sector-specific regulations.³⁴ This is because the intensity of judicial review is subject to the judicial department's assessment of the extent to which it should interfere in the decision-making of other departments with consideration of the separation of powers, the insights of democracy, the expertise of the judicial department itself and public consensus over a certain issue;³⁵ and in the case of sector-specific or "expert fields" regulation, the judicial department is not usually as expert as the legislator nor is it equipped with sufficiently adequate personnel,

³² Su, J.-h. (1998). "The Effects and Scope of Individual Constitutionality Review from the Point of Intergration Theory (Integrationslehre) " *Constitutional Interpretation and Constitutional Theory*: 29.

³³ Li, C. c. (2007). "The Tension between Judicial and Legislative Powers--A Commentary Focused on the Restriction to Legislative Power by Constitutionality Review": 51.

³⁴ See: No.315 Official Interpretation; Chen, Y. C. (1994). *The Theory and Practice Studying Of Taiwan Regulatory Economic Law*, National Chung Hsing University: 74; Lee, C.-L. (2000). "The Basic Constitutional Theory of Legislative Discretion " *Taipei University Law Review* 47: 61; Tsai, W.-I. (2001). "Delegated Legislation in Speciality Fields--A Commentary of No.524 Official Interpretation."

³⁵ See concurring opinion to No.571 Official Interpretation by Grand Justice Lin, T.-Y..

especially in the case of delegated legislation. In other words, it is not in a better position than the legislator to make such decisions, and therefore it should be extremely hesitant to replace legislative decisions with its own.³⁶

It should be noted that besides delegated legislation mentioned above, in many cases, legislation regarding sector-specific regulation is drafted by the relevant administrative departments.³⁷ This is because, according to Article 58(2) of the Constitution, administrative departments are entitled to draft statutory bills to be submitted to the legislator – i.e. Parliament.³⁸ Due to the fact that these administrative departments are more experienced and expert in these regulated areas, traditionally, unless there exist significant disputes in these drafted bills, they are usually respected and passed by the legislator without substantial revisions.³⁹

A quick examination of the jurisprudence on constitutionality leads to the conclusion that there are not many actual cases that directly discuss legislative discretion, especially as regards sector-specific regulation. This is partly because of the concise nature of Official Interpretations which do not leave much room for very detailed scholarly discussion,⁴⁰ but mostly because the Grand Justices are cautious in making

³⁶ Lee, C.-L. (2000). "The Basic Constitutional Theory of Legislative Discretion " *Taipei University Law Review* 47: 62.

³⁷ Luo, C.-H. (2004). *The Parliament and Legislation*, Wu-Nan Publishing: 36.

³⁸ Article 58 (2) Constitution: "Statutory or budgetary bills or bills concerning martial law, amnesty, declaration of war, conclusion of peace or treaties, and other important affairs, all of which are to be submitted to the Legislative Yuan, as well as matters that are of common concern to the various Ministries and Commissions, shall be presented by the President and various Ministers and Chairmen of Commissions of the Executive Yuan to the Executive Yuan Council for decision."

³⁹ Functional separation is one of the examples with such significant disputes, and hence the shelving of the drafted bill.

⁴⁰ This concise feature is especially obvious in earlier Interpretations. For example, No.54 Official Interpretation briefly states: "Where a prosecutor discovers that an accuser made a malicious accusation, the prosecutor should initiate a suit to indict the accuser for the malicious accusation and does not need to make a separate non-prosecution disposition of the person falsely charged. Nevertheless, the prosecutor should issue a non-prosecutorial disposition when the accuser applies in the original suit."

Official Interpretations and therefore cannot cover many scholarly disputes like legal treatises.⁴¹ In fact, while discretion in sector-specific regulation is well recognised,⁴² this has not attracted much scholarly attention until recent years, and most of the commentaries focus on administrative discretion.⁴³ Therefore, there has not been developed a manifest effort test, or its equivalent in Taiwanese constitutional jurisprudence, as exists in the jurisprudence of European Courts to clarify the boundary between legislative discretion and constitutionality review. That said, some principles and concepts of legislative discretion can be found in the rationales of some Official Interpretations, which will be discussed below.

2.5.2 Official Interpretations Regarding Legislative Discretion

a. Official Interpretation No.485

In Official Interpretation No.485 where the Grand Justices dealt with legislation (Act for Rebuilding Old Quarters for Military Dependents) that grants privileges to incumbent residents of "Old Quarters", the Grand Justices give clear reasoning about their legislative discretion in this case:

"The improvement of the people's welfare is one of the basic principles of the Constitution, which is self-evident in light of the Preamble, Article 1, the Fundamental National Policies in Chapter XIII and the 10th Amendment. Based on this principle,

Also, before No.80 Official Interpretation, the Grand Justices did not give their reasoning together with the holding.

⁴¹ One example of this feature is the quantity of the Official Interpretations. To this date (November 2015), only 733 Official Interpretations were made.

⁴² See *infra* note 21.

⁴³ See for examples: Huang, C.-C. and H.-F. Wan (1998). "The Assessment, Announcement and Appeal of Monopoly Undertakings." *The Taiwan Law Review*; Tsai, W.-I. (2001). "Delegated Legislation in Speciality Fields--A Commentary of No.524 Official Interpretation"; Chang, L. (2007). "The Discretion of Fair Trade Commission--A Commentary of 2006 No.148 and 163 Judgments of Taipei Superior Administrative Court "; Huang, J. (2009). "The Intensity of Judicial Control of Administrative Decisions in High-Technology Speciality Fields." *Soochow University Law Review* **21**(1): 95-127.

the State should provide various kinds of benefits in order to guarantee the basic needs of people, as required by human dignity, to assist the economically disadvantaged and implement welfare measures such as social safety. Since the said benefits are related to the allocation of state resources, the legislative body has full authority to make decisions on issues concerning the priority of various kinds of benefits, purposes of enactment, the scope of beneficiaries, ways and amounts of provision etc. The legislative body can consider relevant factors of social policies, such as the necessity of benefit and public finance in the law-making process, and enact such policies to make a restricted allocation of welfare resources."⁴⁴

b. Official Interpretation No.490

In Official Interpretation No.490 where the Grand Justices dealt with the provisions in the Act Of Military Service System or, more specifically, the conflict between religious beliefs and military service, the Grand Justices specified that regulations imposing military obligations are within the legislator's discretion, as they noted that: "[i]mportant matters regarding military service shall be specified in laws and solely left to the legislature's discretion with due consideration of national security and the needs of social development."⁴⁵

c. Official Interpretation No.442

Despite not being in the holding and reasoning of Official Interpretation No.442 itself, in his concurring opinion, Grand Justice Lin proposed that the boundary of legislative discretion should be Article 23 and some substantive concepts of the Constitution, as he stated:

⁴⁴ See the reasoning of Official Interpretation No.485.

⁴⁵ See the holding of Official Interpretation No.490.

"... with regard to the right of instituting legal proceedings, the Constitution only stipulates the types of proceedings, such as civil proceedings or criminal proceedings. Administrative proceedings include election proceedings, public servant discipline proceedings, constitutionality reviews and the dismissal of unconstitutional political party proceedings. As for the design of the conditions and procedures for such proceedings, that is left to the legislator. Therefore, with regard to procedures, the levels of trials and the conditions for proceedings, the legislator enjoys discretionary power along with consideration of citizens' election rights, the right to equity and other rights and freedoms, as well as Article 23 of the Constitution. Unless such developing and discretion is exercised against the essence of the Constitution, the decision-making of the legislator is only a matter of the appropriateness of legislative policy, but not constitutionality."⁴⁶

d. Official Interpretation No.472

In his concurring opinion in Official Interpretation No.472, Grand Justice Su proposed the principle of proportionality and the principle of equity as the boundary of legislative discretion, as he stated:

"...[a]rticle 10(5) of The Additional Articles of the Constitution of the Republic of China stipulated that the State shall promote universal health insurance and promote research into and the development of both modern and traditional medicines. Under this 'constitutional delegation', the legislator is entitled to design and plan universal health insurance, has an obligation to do so, and has broad

⁴⁶ See the concurring opinion to Official Interpretation No.442 by Grand Justice Lin, Y.-M..

leeway in realising this 'state objective' (*Staatsziel*); however, its decision-making in such designing and planning should meet the requirements of constitutional freedom and equity, and it cannot exceed the framework of legislative development set out by the Constitution ... this is because, although the principle of the welfare state is significantly meaningful to the interpretation of fundamental rights and judgment as to the boundary of fundamental rights limitations, the realisation of this constitutional principle cannot hinder the principles of democratic politics. Thus, the realisation of the State's task in achieving social justice should still rely on the legislator on the basis of its right of legislation development, without violating the principle of proportionality, the principle of equity and other constitutionality requirements."⁴⁷

3 Summary—A Comparison with the European Union

A few observations can be made from a comparison of fundamental rights protection regimes in the European Union and Taiwan, and these include similarities and differences. For the purposes of this thesis, these differences play a crucial role in how the criteria for review of the legality and constitutionality of regulatory measures are devised.

From a historical perspective, as the European Union's predecessors were created mainly for economic purposes, the protection of fundamental rights was not the first priority and thus not included in the legal framework. However, since such cases as *Stauder*, fundamental rights began to gain recognition as constituents of the general principles of Community law. Over the years, the protection of fundamental rights and

⁴⁷ See the concurring opinion to No.472 Official Interpretation by Grand Justice Su, J.-H..

freedoms was strengthened and its scope enlarged by the Court of Justice and the General Court, and also gained Treaty status in Article 6 TEU.

Taiwan (R.O.C), on the other hand, was established as a constitutional state, with a codified Constitution, and can be said to have seen the protection of fundamental rights as an important constitutional value since its earliest existence. The inclusive Article 22 of the Constitution plays an important role in the enlargement of the scope of protection, as it opens up the possibility of some interests being recognised as rights in the future without amending constitutional provisions or being recognised by an eligible institution, such as the Court of Justice in the European Union.

This observation, of course, leads to discussions about another difference between these two jurisdictions' institutional design. The European Union is a supranational organisation, and therefore its legal system is distinct from that of a single State.

The EU law is constituted of a series of Treaties and legislation, such as Regulations and Directives, which have direct effect or indirect effect on the national laws of Member States, and it is the responsibility of the Court of Justice to review the legality and validity in the interpretation and application of these Treaties and legislation.

The Court of Justice has a wide range of jurisdiction, such as those specified in Article 19 TEU and Articles 251–281 TFEU. Among these, the most relevant to this thesis is Article 263, which states: "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the

European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties." At the same time, it can also make preliminary rulings to interpret Treaties of the Union, and to validate and interpret acts of Union institutions. In addition, if a question may involve a conflict between national law and EU law is raised before a national court or tribunal of a Member State, that court or tribunal may request a preliminary reference from the Court if it considers that a decision on the question is necessary to enable it to give judgment, and shall request such ruling if there is no judicial remedy under national law for the decision regarding such a question (Article 267 TFEU). As fundamental rights became an integral part of European Union law, when the Court of Justice is reviewing the validity of legislative acts or acts of Union institutions in its preliminary rulings, an important criterion is that whether the said legislative acts or acts of Union institutions compatible with fundamental rights protection. With that said, cases regarding fundamental rights constitute only a fraction of the case law of the Court of Justice.⁴⁸

On the other hand, the judicial system in Taiwan is similar to the domestic legal

⁴⁸ It is difficult to know exactly how many cases have been brought before the European Courts, and this may be because the term "fundamental rights" itself is not used as a subject-matter category of European-courts statistics, such as the statistics in the Annual Report of the Court of Justice (see, for example, the Annual Report of the Court of Justice 2015, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/en_ecj_annual_report_2014_pr1.pdf, pp.95–104, accessed April 2016). Despite this difficulty, a search using "fundamental rights" as the subject matter in the CURIA databank gave 220 returns. This, however, should be deemed an underestimation, as in many cases while fundamental rights are not the subject matter, the European Courts still considered the fundamental rights involved. Accordingly, using "fundamental rights" as the keywords to search in the same databank gave over 3,900 returns. On the other hand, a search of the HUDOC databank of the ECtHR that deals with fundamental rights issues, using English as the published language, gave over 17,000 returns, as suggested by the 1959–2014 statistics in the ECtHR 2014 Annual Report, available at: http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf (accessed April 2016). Take property rights for example, amongst the 17,754 results found in the Annual Report, there are 2,898 cases regarding the protection of property rights.

system in EU Member States, especially the continental States. As for the constitutionality of legal acts in Taiwan, especially those relating to fundamental rights issues, this is monopolised by the Grand Justices, who are very economical in making their Official Interpretations. To this day, only 733 Official Interpretations have been made, with just about half of them related to fundamental rights or human rights,⁴⁹ in contrast with the much more cases handled by the European Courts⁵⁰ and the ECtHR.⁵¹ In fact, coincidentally similar to the late arrival of fundamental rights into the jurisprudence of the European Courts such as *Nold*, while the first Official Interpretation was made in 1949, the Grand Justices did not really engage in in-depth protection of fundamental rights until the 1990s, and most earlier Official Interpretations dealt with the structural design of the government in the Constitution or literal explanation of provisions of substantive or procedural legislative acts. Even if some early Official Interpretations were related to fundamental rights, their reasoning was mostly brief and vague. In many cases, while fundamental rights were involved, it was usually the normative requirements that were not met, and the Grand Justices simply mentioned: "(the legislative act at issue) ... is in violation of the constitutional right of the people" or "is in violation of a right guaranteed by the

⁴⁹ Observation and calculation by the author.

⁵⁰ It is difficult to know exactly how many cases have been brought before the European Courts, and this may be because "fundamental rights" is not used as a subject-matter category of European Courts statistics, such as the statistics in the Annual Report of the Court of Justice (see, for example, the Annual Report of the Court of Justice 2015, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/en_ecj_annual_report_2014_pr1.pdf accessed April 2016). Despite this difficulty, a search using "fundamental rights" as the subject matter in the CURIA databank gave 220 returns. This, however, should be deemed an underestimation, as in many cases while fundamental rights are not the subject matter, the European Courts still considered the fundamental right involved. Accordingly, using "fundamental rights" as the keywords to search in the same databank gave over 3,900 returns.

⁵¹ A search in the HUDOC databank of the ECtHR that deals with fundamental rights issues, using English as the published language, gave over 17,000 returns, as suggested by the 1959–2014 statistics in the ECtHR 2014 Annual Report, available at: http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf (accessed April 2016). Take property rights for example, amongst the 17,754 results found in the Annual Report, there are 2,898 cases regarding the protection of property rights.

Constitution".⁵² This is, however, understandable as the current Constitution came into force in 1949 and the functions of many roles in the government required further clarification, similarly the martial-law regime in Taiwan which was not lifted until 1987. The end of the martial-law regime can be seen as being reflected in the strengthening of the protection of fundamental rights in Official Interpretations in two ways: first, the protection of fundamental rights is more accentuated by states; and second, more and more legal scholars returning from overseas are being selected as Grand Justices to introduce concepts of fundamental rights. For example, the protection of property rights was first seen in Official Interpretation No. 219 but not thoroughly discussed until No.400, and the freedom to conduct a business was not applied until Official Interpretation No. 404. With this changing trend, however, to date only about half of the Official Interpretations are related to fundamental rights. In addition, as mentioned in (2.2), it is very difficult to bring a case for review before the Grand Justices. Take a possible dispute about telecoms forced access as an example, if a case were brought before a general administrative court, and were the said court to find a constitutionality dispute existed regarding the regulatory measure, it would have the competence to decide whether to stop the procedure and take the case for review by the Grand Justices.⁵³ Considering the complex relationship between telcos and the regulator, NCC,⁵⁴ where the NCC in many cases applies a carrot-and-stick approach to seek a balance between telcos, disputes with regard to telecom regulations have seldom been brought before the administrative court, let alone referred to the

⁵² For examples, in Official Interpretations Nos. 313 and 394, the Grand Justices simply emphasised that in case the law authorizes the promulgation of a regulation to supplement such triggering conditions, the contents and scope of such authorization shall be concrete and clear so that the regulation promulgated according to such law may be in compliance with Article 23 of the Constitution.

⁵³ Article 5 (2) of the Act of Ruling of the Grand Justices of Judicial Yuan. See also: Ibid, Article 5 (1) b.

⁵⁴ See the discussion about the Taiwanese telecoms market in Chapter Three (3.1).

Grand Justices. This is one of the main reasons why there are to date no scholarly comments about constitutionality reviews regarding telecoms forced access mechanisms, or even other telecoms regulations.

Chapter VI

Legality and Constitutionality of Restrictions to Right to Property in the European Union

Preface

In order to examine the legality and constitutionality of telecoms forced-access mechanisms, it is important to identify which fundamental rights and freedoms of the telcos are potentially affected by these mechanisms and thus should be subject to a relevant constitutionality review. This chapter therefore discusses property rights, or the "right to property" in the European Union, and has three sections. As the implementation of EU telecoms forced-access mechanisms strongly relies on the transposition of Member States, especially via the designing of their property-right systems, it has been argued whether the EU has the competence to propose legislation that may affect the property orders of Member States. This issue, especially in relation to Article 345 TFEU, will be discussed in the first section (1) of this chapter. The second section discusses the protection of the right to property in the CFR and the case law of the Court of Justice (2), including an introduction (2.1), and an analysis of European Court case law (2.2). Although the European Convention on Human Rights (ECHR) is not a legal Union instrument, and the European Court of Human Rights (ECtHR) that it established is not a Union court, because of the importance of the ECHR in protecting fundamental rights in the European Union's legal system, this thesis will also take ECHR provisions and the jurisprudence of the ECtHR into account (3).

1. Article 345 TFEU and Property Rights

Union mechanisms, especially regarding limits on use and even the expropriation of

property that Member States are required to implement. This naturally raises considerations as to whether European legislation has the competence to regulate matters of property law within Member States, and most notably the scope of Article 345 TFEU (formerly Article 295 TEC).

Article 345 TFEU states: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership." The interpretation of this article has prompted much debate within different European Union institutes, such as the Commission and the Court of Justice. Such debate includes the scope of application of the article, whether this article empowers the European Union or Member States to legislate in the field of property law, and what the "Treaties" are that this article refers to.¹ Of special importance to this thesis, the wording of the provision seems to deny that the Treaties (TEU and TFEU) and even secondary EU legislation affect Member States' rules on property rights,² and thus EU telecoms forced-access mechanisms, which, as specified in this thesis, may affect property-right rules in Member States and cannot be justified.

The above explanation should not, however, be deemed correct. Article 345 TFEU should be understood as meaning that the Treaty may apply, but only if it does not infringe the rules governing systems of property ownership in Member States.³ As stated in *Commission v Portugal*: "[Article 345 TFEU] merely signifies that each

¹ See for example: Pielow, J.-C. and E. Ehlers (2008). "Ownership unbundling and constitutional conflict: a typical German debate?" *European Review of Energy Markets* 2(3): 13–15; Akkermans, B. and E. Ramaekers (2010). "Article 345 TFEU (ex Article 295 EC), its meanings and interpretations." *European Law Journal* 16 (3): 292–314 and Ramaekers, E. (2013). *European Union Property Law*: 101–141, Intersentia, Cambridge.

² Ramaekers (2013) *supra* n 1:114.

³ Akkermans and Ramaekers (2010). *Supra* n 1: 298.

Member State may organise as it thinks fit the system of ownership of undertakings whilst at the same time respecting the fundamental freedoms enshrined in the Treaty."⁴ It has been further pointed out that this Article does not concern the content of rights of ownership nor the objects of right of ownership; rather, it concerns systems of property ownership,⁵ i.e. the ways in which rights of ownership can be held.⁶ Additionally, from a historical perspective, this Article only concerns the subjects of property relationship, namely undertakings,⁷ and regardless of whether these undertakings are state-owned or private.⁸ To conclude, Article 345 TFEU only concerns the systems of property ownership of undertakings. Undertakings, and the question of whether or not they are owned publicly or privately, are precluded from the scope of application of the Treaties, but national rules governing rights of ownership and objects of ownership are not precluded from the scope of application of the Treaties.

It has been argued that Article 345 TFEU also helps to formulate the scope of property rights protection in the CFR, which will be discussed in the following section. As Peers *et al.* point out, to the extent that property-related decisions of the Member States are considered as being protected by Article 345 TFEU, the European Union must not interfere. This limitation may also be considered when determining the scope of Article 17 of the CFR.⁹

⁴ Case C-367/98, *Commission v Portugal* [2002] E.C.R. I-4731, para. 28.

⁵ Ramaekers (2013) *supra* n 1: 111.

⁶ *Ibid.*

⁷ Akkermans and Ramaekers (2010). *Supra* n 1: 299 and Ramaekers (2013) *supra* n 1: 107.

⁸ See Commission green papers: COM (2004) 327 final, 20, COM (2007) 529 final, 6, COM (2007) 530 final, 6, COM (2007) 532 final, 6.

⁹ Peers, S., T. Hervey, *et al.* (2014). *The EU Charter of fundamental rights: a commentary*, Bloomsbury Publishing: 470.

2. Protection of the Right to Property in the CFR and the Case Law of Court of Justice

2.1 Introduction

The CFR has gained the status of a source of law in the Union following the entry into force of the Lisbon Treaty. However, even before the Lisbon Treaty came into force, the CFR was already used as an important reference document. Advocates General have referred on several occasions to the CFR in proceedings in the Court of Justice, as have cases decided in national courts of Member States, including those in the United Kingdom.¹⁰ As a result it is fair to say that, over the last decade, the CFR had already had an impact on EU and domestic litigation. The direct enforceability of the Charter after the Lisbon Treaty can be seen as the conclusion of a process of its gradual introduction into the EU and domestic legal orders.

The protection of property rights as fundamental rights is enumerated in two main articles, namely Articles 17 and 52 CFR. While Article 17 directly addresses the protection of property rights, Article 52, and especially Article 52(1), is a general provision that establishes limitations to the applications of the fundamental rights and freedoms in the CFR and sets out criteria for the said limitations.

Article 17 states:

"Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

¹⁰ See, for example, *R (A, B, X and Y) v East Sussex County Council* [2003] EWHC 167.

Intellectual property shall be protected."

Article 52, meanwhile, states:

"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

2.2 Analyses of Cases before the European Courts

(1) The definition and scope of "possession"

The Court of Justice has reaffirmed several times in its case law that the text on "possession" also includes a wide range of lawful interests, including intangible property. Such lawful interests should be concrete and cannot be mere expectations.¹¹ In other words, the term possession should refer either to "existing possessions" or "assets", including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property

¹¹ Case T-256/11, *Ezz v Council* [2014] OJ C 204/28.

right. Where the proprietary interest is in the nature of a claim, it may be regarded as an 'asset' only where it has sufficient basis in law. For example, a mere expectation of acquiring property shall not be protected.¹² Similarly, the Court of Justice in the *Alliance for Natural Health*¹³ case held that a market share cannot be claimed as a right to property, as such a market share only constitutes a momentary economic position which is exposed to the risks inherent in changing circumstances.¹⁴ It should be noted that, in the same case, the Court of Justice stated that an economic operator cannot claim an acquired right or even a legitimate expectation that an existing situation which is capable of being altered by measures taken by Community institutions within the limits of their discretion will be maintained.¹⁵ In short, the Court of Justice has concluded that possessions in Article 17(1) are rights "with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit".¹⁶

With the entry into force of the CFR and the Court of Justice starting to cite it as a source of law, the broad meaning of possessions remains the same. A distinction made by the CFR, as opposed to the ECHR that will be discussed below, however, is that the CFR has explicitly stated that intellectual property is protected. This can be best illustrated, among other cases, in the recent *UsedSoft* case.¹⁷ In *UsedSoft*, despite not directly applying the CFR, the Court of Justice affirmed that property rights also apply to the sale of intangible goods, such as a copy of a computer program. However,

¹² Ibid.

¹³ Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health* [2005] E.C.R. I-6451.

¹⁴ See also: Case C-280/93, *Germany v Council* [1994] E.C.R. I-4973 and Case C-210/03, *Swedish Match v Secretary of State for Health*, [2004] E.C.R. I-11893.

¹⁵ See also: Case C-52/81, *Faust v Commission*, [1982] E.C.R. I-3745 and *Swedish Match*, *ibid.*

¹⁶ Case C-283/11, *Sky Österreich v Österreichischer Rundfunk* [2013] OJ C 269/25.

¹⁷ Case C-128/11, *UsedSoft v Oracle International* [2012] OJ C 287/10.

as mentioned above, intangible goods that are not intellectual property shall also be protected. In *FA Premier League*,¹⁸ the Court of Justice held that although sporting events cannot be regarded as intellectual creations and cannot be protected by copyright, limitations on the rights to broadcast those events can be regarded as infringements of property rights.¹⁹ This view is reaffirmed by *Sky Österreich*,²⁰ in which the Court of Justice held that exclusive broadcasting rights are indeed property rights.

(2) Restrictions upon the Right to Property

a. Social function of rights

Even before the CFR was enacted, the Court of Justice had long held that property rights, being fundamental rights, were not absolute and were subject to certain restrictions. As early as *Nold*, the Court held that:

"If rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights

¹⁸ Case C-403/08, *Football Association Premier League v QC Leisure* [2011] E.C.R. I-9083.

¹⁹ Opinion of Advocate General Jääskinen in Case C-201/11 P, *UEFA v Commission* [2013] OJ C 260/3.

²⁰ *Sky Österreich*, *supra* n7.

is left untouched."

This social-function rationale is maintained in Court of Justice case law,²¹ sometimes with additional remarks about the relationship with that social function in the European Union. In *Wachauf*, the Court stated that: "The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market."²²

With the entry into force of the CFR, the idea that fundamental rights that are protected under the CFR are subject to social function restrictions, especially Union values, should remain the same, as in the opinions in *N. S. v SSHD*²³ and *Dominguez*,²⁴ the Advocates General stated that rights recognised by the CFR which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

b. Provided for by law

Property rights, like any fundamental rights, are not absolute and are subject to certain restrictions. However, in order to be upheld, these restrictions must satisfy certain conditions. In *Ezz*,²⁵ the General Court established that in order for a limitation on the exercise of the right to property to comply with European Law, it must satisfy three

²¹ See: Case C-84/95, *Bosphorus v Minister for Transport* [1996] E.C.R. I-3953 and Case C-317/08, *Alassini v Telecom Italia* [2010] E.C.R. I-2213.

²² Case C-5/88, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] E.C.R. I-02609. See also: Case C-265/87, *Schröder v Hauptzollamt Gronau* [1989] E.C.R. 2237; Case C-177/90, *Kühn v Landwirtschaftskammer Weser-Ems* [1992] E.C.R. I-0035, Case C-22/94, *Irish Farmers' Association* [1997] E.C.R. I-1809.

²³ Case C-411/10, *N. S. v Secretary of State* [2011] E.C.R. I-13905.

²⁴ Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique* [2012] OJ C 73/2.

²⁵ *Ezz*, supra n 11..

conditions: the limitation must be "provided for by law", the limitation must refer to an objective of general interest recognised as such by the European Union, and it must not be excessive: it must be necessary and proportionate to the aim sought.

The first condition, that the restrictions are provided for by law (Article 52 (1)),²⁶ as mentioned above, is also known as "legality", "legal certainty" or the "rule of law", and it has been recognized as one of the general principles of the European Union since the 1960s.²⁷ The legal certainty requirement has been comprehended in several aspects, or sub-categories, such as legitimate expectations, acquired rights, non-retroactivity, lack of procedural time limits and the demand for understandable language;²⁸ and each of these aspects has been repeatedly ruled on by the Court of Justice. With regard to the doctrine (principle) of legitimate expectations, it means that: "those who act in good faith on the basis of law as it is or seems to be should not be frustrated in their expectations".²⁹ When deciding on the legality of a changed regulation in *Töpfer*, the Court held that the protection of legitimate expectation forms part of the Community legal order, and any failure to comply with it is an infringement of the Treaty or rule of law relating to its application within the meaning of Article 173 EEC (now Article 263 TFEU).³⁰

The principle of acquired rights protection means that, when legislation is amended, unless the legislature expresses a contrary intention, the continuity of the legal system

²⁶ Case C-407/08 P, *Knauf Gips v Commission* [2010] E.C.R. I-06375.

²⁷ Calmers, D., C. Hadjiemmanuil, et al. (2014). *European Union Law, Text and Materials*, Cambridge University Press.

²⁸ Schermers, H. G. and D. F. Waelbroeck (2001). *Judicial protection in the European Union*, Kluwer Law International.

²⁹ Kaczorowska, A. (2013). *European Union Law*, Routledge.

³⁰ Case C-112/77, *Töpfer v Commission*, [1978] E.C.R. I-1019. See also: Case C-120/86, *Mulder v Minister van Lanbouw en Visserij* [1988] E.C.R. I-2321 and Case C-212/80, *Amministrazione delle finanze dello Stato v Salumi*, [1981] E.C.R. I-2735.

must be ensured.³¹ Regarding non-retroactivity, as the Court held in *Opel Austria*, the Regulation in question should not have come into force before it had been notified and the Regulation published.³² In *Netherlands v Commission*, the Court confirmed the principle in the context of a lack of procedural time limits when the applicant argued that the financial aid Regulation challenged (ECSC Treaty, Article 35) failed to provide any specific period within which to exercise the alleged right.³³

The demand for understandable language is confirmed by the Court of Justice in *Farrauto*,³⁴ in which an Italian worker brought a suit against a German industrial social insurance body in Germany. In his opinion in *Digital Rights Ireland*, Advocate General Cruz Villalón also made a profound remark about the "quality of law" meeting the requirement of being "provided for by law", under which Union legislation should not be just a matter of general referral but must be sufficiently clear and foreseeable as to the meaning and nature of applicable measures, and must define with sufficient clarity the scope and manner of exercising of the power of interference when exercising rights. He further pointed out that the European Union legislature cannot entirely leave to Member States the task of defining guarantees capable of justifying that interference, but should rather fully assume its share of responsibility by defining at the very least the principles which must govern the definition, establishment, application and review of observance of those guarantees. Thus, an example of merely giving the description of "serious crime" in the European Union legislation should not be deemed adequate in light of the intensity of the

³¹ Case C-23/68, *Klomp v Inspectie der belastingen* [1969] E.C.R. I-0043. See also Case C-10/78, *Belbouab v Bundesknappschaft* [1978] E.C.R. I-1915.

³² Case T-115/94, *Opel Austria v Council*, [1997] E.C.R. II-2739. See also: Case C-98/78, *Racke v Hauptzollamt Mainz* [1979] E.C.R. I-0069, *Salumi supra* n 21.

³³ Case C-59/70, *Netherlands v Commission* [1971] E.C.R. I-0639.

³⁴ Case C-66/74, *Farrauto v Bau-Berufsgenossenschaft* [1975] E.C.R. I-0157.

interference.³⁵

c. General interest

The next requirement for an infringement to be legitimate is that restrictions of rights, while provided for by law, must meet the general or public interest. Usually mentioned together with the social functions of rights, this requirement has been repeatedly quoted in Court of Justice case law.³⁶ This requirement, as explained by the Court of Justice in *Dereci*, means that limitations of rights must refer to an objective of general interest, recognised as such by the European Union.³⁷ These objectives include those pursued under the CFSP and referred to in Article 21(2)(b) and (d) TEU, namely supporting democracy, the rule of law and human rights as well as the sustainable development of developing countries with the essential objective of eradicating poverty.³⁸

Compared to the ECtHR, the Court of Justice is not eager to set criteria to determine whether there exists a general or public interest in a case. However, when citing an ECtHR case, *Malama*, Advocate General Mischo pointed out, in his opinion in *Booker Aquaculture*, that the notion of public interest is necessarily extensive, and the authorities of Member States enjoy a certain margin of appreciation as, in principle, they are better placed to appreciate what is in the public interest.³⁹ This opinion was maintained in *S.P.C.M.*, where the Court held that the Community legislature must

³⁵ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland v Minister for Communications Marine and Natural Resources*, [2014] OJ C 175/6.

³⁶ For examples, see: *Schröder*, *supra* n 13 and Case C-200/96, *Metronome Musik v Music Point Hokamp* [1998] E.C.R. I-1953 and *Alliance* *supra* n4.

³⁷ Case C-256/11, *Dereci v Bundesministerium für Inneres* [2011] E.C.R. I-11315.

³⁸ *Ezz* *supra* n 16.

³⁹ Joined Cases C-20/00 and C-64/00 *Booker Aquaculture v Scottish Ministers* [2003] E.C.R. I-7411.

also be allowed broad discretion, which may involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments.⁴⁰ Thus, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having due regard to the objective which the competent institution is pursuing.

d. Principle of proportionality

According to Article 52(1) CFR, any limitation on property rights is also subject to the principle of proportionality. The idea of proportionality was first recognised in the Community in Article 5 TEC (now Article 5(3b) TEU), stating that: "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty". The principle of proportionality has been recognised as one of the general principles of European Law by the Court of Justice since the 1950s.⁴¹ It was first recognised by the Court of Justice in *Fédéchar*.⁴² In *Solange I*, the Advocate General provided an early formulation of the principle of proportionality, stating that: "the individual should not have his freedom of action limited beyond the degree necessary in the public interest".⁴³ Since then, the concept of proportionality has been further developed. When dealing with a European Directive prohibiting the use of certain hormonal substances in livestock farming in the frequently quoted *Fedesa*, the Court of Justice held that by virtue of the principle of proportionality, the lawfulness of the said Directive depended on whether it was appropriate and necessary to achieve the objectives legitimately pursued by the law in question. When there is a choice

⁴⁰ Case C-558/07, *S.P.C.M. v Secretary of State for the Environment, Food and Rural Affairs* [2009] E.C.R. I-5783.

⁴¹ Damian Chalmers (2006), *supra* n 18.

⁴² Case C-8/55, *Fédération Charbonnière de Belgique v High Authority* [1954] E.C.R. I-245.

⁴³ Case C-11/70, *International Handelsgesellschaft v Einfuhr* [1970] E.C.R. I-1125.

between several appropriate measures, the least onerous must be adopted, and any disadvantage caused must not be disproportionate to the aim(s) pursued.⁴⁴ Nowadays, it has been established that the principle of proportionality generally entails a three-stage test:

- (a) the measure is suitable to achieve a legitimate aim (appropriateness test),
- (b) the measure is necessary to achieve that aim or no less restrictive means are available (necessity test), and
- (c) the measure does not have an excessive effect on the applicant's interests (reasonableness). The principle of proportionality therefore requires that a measure is both appropriate and necessary, and as such the Court of Justice reviews both the legality of a measure but also, to some extent, the merits of legislative and administrative measures.⁴⁵

When the principle of proportionality is applied under the Union's legal order, it is not always the weighing of fundamental rights according to the restrictive method discussed above, but rather a weighing of different fundamental rights and freedoms that are guaranteed within the European Union. In this regard, assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and striking a fair balance between them.⁴⁶

⁴⁴ Case, C-331/88, *R v Minister of Agriculture, Fisheries* [1990] E.C.R. I-4023. See also: Case C-189/01, *Jippes v Minister van Landbouw* [2001] E.C.R. I-5689, Case C-343/09, *Afton Chemical v Secretary of State for Transport*, [2010] E.C.R. I-7027, and joined cases C-581/10 & C-629/10 *Nelson & TUI Travel v Deutsche Lufthansa* [2012] OJ C 399/3, and *Sky Österreich*, *supra* n 7.

⁴⁵ Craig, P. and G. de Búrca (2015). *EU law: Text, Cases, and Materials*, Oxford University Press. See also: Opinion of Advocate General Trstenjak in Case C-271/08, *Commission v Germany* [2010] E.C.R. I-7091. However, in some Court of Justice cases that have applied the principle of proportionality, only the third stage – reasonableness – has been considered.

⁴⁶ See: *Sky Österreich*, *supra* n 7 and Case C-275/06, *Promusicae v Telefónica de España* [2008] E.C.R. I-0271, and Case C-544/10, *Deutsches Weintor v Land Rheinland-Pfalz* [2012] OJ C 331/3. For more

The principle of proportionality has been quoted many times in Court of Justice case law when the Court is applying the CFR. For example, in *UEFA*,⁴⁷ when considering whether Union secondary legislation⁴⁸ infringed the exclusive rights to broadcast a football event, the Court applied the principle of proportionality by weighing the said broadcasting rights (property rights) against the right to disseminate information and ensuring wider access by the public to the television coverage of events of major importance.⁴⁹ In another case, *Sky Österreich*, regarding exclusive broadcasting rights, the Court reckoned that requiring the broadcasting rights-holder to provide short clips (extracts) to other broadcasters based on the costs directly incurred in providing such clips (e.g. providing access to the signal) might constitute an infringement of the rights to property and professional freedom; however, the marketing on an exclusive basis of events of high interest to the public is increasing and is liable to restrict considerably the access of the general public to information relating to those events. The Court also found that, despite the fact that a less restrictive measure could have consisted of providing compensation to holders of exclusive broadcasting rights in excess of costs directly incurred, this could deter or even prevent certain broadcasters from requesting access for the purpose of making short news reports; and therefore, by requiring the holders to provide the said extracts only at the level of the costs incurred, this might not be deemed disproportionate.

discussion about the weighing of fundamental rights, see Chapter Ten.

⁴⁷ Case C-201/11 P, *UEFA v Commission* [2013] OJ C 260/3.

⁴⁸ Article 3a of Directive 89/552 as amended by Directive 97/36.

⁴⁹ In this regard, the Court of Justice has combined consideration of the general interest and proportionality. In fact, it is not rare for European Courts to combine observations of proportionality and other legitimate considerations. For example, in the aforementioned *Ezz*, the General Court even considered that restrictive measures were not disproportionate because they are by nature temporary and reversible and do not therefore infringe the “essential content” of the right to property.

(3) Fair compensation

As will be discussed below, although not enumerated in ECHR provisions, the ECtHR uses compensation as an index of whether a proper balance has been struck between the harms caused and the benefits gained. This compensation should be paid in timely fashion, and whilst it may not need to be paid in full, a total lack of compensation can be considered justifiable only in exceptional circumstances. The CFR, however, explicitly states "fair" compensation paid in good time to be one of the conditions of a legitimate deprivation of possessions. In the aforementioned *Sky Österreich*, compensation was one of the elements in the Court of Justice's decision about determining the proportionality of the legislative measure, and the Court held that partial compensation, together with the merits of other rights and freedoms, constituted a fair balance and thus the legislative measure at issue was legitimate.

(4) The essence of property rights

The CFR has made a distinction separating it from the ECHR by explicitly stating that any limitation on rights and freedoms should respect the essence of those rights and freedoms. This is actually a reaffirmation of statements in Court of Justice case law. As early as *Nold*, the Court of Justice noted that while fundamental rights may be subject to certain limits, the substance of such rights should be left untouched. This finding has been repeatedly noted in later cases, though sometimes in alternative terms, as for example in the aforementioned *Schröder* and *Wachauf* cases, where the Court held that restrictions should not infringe upon the "very substance" of the rights guaranteed;⁵⁰ in *Keller*,⁵¹ where the Court of Justice was dealing with professional

⁵⁰ See also: Case C-177/90 *Kühn* [1992] E.C.R. I-0035, Case C-22/94, *Irish Farmers' Association* [1997] E.C.R. I-1809, Case C-200/96, *Metronome Musik* [1998] E.C.R. I-1953.

⁵¹ Case C-234/85, *Staatsanwaltschaft Freiburg v Franz Keller* [1986] E.C.R. I-2897.

freedom, the Court held that the Community restriction should not impinge on the "actual substance" of that freedom.

After the CFR came into force, as per a requirement of the Article, the Court of Justice maintained the same opinion, i.e. that any limitation of fundamental rights and freedoms should not impair the essence of the said rights and freedoms. And in *Eifert*, the Court held that: "limitations may be imposed on the exercise of rights ... as long as the limitations ... respect the essence of those rights and freedoms".⁵² In *ZZ*, the Court held that "... whilst Article 52(1) of the Charter admittedly allows limitations on the exercise of the rights enshrined by the Charter, it nevertheless lays down that any limitation must in particular respect the essence of the fundamental right in question ... ".⁵³

Whether the essence of each fundamental right, for example where property rights are affected, involves in-depth discussion, this depends on the content of the right at issue. Oddly enough, despite repeated emphasis that the essence of rights should be respected, the Court of Justice has rarely directly dealt with this issue, i.e. explaining why the Court has held that the essence of each disputed fundamental right and freedom has or has not been affected in cases.⁵⁴ Usually, from the author's observation, the Court merely describes the facts and does not really explain their

⁵² Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke and Eifert v Land Hessen* [2010] E.C.R. I-11063.

⁵³ Case C-300/11, *ZZ v Secretary of State for the Home Department* [2013] OJ C 225/7.

⁵⁴ However, it does not mean whether the essence of certain fundamental rights and freedoms has never been paid attention to in European Judicial proceedings. In his opinion to *Deutsches Weintor eG v Land Rheinland-Pfalz* regarding to the freedom of labeling applicant's alcoholic beverage (the freedom to conduct a business), Advocate General Mazák seemed to combine the consideration of whether the essence of the fundamental rights and freedoms has been affected and proportionality by raising the point that the prohibition only places restrictions within a clearly defined sphere on the business activities, and therefore the essence and actual substance of such right was not impaired.

relationship to the essence of the rights at issue. An example of this is *Sky Österreich*, in which the Court noted that the Union legislative provision⁵⁵ that requires broadcasting rights holders to offer short clips of important matches to other broadcasters "does not prevent a business activity from being carried out as such by the holder of exclusive broadcasting rights" and "does not prevent the holder of those rights from making use of them by broadcasting the event in question itself for consideration or by granting that right to another broadcaster on a contractual basis for consideration or to any other economic operator", and therefore this does not affect the core content of fundamental rights and freedoms.

3. Protection of the Right to Property in ECHR and ECtHR Case Law

The protection of property rights under the ECHR is stated in Article 1 of Protocol 1 (henceforth referred to as Article 1):

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or

⁵⁵ Directive 2007/65/EC of the European Parliament and the Council amending Council Directive 89/552/EC (OJ L 298, 17.10.1989) on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

penalties."⁵⁶

The interpretation of the ECHR is mainly conducted by the European Court of Human Rights (ECtHR), though other Council of Europe institutions may provide interpretative guidance. The ECtHR is a supranational court, established in 1959, which supervises the implementation of the ECHR.⁵⁷

Article 1 set out the protection of property rights. However, as aforementioned, property rights are not absolute but are subject to reasonable limitation or interference from the State. It has been observed that the ECtHR has therefore developed a five-step test to deal with whether there are violations of Article 1:⁵⁸

Step 1: Did the applicant have property in the sense of Article 1?

Step 2: Was there interference with the peaceful enjoyment of the property?

Step 3: Was the interference provided for by law?

Step 4: Did the interference pursue the general interest?

Step 5: Did the interference strike a fair balance between the means employed and the aim sought?

Step 1

In this step, two questions should be considered: (1) who can claim to be the victim of

⁵⁶ It has been long debated whether economic rights such as property rights shall enjoy equal protection with civil or political rights, such as freedom of speech, as the latter ones traditionally are more vulnerable to the power of States. Upholders think that with the adoption of Protocol 1 of the ECHR, economic rights are not considered less important than political rights. See: Kirchner, S. and K. Geler-Noch (2012). "Compensation under the European Convention on Human Rights for Expropriations Enforced Prior to the Applicability of the Convention." *Jurisprudence* 19(1): 24. This issue will be further discussed in later chapters, especially Chapter Eight.

⁵⁷ As stated in Article 19 of the ECHR, the ECtHR was established "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols".

⁵⁸ This observation, see: Schutte, C. B. (2004). "The European fundamental right of property." *Studiekring'Prof.*

interference with property, i.e. who may bring proceedings before the Convention bodies; and (2) what is property, i.e. what constitutes a "possession" within the meaning of the ECHR?

Regarding the first question, everyone whose rights are violated will have an effective remedy before the State, as stated in Article 13 of the ECHR: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

According to Article 1, not only natural persons but also legal persons are entitled to the enjoyment of property rights protection. However, shareholders generally have no claim based on damage to a company. The "piercing of the corporate veil" will only be permitted in exceptional circumstances, such as when a company is unable to make a claim through its organs or liquidators.⁵⁹

As for the second question, the concept of property under Article 1 is very broad, and not limited to the ownership of physical goods.⁶⁰ The text in the Article is "possessions" in English and "*biens*" in French, and is deemed to include a wide range of lawful interests that have a pecuniary value, but not abstract concepts,⁶¹ as in civil

⁵⁹ See: *Yarrow v the United Kingdom* (1983) App No. 9266/81, 30 DR 155; *X v Austria* (1966) App no.1706/62, 21 CD 34 and *Agrotexim v Greece* (1995) App no. 14807/89 21 EHRR 250. In *Agrotexim*, the ECtHR disputed whether a shareholder should generally be able to claim for violations of the property rights of a company, as disagreements between shareholders and a company's board of directors or amongst shareholders are common, and such disagreements could cause difficulties in relation to an infringement of the company's rights. It may also cause the risk of violating the ECHR's requirement that all domestic remedies be exhausted (Article 35).

⁶⁰ See: *Iatridis v Greece* (2000) App no. 31107/96, ECHR 1999-II 75, para. 40.

⁶¹ The object of the property right claimed "must be adequately definable in relation to the claims based thereupon". See: Van Dijk, P., G. J. Hoof, *et al.* (1998). *Theory and practice of the European*

law legal doctrine.⁶² It should be noted that such interest should at least have a certain economic value.⁶³ For example, the ECtHR has confirmed the following as being protected under Article 1: movable or immovable property, tangible or intangible interests, such as shares,⁶⁴ patents,⁶⁵ an arbitration award (as long as it is sufficiently established and enforceable),⁶⁶ an entitlement to a pension,⁶⁷ a landlord's entitlement to rent,⁶⁸ the running of a business,⁶⁹ the right to exercise a profession or even a legal claim.⁷⁰ However, property in relation to the Article should be restricted to that which already exists, or at least there being a legitimate expectation that a certain state of affairs will apply;⁷¹ in other words, the mere expectation of getting property is not protected under the Article.⁷²

As for identification of the concept of property rights, the ECtHR is not restricted by definitions in domestic law but has an autonomous nature.⁷³ In other words, the ECtHR is not bound by the circumstance of whether a right or advantage under

Convention on Human Rights, Martinus Nijhoff Publishers: 621.

⁶² Van Banning, T. R. (2002). *The Human Right to Property*, Intersentia nv

⁶³ In cases where the enjoyment of property is concerned but the economic impact is difficult to assess, Article 8 can come into play, see: Carss-Frisk, M. (2001). *The Right to Property: a Guide to the Implementation of Article 1 of Protocol No. 1 of the European Convention on Human Rights*, Directorate General of Human Rights Council of Europe.

⁶⁴ *Bramelid & Malmström v Sweden* (1982) App nos 8588/79, 8589/79, 29 DR 64

⁶⁵ *Smith Kline & French Lab v Netherlands* (1990) App no. 12633/87, 66 ECHR 70.

⁶⁶ *Stran Greek Refineries & Stratis Andreadis v Greece* (1995) App no 13427/87, 19 EHRR 293

⁶⁷ *Müller v Austria* (2008) App no 28034/04, ECHR 18.

⁶⁸ *Mellacher v Austria* (1989) App no. 10522/83, 11011/84, 11070/84, 12 EHRR 391.

⁶⁹ *Bramelid supra n 11* and *Van Marle v Netherland* (1986) App no. 8543/79 8674/79 8675/79 8685/79, 8 EHRR 483.

⁷⁰ *Pressos Compania Naviera v Belgium* (1997) App no.17849/91, 21 EHRR 301

⁷¹ See: *Pine Valley Developments v Ireland* (1991) App no.12742/87, 14 EHRR 319. In this case, the ECtHR thought the applicant acted in reliance on permission duly recorded in a public register, and thus constituted a legit expectation.

⁷² See: *Marckx v Belgium* (1979) App no. 6833/74, 2 EHRR 330 and *X v Germany* (1979) App no. 8410/78, 18 DR 216. In *Maarckx*, the ECtHR disputed the right to acquire possessions, whether on intestacy or through voluntary dispositions, being protected under Article 1; in *X*, the ECtHR disputed whether fees that have not come into existence are protected under Article 1.

⁷³ Schutte(2004), *supra* n49.

national law is considered to be a property right.⁷⁴ This flexible approach is important for the supranational nature of the ECtHR, as it makes it possible for the ECtHR to deal with the different concepts of property rights within States. However, it is still relevant to consider the position as a matter of domestic law.⁷⁵ Apparent violations of domestic law are generally not protected under Article 1.⁷⁶

Step 2: Interference

In the second step, the ECtHR has to consider whether there has been interference with property. Regarding this, the ECtHR has established a *three-rule* test in its case law.⁷⁷ First, in *Sporrong*, the ECtHR pointed out:

"That Article (Article 1) comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by

⁷⁴ Alkema, E., J. Loof, *et al.* (2000). "The Concept of Property—In Particular in the European Convention on Human Rights " *The Right to Property—The Influence of Article 1 Protocol No. 1 ECHR on Several Fields of Domestic Law*.

⁷⁵ See: *Pressos*, *supra* n61. It should be noted that consideration of domestic law is not restricted to the concept of the property, but also to the entitlement to property. In *Gratzinger & Gratzingerova v Czech* (2002) App no.39794/98, 35EHRR CD202, the applicants were originally Czech nationals but later lost their nationality. The ECtHR held that the applicants had not shown that they had a claim which was sufficiently established to be enforceable, and therefore could not argue that they had a "possession" within the meaning of Article 1.

⁷⁶ See: *S. v the United Kingdom* (1986) App no. 11716/85, 47 DR 274. In this case, the ECtHR pointed out that occupying a property without a legal right under domestic law is not protected under the Article.

⁷⁷ The ECtHR, however, has sometimes emphasised that the three rules are connected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of possessions and should be construed in the light of that general principle, " ...the rules are not 'distinct' in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They must therefore be construed in the light of the general principle laid down in the first rule". See *Mellacher supra* n 15.

enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph".⁷⁸

It should be noted that although Article 1 deals with property rights violations by States, it is not restricted to property interfered with by or transferred to (see below) States. In other words, where States take certain measures resulting in property being transferred to or affected by other individuals (a private third party), this also constitutes interference under Article 1.⁷⁹

a. Deprivation of Property

When considering whether there has been interference with property, the ECtHR will first examine the second rule, i.e. whether there has been deprivation of property. This is because the first of the *three rules* is of a general nature and should therefore be examined after the last two.

As for whether there is any deprivation of property, it should be noted that "deprivation" here is not restricted to formal or legal expropriation or transfer of ownership; the ECtHR also considers whether there has been a *de facto* taking of property, i.e. the State takes measures that interfere with property rights to an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.⁸⁰

⁷⁸ *Sporrong & Lönnroth v Sweden* (1982) App no. 7151/75; 7152/75, ECHR 5.

⁷⁹ See: *James v United Kingdom* (1986) App no.8793/79, ECHR 2; *Scollo v Italy* (1996) App no.19133/91, 22 EHRR 514; *Bramelid supra* n 16.

⁸⁰ *Sporrong, supra* n 69.

Such *de facto* deprivation has been frequently reiterated by the ECtHR. In *Papamichalopoulos*, the ECtHR held that the loss of all ability to dispose of land, taken together with the failure to remedy the situation, entailed sufficiently serious consequences for the applicants' land *de facto* as to have been expropriated.⁸¹ In *Brumarescu*, the relevant property was never legally nationalised, as the nationalisation legislation was found to be void, but the ECtHR stated that it was necessary to look behind appearances and investigate the reality of the situation complained of, and as the applicant could not use the property, the State's behaviour should be deemed deprivation.⁸²

b. Control of the Use of Property

As stated in the second paragraph of Article 1, the third rule provides that property rights generally should be protected, unless under certain legitimate circumstances whereby the State is entitled to enforce necessary laws to control the use of the said property.

In *Sporrong*, the State imposed two measures, namely expropriation permits and the prohibition of construction on the relevant land for future development. The ECtHR held that although the measures had made it more difficult for the applicant to use, sell, donate and otherwise deal with the property, he was still entitled and able to do so, and therefore there was no deprivation of property. However, the prohibition on construction clearly amounted to control over the use of property, within the meaning of the second paragraph (the third rule).⁸³

⁸¹ *Papamichalopoulos and others v Greece* (1993) App no 14556/89, ECHR 28.

⁸² *Brumarescu v Romania* (1999) App no.28342/95, ECHR 105.

⁸³ *Sporrong*, *supra* n 69.

In *Scollo*, the applicant claimed the return of his flat. The proceeding, however, was suspended by domestic legislation. The ECtHR found that the tenant's continuing to occupy the flat undoubtedly amounted to control over the use of possessions, and the second paragraph of Article 1 applied accordingly.⁸⁴ A similar case is *Hutten-Czapska*, in which the applicant's house was assigned to a tenant by State legislation. The ECtHR held that the measures taken could not be considered a formal or *de facto* expropriation but did constitute control over the use of the property.⁸⁵

In *Mellacher*, new domestic legislation limited the rent for accommodation. The applicant, being a landlord, contested the lawfulness of such legislation. The ECtHR found that the measures taken did not amount either to formal or to *de facto* expropriation, as there was neither transfer of the applicant's property nor was he deprived of his right to use, let or sell it. The contested measures which deprived the applicant of part of his income from the property amounted to control over the use of the property. Accordingly, the second paragraph of Article 1 applied.⁸⁶

c. Violations of Peaceful Enjoyment of Property?

The first rule, as aforementioned, is of a general nature. If State measures do not fall under the next two rules, the ECtHR will consider whether such a measure violates peaceful enjoyment of the property.⁸⁷ However, even if measures fall within the ambit

⁸⁴ *Scollo*, *supra* n 70.

⁸⁵ *Hutten-Czapska v Poland* (2008) App no. 35014/97, ECHR 355.

⁸⁶ *Mellacher supra* n 59.

⁸⁷ In *Sporrong*, the ECtHR held that the expropriation permits of the two measures were not deprivations, nor were they intended to limit or control of such property; they were therefore had to be considered under the first sentence of the first paragraph (i.e. the first rule). See also *Broniowski v Poland* (2005) App no.31443/96, ECHR 647, the ECtHR considered that the alleged violation could not be classified into a precise category, and it was appropriate to be examined under the general rule of

of neither the second nor the third rule, that does not mean they violate the provisions contained within the first rule.⁸⁸

In *Loizidou*, the applicant was denied access by the State to her own land for 16 years. The land was neither denied (or *de facto* denied) nor controlled by the State. However, the ECtHR noted that the denial of access over a period of 16 years had affected the applicant's right as a property owner, and thus constituted a violation of peaceful enjoyment of the property.⁸⁹

In *Stran Greek Refineries*, new domestic legislation voided a contract and its arbitration clauses, and a further arbitration award was denied by the State. The ECtHR considered the first rule and found it was impossible for the applicants to secure enforcement of arbitration under which the State was required to pay them specified sums in respect of expenditure they had incurred in seeking to fulfil their contractual obligations or even for them to take further action to recover the sums in question through the courts, and therefore concluded interference existed.⁹⁰

In *Driza*, the State enacted an act under which the former owners of property who were expropriated under the communist regime could claim ownership or compensation. This right to claim, however, became uncertain after the State enacted another series of acts. The ECtHR held that the continuing failure to pay the applicants compensation and recognise their right to ownership of property amounted

peaceful enjoyment of possessions.

⁸⁸ *Sporrong*, *supra* n 69.

⁸⁹ *Loizidou v Turkey* (1995) App No 15318/89, ECHR 10.

⁹⁰ *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) App no. 13427/87, ECHR 48.

to interference with the right to peaceful enjoyment of possessions.⁹¹

Step 3: Provided for by Law⁹²

This requirement is often also called "legality", "legal certainty" or the "rule of law".

Whether or not interference is provided for by law is, in some cases, the first question to ask, i.e. if the interference was not lawful, it could not be compatible with Article 1, as the ECtHR stated in the aforementioned *Iatridis*: " ... whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ... becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary".⁹³

The requirement for legal certainty, although explicitly stated in the second sentence of the first paragraph of Article 1, is actually a principle inherent in the whole ECHR,⁹⁴ and has a broader meaning: any State measure that limits a national's fundamental rights should be provided for by law, be issued and executed by an appropriate authority, follow a proper procedure, and not be arbitrary. For example, in a serious case against Bulgaria, properties owned by the applicants were nationalised under the communist regime. Later legislation, namely a restitution law, was enacted in order to return property or award compensation. The legislation was later amended with a renewing time limit. The ECtHR held that the authorities' failure to set clear

⁹¹ *Driza v Albania* (2007) App no. 33771/02, 49 EHRR 779.

⁹² In recent years, however, the ECtHR has adopted a general test for all kinds of interferences once the interference has been established. In *Beyeler*, the ECtHR identified the three criteria (lawfulness, in the general interest and proportionality) with which any interference with a possession must comply. See: *Beyeler v Italy* (2002) App no. 33202/96, ECHR 2000-I 57 See also *Schutte* (2004), *supra* n 49.

⁹³ *Iatridis*, *supra* n 51, para. 58.

⁹⁴ The ECtHR stated "...the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention". *Iatridis*, *supra* n 51, para. 58.

limits on the restitution of property of *bona fide* third parties generated legal uncertainty.⁹⁵

The ECtHR has a broad ("substantive") perception of law. This includes not only statutory laws, and the case law of national courts itself, but also lower-level regulations and even established practices,⁹⁶ as the ECtHR stated in *Kruslin*: "... the Court has always understood the term 'law' in its 'substantive' sense, not its 'formal' one ... it has included both enactments of lower rank than statutes and unwritten law".⁹⁷ This relatively loose requirement is different from the attitude of the Court of Justice, as the "law" in the jurisprudence of the latter seemed to be limited to statutory provision.⁹⁸

Step 4: In the Public or General Interest

Once interference with property has been established, the ECtHR will then consider whether such interference is lawful, and the first step is to examine whether it is in the public or general interest.⁹⁹ The ECtHR has emphasized that: "[i]n order to be justified, any interference with the right to property must serve a legitimate objective in the public, or general, interest."¹⁰⁰

Public or general interest, however, is not necessarily restricted to affairs that benefit the public. As long as the State's taking of property is in pursuit of legitimate social,

⁹⁵ See: *Todorova v Bulgaria* (2012) App no. 40265/04, ECHR 883; *Lithgow and Others v The United Kingdom* (1986) App no. 9006/80; 9263/81, ECHR 8.

⁹⁶ *Schutte* (2004), *supra* n49.

⁹⁷ *Kruslin v France* (1990) Application No 11801/85, 12 EHRR 547.

⁹⁸ As observed by Advocate General Villalón in his Opinion in Case C-70/10, *Scarlet Extended v SABAM* [2011] E.C.R. I-11959, para. 37.

⁹⁹ According to the ECtHR, 'general' and 'public' are the same. See: Ploeger, H. D., D. A. Groetelaers, *et al.* (2005). "Planning and the Fundamental Right to Property."

¹⁰⁰ *James*, *supra* n 26.

economic or other policies, such an act can be deemed to be "in the public interest", even if the community at large has no direct use or enjoyment of the property taken. The ECtHR's consideration of the public or general interest can best be illustrated in *James*. In *James*, new legislation entitled long (over 21 years) leaseholders to buy the ownership of their house at less than the market value. In challenging the lawfulness of the legislation, the applicants contended that the transfer of property from one person to another could not be "in the public interest". The ECtHR refuted this argument and held that the compulsory transfer of property from one individual to another may constitute a legitimate aim in the public interest. It added that the taking of property pursuant to a policy calculated to enhance social justice within the community could properly be described as being in the public interest.¹⁰¹

The ECtHR in *James* further pointed out that States have a wide "margin of appreciation" to implement social and economic policies, given the different cultural, historic and philosophical practices amongst them:

"Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken ... Here as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation ... unless that is manifestly without reasonable foundation."

¹⁰¹ Ibid.

The ECtHR concluded that, in *James*, the belief of the UK legislature in the existence of a social injustice on the part of leaseholders could not be characterized as manifestly unreasonable.¹⁰² The doctrine of the margin of appreciation has been quoted and adopted frequently in subsequent cases.¹⁰³

With the establishment of the doctrine of margin of appreciation, the ECtHR generally respects the judgements of States (in their domestic legislature or administrative acts) about whether a measure is in the public or general interest. However, that is not to say that the ECtHR does not have a role to play in assessing whether a State's legislation or acts are of public or general interest; it is able to review whether the margin of appreciation has been exceeded. As noted in *Jahn*, the ECtHR cannot abdicate its power of review and must therefore determine whether the requisite balance was maintained in a manner consonant with the applicant's right to the peaceful enjoyment of his property, within the meaning of the first sentence of Article 1. Indeed, in recent years, there are increasing numbers of cases in which States were found to have exceeded the margin.¹⁰⁴

Step 5: Fair Balance Test

¹⁰² The ECtHR further noted that the more important the social considerations, the wider the margin of appreciation. See: *Herrmann v Germany* (2007) App no. 9300/07 ECHR 26.

¹⁰³ For example, in *Pressos*, the ECtHR noted that under the ECHR system it is for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property, and of the remedial action to be taken, see *Pressos supra* n 22. In *AGOSI*, the ECtHR pointed out that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question. See: *AGOSI v The United Kingdom* (1986) App no. 9118/80, ECHR 13. In *Zvolask*, the ECtHR pointed out that because of the State's direct knowledge of the society and its needs, it is in principle better placed to appreciate what is "in the public interest". It is thus for the State to make the initial assessment of the existence of a problem of public concern warranting measures of deprivation of property, see: *Zvolský & Zvolská v The Czech Republic* (2002) App no. 46129/99, ECHR 2002 I-X

¹⁰⁴ See: *Sporrong supra* n 69, *Holy Monasteries v Greece* (1995) App no 13092/87, 20 EHRR and *Spacek v the Czech Republic* (1999) App no.26449/95, ECHR 128.

It is not sufficient that interference is of public or general interest and meets a legitimate objective; it must also be proportionate,¹⁰⁵ i.e. there must exist a reasonable relationship of proportionality between the means employed by the State and the aim sought.¹⁰⁶ In other words, a fair balance must be struck between the demands of the public or general interest of the Community and the protection of the individual's property rights.¹⁰⁷ In fact, this test is usually the core issue in most ECtHR property rights cases, as it has been noted above that the ECtHR generally respects the State's assessment about public or general interests.

The principle of proportionality or fair balance may be best explained in *Sporrong*, in which ECtHR stated

" ... the Court must determine whether a fair balance was struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights ... The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 ... Being combined in this way, the two series of measures created a situation which upset the fair balance which should be struck between the protection of the right to property and the requirement of the general interest: the *Sporrong Estate* and *Mrs Lönnroth* bore an individual and excessive burden which could have been rendered legitimate only if

¹⁰⁵ However, in *Velikovi*, the ECtHR mixed the general interest and proportionality, saying the proportionality of interference must be decided with reference to: (i) whether or not the case clearly fell within the scope of the legitimate aims of the legislation at issue; and (ii) the hardship suffered by the applicants and the adequacy of the compensation actually obtained or that which could have been obtained. See: *Velikovi and others v Bulgaria* (2007) App. no 43278/98, 48 EHRR 27.

¹⁰⁶ As in *Kopecký*, the ECtHR reiterated: "[t]he application of the relevant provisions of the restitution laws by the national courts shows how the State assessed the competing interests. Even accepting that the State had a wide margin of appreciation in the case, the need to maintain a fair balance means that promotion of the general interest must not impose an excessive burden on a restitution claimant." See: *Kopecký v Slovakia* (2004) App no.44912/98, ECHR 446.

¹⁰⁷ *Iatridis*, *supra* n 51.

they had had the possibility of seeking a reduction of the time-limits or of claiming compensation."¹⁰⁸

One of the main measures of proportionality held by the ECtHR is the weighing between the loss of the applicant and the compensation he receives. The ECtHR stated in *James* that: "[a]lthough Article 1 does not expressly require the payment of compensation for a taking of, or other interference with, property. But in the case of a taking (or deprivation) of property, compensation is generally implicitly required."¹⁰⁹ Again in *Jahn*, the ECtHR stated: "[c]ompensation terms under the relevant legislation are material to the assessment [of] whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants."¹¹⁰

Although in *Former King of Greece*, the ECtHR has stated that in many cases of lawful expropriation, such as a distinct taking of land for road construction or other "public interest" purposes, only full compensation may be regarded as reasonably related to the value of the property,¹¹¹ it should be noted that full compensation is not always granted under ECtHR case law,¹¹² as suggested in *James*: "[l]egitimate objectives of 'public interest', such as are pursued in measures of economic reform or

¹⁰⁸ *Sporrong supra* n 69.

¹⁰⁹ *James, supra* n 70.

¹¹⁰ *Jahn et al. v Germany* (2005) App no. 46720/99, 72203/01, 72552/01, ECHR 444.

¹¹¹ *Former King of Greece and others v Greece* (2000) App no 25701/94, ECHR 640.

¹¹² *James, supra* n 26. The standard employed by the ECtHR, therefore, was lower than the standard under general public international law under which an individual can be fully compensated. This general compensation rule employs the so called "Hull" formula, which requires compensation to be "prompt, adequate, effective" and the victim has to receive full compensation. See: Kirchner (2012) *supra* n 3. This issue has been disputed in *Lithgow*, where the applicant claimed that deprivation of property is subject to the conditions provided for "by the general principles of international law", and thus should be "adequate, prompt and effective". The ECtHR rejected this argument, saying this requirement only applies to non-nationals. The amount of compensation awarded, however, has increased in more recent cases, see: *Lithgow, supra* n 32.

measures designed to achieve greater social justice, may call for less than reimbursement of the full market value." However, a denial of compensation is *per se* not lawful. This principle was also illustrated in *James*, as the ECtHR stated:

"the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances ... the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment [of] whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants ... the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1."¹¹³

In the slightly later case of *Lithgow*, the applicant's aircraft were nationalised by the State. While not contesting the nationalisation, the applicant claimed that the compensation they received was grossly inadequate and discriminatory. The ECtHR pointed out that while compensation standards may vary,¹¹⁴ compensation may not be denied *per se* – this would amount to a second violation of the right to property because compensation claims are also protected under Article 1. Only in very extreme

¹¹³ *James*, *supra* n 26.

¹¹⁴ The ECtHR stated that the “margin of appreciation” doctrine does not only apply when considering whether nationalisation was in the public interest, but also to the choice of compensation terms: “the Court’s power of review in the present case is limited to ascertaining whether the decision regarding compensation fell outside the United Kingdom’s wide margin of appreciation; it will respect the legislature’s judgment in this connection unless that judgment was manifestly without reasonable foundation”. *Lithgow*, *supra* n 85.

circumstances may compensation be denied in expropriation cases. Again in *Pressos Compania Naviera*, a collision of ships occurred in Belgian waters. The owners of the ships sued for damages but the compensation was later denied by new domestic legislation. The ECtHR reiterated that the denial of compensation is only justifiable in exceptional circumstances.¹¹⁵

Not only should a compensation be granted in principle, but the proceedings should also be timely and not excessively lengthy. This rule should also be applied to administrative or judicial proceedings.¹¹⁶ The ECtHR further noted that there exists a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage.¹¹⁷ Regarding the excessive length of judicial proceedings, the ECtHR has developed key criteria for verification of the effectiveness of a compensation claim in *Wasserman*:¹¹⁸

- an action for compensation must be heard within a reasonable time;
- the compensation must be paid promptly and generally no later than six months from the date on which the decision awarding compensation becomes enforceable;
- the procedural rules governing an action for compensation must conform to the principle of fairness guaranteed by Article 6 of the Convention;

¹¹⁵ For other examples see also: *The Holy Monasteries, Former King of Greece* and *Zvolsky*. However, in *Jahn*, after considering the uncertainty of the legal position of heirs and the grounds of social justice, the ECtHR held that the lack of any compensation did not upset the “fair balance”.

¹¹⁶ In *Akkus v Turkey*, the ECtHR pointed out that the abnormally lengthy delays in the payment of compensation for expropriation lead to increased financial loss for the person whose land has been expropriated putting him in a position of uncertainty, especially when the monetary depreciation which occurs in certain States is taken into account... The same applies to abnormally lengthy delays in administrative or judicial proceedings in which such compensation is determined, especially when people whose land has been expropriated are obliged to resort to such proceedings in order to obtain the compensation to which they are entitled. See: *Akkus v Turkey* (2000)App no.19263/92, EHRR 365 and the many subsequent cases against Turkey.

¹¹⁷ See *Scordino v Italy* (2006) App No 36813/97 ECHR 2006-V and *Wasserman v Russia* (2008) App no.21071/05, ECHR 303.

¹¹⁸ *Ibid*.

- the rules regarding legal costs must not place an excessive burden on litigants where their action is justified; and
- the level of compensation must not be unreasonable in comparison with the awards made by the Court in similar cases.

Chapter VII

Legality and Constitutionality of Restrictions to Right to Property in Taiwan

Preface

This chapter discusses the property rights protection regime in Taiwan, and especially the criteria employed in constitutional review. In doing so, this chapter starts with a general overview of the right to property (1), including the constitutional provision (1.1) and an introduction to the concepts, content and scope of the right to property (1.2). The second section (2) contains a discussion about the constitutional review of the right to property in Taiwan, including a general discussion (2.1) and a specific discussion about a special situation, namely expropriation (2.2), which will play an important role later in this thesis.

1. General View of Right to Property

This section contains three subsections. As stated in Chapter Three, unlike the European Union which is a supranational organisation, Taiwan is an individual country with a codified constitution.¹ The first subsection therefore begins with the Taiwanese constitutional provisions related to property rights protection. Because the wordings of these constitutional provisions are very concise in nature and their meanings need to be further interpreted, two main sources—the scholarly discussions and the Grand Justices' Official Interpretations of the constitution provisions--will be cited extensively, as both of them play important roles in the interpretation and formation of fundamental rights.

¹ This thesis will not address Taiwan's status under international law.

The second subsection then discusses the constitutionality tests that relate to property rights. The term "fundamental right(s)" is used interchangeably with "constitutional right(s)" and "right(s)" in this and the following chapters of this thesis, as not only are the latter two terms used in the Taiwanese Constitution, but such rights are concisely included in the Constitution.²

1.1 Constitutional Provisions

There are three articles in the Taiwanese Constitution that relate to the protection of property rights. The first article, Article 15, proclaims that property rights (phrased as "rights to property"), along with the rights to exist and rights to work, are constitutional rights and should be protected.

Article 15: "The rights to existence, the rights to working, and the rights to property shall be guaranteed to the people".

The second provision is Article 23. As mentioned earlier in Chapter Three, this article is a general provision about the legitimate restriction of constitutional rights. In other words, it states under which circumstances a legal measure may restrict fundamental rights.

Article 23: "All the freedoms and rights enumerated in the preceding Article shall not

² As stated in Article 22 of Taiwanese constitution: "*All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.*" Constitutional rights, at least Taiwanese constitutional rights, are not necessary fundamental rights as defined in the previous chapters. However, the differences between fundamental rights and constitutional rights are not the focus of this thesis and will not be discussed in this thesis. Further discussions on this issue, see: Zhao, H. (2013). "The Formal Rationality of the Constitutional Norms and Its Value in the Perspective of the Limited Models of the Fundamental Rights." *Academia Sinica Law Journal* **12**.

be restricted by law except by such as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare".

The third relevant article especially states that certain properties are subjects to the restrictions of the State.

Article 145: "With respect to private wealth and privately-operated enterprises, the State shall restrict them by law if they are deemed detrimental to the balanced development of national wealth and people's livelihoods.

Cooperative enterprises shall receive encouragement and assistance from the State. Nationals' productive enterprises and foreign trade shall receive encouragement, guidance and protection from the State".

Two points should be noted regarding this third provision. First, the terms "people" and "nationals" used in these articles have the same meaning in the perspective of this thesis.³ Second, Article 145 is contained within Chapter XIII on "Fundamental National Policies". This chapter was drafted and enacted upon the social and economic background of the 1940s and many articles have yet to be amended. Such articles are generally deemed out of date and therefore should be regarded mere as guidance rather than applicable clauses.⁴

³ The differences occur in cases such as when foreigners stay in Taiwan's territory. In this case, foreigners can still enjoy fundamental or constitutional rights, but do not have the rights to receive education and social welfares. In Taiwanese Constitution, there is another term "citizen" who are nationals that are capable of participating in politics and serving as civil servants.

⁴ Wu, G. (2005). "The Socila Movement and Constitution Interpretations." *The Theory and Practice of Constitution Interpretations* 1-7.

1.2 Concepts, Content and Scope of Right to Property

As Article 15 of Taiwanese Constitution is concisely worded and the true meaning of its wording is not comprehensible without further interpretation, Taiwanese legal scholars have strived to fill in the concepts of property rights. The most common approach that the scholars adopted was introducing the relevant constitutional theories from Germany.⁵

With the consideration of German theories, the property rights under the Constitution can be first construed as two concepts. The first concept is that the State has the responsibility to establish a regulatory framework in order to protect property rights. Such framework has a "covering effect" over all legislation and regulations. In other words, not only should the civil legislation be included in such framework, but the effect of such framework should also penetrate into the design of public legislation.⁶ In other words, the legislator should offer the necessary operating system of property rights protection via legislative techniques in both material and procedural legislation. This aspect is called the institutional guarantee (*Institutionsgarantie*) of property rights.⁷

The institutional guarantee was first introduced by the Official Interpretation No.386, according to which the most important content of these is its private-beneficial nature (*Privatnützigkeit*). The private-beneficial nature means that properties themselves are

⁵ See for examples: Su, Y.-C. (1996). "The Protection of Property Rights and Judicial Review"; Lee, H.-t. (2004). *The Protection of Property Rights and the Compensation to Expropriation*; Tsai, W.-i. (2006). The Concept of Property Rights Protection and its Dogmatic Structure, Cheng Kung Law Review.

⁶ Yang, S.-l. (1992). "The Protection of Property Rights and Public Expropriation." *Socioeconomic Law and Institution Review* (9): 259-278; Gee, K.-C. (2001). "The Protection of Property Rights--A Perspective from the Official Interpretations"; Lee, H.-T. (2001). *Essence of the Constitution*, Angle Publishing.

⁷ Ibid.

for private citizens to own and utilise.⁸ The legislators should keep in mind that the point of the existence of property rights is this private-serving nature when they are forming the concepts and the scope of protection of property rights.⁹ In other words, although the legislators are expected to form the private property system, such formation shall not intrude upon the core content of the said system.¹⁰

The second concept of property rights emphasises on their defensive nature, and therefore can be construed as an individual guarantee in contrast with the previous aspect. The classical central idea of this aspect was that each individual can use, make profits from, and dispose of his own property without State interference. The holders of property rights therefore enjoy a subjective public right (*Subjektiv-öffentliches Recht*) against the use of State power to effect any any deprivation of and restriction upon legally acquired properties.¹¹ This concept, however, was later adjusted at the end of 19th century with the rise of Collectivism and the idea of social solidarity.¹² The ideas of social function were then introduced to the once absolute individual property rights. The right to property was therefore considered a right with obligations and the employment of such right is subject to certain restrictions, e.g., the pursuit of public interests.¹³ This process of individual-base property rights evolving to social-base property rights has been defined as the socialisation of property rights.¹⁴

The revised, or rather compromised property right, therefore is not an absolute right

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid; Su (1996) *supra* n 5.

¹¹ Chen, H.-M. (1999). *Basic Theories of Constitutional Fundamental Rights* Angle Publishing: 304.

¹² Yang (1992), *supra* n 114; Tsai, W.-Y. (2001). *The Legal Foundation of Social State*, Tseng-Dien: 48. Zhuang, Z.-F. (2005). *The Research Of Constitutional Property Rights*, National Taiwan University: 10.

¹³ Ibid.

¹⁴ Yang (1992), *supra* n 6: 264; Lee (2004), *supra* n 5.

and should not be regarded as a sheer prohibition of the restriction of employment or the deprivation of properties; rather, it is a right that property-holders can rely on in order to resist the "illegal" entrenchment from State legislation or administrative acts. Taiwanese scholars further interpret that the protection of property rights therefore can be construed as a two-stage protection: In principle it is a guarantee of the established and existing status of ownership (*Bestandsschutz*),¹⁵ and only when the conditions of legal restrictions are met (such as a legal expropriation) would such a guarantee be transformed into the guarantee of value (*Wertsgarantie*), i.e., the compensation of the value of the said properties.¹⁶ This is actually an enlargement of the concept of traditional property rights, from the original rights on objects, to the monetary value of such rights.¹⁷

After figuring out the constitutional meaning, Taiwanese scholars' next step proceeded to identify the content and scope of property rights, i.e., which rights should be included as property rights, or more simply, what should be regarded as "property". Some Taiwanese scholars have called such content "private property rights", in contrast with the previous concepts being "constitutional property rights", as such content can be reflected into private laws.¹⁸ Scholars further explain such content as "[t]he rights that citizens enjoy upon their properties under which they can use, make profits and dispose the said properties and not to be illegally encroached upon by State power"¹⁹ or "All rights and objects that legally and on the owners'

¹⁵ Lee, C.-L. (1999). "Guarantee of the Established and Existing Status and the Guarantee of Values of Property rights." *Taiwan Law Journal*(4): 101; Lee(2001) *supra* n 6: 248.

¹⁶ Ibid Lee (1999):102; Lee (2001):249.

¹⁷ Chen, H.-M. (2002). *Explanation of the Constitution of R.O.C.*, ShanMin Publishing.

¹⁸ Zhuang (2005) *supra* n 12; Tsai (2006) *supra* n 5.

¹⁹ Lee (2001) *supra* n 6.

subjective perception that are with pecuniary values."²⁰ Generally, scholars hold an open attitude about the identification of "property" and admit a wide range of rights and legal interests. Enumerated below are rights and legal interests that are confirmed or agreed by scholarly discussions²¹ to be included as property rights:

- (a) Ownership rights and other *rights in rem* and *quasi rights in rem*;²²
- (b) Creditors' rights;
- (c) Intangible property;
- (d) Monetary property; and
- (e) Freedom of usage

Similarly, the Grand Justices have recognised a wide range of property rights. In their Official Interpretations, the Grand Justices have accepted that the following rights should be protected as property rights: ownership rights;²³ *quasi rights in rem*;²⁴ intangible properties;²⁵ creditor's rights;²⁶ claims of statute of limitations;²⁷ pecuniary claims under administrative laws;²⁸ and collective properties.²⁹

2. Constitutionality Review of Right to Property

2.1 General Standard

As stated above, the modern perception is that property rights are not absolute, but

²⁰ Chen (2002) *supra* n 17.

²¹ See for examples: Su (1996), *supra* n 5; Chen (1999) *supra* n 11; Lee (2001) *supra* n 6; Tsai (2006) *supra* n 5.

²² *Quasi rights in rem* refer to certain rights that have similar nature as *rights in rem* but cannot be regarded as the latter, such as fishery or mining rights in certain regions.

²³ Official Interpretations No.148, 336, 374, 400, 406, 440 and 444.

²⁴ Official Interpretation No.383.

²⁵ Official Interpretations No. 213 and 370.

²⁶ Official Interpretations No.37, 292, 335 and 386.

²⁷ Official Interpretation No.437.

²⁸ Official Interpretations No.187, 201, 246, 280, 285, 312, 316, 320, 389, 431, 434 and 457.

²⁹ Official Interpretation No.410.

bear their social functions, or rather social obligations, and the employment of property rights is therefore subject to certain restrictions or limitations. In other words, when the State applies its legislative power to form the content of property rights, as long as the core content of the said rights is not encroached upon by such legislation, they should be regarded as the scoping of property rights, and thus not be deemed unconstitutional.³⁰

When considering whether the legislative "scoping" of property rights is constitutional, Taiwanese scholars did not develop *ad hoc* constitutionality tests like they did for some other fundamental rights.³¹

The constitutionality review, if, follows the traditional German approach, will therefore have two emphases: (1) in normative review, whether such restrictions meet the requirements of the principle of rule of law; and (2) in substantive review, whether such restrictions are excessive, which is the application of principle of proportionality,—the examination of the suitability, necessity and reasonableness of the said legislation, with the considerations of the intensity of review.³²

On the other hand, if the "trendier" United States *three-pronged test* is applied, the review of the said legislation, being economic legal measures, should apply the rational relationship test and will probably face only the mildest scrutiny as long as the said legislation is rationally related to its legal aims.³³

³⁰ Lee (2001) *supra* n 6: 248.

³¹ Su (1996), *supra* n 5; Lee (2001) *supra* n 6; Chen (2002) *supra* n 17;

³² Chen (2002) *supra* n 17; Liao, Y.-H. (2008). "Unpredictable or an Inherent Order? The Constitutionality Review Criteria Proposed by Current Grand Justices " *Academia Sinica Law Journal* 2: 211.

³³ *Ibid.*

2.2 Special Situation: Expropriation

2.2.1 Concept of Expropriation

While as mentioned above, it is well agreed amongst Taiwanese constitutional scholars that the content of property rights includes rights such as the peaceful enjoyment, ownership, and the freedom of employment without State control as defined in the European legal framework, but unlike the latter where these types of rights have been clearly distinguished, the judicial practices and scholarly discussions in Taiwan seldom accentuate the conditions and effects of these different rights, and rather emphasise heavily the expropriation of property, especially of land. These can be seen by their endeavour in proposing different legal bases and special conditions for expropriation in contrast to intervene upon regular property rights (see discussion below).

The constitutionality of one of the main piece of expropriation legislation, i.e., the Land Expropriation Act, and of its application by administrative departments, has yielded many scholarly discussions.

As discussed in (1.2), the Taiwanese Constitution is not against the legislative restrictions of property rights, but rather will see whether such restrictions are excessive (or "exceeding the endurable limit" in Taiwanese scholars' terminology).

When such restrictions are deemed legitimate but excessive, the damage that the property owners bear becomes a special sacrifice (*Sonderopfer*, see discussion below) and relevant compensation should be granted.³⁴ Taiwanese scholars have greatly

³⁴ Lee (2001) *supra* n 6: 260.

stressed that the compensation is the condition of expropriation, and have described the relationship of expropriation and compensation as a "lip-and-teeth condition" or "synthetic condition".³⁵

Compensation for expropriation has been described as the "constitutional condition of property rights protection", "the protection of basic living conditions of the expropriatee", and "the condition of the fulfilment of expropriation."³⁶ There have been several theories quoted by Taiwanese scholars in discussing the rationale of compensation for expropriation:³⁷

- (a) Benevolence theory: the supporters of this theory think that because the State power and public interest is a priority, the restrictive legal measures are legitimate and the property rights-holders cannot claims for damages thereafter. The compensation in this regard is just benevolence from the state as an "ethical obligation." The amount of the compensation is a matter of the State's discretion and cannot be challenged;
- (b) Vested right theory: this theory originated from the vested right (*Vollrecht*) doctrine in natural law. While property rights are considered vested rights under this doctrine and should be respected, in exceptional situations they should give way to State power and to fulfil a public interest. However, the absence of due compensation will undermine the vested right doctrine and such compensation should therefore be granted in exchange for the vested right;
- (c) Special sacrifice theory: under this theory, when property rights are

³⁵ See the concurring opinion to Official Interpretation No.579 by Grand Justices Hsieh, Z-C.

³⁶ Lee (2001) *supra* n 6; Wu, G. (2004). *The Explanation and Application of Constitution*.

³⁷ The detailed introduction to these theories, see: Lee (1999) *supra* n 15; Lee (2001) *supra* n 6 and Zhuang (2005) *supra* n 12.

encroached by the State power by means of legislative restrictions for the overall good of the public, and such restrictions exceed the scope of social obligations, the rights-holders bear a heavier burden than others and such a situation constitutes a violation of the principle of equity. From the rights-holders' perspective, the damage caused by the State power should be regarded as a special sacrifice, and such sacrifice should be redressed by being shared by the public, e.g., by means of taxation, as the public is benefited at the cost of the sacrifice of the few, which should be regarded as unfair or inequitable under the principle of equity;³⁸

- (d) Subjective theory: under this theory, the difference between the burdens imposed by the social obligations of property rights and the legislative restrictions that required compensation lies in the intention of the legislator. If the legislator's intention is to form the content and scope of the property rights, the burdens imposed by such legislation should be regarded as the social obligations of the property rights; otherwise the burdens or damage imposed by these legislations should be compensated;
- (e) Social function theory: as stated above, property rights are not absolute under this theory, but rather have their social functions. The enjoyment and employment of property rights are part of the social responsibilities, and it is also the reason why they should be protected and compensation should be granted when the said rights are infringed, as failure to protect such rights will impede the fulfilment of the social obligations;
- (f) Reasonable expectation theory: this theory holds that whether compensation should be granted depends upon the severity of the legislative restrictions. If

³⁸ See Official Interpretations No.400, No.440, No.670.

they are not severe and society expects that the right-holders should bear such burden, they should be regarded as the social obligations of property rights. On the contrary, compensation should be granted where the legislative restrictions are severe and one cannot expect right-holders to bear such burdens.

Among the above theories, the special sacrifice theory is adopted by the German Federal Courts when assessing whether compensation should be granted. In other words, a comparison should be made between the damage or sacrifice borne by the property rights-holders and others. If such damage or sacrifice is apparently unfair and lacking in reasonableness (*Zumutbarkeit*), it should be regarded as expropriation and due compensation should be granted; on the other hand, were such damage or sacrifice not apparently unfair and unreasonable, they should be regarded as the social obligations of the property rights, and State compensation should not be granted.³⁹

In Taiwan, the term "special sacrifice" was first cited by the Grand Justices in Official Interpretation No.336, and repeatedly appeared in later Interpretations. In the reasoning of Official Interpretation No.400, the Grand Justices held:

"The purpose of Article 15 of the Constitution, which provides that the people's property right shall be protected, is to guarantee each individual the freedom to exercise his/her rights to use, profit and dispose for the duration of the property, and to prevent the infringements from public power and other parties upon his/her freedoms, so that he/she may develop his/her personality and maintain his/her

³⁹ Yang (1992), *supra* n 6; Lee (2001) *supra* n 6.

dignity. However, individuals' freedom to exercise their property rights should be restrained by their social or ecological responsibilities according to the law. Those individuals whose property rights have been restrained due to the abovementioned responsibilities and have been particularly sacrificed for public benefits shall have the right to be fairly compensated."

In the reasoning of Official Interpretation No.440, the Grand Justices reiterated the holding in No.400 and stated:

"It has been provided in Article 15 of the Constitution that the people's rights of property shall be protected. When state organizations legally exercise their public power and incidentally cause harm to people's property, and this harm goes beyond the normal degree of tolerance the victim as a socially responsible person should display and becomes a special sacrifice to him/her, the state shall compensate him/her fairly."⁴⁰

2.2.2 Conditions of Expropriation

As discussed earlier in this sub-section, there are two different perspectives with regard to the scope of expropriation. The first view is that the expropriation is limited to the deprivations only. The proponents of this view hold that the conditions and effects of legislative restrictions to other kinds of interferences with property rights should apply the analogy of the "pure" expropriation. The second view is that expropriation refers to any kind of property rights interferences as long as such interferences are excessive and constitute special sacrifice. In either case, it is

⁴⁰ Lee (2001), *supra* n 12; Tsai (2001) *supra* n 6 and Zhuang (2005) *supra* n 12.

essential to look into the conditions of expropriation.

The consensus among Taiwanese scholars is that the following conditions should be met for an expropriation to be held constitutional:

- (a) the expropriation should be provided for by law (the principle of rule of law);
- (b) the expropriation should have more than a legitimate aim;
- (c) the expropriation should be for public interest;
- (d) the expropriation measures should be proportional to their legal aims, or be imposed via the least harmful method available (principle of proportionality);
and
- (e) there should be supplementary measures, i.e., compensation provisions about the compensation to the expropriation.

While some of these conditions are not any different from, or even overlap with, constitutionality tests for general property right regulation, there are some particular concerns about (a), and (b) and (e) are the special conditions of expropriation. These conditions will be further discussed in the later analysis chapter (Chapter Eleven).

It should be noted that in practice one of the main issues for an expropriation to be legitimate, or constitutional, is that the administrative departments usually treat the grant of compensation as the only condition of expropriation. In other words, Taiwanese administrative departments hold that as long as due compensation is granted, it is constitutional to carry out the expropriation. Such a view should be regarded as a misunderstanding of the constitutionality conditions and is therefore severely criticized by scholars, as the grant of compensation should be on the ground

that the expropriation is legitimately carried out, i.e., the expropriation should have passed all these review criteria.⁴¹

3. Summary drawn from Chapters Six and Seven--A Comparison of Legality and Constitutionality of restrictions to the Right to Property in the European Union and Taiwan

From the previous two chapters, it is possible to make certain observations. First, it is agreed in the two targeted jurisdictions that the right to property, as an economic right, is not absolute, but should be viewed in the light of the social function of property. Therefore, a light-touch approach to the review of the constitutionality and legality of the regulatory measure is adopted in both jurisdictions.

Second, compared to the situation in the European Union, Taiwanese jurisprudence and scholarly discussions place considerable emphasis on the definition of expropriation and its effect. The result is that under the Taiwanese constitutional framework, a legal interference will more readily be found to be an expropriation, at least compared to Germany (whence Taiwan adopted most of its constitutional theories), as long as a special sacrifice—a burden exceeding its social functions—is recognised. Once an expropriation is confirmed, due compensation should follow. This is the so-called "lip-teeth" condition. In the European Union, it is more difficult for a legal interference to be recognised as an expropriation, but once it is, a timely and due amount of compensation is also emphasised in the European legal framework.

⁴¹ See for examples: Chen, A.-E. (1998) "The Evolution of Property Rights in Official Interpretations." *The Theories and Practices of Constitution Interpretation*; Lee (2001) *supra* n 6; Chen (2002) *supra* n 17.

Third, as discussed in Chapters Two and Three, telecoms forced access mechanisms include a series of obligations. Many of these obligations can be construed as the control of use (such as the forced opening of local loops and the obligations of facilities co-location) and even deprivation of property (such as ownership separation), and have to be deemed as interferences with property rights in both jurisdictions. These interferences, however, should be viewed in the light of the social function of the property. It is therefore interesting to see whether the properties at issue—the telecoms facilities that have a public service nature—will be required to bear an even more intensive form of State intervention due to their social function.

Chapter VIII

Legality and Constitutionality of Restrictions upon Freedom to Conduct a Business in the European Union

Preface

As discussed earlier, in order to examine the legality and constitutionality of telecoms forced access mechanisms, it is necessary to identify which fundamental rights and freedoms of telcos are affected by these mechanisms, thus rendering such mechanisms potentially subject to a relevant constitutionality review. The first section of this chapter therefore discusses the freedom to conduct a business in the European Union. The freedom to conduct a business as guaranteed by Article 16 of the CFR is derived from the case law of the Court of Justice,¹ which itself was inspired by the national laws of some of the Member States, but initially as a general principle instead of an individual right. Hence, the first part of this section (1) is about the historical development and concept of the freedom to conduct a business: how did freedom to conduct a business originate in European law (1.1), and how is it being protected, i.e., does it enjoy the same status of protection as other typical rights such as the right to property (1.2), as both are economic rights targeted by this thesis? Then, what kinds of freedoms are included in the freedom to conduct a business (1.3)?

As the main aim of recognizing the freedom to conduct a business is to safeguard the right of each person in the EU to pursue a business without being subject to either discrimination or disproportionate restrictions,² the next part focuses on the

¹ Case C-59/83, *SA Biovilac NV v European Economic Community* [1984] E.C.R. 4057, para. 21.

² See, for instance, Case C-230/78, *Eridania v Ministry of Agriculture and Forestry* [1979] E.C.R. 2749, paras. 20–22; Case C-240/83, *Procureur de la République v Association de défense des brûleurs*

restrictions upon freedom to conduct a business (2): the nature of the review of the legality of restrictions upon that freedom (2.1) and the restrictions recognised as legitimate in the jurisprudence of the Court of Justice (2.2).

1. History and Concept of Freedom to Conduct a Business in the European Union

1.1 History of Freedom to Conduct a Business

1.1.1 Case Law of the Court of Justice

The freedom to conduct a business has a long history in European Union law. It was first seen as a corollary to the fundamental right to property, but gradually gained a separate existence.³ In a number of early Court of Justice cases, such as the aforementioned *Nold*,⁴ the concept of the said freedom, such as the right freely to choose and practise a trade or profession, was recognised. In *Sukkerfabriken Nykøbing Limiteret*,⁵ the Court of Justice noted another concept: the freedom to make a contract. In the beginning, however, the freedom to conduct a business was usually seen as a corollary to the fundamental right to property, at least by the Court of Justice. Indeed, as mentioned in Chapter Six, a major concept of property rights, according to the much-cited ECtHR case law of the Court of Justice, is that there should be no unlawful interference in the peaceful enjoyment of the said property. Understandably, there will be some overlap between the scope of property rights and the freedom to conduct a business. Indeed, in *Eridania*,⁶ the Court of Justice asserted that the

d'huiles usagées (ADBHU) [1985], E.C.R. 531, paras. 9-13; Case C-200/96, *Metronome Musik v Music Point Hokamp* [1998] E.C.R. I-1953, para. 21.

³ See: Opinion of Advocate General Villalón, Case C-426/11, *Alemo-Herron v Parkwood Leisure* [2013] OJ C 260/6, para. 48.

⁴ Case C-4/73, *Nold v Commission* [1974] E.C.R. 491, para. 14. See also Chapter Four of this thesis.

⁵ Case C-151/78, *Sukkerfabriken Nykøbing v Ministry of Agriculture* [1979] E.C.R. 1, para. 19.

⁶ Case C-230/78, *Eridania v Ministry of Agriculture and Forestry* [1979] E.C.R. 2749, para. 22.

limitations on quotas laid down by Community rules were related to the maintenance of market advantage, and thus were an issue of property rights protection. Again, in *Finsider*,⁷ the Court of Justice asserted that the limitations were imposed on production quotas for certain products did not constitute expropriation without any compensation. It was not until the 1980s that the freedom to conduct a business started to gain some status as a general principle in the European Union, distinct from property rights, in cases such as *Hauer*⁸ and *Schrader*.⁹ Over the years, the Court of Justice has come to recognise *inter alia* the right to engage in economic or commercial activity¹⁰ and the freedom to trade.¹¹

Like other fundamental rights and freedoms, the Court of Justice does not regard the freedom to conduct a business as absolute; rather, it has to be read in light of its social function.¹² This attitude has been followed in subsequent cases, despite different terms having been set out in Court of Justice case law. These terms include a "right to economic initiative", a "right of private initiative", "freedom of enterprise",¹³ "freedom of trade",¹⁴ "freedom to pursue an occupation"¹⁵ or a "professional activity"¹⁶. It has been noted that these terms are different in name only;¹⁷ they do not affect the substance of the right.

⁷ Case T-26/90, *Finsider v Commission* [1992] E.C.R. II 1789.

⁸ Case C-44/79, *Hauer v Land Rheinland-Pfalz* [1979] E.C.R. 3727.

⁹ Case C-265/87, *Schrader v Hauptzollamt Gronau* [1989] E.C.R. 2237.

¹⁰ *Nold* [1974] E.C.R. 491.

¹¹ Case C-240/83, *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985], E.C.R. 531.

¹² Case C-4/73, *Nold v Commission* [1974] E.C.R. 491, para. 14.

¹³ Case C-161/97, *Kernkraftwerke Lippe-Ems v Commion* [1999] E.C.R. I-2057.

¹⁴ *ADBHU* [1985] E.C.R. 531.

¹⁵ Case C-177/90, *Kuehn v Landwirtschaftskammer* [1992] E.C.R. I-35.

¹⁶ Case C-44/79, *Hauer v Land Rheinland-Pfalz* [1979] E.C.R. 3727.

¹⁷ See Opinion of Advocate General Stix-Hackl, joined Cases C-184/02 & C-223/02, *Spain & Finland v Parliament & Council* [2004] E.C.R. I-7789, para. 18.

1.1.2 ECHR and ECtHR Case Law

Despite the ECHR having entered into force early in 1953, as an early fundamental rights document in Europe, there were no ECHR articles stipulating the freedom to conduct a business. This may be due to the fact that the ECHR was drafted primarily in consideration of the Universal Declaration of Human Rights of the United Nations and in accordance with the common heritage of political traditions, ideals, freedoms and rule of law of European countries; and at the time of its drafting, political rights and rights closely related to individuals were its major concern.¹⁸ Hence, protection of the freedom to conduct a business does not fall within the fundamental rights enumerated in the ECHR. The ECtHR further confirms this by adopting a strict attitude toward the absence of any provision concerning the freedom to conduct a business, which cannot be amended by extrapolating the right to property. As in *Marckx v Belgium*, the ECtHR held that Article 1 of Protocol No. 1 of the ECHR only applies to existing possessions and does not guarantee the right to acquire possessions.¹⁹

That is not to say, however, that the freedom to conduct a business has never appeared in ECtHR case law; the ECtHR has recognised elements of the right in the European Convention on Human Rights (ECHR), particularly those deriving from the freedom to enjoy the right to property (Article 1 of Protocol No. 1 of the ECHR)²⁰ and those related to freedom of expression (Article 10 of the ECHR, freedom of commercial expression),²¹ as the ECtHR has used Article 1 of Protocol No. 1 to the ECHR – on

¹⁸ See: Preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 2.

¹⁹ *Marckx v Belgium* (1979) App. no. 6833/74, 2 EHRR 330, para. 50.

²⁰ *Smith Kline and French Laboratories v the Netherlands* (1990) App. no. 12633/87, 66 ECHR.

²¹ *Krone Verlag GmbH & Co. KG v Austria* (No. 3), (2006) App no. 39069/97 42 EHRR 28; *Casado Coca v Spain* (1994) App. no. 15450/89 18 EFRR 1; *Barthold v Germany* (1985) App No 8734/79, 7

the protection of private property – as the basis for inferring principles protecting the right to economic initiative.²² Also, it has been argued that the freedom to conduct a business serves as an evaluation scale for interference in the legality of fundamental rights and freedoms in the ECHR. For example, in *Informationverein Lentia*, the ECtHR expressed its concern that national regulations that seriously curtail the freedom to conduct business might not comply with the guarantee of freedom of expression in Article 10 of the ECHR.²³ In the recent case of *Ahmet Yildirim*, the ECtHR cited the Court of Justice case *Scarlet Extended*²⁴ when considering whether a fair balance had been struck between the right to intellectual property and the freedom to conduct business, the right to the protection of personal data and the freedom to receive or impart information when imposing obligations on Internet service providers.²⁵

1.2 The Nature of Freedom to Conduct a Business

1.2.1 A General Principle or Human Right?

The freedom to conduct a business, as protected in Article 16 CFR, has a long relationship with the freedom to pursue an occupation and the right to property, now protected in Articles 15 and 17 CFR, respectively. In particular, the Court of Justice has recognised that the freedom to conduct a business is a corollary of the right to property,²⁶ both form general principles of EU law and are subject to limitations in

EHR 383.. See also: *Anheuser-Busch Inc v Portugal* (2007) App. no 73049/01, 44 EHRR 42, para. 72.

²² See Mock, W. B., G. Demuro, *et al.* (2010). *Human Rights in Europe*, Durham.; L. Rossi, L. S. (2008) "How fundamental are fundamental principles? Primacy and fundamental rights after Lisbon." *Yearbook of European Law* 27(1): 65.

²³ *Informationverein Lentia v Austria* (1994) App. no. 37093/97 17 EHRR 93.

²⁴ Case C-70/10, *Scarlet Extended SA v Société belge des auteurs* [2011] E.C.R. I-11959

²⁵ *Ahmet Yildirim v Turkey* (2013) App. no. 3111/10 ECHR 3003.

²⁶ Case C-59/83 *SA Biovilac NV v European Economic Community* (1984) E.C.R. 4057, para. 21.

the EU and national legislation deemed to be in the interest of the EU.²⁷

With the entry into force of the Lisbon Treaty and CFR, these general principles of the European Union are no longer exclusively guiding norms to ensure the protection of fundamental rights within the Union;²⁸ other sources, such as the ECHR and constitutional traditions common to Member States that aim to protect fundamental rights, also constitute general principles of the Union.²⁹ This leads to a degree of legal uncertainty regarding the scope of application of fundamental rights protection in the European Union.³⁰ One of the concerns of this uncertainty is whether the freedom to conduct a business should be understood as more of a subjective right that is individually justiciable in contrast to a general principle.

This issue is closely related to the nature of the freedom to conduct a business. Indeed, the seventh recital of the Preamble to the CFR seems problematic. It refers to the Charter as a collection of "rights, freedoms and principles". This suggests that not everything in the Charter can be viewed as a fundamental right or freedom. Thus, the freedom to conduct a business may well be a general principle or social right. Despite being termed a "freedom", one major concern with the freedom to conduct a business being a fundamental right or freedom is the lack of clarity in the text of Article 16 of the CFR.³¹ Groussot *et al.* adopted the same analogy in their discussions of

Association Médiation Sociale, where the Court of Justice considered another social

²⁷ Case C-44/79, *Hauer v Land Rheinland-Pfalz* [1979] E.C.R. 3727. and Case C-265/87, *Schrader v Hauptzollamt Gronau* [1989] E.C.R. 2237.

²⁸ See Groussot, X., L. Pech, *et al.* (2011). "The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication." Available at SSRN 1936473.

²⁹ Article 6(3) TEU.

³⁰ Groussot, X., L. Pech, *et al.* (2011). "The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication."

³¹ See Oliver, P. (2013). "What Purpose Does Article 16 of the Charter Serve?" *General Principles of EU Law and European Private Law*, Kluwer: 293.

right, the right to information as stipulated in Article 27 of CFR, and compared it with the provisions in Article 21 ("non-discrimination").³² They then concluded that the freedom to conduct a business in Article 16, in the absence of national law to implement it, was not specific enough to be a right.³³ Even if Article 16 should be deemed a "principle" in the sense of Article 52(5) of the Charter, it should be considered and viewed as a "principle" having justiciability, even if only to a limited extent.³⁴

Here, however, from the close relationship of the freedom to conduct a business with the right to property, the freedom to contract and the freedom to exercise an economic activity,³⁵ it may be concluded that although Article 16 of the CFR bears the "prodromal signs" of a "principle" in the sense of Article 52(5) of the Charter (by making references to national laws and practices),³⁶ it is more akin to a fundamental right. This stance is upheld by the Court of Justice for, as it states in *Alemo*: "...the interpretation of Article 3 of Directive 2001/23 must in any event comply with Article 16 of the Charter, laying down the freedom to conduct a business ... *That*

³² Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT* [2014] OJ C 85/3, cited from Oliver, P(2013) above.

³³ Groussot, X., G. T. Petursson, *et al.* (2014). "Weak Right, Strong Court-The Freedom to Conduct Business and the EU Charter of Fundamental Rights." *Lund University Legal Research Paper Series* (01): 6.

³⁴ See Lenaerts, K. (2012). "Exploring the limits of the EU charter of fundamental rights." *European Constitutional Law Review* 8(03): 375.

³⁵ *Ibid.*

³⁶ See also: In *Spain and Finland*, the Court of Justice considered the legality of a Union Directive aiming to regulate the organization of the working time of persons performing road-transport activities. The two Member States argued that those rules could not be extended to self-employed persons, as that would have constituted a violation of the right to private initiative and the right to the freedom to pursue an economic activity. The Court ruled, however, that these rights are general principles of EU law and must be read in light of their social function. Same conclusion: Usai, A. (2013). "The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration, The." *German LJ* 14: 1867, as the author asserted that the right to economic initiative may be applied both against the EU and against Member States, not only when implementing Union law, but also whenever the genuine substance of a EU citizen's rights is undercut.

fundamental right covers, *inter alia*, freedom of contract, as is apparent from the explanations provided as guidance to the interpretation of the Charter" (emphasis added).³⁷

1.2.2 Freedom to Conduct a Business as a Lesser Right?

As discussed above, the freedom to conduct a business is more of a fundamental right and freedom in its nature than a general principle, but a concern that is raised is how that right should be exercised. To be specific, does the freedom to conduct a business enjoy a lesser level of protection than other fundamental rights, even lesser than the right to property, i.e. does it enjoy unfettered exercise in the absence of restraint or control over an action, or is it like a principle that can only be exercised to the degree that it is implemented by law?

Lord Goldsmith, who was the UK government's representative in drafting the CFR, made a clear distinction between individually justiciable civil and political rights and social and economic rights.³⁸ In his opinion, freedom to conduct a business, together with economic freedoms to seek employment and to property as social and economic rights, first took the form of principles which were implemented differently in the national laws and practices of the Member States.³⁹ These principles only gave rise to rights to the extent that they are implemented by national law or, in areas where there was such competence, by Community (now EU) law. He then remarked, that such modern social and economic rights are "usually not justiciable individually in the

³⁷ Case C-426/11, *Alemo-Herron v Parkwood Leisure* [2013] OJ C 260/6, para. 32.

³⁸ P. Goldsmith (2001). "A charter of rights, freedoms and principles", *Common Market Law Review* **38**(5): 1201-1216.

³⁹ *Ibid*, 1212.

same ways as other rights but instead "inform policy-making by the legislator";⁴⁰ they are recognized and given effect to in different ways in the Member States whose competence this primarily is. Indeed, as observed by Oliver, before the entry into force of the CFR, claims based on what is now Article 16 were almost never successful, except in *Scarlet Extended*.⁴¹ The reason for this low success rate is to be found in the fact that the right is closely related to the right to property,⁴² and also due to the broad exceptions that the ECtHR accepts as justifications for its limitation under the ECHR. In fact, cases regarding to the freedom to conduct a business are often resolved on the basis of other grounds, such as equality, legitimate expectations or other fundamental freedoms.⁴³

After the entry into force of the CFR, there are disputes whether the restrictions recognised in historic case law should be sustained (see discussions below at (3)),⁴⁴ but this issue remains, again due to the unique wording of Article 16, especially compared to that of right to property as protected in Article 17. Commentators, such as Peers *et al*, observed that in the text of Article 16 the freedom to conduct a business being a freedom to be exercised "in accordance with Union law and national law and practices" raises an assumption that its exercise is more limited, by contrast to rights to work and property, despite the further comment that it requires the Court of Justice to make clear whether the freedom to conduct a business should be understood as a

⁴⁰ Ibid.

⁴¹ Groussot, X., G. T. Petursson, *et al.* (2014). "Weak Right, Strong Court-The Freedom to Conduct Business and the EU Charter of Fundamental Rights." *Lund University Legal Research Paper Series* (01): 5.

⁴² Micklitz, H.-W. (2005). *The politics of judicial co-operation in the EU: Sunday trading, equal treatment and good faith*, Cambridge University Press: 101-102.

⁴³ Oliver, P. (2013). "What Purpose Does Article 16 of the Charter Serve?" *General Principles of EU Law and European Private Law*, Kluwer: 293.

⁴⁴ Peers, S., T. Hervey, *et al.* (2014). *The EU Charter of Fundamental Rights: a Commentary*, Bloomsbury Publishing: 459.

lesser right than the right to property or strengthened protection be granted as a subjective right.⁴⁵

To conclude, freedom to conduct a business, unlike individually justiciable civil rights, is more of a modern social and economic right in nature, and thus should allow for a wider range of intervention, as confirmed in *Sky Österreich*:

"... on the basis of that case-law and in the light of the wording of Article 16 of the Charter, which differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter, the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest."⁴⁶

This non-absolute nature, as observed by Advocate General Villalón in *Alemo-Herron*, is often used in the jurisprudence of the Court of Justice in contrast to other fundamental rights,⁴⁷ such as privacy,⁴⁸ health⁴⁹ and intellectual property rights,⁵⁰ as in the jurisprudence of the ECtHR.

⁴⁵ Ibid, 444.

⁴⁶ Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] OJ C 269/25.

⁴⁷ Opinion of Advocate General Villalón, Case C-426/11, *Alemo-Herron v Parkwood Leisure* [2013] OJ C 260/6.

⁴⁸ Case C-1/11, *Interseroh Scrap and Metal Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM)* [2012] OJ C 151/8., para. 44; Case C-70/10, *Scarlet Extended SA v Société belge des auteurs* [2011] E.C.R. I-11959, para. 50; and Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] OJ C 98/6, para. 48.

⁴⁹ Case C-544/10 *Deutsches Weintor v Land Rheinland-Pfalz* [2012] OJ C 331/3, para. 55.

⁵⁰ Case C-70/10, *Scarlet Extended SA v Société belge des auteurs* [2011] E.C.R. I-11959, para. 50, and Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] OJ C 98/6, para. 48.

1.3 Content of Freedom to Conduct a Business

The Official Explanations of the CFR, besides specifying the sources of freedom to conduct a business, also make it clear that this freedom includes three categories: the freedom to pursue an economic or commercial activity; the freedom to make contracts; and the principle of free competition,⁵¹ with the first two rights finding expression in Court of Justice case law⁵² and the third right being based on the wording of Treaties (ex Article 4(1) EC) and Article 119 TFEU:

"This Article is based on Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity (see judgments of 14 May 1974, Case 4/73 *Nold* [1974] ECR 491, paragraph 14 of the grounds, and of 27 September 1979, Case 230-78 *SpA Eridiana and others* [1979] ECR 2749, paragraphs 20 and 31 of the grounds) and freedom of contract (see *inter alia* *Sukkerfabriken Nykøbing* judgment, Case 151/78 [1979] ECR 1, paragraph 19 of the grounds, and judgment of 5 October 1999, C-240/97 *Spain v Commission* [1999] ECR I-6571, paragraph 99 of the grounds) and Article 119(1) and (3) of the Treaty on the Functioning of the European Union, which recognises free competition. Of course, this right is to be exercised with respect for Union law and national legislation. It may be subject to the limitations provided for in Article 52(1) of the Charter".⁵³

⁵¹ See: Opinion of Advocate General Villalón, Case C-426/11, *Alemo-Herron v Parkwood Leisure* [2013] OJ C 260/6. See also Opinion of Advocate General Mazák, Case C-544/10 *Deutsches Weintor v Land Rheinland-Pfalz* [2012] OJ C 331/3, and Opinions of Advocate General Geelhoed, Case C-210/03, *Swedish Match UK Ltd v Secretary of State for Health* [2004] E.C.R. I-11893.

⁵² See, for example, Case C-4/73, *Nold v Commission* [1974] E.C.R. 491; Opinion of Advocate General Kokott, Case C-441/07 P, *Commission v Alrosa Company Ltd.* [2010] E.C.R. I-5949, para. 225; Opinion of Advocate General Villalón, Case C-426/11, *Alemo-Herron v Parkwood Leisure* [2013] OJ C 260/6, para. 54.

⁵³ See: "Explanations Relating to the Charter of Fundamental Rights", available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF> (accessed

However, as the Advocate General pointed out in *Alemo-Herron*, despite the fact that the freedom to conduct a business derives from these three sources, to date case-law has not, in fact, provided a full and useful definition of this freedom. The judgments in which the Court has had occasion to rule in this area have gone no further than either referring to the right to property or simply citing the provisions of Article 16 of the Charter. However, this does not mean that the basic elements of the right cannot be inferred and, in this, the sources referred to in the explanations of Article 16 of the Charter are of considerable assistance. In effect, the freedom to conduct a business, as stated in that article, acts to protect economic initiative and economic activity, obviously within limits but nevertheless ensuring that there are certain minimum conditions for economic activity in the internal market. Thus, the freedom to conduct a business acts as a limit on the actions of the Union in its legislative and executive role, as well as on the actions of Member States in their application of European Union law.⁵⁴

Via the analysis of the three categories stated in the Official Explanation we can conclude the freedom to conduct a business would include any legitimate form of profit-making activity.⁵⁵ It also seems to encompass the full "life-cycle" of such activities,⁵⁶ for instance from setting up a company⁵⁷, through the operation of the

April 2016).

⁵⁴ *Supra* n 50.

⁵⁵ See: European Union Agency for Fundamental Rights (2015) "Freedom to Conduct a Business: Exploring the Dimensions of a Fundamental Right", available at: http://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf (accessed April 2016):11.

⁵⁶ *Ibid.*

⁵⁷ Article 15 (2) of the Charter includes "the right of establishment" but relates specifically to EU citizens doing so "in any Member State". A "freedom of establishment", as an EU common market principle, is also explicit in Article 49 of Treaty on the Functioning of the European Union, See: Case

business, including the protection for the established market position,⁵⁸ the protection of commercial of secrecy,⁵⁹ the freedom to choose with whom to do business,⁶⁰ the freedom to determine the price of a service,⁶¹ to insolvency or closing a business.⁶²

2. Restrictions upon Freedom to Conduct a Business in the European Union

2.1 Legality Review of Restrictions upon Freedom to Conduct a Business

The Court of Justice has consistently held that fundamental rights are not absolute but must be considered in relation to their social function.⁶³ Restrictions, therefore, may be imposed but should be legitimate, provided that they correspond to objectives of general interest pursued by the EU and do not constitute, with regard to the aim pursued, disproportionate and intolerable interference or impair the very substance of such rights.⁶⁴

The analysis of the legality of restrictions on the freedom to conduct a business is, in

C-244/11, *European Commission v Hellenic Republic* [2012] OJ C 9/15.

⁵⁸ See for example: Case C-280/93, *Germany v Council* [1994] E.C.R. I-4973.

⁵⁹ See for example: Case C-1/11, *Interseroh Scrap and Metal Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM)* [2012] OJ C 151/8.

⁶⁰ Joined Cases C-90/90 & C-91/90, *Neu and others v Secrétaire d'État à l'Agriculture et à la Viticulture* [1991] E.C.R. I-3617, para. 13.

⁶¹ Case C-437/04, *Commission v Belgium*, [2007] E.C.R. I-2513, para. 51, and Case C-213/10, *F-TEX SIA v Lietuvos-Anglijos UAB, Jadecloud-Vilma*, [2012] OJ C165/3, para. 45.

⁶² See Recommendation 2014/135/EU OJ L 74/65: Article 16 of the Charter insofar as " (19) Court confirmation of a restructuring plan is necessary to ensure that the reduction of the rights of creditors is proportionate to the benefits of the restructuring and that creditors have access to an effective remedy, in full compliance with the freedom to conduct a business and the right to property as enshrined in the Charter of Fundamental Rights of the European Union. The court should therefore reject a plan where it is likely that the attempted restructuring reduces the rights of dissenting creditors below what they could reasonably expect to receive in the absence of a restructuring of the debtor's business. "

⁶³ See for examples: Case C-5/88, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] E.C.R. 2609; Case C-44/94, *R v Minister of Agriculture Fisheries and Food*, [1995] E.C.R. I-3115; Case C-200/96, *Metronome Musik v Music Point Hokamp* [1998] E.C.R. I-1953 and Joined Cases C-184/02 & C-223/02, *Spain & Finland v Parliament & Council* [2004] E.C.R. I-7789.

⁶⁴ See Article 52 of CFR and the *Explanations relating to the Charter of Fundamental Rights*. See also Joined Cases C-184/02 & C-223/02, *Spain & Finland v Parliament & Council* [2004] E.C.R. I-7789, paras. 52–54.

the view of this thesis, best demonstrated in the aforementioned *Sky Österreich* case,⁶⁵ despite the order of the analytical steps taken being unconventional. In this case, the regulatory measure challenged is the Audiovisual Media Services Directive (AVMSD),⁶⁶ which in its Article 15 states that a broadcaster that is transmitting an event of great interest to the public, using an exclusive right to do so, must allow other broadcasters to use short extracts, of their own choice, from its signal.

Sky Österreich had acquired the exclusive right to broadcast Europa League matches in the 2009–10 to 2011–12 seasons on Austrian territory with a considerable monetary bid. On the other hand, Österreichischer Rundfunk, a public broadcaster, sought to acquire short extracts to broadcast but could not reach an agreement with Sky Österreich regarding the price. The Austria Court thought that implementation of the regulatory measure in question might be contrary to the fundamental right to conduct a business and the right to property, and took it to the Court of Justice. Interestingly, the Court of Justice decided that the right to property was not applicable in this case, as broadcasters who have acquired an exclusive broadcasting right cannot rely on an "established legal position", which is essential to the right to property.

In dealing with the freedom to conduct a business, the Court of Justice considered the following questions:

- (1) does the challenged regulatory measure affect the core content of the freedom to conduct a business;

⁶⁵ Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] OJ C 269/25.

⁶⁶ Directive 2007/65/EC of the European Parliament and of the Council, 11 Dec. 2007, O.J. 2007, L 332/27 (Audiovisual Media Service Directive). (The provisions were renumbered by the codifying Directive 2010/13/EU of the European Parliament and of the Council on 10 March 2010, O.J. 2010, L 95/1).

- (2) does this provision have a legitimate aim;
- (3) is it appropriate for this aim;
- (4) could a less restrictive measure achieve the objective as effectively; and
- (5) does the provision strike a fair balance between the objective and the harm caused to the freedom to conduct a business?

The Court found that Article 15(6) AVMSD does not affect the core content of the freedom to conduct a business, as that provision does not prevent a business activity from being carried out by the holder of exclusive broadcasting rights. In addition, it does not prevent the holder of those rights from making use of them by broadcasting the event in question itself for consideration, or by granting that right to another broadcaster on a contractual basis for consideration, or to any other economic operator.⁶⁷

The Court also found that the provision in question had a legitimate aim. The safeguarding of the fundamental freedom to receive information, guaranteed under Article 11(1) of the Charter, and the promotion of the pluralism of the media in the production and programming of information in the European Union, protected under Article 11(2) of the Charter, are of great interest to the public.⁶⁸

The provision was also found to be appropriate to its aims, as it puts any broadcaster in a position to be able to broadcast short news reports and thus inform the general public of events of great interest to it, but which are marketed on an exclusive basis,

⁶⁷ Case C-283/11, *Sky Österreich v Österreichischer Rundfunk* [2013] OJ C 269/25, para. 49.

⁶⁸ *Ibid*, paras. 51–52.

by guaranteeing those broadcasters access to those events.⁶⁹

The Court found that less restrictive measures did exist, such as requiring compensation for holders of exclusive broadcasting rights in addition to costs directly incurred in providing access to the signal, but such measures would not achieve the objective pursued as effectively as they would deter or even prevent certain broadcasters from requesting access for the purpose of broadcasting short news reports and thus considerably restrict the access of the general public to the information.⁷⁰

Finally, the Court held that where several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and striking a fair balance between them.⁷¹ The Court then considered the economic impact and the conditions laid down, such as the maximum length of the short extracts and identifying the source, and the reasonableness of costs, and found that a fair balance had been struck in this case.

2.2 Restrictions Recognised in the European Courts' Jurisprudence

Before the entry into force of the CFR, it was observed that the reach of the economic jurisprudence of the Court of Justice and the vital restrictions and interferences between economic and social orders were clearly contained, limited by the legitimate

⁶⁹ Ibid, para. 53.

⁷⁰ Ibid, para. 55.

⁷¹ Ibid, para. 60.

social aims of Member States, especially regarding the regulation of industries of public significance.⁷² With the entry into force of the CFR, and the enhanced status afforded by the freedom to conduct a business, an issue that surfaced is whether the restrictions recognised in European Court case law, especially whether they still correspond to an objective pursued by the Union, should be sustained. With regard to this issue, as Article 52 (1) of the CFR reproduces the settled case law of the Court and accepts that limitations may be imposed on the exercise of rights and freedoms recognised by the CFR, on condition that: those limitations are provided for in law, respect the essence of the rights and freedoms in question, are subject to the principle of proportionality, are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.⁷³

The European Courts' jurisprudence has found legitimate a wide range of restrictions that have been imposed on the freedom to conduct a business to be legitimate, such as restrictions to ensure the public's safety⁷⁴ and health⁷⁵ in the context of the fight against terrorism,⁷⁶ sanctions in the framework of the Common Foreign and Security Policy, the objectives of the Common Agricultural Policy and improvements to road safety, but often in relation to fundamental freedoms such as the free movement of goods and services.⁷⁷ More particularly, when establishing the competition rules necessary for the functioning of the internal market, the European Union has adopted

⁷² Peers, S., T. Hervey, *et al.* (2014). *The EU Charter of fundamental rights: a commentary*, Bloomsbury Publishing: 459.

⁷³ *Ibid.*

⁷⁴ See, for example: joined Cases C-184/02 & C-223/02, *Spain & Finland v Parliament & Council* [2004] E.C.R. I-7789.

⁷⁵ See, for example: Case C-376/98, *Germany v Parliament* [2000] E.C.R. I-8419.

⁷⁶ See, for example joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council of the European Union and EC Commission* [2008] E.C.R. I-6351.

⁷⁷ See: European Union Agency for Fundamental Rights, (2015) "Freedom to Conduct a Business: Exploring the Dimensions of a Fundamental Right."

many rules that are claimed to limit business activity by their very nature.⁷⁸ They do so notably by requiring the prior authorization of mergers, prohibiting the abuse of a dominant position and prohibiting agreements that restrict competition where their positive effects do not outweigh this negative effect. Hence, to safeguard the fundamental freedom to conduct a business, it is essential that relevant competition law as well as its application by the authorities charged with its implementation is subject to effective judicial control, to ensure that restrictions are proportionate and do not go beyond what is necessary to achieve the aim: a free and competitive internal market.⁷⁹

The scope of the freedom to establish and conduct a business is also determined by the fact that the Charter contains other fundamental rights and values that, in practice, often need to be balanced with the freedom to conduct a business. Besides the rights of workers, this is also the case with respect to freedom of expression,⁸⁰ intellectual property rights⁸¹ and consumer protection.⁸² In such cases, the Court of Justice has to weigh competing fundamental rights and strike a fair balance, taking into account the specific circumstances of a given case.

⁷⁸ See for example, Case T-41/96, *Bayer v Commission* [2000] E.C.R. II-3383, para. 180.

⁷⁹ See for example, Case C-320/03, *Commission v Austria* [2005] E.C.R. I-9871. See also Drexl, J., W. Kerber, *et al.* (2011). *Competition policy and the economic approach: foundations and limitations*, Edward Elgar Publishing.

⁸⁰ See Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] OJ C 269/25, paras. 30–68 (in this case the CJEU concluded that limitations on the obligation aiming to safeguard the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter on the freedom to conduct a business are justified and in line with the principle of proportionality).

⁸¹ See for example: Case C-70/10, *Scarlet Extended SA v Société belge des auteurs* [2011] E.C.R. I-11959.

⁸² Case C-12/11, *Denise McDonagh v Ryanair* [2013] OJ C 86/2. In this case, Ryanair argued that its obligation to provide care to passengers whose flights have been cancelled due to extraordinary circumstances (such as the closure of airspace due to the eruption of the volcano) disproportionately interferes with its right under Article 16 of the CFR. This argument was not upheld by the Court. In another case: Case C-281/09, *European Commission v Kingdom of Spain* [2011] E.C.R. I-11811, the Court balanced the freedom to conduct a business and respect for their editorial independence of the broadcaster and consumers' interest against excessive advertising.

Chapter IX

Legality and Constitutionality of Restrictions upon Freedom to Conduct a Business in Taiwan

Preface

As discussed in Chapter Six, to examine the constitutionality of telecoms forced access mechanisms, it is necessary to identify which fundamental rights and freedoms of telcos are affected by these mechanisms and thus should be subject to a relevant constitutionality review. This chapter discusses the freedom to conduct a business in Taiwan, and more importantly the legality under the Constitution of restrictions on the freedom to conduct a business. In doing so, this chapter starts with an introduction to the concepts and content of the freedom to conduct a business in Taiwan (1), and goes on to discuss the scope for constitutional review of restrictions on the freedom to conduct a business (2), including constitutional review criteria (2.1) and a selection of Official Interpretations of the freedom to conduct a business (2.2). The end of this chapter in section (3) will compare the different systems employed to review the legality of review systems of restrictions on the freedom to conduct a business in Taiwan and in the European Union, pulling together observations from this and the previous chapters.

1. The Concepts and Content of Freedom to conduct a Business

1.1 Introduction

As discussed in Chapter Five, the Taiwanese Constitution's provisions are very broad in their meaning and concise in their language. Many fundamental rights and freedoms are not stipulated in the articles of the Constitution and have to be inferred

by analogy with existing provisions or through the inclusive protection in Article 22 of the Constitution.¹

While not stipulated in constitutional provisions, the freedom to conduct a business has long been recognised as a constitutional freedom,² and it is widely agreed that such a freedom originates from an analogy with the right to work³ and the right to property, both protected in Article 15 of the Constitution.⁴ This view is sustained by the later Official Interpretation No. 514, as a Grand Justice pointed out: "[t]he people's freedom to run a business is protected as the right to work and the right to property under Article 15 of the Constitution."⁵ It should be noted, however, that Taiwanese commentators seem to recognise that the freedom to conduct a business has a closer relationship with the right to work than the right to property. The importance of this view for the present discussion is that the constitutional review criteria adopted should therefore be similar to those for the right to work.⁶ This issue will be discussed further later in this section (2.1).

1.2 The Concept of Freedom to Conduct a Business

¹ Article 22 of Constitution reads: "All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution."

² See: Lee, H.-T. (1990). "Comments on the Judicial Review of Business Operating Permit and Restrictons on Freedom to Conduct a Business."; Chen, H.-m. (1995). *The Explanational Notes of the Constitution of R.O.C.*, Hsin-min Chen; Lee, H.-T. (1998). *The Family Tree of Right to Work*; Huang, Y. (2000). "The Meaning and Evolution of Right to Work" *The Law Monthly* **51**(10): 34-55.

³ The right to work is sometimes comprehended as a "freedom of occupation" in scholarly discussions; this is especially true when Grand Justices and scholars are discussing constitutional review criteria, see discussion below in 2.1.

⁴ Article 15 of the Constitution reads: "The right of existence, the right of work, and the right to property shall be guaranteed to the people."

⁵ No. 514 Official Interpretation.

⁶ Tsai, T.-J. (2006). "The Protection and Limitation of Freedom to Conduct a Business." *National Taiwan University Law Journal* **35**(3): 277-321; Lee, C.-L. (2008). "The Thought of Equality in Economic Regulations and Comments on the Freedom to Conduct a Business in Official Interpretations"; Hsu, C.-h. (2010). "The Constitutionality Review of Occupational Regulation: A Commentary to No.649 Official Interpretation".

Although one of the major sources of the freedom to conduct a business originated from the right to work, to date, when compared to the many Official Interpretations of the right to work,⁷ there are relatively few Official Interpretations directly related to the freedom to conduct a business.⁸ It is therefore left to scholars and commentators to define the meaning and content of the freedom to conduct a business. Most Taiwanese scholars and commentators adopt the rationale of German scholars towards Article 12 of the German Basic Law to comprehend the right to work and the freedom to conduct a business;⁹ and, according to them, the freedom to conduct a business means that the activities of conducting a business should be free from improper interference from the State.¹⁰ The objectives of such activities should be profit-oriented and the relevant activities should be constant and repeating in nature, and through the medium of certain properties.¹¹

1.3 The Content of Freedom to Conduct a Business

It has been pointed out that, unlike the right to work, which comprises individual intentions and behaviours, the freedom to conduct a business usually includes many elements, such as people, matters (business activities themselves) and objects (land,

⁷ The Official Interpretations regarding to right to work, include No.404, No.411, No.453, No.462, No. 491, No.494, No.510, No.514, No. 538, No.545, No. 547, No.584 and No.702.

⁸ The only Official Interpretation directly related to the freedom to conduct a business is No.514, see discussion below in (2.2).

⁹ Article 12 of German Basic Law reads (translated):

"(1) All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.

(2) No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all.

(3) Forced labour may be imposed only on persons deprived of their liberty by the judgment of a court."

¹⁰ Huang, Y. (2000). "The Meaning and Evolution of Right to Work " *The Law Monthly* **51**(10): 48; Dong, B. and J.-p. Fa (2003). *New Commentary on Constitution*; Tsai, T.-J. (2006). "The Protection and Limitation of Freedom to Conduct a Business." *National Taiwan University Law Journal* **35**(3): 289.

¹¹ *Ibid.*

buildings or the media of business activities) and thus is subject to multi-dimensional regulations. These regulated people, matters and objects are in principle under the protection of the freedom to conduct a business.¹² Thus, according to scholars and commentators, the content of the freedom to conduct a business includes:

- a. the freedom to enter and exit an economic market (the starting, stopping and maintenance of a business);
- b. the freedom to be active in an economic market; and
- c. the right to request the State to maintain effective competition in the market so that all market players enjoy a fair and reasonable competitive status.¹³

2. Constitutionality Review of Regulatory Measures

2.1 Constitutionality Review Criteria

The freedom to conduct a business is a fundamental right and any legislative or administrative regulatory measure restricting that right should be subject to a constitutional review. The Grand Justices and scholars have not developed an *ad hoc* constitutional review system for the freedom to conduct a business; therefore, any review should follow general criteria: a normative review (rule of law) and a substantive review. The key issue, however, is what the intensity of such a review should be.¹⁴ As protection of the freedom to conduct a business originates from the right to work and the right to property, the consensus among Taiwanese scholars and commentators is that the intensity of constitutional review of regulatory measures

¹² Tsai, T.-J. (2006). "The Protection and Limitation of Freedom to Conduct a Business." *National Taiwan University Law Journal* **35**(3): 290.

¹³ Huang, Y. (2000). "The Meaning and Evolution of Right to Work " *The Law Monthly* **51**(10): 48; Tsai, T.-J. (2006). "The Protection and Limitation of Freedom to Conduct a Business." *National Taiwan University Law Journal* **35**(3): 293; Hsu, C.-h. (2010). "The Constitutionality Review of Occupational Regulation: A Commentary to No.649 Official Interpretation".

¹⁴ For a discussion about constitutional review intensity, see Chapter Four.

restricting the freedom to conduct a business should be the same as that for the right to work.¹⁵

With regard to constitutional review criteria for restrictions upon the right to work, the Grand Justices and scholars usually comprehend such a right as "freedom of occupation", and so they introduced the "three-stage theory" (*Dreistufentheorie*), which derives from the *Apotheken urteil* case in the Federal Constitutional Court of Germany,¹⁶ to decide restrictions on the freedom of occupation into three categories:¹⁷

- a. restrictions on the freedom to engage in an occupation;
- b. subjective restrictions on the freedom to choose an occupation; and
- c. objective restrictions on the freedom to choose an occupation.

With regard to the freedom to engage in an occupation, there are no restrictions on setting the conditions or eligibility for engaging in an occupation, only on the manner in which engagement is restricted. According to the Federal Constitutional Court of Germany, such a restriction is legitimate as long as a reasonable assessment of the public interest has been made and the restriction is fit for purpose (*Zweckmäßig*). The intensity of such review, according to Taiwanese scholars, should be a Rational Relationship Test.¹⁸ However, for the latter two categories – the subjective and objective restrictions on the freedom to choose an occupation – the restriction will

¹⁵ Lee, H.-T. (1990). "Comments on the Judicial Review of Business Operating Permit and Restrictions on Freedom to Conduct a Business"; Tsai, T.-J. (2006). "The Protection and Limitation of Freedom to Conduct a Business." *National Taiwan University Law Journal* 35(3): 292; Hsu, C.-h. (2010). "The Constitutionality Review of Occupational Regulation: A Commentary to No.649 Official Interpretation".

¹⁶ BVerfGE7377 ff.

¹⁷ The Official Interpretations that applied the three stage theory include No.510, No.584, No.637, No.649 and No.655.

¹⁸ See the concurring opinion to No.584 Official Interpretation by Grand Justices Hsu, T.-L.

only be legitimate when it aims to protect a particularly significant public interest (*besonders wichtige Gemeinschaftsgut*) and such restriction should be inevitable (*unumgänglich*). In subjective restrictions on the freedom to choose an occupation, engaging in such an occupation requires eligibility, and such eligibility is subjective, i.e. one can work to achieve it. The restriction of such freedom, according to the Federal Constitutional Court of Germany, should meet the principle of proportionality. Such intensity, as understood by Taiwanese scholars, equates to an Intermediate Scrutiny Test. As for objective restrictions on the freedom to choose an occupation, engaging in such an occupation requires eligibility, and such eligibility cannot be gained via endeavour. A restriction on this freedom is only legitimate when compelling public interests are very likely (*höchstwahrscheinlich*) to be infringed and such a restriction absolutely necessary.¹⁹ In Taiwanese scholars' eyes, such intensity equates to a Strict Scrutiny Test.²⁰

Following this rationale, Taiwanese scholars and commentators have held that restrictions on the freedom to conduct a business should be categorised into: restrictions on the freedom to engage in the freedom to conduct a business, subjective restrictions of freedom to conduct a business and objective restrictions on the freedom to conduct a business. While confusing in terms of language, the scholarly discussions end here and do not raise any examples of what constitutes these restrictions. It therefore leaves much speculation:

(1) what is the freedom to engage in the freedom to conduct a business?

¹⁹ BVerfGE 7, 405.

²⁰ Tsai, T.-J. (2006). "The Protection and Limitation of Freedom to Conduct a Business." *National Taiwan University Law Journal* 35(3): 292; Lee, C.-L. (2008). "The Thought of Equality in Economic Regulations and Comments on the Freedom to Conduct a Business in Official Interpretations"; Hsu, C.-h. (2010). "The Constitutionality Review of Occupational Regulation: A Commentary to No.649 Official Interpretation".

- (2) As discussed above, unlike restrictions on the freedom to engage in an occupation, restrictions on the freedom to choose an occupation involve the eligibility to engage in an occupation, and thus incur the requirement of a significant public interest and the inevitability of such restriction. The same can hardly be said of the distinction between subjective and objective restrictions on the freedom to conduct a business and the so-called "freedom to engage in the freedom to conduct a business."
- (3) It is difficult to draw a clear line between the object of the first category of restrictions on the right to work, the freedom to engage in an occupation, and the freedom to conduct a business. Is it necessary or more sensible further to distinguish the restrictions on the freedom to conduct a business into three categories and to apply different review intensities than directly to adopt a Rational Relationship Test?

Of particular importance to the discussion later in this chapter,²¹ this thesis holds that restrictions on the freedom to conduct a business, as a derivative of the right to work, are a kind of economic fundamental right and freedom.²² Such economic fundamental rights and freedoms, except for some special considerations (such as the eligibility to engage in an occupation, as discussed above), should be subject to a low intensity of constitutional review, such as the American Rational Relationship Test or German Tenability Control. This stance will be used in Chapter Eleven.

2.2 Official Interpretations concerning the Freedom to Conduct a Business

²¹ See discussion in Chapter Eleven.

²² See, for reference, the concurring opinion to No.584 Official Interpretation by Grand Justices Hsu, T.-L.

While the Grand Justices do not always give clear instructions about constitutional review criteria, it is essential to look at their Official Interpretations, especially to see how the principle of proportionality is applied in real cases. However, as discussed earlier in this section, only one Official Interpretation has been directly made of the freedom to conduct a business. In Official Interpretation No. 514, the challenged regulatory measure was the Arcade Games Business Guidance and Regulation Act (now annulled), in which the arcade-game operators should not allow children and juveniles under 18 years of age to enter (Article 13(12)), and violators will have their permission to operate their business revoked (Article 17(13)).

In their reasoning, the Grand Justices first recognised the freedom to conduct a business, by saying:

"The people's freedom to run a business is protected as the right to work and the property right under Article 15 of the Constitution. Based on the constitutional protection of the right to work, people are free to choose to engage in a certain business as their profession. Therefore, people are free to start or end a business and determine the office hours, location, customers, and manner of the business. Moreover, based on the constitutional protection of the property right, people are free to operate a business. For example, people are free to determine the manufacture, transaction and disposition of the goods produced by their business."

They went on to say: "According to Article 23 of the Constitution, the content regarding the requirements for business permission, the obligations a business should obey, and the sanctions imposed for violation of said obligations, as mentioned above,

should be regulated under legislative law. If a restriction on a business is authorized under legislative law and orders are issued as supplemental regulations, the purpose, content, and scope of the authorization should be concrete and definite."

In the present case, the Grand Justices held that Article 13(12) of the Act, besides being an obligation on game arcade operators to manage their business, was also "a restriction on the people's freedom to choose their customers, which is part of the freedom to choose one's profession" and its legal effect on the revocation of permission to operate a business is "related to the constitutional protection of the people's right to work and property right. Therefore, the regulation governing revocation of the permission should be regulated or authorized under legislative law." This case was, however, decided on its formality instead of substance, as the Grand Justices found that the regulation was necessary for certain purposes, but was issued when "relevant law and systems were not fully developed", and "[s]ince the relevant issues are regulated under legislative law, the agency in charge should no longer apply the order issued without the authorization given by legislative law."²³

3. Summary—A Comparison of the Legality and Constitutionality of restrictions upon the Freedom to Conduct a Business in the European Union and Taiwan

This and the previous chapter have discussed the legality and constitutionality of restrictions on the freedom to conduct a business in the European Union and Taiwan, with special attention paid to the review criteria of legality and constitutionality.

Three main observations can be made with regard to the differences between these

²³ Official Interpretation No.514, *The Republic of China Constitutional Court Reporter: Interpretations*, Nos.499-570 (2000-2003) 2nd ed., 2007.

two jurisdictions:

First, it has been heavily debated in the European Union whether the nature of the freedom to conduct a business is a general principle or an individually enforceable right. In other words, the freedom to conduct a business does not clearly enjoy the same status of protection as other rights related to work within the European legal framework, such as the freedom of movement for workers. The reason for this is possibly because of the close relationship between the freedom to conduct a business and the right to property, and therefore should be treated as such. Also, it is not settled whether the freedom to conduct a business enjoys the same protection as other rights, including the right to property, i.e. should it have to bear wider interference than the right to property? On the other hand, the freedom to conduct a business has almost never been denied as a constitutional right in Taiwan. Taiwanese scholarly discussions emphasise, however, its relationship with the right to work, i.e. the freedom to conduct a business originated from the right to work, and many of the discussions are an analogue of the latter. One of these features is the emphasis on subjective and objective restrictions. This is consistent with examples found in the national laws of Member States of the European Union²⁴ but rarely discussed in the Union context; this may be due to the differences between a nation and a supra-national organisation.

Second, while the reviews in these two jurisdictions follow the same main theme of the application of the principle of proportionality, the discussions in Taiwan focus mostly on the intensity of review applicable to different types of restrictions, while in

²⁴ See: European Union Agency for Fundamental Rights (2015) "Freedom to Conduct a Business: Exploring the Dimensions of a Fundamental Right": 34.

the European Courts' jurisprudence much effort is paid to the question of legitimate grounds, i.e. what objectives of general interest can be used to restrict the freedom to conduct a business, and with respect to what other fundamental rights and freedoms can the freedom to conduct a business be used as a counterweight?

Finally, since telecoms forced access mechanisms, as discussed in Chapters Two and Three, include a series of obligations such as the control of interconnection fees, the requirement of facilities co-location, and the restriction on entering or not entering a contract, we can conclude that the telco's freedom to conduct a business will be interfered with or restricted by the imposition of telecoms forced access mechanisms.

Chapter X

Analysis (1): The European Union

Preface

This chapter analyses the legality of telecoms forced access mechanisms in the European Union. To this end, the discussion in this chapter will apply the legality/lawfulness criteria in the jurisprudence of European Courts, to examine the three main telecoms forced access mechanisms identified earlier in this thesis (Chapter Two), with special consideration given to whether these mechanisms excessively restrict the fundamental rights and freedoms, and especially economic rights, of the telecoms companies, or telcos, upon which these regulatory mechanisms are imposed.

This chapter starts with a discussion of the conditions for judicial review of telecoms forced access mechanisms (1). First, I discuss the nature of telecoms forced access mechanisms (1.1), and how they are implemented in the European Union (1.2). I then discuss an important feature of the underlying economic policy and public interest nature of telecoms forced access mechanisms which hinders the application of a legality test, i.e. the discretion of the European institutions (1.3). The second section of this chapter considers the application of the proportionality test to telecoms forced access mechanisms in order to examine their legality (2). This chapter ends with a brief conclusion (3). The findings in this chapter will be further analysed, together with those reached in next chapter, in Chapter Twelve.

1. Telecoms Forced Access Mechanisms in the European Union

1.1 The Nature of Telecoms Forced Access Mechanisms

Telecoms forced access mechanisms, as specified in Chapters Two and Three, are regulatory measures within the telecoms regulatory framework that are designed to achieve better access to telecoms networks for other telecoms companies and citizens. The telecoms regulatory framework is generally regarded as a form of sector-specific (industry) regulation.¹ There are several significant differences between sector-specific regulation and traditional competition law: e.g. sector-specific regulation tends to apply *ex-ante* to ensure the development of a competitive market in the industry, while competition law emphasises *ex-post* intervention. While this thesis has no intention of dealing with these differences, it is important to note that, as has been specified in Chapters One Chapter Two, many economic theories, especially competition law theories, play important roles in shaping sector-specific regulation, not to mention that the prevailing trend of telecoms regulation is moving from sector-specific regulation towards competition regulation.² In this regard, there is no doubt that telecoms regulation has an economic policy nature. An example which will play an important role later in this chapter is the essential facility doctrine, which is derived from economic theories and plays an important role in competition law, but has also been adopted frequently in telecoms regulation, such as telecoms forced access mechanisms.

On the other hand, telecoms regulation also has the function of offering a public service; in other words, the maximization of economic benefits is not always the only

¹ See for example: Larouche, P. (2000). *Competition law and regulation in European telecommunications*, Hart Publishing: 442; Geradin, D. and M. Kerf (2003). *Controlling market power in telecommunications: antitrust vs sector-specific regulation*, Oxford University Press.

² See, in this regard, Freund, N. and E.-O. Ruhle (2011). "The evolution from sector-specific regulation towards competition law in EU telecom markets from 1997 to 2011: Different effects in practical implementation."

policy goal pursued. Sometimes, telecoms regulatory measures are required to give way and consider benefiting all citizens in order to fulfil the concept of a guarantor State (*Gewährleistungsstaat*). The universal service--i.e. the provision of a defined minimum set of services to all end-users at an affordable price³--is a legal obligation imposed on telcos regardless of the actual costs of providing such services, and is a good example of this function. Telecoms forced access mechanisms similarly pursue public service goals (see the discussion later in this chapter). In this regard, there is no denying that telecoms forced access mechanisms do, by their nature, exist to promote public or social interests as well as economic ones.

1.2 Implementing Instruments

The main legal instruments that formulate the structure and lay down the conditions for telecoms forced access mechanisms take the form of regulations and directives. These include the Regulation on Unbundled Access to the Local Loop, the Framework Directive and the Access Directive. The Commission Recommendation 2000/417/EC of 25 May 2000 on Unbundled Access to the Local Loop, while not binding, also plays an important role in formulating the regulatory framework for local-loop unbundling.⁴ The many decisions made by the Council and the Commission are mostly supplementary to the said regulations and directives, and concern individual cases. In this regard, and for the purposes of the discussion in this thesis, this chapter focuses on the legality of telecoms forced access legal instruments of a general nature.

1.3 The Relationship between Judicial Review and Legislative Discretion

1.3.1 Legislative Discretion in the Jurisprudence of European Courts

³ See Recital (4) in the Preamble to the Universal Service Directive.

⁴ See discussions in Chapter Two.

When considering the legality of telecoms forced access mechanisms, i.e. whether they excessively curtail the fundamental rights of telcos, it should be noted that the European Courts do not usually move directly to applying a proportionality test to review the said mechanisms. Instead, they tend to respect the decisions made by the relevant institutions and it is well recognised in the jurisprudence of the European Courts that the Union institutions enjoy discretionary power to enact legislation, especially in fields that require expertise and consideration of the public interest. As noted in *Emesa Sugar*, where a sugar company sought to challenge a newly adopted decision (Decision 97/803/EC) and be treated equally, the Court pointed out: "[t]he Court's review must be limited, in particular if the Council has to reconcile divergent interests and thus select options within the context of the policy choices which are its own responsibility."⁵ Similarly, in *Arnold André*, where the Court dealt with the lawfulness of a Community Directive (Directive 89/622/EC) that was implemented by a Member State to prohibit oral-use tobacco, "the Community legislature must be allowed a broad discretion in an area ... which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."⁶ In *Germany v Council*, where certain Member States that produced bananas were concerned that agricultural workers living in economically less-favoured regions should be able to dispose of produce of vital importance for them, the Court of Justice held that:

⁵ Case C-17/98 *Emesa Sugar (Free Zone) NV v Aruba* [2000] E.C.R. I-675, paras. 90 and 91.

⁶ C-434/02 *Arnold André v Landrat des Kreises Herford* [2004] E.C.R. I-11825. See also, to this effect: Case C-84/94 *United Kingdom v Council* [1996] E.C.R. I-5755, para 58; Case C-233/94 *Germany v Parliament and Council* [1997] E.C.R. I-2405, paras. 55 and 56; Case C-157/96 *National Farmers Union* [1998] E.C.R. I-2211, para. 61.

"the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. More specifically, where the Community legislature is obliged, in connection with the adoption of rules, to assess their future effects, which cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question."⁷

The Court's review is therefore limited in these circumstances, in particular if, in establishing a common organization for a market, the Council has to reconcile divergent interests and thus select options within the context of policy choices which are its own responsibility.⁸

In short, in cases that involve political and social interests or complex economic assessments, the European Courts generally recognise that Union Institutions enjoy discretionary power in terms of adopting relevant regulatory measures or making economic assessments, unless such adoptions or assessments, at the time when Union institutions are making decisions, are manifestly erroneous or inappropriate.

1.3.2 Rationale of (Legislative) Discretion

Discretion has been defined as the competence of an institution to decide a certain issue with the highest authority. The competence of other institutions has to be

⁷ Case C-280/93 *Germany v Council* [1994] E.C.R. I-4973. See also Case C-331/88 *Fedesa and Others* [1990] E.C.R. I-4023, para. 14.

⁸ *Ibid.*

recognized and respected by the courts when they exercise their power of judicial review. In other words, there is no discretion for a deciding institution if a controlling court with higher authority is allowed to decide the same case.⁹ As mentioned in the cases noted above, discretion is generally granted in cases that involve political, economic and social choices where institutions have to make complex assessments. Fritzsche (2010) further distinguishes four categories where discretion is likely to arise: weighing of interests and policies, expert knowledge and expert committees, the appraisal of complex economic matters and complex value judgements, but understandably the distinctions between these four categories are not always clear and they sometimes overlap.¹⁰ Telecoms forced access mechanisms, for example, can involve all four categories.

Discretion is one aspect of the institutional balance¹¹ which the Court of Justice considers to be a legal principle laid down in the Treaty,¹² as the Court noted in *Meroni*, when referring to "the balance of powers which is characteristic of the institutional structure of the Community".¹³ The European Courts have also repeatedly held that they form part of this institutional balance.¹⁴ There is no exact source from which the Courts derive this institutional balance. Some have argued that

⁹ Fritzsche, A. (2010). "Discretion, scope of judicial review and institutional balance in European Law." *Common Market Law Review* 47(2): 363

¹⁰ *Ibid*: 368.

¹¹ It is consented that discretion and the separation of powers are linked at the EU level, see for example Schermers, H. G. and D. F. Waelbroeck (2001). *Judicial protection in the European Union*, Kluwer Law International: 886

¹² See Case C-138/79, *SA Roquette Frères v Council* [1980] E.C.R. 3333, para. 33: "the institutional balance intended by the Treaty" and Case C-70/88 *European Parliament v Council* [1990] E.C.R. I-2041, para. 26: "the institutional balance laid down in the Treaties establishing the European Communities".

¹³ Case C-9/56, *Meroni v High Authority* [1957] E.C.R. 133.

¹⁴ See for example Case C-415/85, *Commission v Ireland* [1988] E.C.R. 3097, paras. 8–9 in which the Court held that due to the balance of powers established by the Treaty, it could not decide whether such an action is brought for proper motives.

discretion, according to Article 7(1) EC (now contained in Art. 13(2) TEU) which states that: "[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty", is the basic rule,¹⁵ while others regard it as a general principle of Community law rooted in the doctrine of the separation of powers, as recognised by the constitutions of Member States,¹⁶ despite the Union's institutional structure not being quite the same as the separate legislative, executive and judicial powers of Member States. For example, the Commission has legislative,¹⁷ administrative,¹⁸ executive¹⁹ and judicial powers.²⁰

1.3.3 Manifest Error

As discussed above, the European Courts have reiterated that the discretionary powers of other Union institutes should be respected, and the lawfulness of measures adopted by Union institutions can be challenged only if the assessments made by Union institutions are manifestly erroneous, or the measures adopted are manifestly inappropriate regarding achieving the objectives intended, as such errors fall within the scope of Article 263(2) of the TFEU as an "infringement of the Treaty or any rule of law relating to its application".²¹ It is therefore crucial to know how much latitude there is, or what may constitute a manifest error.

¹⁵ E.g. Hilf, *Die Organisationsstruktur der Europäischen Gemeinschaften: rechtliche Gestaltungsmöglichkeiten und Grenzen* (Springer, Berlin u.a., 1982), cited from Fritzsche (2010), *supra* n 9: 384.

¹⁶ Bernhardt, *Verfassungsprinzipie – Verfassungsgerichtsfunktionen – Verfassungsprozessrecht im EWG-Vertrag* (Duncker & Humblot, Berlin, 1987) cited from Fritzsche (2010), *supra* n 9: 385. See also Case C-159/96 *Republic v Commission* [1998] E.C.R. I-7379, para. 72: "a general rule of law".

¹⁷ Article 17(2) TEU.

¹⁸ Article 17(1) TEU.

¹⁹ Craig, P. and G. de Búrca (2015). *EU law: Text, Cases, and Materials*, Oxford University Press: 37

²⁰ Article 17(1) TEU and Article 258 TFEU

²¹ Fritzsche (2010), *supra* n 9: 398

According to Legal (2000), discretion lies within the freedom of choice afforded by the economic methodology to be applied and in the global determination reached on the basis of this methodology; the latter applies as long as it is not contradicted by facts and not obviously contrary to accepted methods of economic reasoning.²² Thus, the adoption of a methodology that is contradicted by facts or which is obviously contrary to accepted methods of economic reasoning should be regarded as manifestly erroneous. The former President of the Court of First Instance, Vesterdorf, gave a further explanation that the role of the General Court is to check whether the Commission has "clearly overlooked, underestimated, or exaggerated the relevant economic data, drawn unconvincing, in the sense of implausible, direct inferences from primary material facts or adopted an erroneous approach to assessing the material facts", and in the absence of such errors, the Court should uphold a decision.²³

A more innovative and rather aggressive approach to analyzing what constitutes a manifest error has been taken. In *Tetra Laval*, one of the grounds for appeal concerned the scope and nature of the judicial review carried out by the Court of First Instance in the Opinion of Advocate General Tizzano. Advocate General Tizzano also proposed his own standard after examining a Court of Justice case, *Kali and Salz*.²⁴ First, he distinguished the Courts' tasks into finding out facts and making complex economic assessments; regarding the former, "the issue is to verify objectively and materially the accuracy of certain facts and the correctness of the conclusions drawn

²² See Legal, H. (2006). Standards of proof and standards of judicial review in EU competition law. Annual Proceedings-Forham Corporate Law Institute, Kluwer Academic Publishers: 115.

²³ See: Vesterdorf, B. (2005). "Judicial Review in EC competition law: Reflections on the role of the Community Courts in the EC system of competition law enforcement." *CPI Journal* 1: 32.

²⁴ Joined Cases C-68/94 and C-30/95, *France and Others v Commission* [1998] E.C.R. I-1375.

in order to establish whether certain known facts make it possible to prove the existence of other facts to be ascertained".²⁵ As for complex economic assessments, he admitted that "review by the Community judicature is necessarily more limited, since the latter has to respect the broad discretion inherent in that kind of assessment and may not substitute its own point of view for that of the body which is institutionally responsible for making those assessments",²⁶ but the Courts can still review:

"whether the Commission undertook a thorough and painstaking investigation, and in particular whether it carefully inquired into and took sufficiently into consideration all the relevant factors; and whether the various passages in the reasoning developed by the Commission in order to arrive at its conclusions in respect of the compatibility or otherwise of a concentration with the common market satisfy requirements of logic, coherence and appropriateness".²⁷

It should be noted that, in the same case, the Court of Justice, on the other hand, engaged in rather conservative and traditional reasoning, stating:

"Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that

²⁵ See Opinion of Advocate General Tizzano in Case C-12/03 P *Commission v Tetra Laval* [2005] E.C.R. I-987, para. 86.

²⁶ *Ibid.*

²⁷ *Ibid.*, para. 88.

evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."²⁸

The opinion of Advocate General Tizzano, while being very detailed in its reasoning, has been criticised as far-reaching²⁹ and going somehow against the Courts' traditionally conservative attitude. From the discussion above, we can conclude that, generally, a manifest error has been made when a Union Institution has:

- a) adopted a methodology that is contradicted by the facts or obviously contrary to accepted methods of economic reasoning; or
- b) clearly overlooked, underestimated or exaggerated relevant economic data, drawn unconvincing, in the sense of implausible, direct inferences from primary material facts or adopted an erroneous approach to assessing material facts.

1.3.4 Legislative Discretion in Cases Involving Fundamental Rights

As discussed above, it is generally recognized in Court of Justice jurisprudence that the Union legislature must be allowed broad discretion in an area which involves complex political, economic and social choices on its part, and in which it is called on to undertake complex assessments. Only if a measure adopted in this field is manifestly inappropriate in relation to an objective which competent institutions are seeking to pursue can the lawfulness of such a measure be affected. It should, however, be noted that, in some recent cases with regard to the protection of fundamental rights, especially the right to privacy, the Court of Justice started to increase the intensity of its scrutiny. Amongst these cases, one of the most notable is

²⁸ Ibid, para. 39.

²⁹ Fritzsche (2010), *supra* n 9: 400.

Digital Rights Ireland, in which the Court of Justice introduced the rationale of ECtHR case law, and held that if an important fundamental right is involved, even in expert knowledge areas, the said discretionary power should be more limited.³⁰ While it is not rare for the Court of Justice to "borrow" a rationale from the ECtHR in human rights cases, it is the first time it has clearly applied the analogy of the latter to limit the scope of legislative discretion and engaged in a substantive proportionality review. This innovative case is therefore worth further in-depth analysis.

The Union legislation challenged was Directive 2006/24/EC, which requires telephone communication service providers to retain traffic and location data relating to them for a period specified by law in order to prevent, detect, investigate and prosecute crimes and safeguard the security of the State. Particular issues were whether the Directive was compatible with: the right of citizens to move and reside freely within the territories of Member States as laid down in Article 21 TFEU; the right to privacy as laid down in Article 7 CFR and Article 8 ECHR; the right to freedom of expression as laid down in Article 11 CFR and Article 10 ECHR; and the right to good administration as laid down in Article 41 CFR.³¹

In this regard, the Court of Justice first reviewed settled case law and explained that the principle of proportionality requires that the acts of EU institutions are appropriate for attaining legitimate objectives pursued by the legislation at issue and do not

³⁰ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources* [2014] OJ C 175/6.

³¹ *Ibid*, para. 18.

exceed the limits of what is appropriate and necessary in order to achieve those objectives.³²

Unlike settled case law that respects the Union's legislative discretion, however, the Court of Justice in *Digital Rights Ireland* used an analogy with the ECtHR case of *Marper* in which the ECtHR stated:

"A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights ... Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted...".³³

The Court of Justice therefore stated that where interference with fundamental rights is an issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular: the area concerned; the nature of the right at issue guaranteed by the CFR; the nature and seriousness of the interference; and the object pursued by the interference.³⁴ The Court of Justice further specified that, in view of the important role played by the protection of personal data in light of the fundamental right to respect private life and the extent and seriousness

³² Ibid, para. 46.

³³ *Marper v the United Kingdom* (2008), App no. 30562/04, 30566/04, ECHR 1581.

³⁴ *Supra* n 30: 47.

of the interference with that right caused by Directive 2006/24, the EU legislature's discretion is reduced, with the result that any review of that discretion should be strict.³⁵

The Court of Justice then applied a proportionality test and found that the retention of such data may be considered to be appropriate for attaining an objective pursued by the Directive.³⁶ However, the Court of Justice went on to examine the safeguards put in place to restrict interference with the right of privacy and the protection of personal data. It again drew an analogy with other ECtHR cases³⁷ and emphasised that the EU legislation in question must lay down clear and precise rules governing the scope and application of the measure in question, and impose minimum safeguards so that persons whose data have been retained have sufficient guarantees to protect their personal data effectively against the risk of abuse and any unlawful access to and use of those data.³⁸

After a careful examination, the Court of Justice pointed out that Directive 2006/24 entailed wide-ranging and particularly serious interference with those fundamental rights within the legal order of the EU, but without such interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary. Moreover, as for concerns about the rules relating to the security and protection of data retained by network providers, it held that Directive 2006/24 did not provide sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of data retained against the risk of abuse and any unlawful access to and use

³⁵ *Supra* n 30: 48.

³⁶ *Supra* n 30: 49.

³⁷ *Liberty and Others v the United Kingdom* (2008) App no. 58243/00, 28 ECHR 16; *Rotaru v Romania* (2000) App no. 28341/95, ECHR 2000-V.

³⁸ *Supra* n 30: 54.

of that data. The Court of Justice concluded that, in this case, Directive 2006/24 failed to lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter.

Similarly, in *Google Spain*,³⁹ where the Court of Justice dealt with whether the processing of personal data by Internet search engines derogated the privacy and personal data-protection regime in the European Union, most notably Articles 7 and 8 of the CFR and Directive 95/46/EC,⁴⁰ despite being a case involving technology and special industry, the Court of Justice engaged in a thorough investigation of possible fundamental rights infringements.

The Court of Justice pointed out the potential seriousness of interference with fundamental rights, which cannot be justified merely by the economic interest which the operator of such an engine has, there are also the effects of the removal of links from the list of results on the legitimate interests of Internet users potentially interested in having access to that information, and so a fair balance should be sought. The Court of Justice further stated that the balance in specific cases may depend on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, which may vary according to the role played by the data subject in public life.⁴¹

Another case that shows the increasing intensity of the scrutiny of fundamental rights

³⁹ Case C-131/12, *Google Spain v AEPD* [2014] OJ C 165/11.

⁴⁰ Council Directive 95/46/EC on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 OJ L 281/31.

⁴¹ *Google Spain*, *supra* n 39, para. 81.

by the Court of Justice is *Schrems*.⁴² In this case, a social network (Facebook) user in Ireland contested his personal data being transferred to Facebook Ireland's parent company in the United States, which he contended does not provide protection of personal data equivalent to that in the European regime, also as in Articles 7 and 8 of the CFR and Directive 95/46/EC. Specifically, he contested whether the validity of a Commission Decision⁴³ under which this personal-data transfer is practised is legitimate.

Drawing on the spirit of more intense scrutiny of the protection of privacy and personal data from *Digital Rights Ireland*, the Court of Justice engaged in a careful examination of whether the Decision at issue derogates Articles 7 and 8 of the CFR. As such, the Court of Justice found that the Decision does not contain any limit on such interference, nor does it refer to the existence of any effective legal protection against interference of that kind⁴⁴; further, the Decision denies the national supervisory authorities the powers that derive from Directive 95/46/EC, whereby a person, in bringing a claim under that provision, may put forward matters calling into question what a Commission decision has found.⁴⁵ The Court of Justice thus found the Decision at issue does not render sufficient guarantees to protect personal data effectively against the risk of unlawful access, use and abuse.

Similarly, in the aforementioned *Sky Österreich*, while recognising a broad intervention should be borne to freedom to conduct a business, the Court of Justice

⁴² Case C-362/14, *Schrems v Data Protection Commissioner*, [2015] OJ C 398/5.

⁴³ Commission Decision No. 2000/520/EC, [2000] OJ L 215/7.

⁴⁴ *Schrems*, *supra* n 42, para. 88.

⁴⁵ *Ibid*, para. 102.

still engaged a detailed substantive review.⁴⁶

These cases, led by *Digital Rights Ireland*, have made way for an intense judicial review of cases involving fundamental rights, which no doubt conforms to the trend of fundamental rights protection in the European Union, but at the same time they also raise several questions. First, these cases specifically concern the important role played by the protection of personal data in light of the fundamental right to respect for private life. It leads to speculation as to whether the Court of Justice attaches more importance to the protection of private life than to other fundamental rights, such as the economic rights targeted by this thesis. Since these cases are just the inception of the application of an intensive, or at least a substantive, review of cases in sector-specific or specialised industries, it will be intriguing to see the development of the Court's attitude in future cases.

Second, cases like *Digital Rights Ireland* drew an analogy with *Marper*, which is concerned with the margin of appreciation of authorities in Member States when implementing Union policies. This margin of appreciation, while similar to the character of discretion, has a different legal source from the latter. The term "margin of discretion" finds its EU origins in Article 33(1) of the ECSC Treaty:

"[t]he Court of Justice may not ... examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the Commission took its decisions or made its recommendations, save where the Commission is alleged to have misused its powers or to have manifestly failed to observe the provisions of

⁴⁶ See discussions in Chapter Six.

this Treaty or any rule of law relating to its application".

The ECtHR uses the concept of this term to determine whether a Member State of the ECHR has breached the Convention.⁴⁷ Caution, therefore, should be taken in direct application of the analogy, of one case to another.

Lastly, if we apply the analogy with *Marper* and consider the nature of the right at issue, the nature and seriousness of the interference and the object pursued by the interference, it is similar to the general practice of the Court of Justice's application of a proportionality test. In other words, via such an analogy, the Court's limited review will turn into a fuller one, and legislative discretion is similar to being abandoned. Is this really the intention of the Court of Justice?

2. The Legality of Telecoms Forced Access Mechanism in the European Union

In this section, I will discuss the legality of telecoms forced access mechanisms in the European Union. It has been noted that the proportionality of the restriction on the right to property and the freedom to conduct a business must be verified in the light of the wide margin of discretion conferred on the Union legislature,⁴⁸ and the Courts generally respect the decisions of the legislative departments without engaging in a substantive review. The latest cases such as *Digital Rights Ireland*, however, has indicated that when important fundamental rights are involved, a full or classical proportionality test is not just possible but necessary. In other words, cases that used to be "beyond" the Courts' scrutiny may now and in the future be subject to a full

⁴⁷ See discussions in Chapter Six.

⁴⁸ Opinion of Advocate General Bot in Case C-283/11, *Sky Österreich v Österreichischer Rundfunk* [2013] OJ C 269/25, para. 50.

review.

Here, this thesis will apply the classic full review, while the legislative discretion mentioned above will be temporarily "ignored", for several reasons:

- (1) first, these telecoms forced access mechanisms have seldom been subject to substantive review. If in the future the European Courts' jurisprudence follows the rationale of *Digital Rights Ireland*, the analysis conducted in this research can serve as a reference; and
- (2) from a practical perspective, before cases were brought to the Court, the Court has no way to "filter" cases involving important fundamental rights from those that do not, before really investigating the case. In other words, the decision of whether a light-touch approach should be adopted is actually formulated at the same time as when the Court is reviewing the case. The methodology proposed here is actually not much different from the Court's actual review process.

In the first part (3.1), the fundamental rights and freedoms of the telcos that will be affected by the imposition of telecoms forced access mechanisms will be identified. As noted in the previous chapter, however, fundamental rights and freedoms are not absolute but should be considered along with their social function and balanced with other fundamental rights and interests; in the second part (3.2), a proportionality test will be applied, along with consideration of other fundamental rights and interests in examining the legality of telecoms forced access mechanisms.

It should be noted that, the Court of Justice sometimes applies a "simplified" proportionality test in its jurisprudence,⁴⁹ such as the narration requiring that "acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives",⁵⁰ and sometimes only one criterion for a proportionality test is taken into consideration. In this thesis, however, a classical proportionality test will be applied, i.e. whether the regulatory measure has legitimate aims, whether the requirements of suitability, necessity and proportionality *stricto sensu* are met, and whether the regulatory measure respects the essence of the fundamental rights and freedoms that will be used to examine the legality of these telecoms forced access mechanisms.

In addition, the ECHR provisions and the ECtHR case law will also be considered, due to respect given thereto in the CFR. Since the Treaty of Lisbon took effect on 1 December 2009, the European Union has been expected to sign the ECHR.⁵¹ This would mean that not only are Union institutions subject to external monitoring of their compliance with fundamental rights, and cases against the Union directly or indirectly concerned with Community law can be brought to the ECtHR,⁵² but the Court of Justice is also bound by judicial precedents in ECtHR case law.⁵³ In this regard, the

⁴⁹ As noted by Peers *et al.* (2014) the elements of proportionality test are difficult to separate in practice, and the case law often makes no clear attempt to separate them. See: Peers, S., T. Hervey, *et al.* (2014). *The EU Charter of Fundamental Rights: a commentary*, Bloomsbury Publishing: 1480.

⁵⁰ See for example joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] OJ C 399/3; Case C-283/11, *Sky Österreich v Österreichischer Rundfunk* [2013] OJ C 269/25, para. 29.

⁵¹ Article 6(2) TEU: The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

⁵² Juncker, J.-C. (2006) "A Sole Ambition for the European Continent".

⁵³ It should however be noted that, in December 2014, the Court of Justice issued a negative opinion on the European Union's accession to the ECHR, see Opinion 2/13 of the Court of Justice. See Peers *et al.* (2014) *supra* n 49: 1456.

reasoning of the ECtHR will be taken into consideration where appropriate in this chapter, and an example of the national practice of a Member State for each of the telecoms forced access mechanisms will be discussed in this chapter (see Sections 3.2.1.2, 3.2.2.2 and 3.2.3.2), not just for this purpose but also to avoid the discussion being too abstract.⁵⁴

2.1 Fundamental Rights and Freedoms Involved

2.1.1 Interconnection

As specified in Chapter Two, interconnection refers to the physical (traditional public switched telephone networks, PSTNs) and logical (Internet) linkage of the public communications networks of two or more telcos in order to enable the customers of these different telcos to communicate with each other, or to access services provided by other telcos. While the telcos still retain ownership of the said networks, and remain free to dispose of them or put them to other uses which are not prohibited, they are obliged to let such networks be linked to other telcos. Their rights to use such networks, as protected under Article 17(1) CFR and Article 1(2) of the First Protocol to the ECHR – control over the use of property – are therefore affected, as the concept of control of the use of property is understood to mean a measure which, whilst not entailing transfer of ownership, seeks to "limit or control" the use of property.⁵⁵

Likewise, as interconnection imposes a burden on telcos' freedom to exercise commercial activities, i.e. to use their own networks freely without interference, this

⁵⁴ The Court of Justice can, at the request of courts or tribunals of the Member States, give preliminary rulings on the interpretation of Union law or the validity of acts adopted by the institutions (Article 19 (3) b), while the ECtHR has expressed its concerns that it must in proceedings originating in an individual application, confine its attention, as far as possible, to the concrete case. See: *Ashingdane v United Kingdom* (1985) App no. 8225/78, 7 EHRR 528, para. 59.

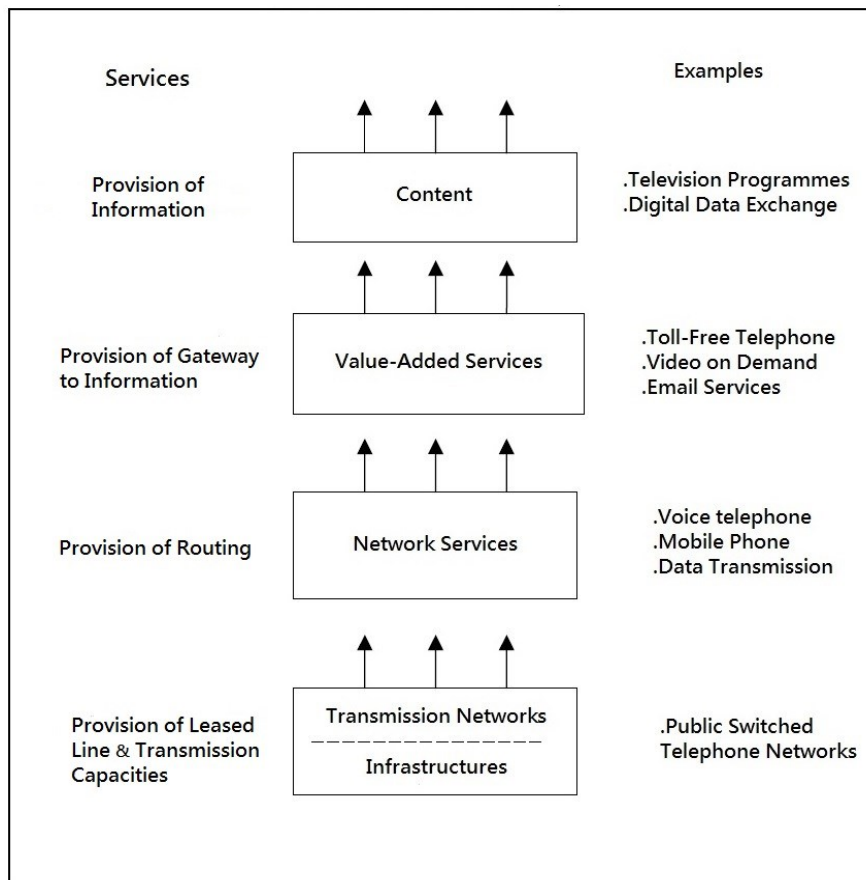
⁵⁵ See *Sporrong & Lönnroth v Sweden* (1982) App no. 7151/75; 7152/75, ECHR 5. para. 44.

mechanism should be regarded as a limitation on telcos' freedom to conduct their business, as those telcos can no longer freely decide with which bodies they may wish to enter into an agreement.⁵⁶

2.1.2 Local Loop Unbundling

As for local-loop unbundling, as noted in Chapter Two, there are three types of local-loop unbundling within the EU's telecoms regulatory. These different types of local-loop unbundling involve different uses of the networks and facilities in the local loops. In full unbundling, for example, metallic cable pairs are leased to another telco for their exclusive use. The lessee (competing telco) has full control of the said networks and is in a direct relationship with the customers for the telecoms services provided by those networks. In line-sharing, while the local loop is used by both the incumbent telco and the competing telco, the competing telco is actually using the high frequency spectrum of the metallic cables that is available via XDSL technology (see below Figure 10.1). And as for sub-loop unbundling, the competing telco puts its own device into the incumbent's street cabinet and connects it to their own backhaul network.

⁵⁶ See Opinion of Advocate General Bot in *Sky Österreich supra* n 50, para. 35.



(Figures 10.1 The layered model of telecommunications and information service provision. Source: Vogelsang, I. and B. M. Mitchell (1997). *Telecommunications Competition: The Last Ten Miles*, MIT Press (MA): 11. Here the high frequency spectrum is the at the second layer from the bottom)

In either type of local-loop unbundling, the incumbent telco is required to bear a burden attached to its property. This burden can either be shared use of the metallic cables (full unbundling), allowing the high frequency spectrum available on its metallic cables to be used by others (line-sharing) or accepting the co-location of another telco's device in its own facility (sub-loop unbundling). While these obligations make it more difficult for the incumbent to use, sell, donate and otherwise deal with its property, it is still entitled and able to do so and thus this does not constitute a deprivation of property;⁵⁷ however, such obligations apparently amount to control over the use of property as understood in Article 1(2) of the First Protocol

⁵⁷ See: *Sporrong, supra* n 55, para. 62.

to the ECHR and the use of property as understood in Article 17(1) of the CFR.

Similar to the situation with interconnection, local-loop unbundling does constitute interference with the incumbent telco's freedom to conduct its business, as the free use of its local loop network is a right inherent in the carrying on of its economic or commercial activities.⁵⁸

2.1.3 Separation

As discussed in Chapter Two, in economic theory, there can be several different models of separation, from the least intense accounting separation, through intermediate functional separation, to the most demanding type, ownership separation.⁵⁹ These different models may involve different fundamental rights and freedoms. Accounting separation, for example, requires telcos to separate their accounting systems in order to satisfy transparency requirements and further facilitate other regulatory measures, such as price control and interconnection, which require cost-oriented pricing. As accounting separation affects telcos' freedom to engage in commercial activities, it is in essence a limitation on their freedom to conduct their business. However, this regulatory measure does not require any network facility or asset to be accessed by others, and thus it is not a telecoms forced access measure of a type that this thesis intends to target.

Other separation models, such as functional separation and ownership separation, are, on the other hand, typical telecoms forced access mechanisms, and they may affect telcos' right to property and freedom to conduct their business. Functional separation, as discussed in Chapter Two, refers to the separation of the access network department

⁵⁸ Case C-230/78, *Eridania v Ministry of Agriculture and Forestry* [1979] E.C.R. 2749, para. 20.

⁵⁹ See discussions in Chapters Two and Three.

of a telco—usually the incumbent telco—into an independent unit, so that these access networks may be equally accessed by the incumbent and competing telcos. At the same time, the application of functional separation is usually accompanied by a series of supplementary arrangements, such as transparency of information and costs,⁶⁰ and the setting up of a Chinese wall,⁶¹ i.e. an information barrier within an organization that is erected in order to prevent the exchange or communication of information. While the ownership of access networks is not changed, the incumbent telco is obliged to accept limits on the use of said property: e.g. networks should be made into independent units equally accessed by other telcos. At the same time, while blocking the communication of information between the network department and other departments does not really affect the use of the networks, it can be regarded as interference in the peaceful enjoyment of the said property. In this regard, functional separation restricts the incumbent telco's right to property (Article 17(1) of the CFR and Article 1(1) and (2) of the First Protocol to the ECHR). It should also be noted that, as functional separation can come with different arrangements for network access, if such arrangements are so intensive as to affect the incumbent telco's rights to use or even sell their property, they can be considered to be a deprivation of possessions, and then such functional separation arrangements should be regarded as *de facto* expropriation (Article 1(1) of the First Protocol to the ECHR).⁶² At the same time, without doubt, such intense interference with the use of property that plays an important role in a telco's operation of its business, i.e. providing telecoms services, will also constitute interference with the telco's freedom to engage in commercial

⁶⁰ See for example (the functional separation of British Telecom), Ofcom. "Final statements on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002.

⁶¹ Ibid.

⁶² *Sporrong*, *supra* n 55, para. 63.

activity.

The much more intrusive ownership separation, as the name suggests, requires more than an independent unit within the incumbent telco, as a further step is needed: i.e. splitting up networks by changing their ownership away from only the incumbent telco. There can be different arrangements for splitting networks. Two of the most common arrangements are:

(1) establishing a separate company to operate on its own as a network company.

There are two kinds of further arrangements for this: a separate network department may be made into:

- a) a company owning the local access network and providing wholesale access to service providers; or
- b) another company providing retail services;⁶³ and

(2) being expropriated by the government and subsumed into a public network department or company.⁶⁴

In either case, there is no doubt that ownership separation constitutes a *prima facie* deprivation of property. Likewise, such intense interference with the use of telecoms networks that play an important role in the incumbent telco's operation of its business will also constitute interference with the telco's freedom to engage in commercial

⁶³ See: "BEREC Guidance on Functional Separation - Annex I, Functional Separation in Practice: EU Experiences." Available at: http://berec.europa.eu/files/documents/bor_10_44Rev1b.pdf: 5 (accessed April 2016).

⁶⁴ ACCC. (2011). Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan: 1.

activity.

2.2 Analysis of Telecoms Forced Access Mechanisms

The European Courts generally apply a proportionality test to examine the legality of a Union regulatory measure,⁶⁵ and this is also true when a case concerns fundamental rights.⁶⁶ As discussed in Chapter Four, it has been reiterated in the jurisprudence of the European Courts that fundamental rights and freedoms are not absolute but should be considered in relation to their social function⁶⁷ and balanced with other rights and the public interest recognised by the European Union,⁶⁸ including the objectives mentioned in Article 3 TEU and other interests protected by specific provisions of the Treaties, such as Article 4(1) TEU and Articles 35 (3), 36 and 346 of the TFEU.⁶⁹ Accordingly, the fundamental rights and freedoms concerned play an important role in the European courts' application of a proportionality test when considering whether a balance has been struck between the public or social interests that a regulatory measure aims to achieve and the fundamental rights and freedoms that the said regulatory measure restricts. In other words, for a legislative restriction of fundamental rights and freedoms to be legal, a regulatory measure should have legitimate aims, be suitable for and necessary to achieve its objectives, and be proportionate to the objectives to fulfil the requirement of a proportionality test, and it

⁶⁵ Protocol on the application of the principles of subsidiarity and proportionality (Protocol No. 2 annexed to the TEU) and Article 5(4) of that Treaty.

⁶⁶ Article 52(1) CFR: "Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

⁶⁷ Case C-5/88 *Wachauf v Germany* [1989] E.C.R. 2609, Case C-200/96 *Metronome Musik v Music Point Hokamp* [1998] E.C.R. I-1953, para. 21 and Joined Cases C-184/02 and C-223/02, *Spain and Finland v European Parliament and Council* [2004] E.C.R. I-1789, para. 52.

⁶⁸ Article 52 (1) CFR.

⁶⁹ Peers *et al.* (2014) *supra* n 49: 1455.

should also respect the essence of fundamental rights and freedoms.⁷⁰ It should be noted that while a classic proportionality test involves a four-step analysis--legitimate aims, suitability (appropriateness), necessity and proportionality *stricto sensu*⁷¹--in reality these four steps are often not clearly distinguished under Court of Justice jurisprudence. In some cases, the Court of Justice applies a "simplified" principle of proportionality by stating the principle that "measures implemented by acts of the European Union are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it",⁷² "measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question"⁷³ or that the said measure is "appropriate and necessary as regards its intended objective".⁷⁴ For the purpose of discussion, however, this chapter will apply a classic four-step analysis.

The principle of proportionality is also respected by ECtHR case law. When a regulatory measure concerns the right to property, one of the main targets of this thesis, while the reasoning may not be the exactly the same, as specified in Chapter Six, the ECtHR also emphasises that it should observe the principle of proportionality. As noted in *James*: "[n]ot only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest', but there must also be a reasonable relationship of proportionality between the means

⁷⁰ *Supra* n 68.

⁷¹ Barak, A. (2012). *Proportionality: constitutional rights and their limitations*, Cambridge University Press.

⁷² Joined Cases C-92/09 and C-93/09, *Volker and Schecke v Land Hessen* [2010] E.C.R.-I 11063, paras. 72 – 86.

⁷³ Case C-189/01 and Case C-189/01, *Jippes and Others v Minister van Landbouw* [2001] E.C.R. I-5689, para. 81.

⁷⁴ *Sky Österreich supra* n 50, paras. 45–66.

employed and the aim sought to be realized."⁷⁵ Also, in *Ashingdane*, the ECtHR states that "... a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved".⁷⁶ Thus, this chapter will apply a proportionality test as the main theme of the discussion.

2.2.1 Interconnection

2.2.1.1 Proportionality Test

A. Legitimate Aims

The first criterion for an interconnection to be legitimate is that it should have legitimate aims or policy objectives. According to Article 52(1) CFR, the objective of a regulatory measure is legitimate if it serves the public good or the protection of rights and freedoms of other persons.⁷⁷ The legitimate aims and policy objectives of interconnection are best explained in the preamble to Council Directive 97/33/EC (the Interconnection Directive), which states that ensuring the "interconnection of public networks and, in the future competitive environment, interconnection between different national and Community operators" is to "promote Community-wide telecommunications services" (Recital 1) and, at the same time, "a general framework for interconnection to public telecommunications networks and publicly available telecommunications services, irrespective of the supporting technologies employed, is needed in order to provide end-to-end interoperability of services for Community users" (Recital 2). These policy objectives are in line with the provisions in Article

⁷⁵ *James v United Kingdom* (1986) App no.8793/79, ECHR 2, para. 50.

⁷⁶ *Ashingdane v United Kingdom* (1985) App no.8225/78, ECHR 8, para. 57.

⁷⁷ Joined Cases C-184/02 and C-223/02, *Spain and Finland v Parliament and Council* [2004] E.C.R. I-7789, para. 53.

100a of the Treaty establishing the European Economic Community (TEEC, now Article 114 (1) TFEU), in that the Council should adopt measures approximating the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishing and functioning of the internal market and ensuring the free movement of services as stipulated in Article 8a TEEC⁷⁸ (now Article 21(1) TFEU), and thus should be regarded as legitimate.

B. Suitability (appropriateness)

Suitability, plainly put, means that a regulatory measure at issue fits the purpose that the said measure was designed to fulfil. The requirement is that the regulatory measure can realise or advance the underlying purpose of the legislation, and the use of such a regulatory measure would rationally lead to the realisation of the legislation's purpose.⁷⁹

There are several considerations regarding the suitability of a regulatory measure. First, the measure chosen does not have to be the only one capable of realising the legislation's objectives,⁸⁰ and there may be cases where several means are used, and all are considered as having a rational connection to the objectives.⁸¹ Second, there is no requirement for the regulatory measure chosen fully to realise its objectives; a partial realisation will meet this requirement.⁸² It also does not matter whether other more proper means exist – this should rather be considered in relation to the latter necessity criterion. Third, the examination of suitability should be continuous: i.e. this

⁷⁸ For reference, see the preamble to the Open Network Directive.

⁷⁹ Barak (2012) *supra* n 71: 303.

⁸⁰ Emiliou, N. (1996). *The principle of proportionality in European law: a comparative study*, Kluwer Law Intl: 28.

⁸¹ Barak (2012) *supra* n 71: 305.

⁸² *Ibid.*

requirement must be met both during the enactment of legislation and during judicial review.⁸³

In the present case, the policy objectives of interconnection, as discussed above, are to promote EU-wide telecoms services by ensuring the interconnection of telecoms networks, and to provide end-to-end interoperability of services for EU users. Indeed, in examining the provisions for interconnection in the Open Network Directive and the Interconnection Directive, while interconnection, together with the obligations imposed (such as the obligation to negotiate⁸⁴ and the harmonisation of technical interfaces and/or service features)⁸⁵ it may not be the only measure to achieve the objectives and may or may not fully realise them, there can be no doubt about that the objectives are those of which it is aiming. This criterion therefore should be regarded as met.

C. Necessity

Necessity, as a sub-discipline of the principle of proportionality, means the least restrictive means. To meet the requirement of necessity, the legislator has to choose the least restrictive amongst all the regulatory measures that are suitable for achieving its policy objectives. As noted in *Fedesa*, the criterion of necessity means that where there is a choice between several appropriate measures to achieve the aim pursued, it must be the least onerous and disadvantageous one.⁸⁶ Also, in *Volker & Schecke*, the Court of Justice noted that Union Institutions should consider whether their objectives could be met by a method involving less interference with fundamental rights, and the

⁸³ Ibid: 312.

⁸⁴ Article 4 Interconnection Directive.

⁸⁵ Recital (2) in Annex II to the Open Network Directive.

⁸⁶ Case C-331/88, *R v MAFF ex parte Fedesa* [1990] E.C.R. I-4023. See also: *Jippes*, *supra* n 73.

requirement of necessity is not satisfied if it is possible to envisage measures which affect fundamental rights less adversely yet still contribute effectively to the objectives of the regulatory measure in question.⁸⁷ It should be noted that effectiveness is to be considered at the same time as the extent of onerousness. The Court of Justice does not prefer a less onerous measure if that measure would not have achieved the intended objective as effectively.⁸⁸

Barak (2012) cites Pulido (2007) and proposes two elements to be included in a necessity test. The first is the existence of hypothetical alternative measures that can advance the objectives of the regulatory measure as well as, or better than, the measure adopted. The second is that hypothetical alternative measures limit the fundamental rights and freedoms less than the regulatory measure at issue. There is no necessity in the regulatory measure at issue if these two requirements are satisfied.⁸⁹ Compared to the other criteria for a proportionality test which are inherently rather abstract in their nature--"have legitimate aims", "fit for purpose" (suitability), "proportionate" (proportionality *stricto sensu*, see discussion below) and "respecting the essence of the rights--the requirement of necessity allows the least leeway for the regulatory measure adopted. The criterion of necessity, like suitability, should be met both during the time of enactment of legislation and during judicial review.⁹⁰

In the case of interconnection, in order to achieve the policy objectives – to promote EU-wide telecoms services and provide end-to-end interoperability of services for EU users – it is not just a matter of choosing the most direct and least disadvantageous

⁸⁷ *Schecke, supra* n 72, paras. 72-86.

⁸⁸ *Sky Österreich supra* n 50, paras. 55, 57.

⁸⁹ Barak (2012) *supra* n 71: 323.

⁹⁰ *Ibid*, p.331.

means; on most, if not all, occasions it may be the only way to adopt interconnection, i.e. there is no more direct way to include the networks and users of small telecoms into the market other than simply to interconnect such networks to the main networks, and so it is difficult to envisage a lighter-touch and more economical measure. This criterion is thus met.

D. Proportionality *Stricto Sensu*

This criterion is probably the most important sub-discipline of the principle of proportionality⁹¹ and is therefore worthy of in-depth analysis. According to proportionality *stricto sensu*, the "benefits" of the measure at issue must outweigh its "costs";⁹² therefore, in order to justify a limitation on fundamental rights and freedoms, a proper relation should exist between the benefits gained by fulfilling the policy objectives and the harm caused to the said fundamental rights and freedoms from achieving the policy objectives. The test requires a balancing of the benefits gained by the public and the harm caused to the fundamental rights through the use of the means selected by the legislation to obtain the proper purpose.⁹³ In other words, even if a regulatory measure is fit for purpose and is the least onerous as per the requirement for suitability and necessity, the harm caused by the restriction of the fundamental rights and freedoms should still be proportionate to the gain achieved in implementing such a restriction if it is to be legitimate. A good example is presented by Grimm (2007). Assume that a law allows the police to shoot a person (even if such shooting would lead to that person's death) if it is the only way to prevent that person from harming another's property. This regulatory measure is designed to protect

⁹¹ Ibid., p.340.

⁹² See Tridimas, T. (2006). *The general principles of EU law*. Chapter 3.

⁹³ Barak (2012) *supra* n 71: 340.

private property, and therefore its policy objective is proper. The regulatory measure adopted by the legislator is rational, since it advances the proper purpose. According to the provision's own words, it can only be triggered when no other means exists to protect the property without taking a human life, and thus the necessity test is fulfilled as well. This provision should, however, still be regarded as unlawful as the protection of private property cannot justify the taking of a human life.⁹⁴ Thus, the implication of this criterion is that the greater the degree of detriment to fundamental rights and freedoms, the greater must be the importance of satisfying the public interest on which the legislator relies.⁹⁵ It should also be noted that the result of the assessment of proportionality *stricto sensu* can affect the second criterion of necessity, as the legislator may be required to adopt a measure that is less restrictive, even if this would lead to a lower level of protection for its policy objectives.⁹⁶

The requirement of proportionality *stricto sensu* is also enshrined in ECtHR case law, usually in the form of the ECtHR's "fair balance" test.⁹⁷ According to the ECtHR, fair balance means that there must be a reasonable relationship between the means employed and the aim sought to be realized.⁹⁸

A classic example of the ECtHR's analysis of proportionality *stricto sensu* was *Hutten-Czapska*. In this case, to address the issue of the shortage of flats after the communist regime, Poland enacted new legislation (*Ustawa o najmie lokali*

⁹⁴ Grimm, D. (2007). "Proportionality in Canadian and German constitutional jurisprudence." *University of Toronto Law Journal* 57(2): 383-397.

⁹⁵ Alexy, R. (2003). "On balancing and subsumption. A structural comparison." *Ratio Juris* 16(4): 436.

⁹⁶ Opinion of Advocate General Maduro in Case C-434/04 *Ahokainen and Leppik* [2006] E.C.R. I-9171, para. 26.

⁹⁷ See for example: *Austinet al v United Kingdom* (2012) App nos. 39692/09, 40713/09, 41008/09, ECHR 459, para. 72.

⁹⁸ *Jahn et al. v Germany* (2005) App no. 46720/99, 72203/01, 72552/01, ECHR 444, para. 38.

mieszkalnych i dodatkach mieszkaniowych, The Lease of Dwellings and Housing Allowances Act of 2 July 1994), to restrict increases in rents payable by tenants and the right to terminate their tenancies. The applicant alleged that such a measure amounted to a violation of Article 1 of Protocol No. 1 to the ECHR. In its reasoning, the ECtHR held:

"Not only must an interference with the right of property pursue, on the facts as well as in principle, a 'legitimate aim' in the 'general interest, but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realized by any measures applied by the State, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."⁹⁹

And the Court continued, stating:

"the Polish State, which inherited from the communist regime the acute shortage of flats available for lease at an affordable level of rent, had to balance the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting interests of landlords and tenants. It had, on the one hand, to secure the protection of the right to property of the former and, on the other, to respect the social rights of the latter, often vulnerable individuals. Nevertheless, the legitimate interests of the Community in such situations call for a fair distribution of the

⁹⁹ *Hutten-Czapska v Poland* (2005) App no.35014/97, ECHR 119 para. 167.

social and financial burden involved in the transformation and reform of the country's housing supply. This burden cannot, as in the present case, be placed on one particular social group, however important the interests of the other group or the community as a whole."¹⁰⁰

The ECtHR, in its ruling, did not just provide a clear explanation of the process of the Court's assessment, but also clarified two possible misunderstandings during it. First, when balancing policy objectives and a restrictive regulatory measure, the public interest – as a policy objective, especially regarding vulnerable individuals – does not necessarily outweigh the fundamental rights and freedoms infringed. Second, in the balancing of benefits and costs, the number of members in the parties is not the Court's first consideration: the interests of a larger group do not necessarily outweigh those of a smaller group; it is just one of the elements of the assessment. The Court has to consider all the benefits and costs, including the nature of the conflicting interests and the intensity of the interference.¹⁰¹

In the present case, when considering all the benefits brought about by implementing interconnection, besides the promotion of Community-wide telecoms services and the provision of end-to-end interoperability of services for Community users as discussed above, another benefit brought about by the implementing of interconnection is the enhancing of access to services of general economic interest (Article 36 CFR). Article 36 CFR, together with Articles 14 and 106 of the TFEU, states that the European Union recognises and respects access to services of general economic interest in order

¹⁰⁰ Ibid, para. 225.

¹⁰¹ See for reference: Opinion of Advocate General in Case C-62/14, *Gauweiler v Deutscher Bundestag* [2015] OJ C 279/12, para. 186.

to promote the social and territorial cohesion of the European Union. While Article 36 CFR does not give a clear definition of "services of general economic interest", it has been pointed out that the deliberate omission of such a definition means that it is regarded as a dynamic and evolutionary concept, especially as technology develops.¹⁰² This issue can be further explored by referring to the Commission's Green Paper on Services of General Interest, which states: "The range of services that can be provided on a given market is subject to technological, economic and societal change and has evolved over time ... Given that the distinction is not static in time ... it would neither be feasible nor desirable to provide a definitive a priori list of all services of general interest that are to be considered non-economic."¹⁰³ This open and indefinite stance is upheld in the Commission's following White Paper, as it states: "In its Green Paper, the Commission has already stated that the Treaty provides the Community with a whole range of means to ensure that users have access to high-quality and affordable services of general interest in the European Union. Nevertheless, it is primarily for the relevant national, regional and local authorities to define, organise, finance and monitor services of general interest",¹⁰⁴ and again, in its Annex, it states: "The term «services of general economic interest» is used in Articles 16 and 86(2) of the Treaty. It is not defined in the Treaty or in secondary legislation. However, in Community practice there is broad agreement that the term refers to services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services,

¹⁰² Peers *et al.* (2014) *supra* n 49: 979.

¹⁰³ European Commission, Green Paper on Services of General Interest, COM (2003) 270, point 45.

¹⁰⁴ European Commission, White Paper on Services of General Interest, COM (2004) 374 final, point 2.3.

energy and communications. However, the term also extends to any other economic activity subject to public service obligations."¹⁰⁵ In other words, services of general economic interest are an open concept which is subject to the latest developments in culture, economics and technology. It is understandable that the Court of Justice held that the national authorities are in the best position to define them.¹⁰⁶ Given that interconnection aims to ensure the provision of end-to-end interoperability of Community-wide telecoms services, the telecoms services facilitated by the provision of interconnection can be regarded as services of general economic interest.¹⁰⁷

It has been proposed that, in accordance with its nature of universal service obligations: ancillary restraints and – to the extent that this is constituted separately – a funding regime, a three-step approach should be used to define a service of general economic interest and the universal obligations that form its core:

First, universal-service obligations should be defined: this means deciding which consumer rights are deemed to exist (or to be necessary) with regard to a particular service.

Second an analysis is necessary of which of these consumer rights, as a result of market failure, would not be adequately provided for in a market setting. This might therefore require the imposition of universal-service obligations, and determination of what the precise content of these obligations would be.

¹⁰⁵ Ibid, Annex 1.

¹⁰⁶ See Case C-202/88, *French v Commission* [1991] E.C.R. I-1223, para. 12; and Case C-157/94 *Commission v Netherlands* [1997] E.C.R. I-5699, para. 39-40.

¹⁰⁷ See, to this effect, Recitals (7) and (8) in the preamble to and Chapter II of the Universal Service Directive.

The answer to the latter point can be determined based on the following questions:

(1) What would be a *proportionate remedy* for the market failure concerned? Is it, for example, necessary to impose obligations on all undertakings in the market or should one or more operators with specific obligations be designated? Again, when looking at remedies, solutions that allow competition to work should be considered the first choice.

(2) Do the undertakings concerned need an *exemption from certain Treaty obligations* in order to perform their task to the required standard?

The third question is the need for ancillary restraints. Should the undertakings concerned receive any *rights and/or obligations in excess of the scope of the universal-service and/or other public-service obligations* themselves?¹⁰⁸

When implementing interconnection in terms of offering this "service of general economic interest", one interesting point to be raised is the status of the competing telcos. Sometimes, other providers of such services are in a relatively weak position, as they are small or medium size entities (SMEs). As these services are indispensable to all and the offering of such services by the SMEs relies on services firstly offered by the incumbent or the dominant market players, it has been noted that certain national consumer protection laws have taken these considerations insight concerning the weaker position of SMEs as grounds for extending the protection of consumer law to cover SMEs as well as traditional consumers.¹⁰⁹ This broad view is in line with the earlier analysis of the relationship between the incumbent telco and its competitors,

¹⁰⁸ See: Sauter, W. (2007) "Services of General Economic Interest and Universal Service in EU Law" TILEC, Tilburg.

¹⁰⁹ As pointed out in Johnston, A. (2016) "Searching for the EU Consumer in Services of General Economic Interest" in Leczykiewicz, D. and S. Weatherill Eds. (2016) *The Images of the Consumer in EU Law*, Hart Publishing, Oxford.

e.g., in telecoms forced access, the competing telcos are at times the incumbent's wholesale customers, and the incumbent bears the relevant obligations, such as the obligation to conclude an agreement and the transparency of cost and information (e.g., the information of the point of interconnection, POI).

Another important benefit brought about by the implementing of interconnection that is related to the access to services of general economic interest referred to above is that interconnection plays an import role in the functioning of communications amongst consumers. This feature distinguishes telecoms interconnection from other network industries that also have a ubiquitous service nature, such as the energy industry, in that communications serve as a medium for expression and receiving information. The freedoms of expression and to receive information are general principles of EU law¹¹⁰ and are among the fundamental rights guaranteed by the legal order of the Union.¹¹¹ As Article 10 of CFR states: "Everyone has the right to freedom of expression.[1] The freedom and pluralism of the media shall be respected. [2] " At the same time, they are also guaranteed in Article 10 of the ECHR.¹¹² It is worth noting that the freedom to receive information and media pluralism are also closely related to another general objective: to facilitate the emergence of a single European information space.¹¹³

It is easy to imagine that compared with the traditional telecoms service era,

¹¹⁰ Case C-260/89, *ERT v DEP* [1991] E.C.R. I-2925, para. 45.

¹¹¹ Case C-250/06, *United Pan-Europe Communications Belgium v Belgian* [2007] E.C.R. I-11135, para. 41.

¹¹² Article 10 of the ECHR includes not only the right to communicate but also to receive information; see *Observer and Guardian v the United Kingdom* (1991) App no.13585/88, ECHR 49, para. 59; *Guerra v Italy* (1998) App no.14967/89, 57DR81, para. 53. Opinion of Advocate General Bot. in *Sky Österreich supra* n 50, para. 43.

¹¹³ *Sky Österreich supra* n 50, para. 43.

interconnection, which does not just allow other telcos to access telecoms networks but also enables customers of other telcos to jointly use telecoms services, has become more important with the thriving of the Internet. Thus, when considering all the benefits of the proportionality *stricto sensu* of interconnection, besides promoting competition, the ensuring of freedom of expression for consumers, and even citizens at large, must be included. It is interesting, however, to discuss, besides the freedom of expression, whether consumers or citizens at large have any direct right over this medium, i.e. a right to communicate or more specifically a right to access the Internet, as opposed to the telcos' property rights and freedom to conduct their businesses in consideration of the proportionality *stricto sensu* of interconnection.

Without a clear definition in the EU human rights framework and other international human documents¹¹⁴ about the right to communicate and the right to access the Internet, it is worth taking a look at the EU telecoms regulatory framework. As Lucchi (2011) notes, it has been an arm-wrestling situation in the legislative process between the Council of the European Union and the European Parliament.¹¹⁵ An amendment was planned to be included in the Framework Directive, which requires national regulatory authorities to protect the interests of EU citizens, in particular: "[A]pplying the principle that no restriction may be imposed on the fundamental rights and freedoms of end-users, without a prior ruling by the judicial authorities, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union on freedom of expression and information, save when public security is

¹¹⁴ Hamelink, C.J. and J.Hoffmann (2008). "The State of the Right to Communicate" *Global Media Journal* 7(1): 7.

¹¹⁵ Lucchi, N. (2011). "Access to Network Services and Protection of Constitutional Rights: Recognising the Essential Role of Internet Access for the Freedom of Expression" *Cardozo Journal of International and Comparative Law* 19 (3):657.

threatened in which case the ruling may be subsequent." This provision, however, was later replaced by a much tamer one: "Measures taken by Member States regarding end-users' access to or use of services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law."

Two observations can be made about this process. First, as stated in the provisions of the earlier draft amendment and the later amendment, there is no doubt that the freedom of expression is included in the said fundamental rights and freedoms, but the same cannot surely be said about the right to access the Internet itself. Second, whether such fundamental rights and freedoms include a right to access the Internet or not, the new provision shows that the exercise of such fundamental rights and freedoms has been much limited and is not unfettered as in the earlier provision.

This second stance is sustained by the European courts and many national courts of Member States. The most common cases in the jurisprudence of the European courts about the right to access the Internet are about online intellectual property infringement issues. In combating online infringements of intellectual property rights, Member States usually adopt a series of measures, such as requiring Internet service providers (ISPs) to install a monitoring or filtering system to block online activities that are liable to infringe intellectual property rights, or a three-strikes procedure, i.e. three warnings (usually from ISPs by email) are sent before a formal judicial complaint is filed. In the aforementioned *Scarlet Extended*, for example, the national

court in Belgium issued an order to require an ISP to install a monitoring system to block all online activities liable to infringe intellectual property rights. In its ruling, the Court of Justice held that the injunction with such a cover-all nature did not respect the requirement that a fair balance be struck between the right to intellectual property on the one hand, and the freedom to conduct a business, the right to the protection of personal data and the freedom to receive or impart information on the other.¹¹⁶

Similarly, in an ECtHR case, *Ahmet Yildirim*, a website owner in Turkey had his website hosted by Google. He was later unable to access his own website since, for a crime investigation, a Turkish criminal court had ordered the national telecoms regulatory authority (TIB) to block all access to Google. The ECtHR cited *Scarlet Extended* and held that such a practice amounted to a violation of the freedom of expression in Article 10 of the ECHR; mainly based on that, the TIB was empowered with too extensive power without limitation.¹¹⁷

Despite not being specified in their rulings, it seems, from the above cases, that the European Courts have implied the existence of a right to access the Internet, as the Courts rejected a general or broad scrutiny of denial of access to the Internet.

It should be noted that, in a similar French constitutional decision¹¹⁸ with regard to whether the national regulatory authority was vested a broad power by national legislation, i.e. HADOPI II, to tackle online intellectual property infringements, the

¹¹⁶ Case C-70/10, *Scarlet Extended SA v Société belge des auteurs* [2011] E.C.R. I-11959, para. 53.

¹¹⁷ *Ahmet Yildirim v Turkey* (2013) App no. 3111/10 ECHR 3003.

¹¹⁸ *Conseil constitutionnel* Decision No. 2009- 580DC of 10 June 2009, cited from Lucchi (2011), *supra* n 115.

highest constitutional French authority, the *Conseil constitutionnel*, concluded that although Internet access cannot be considered a fundamental right in itself, the right to communication – which enjoys a particular status as a protected right – certainly deserves strengthened protection with respect to Internet access.¹¹⁹

Even when recognising that the right to communicate is a fundamental right, a question that promptly follows is whether this "right" can be used by consumers or citizens against telcos. For example, were telcos to fail to offer adequate Internet access or even other media for communications, are consumers eligible to claim their right to communicate has been infringed by the said telcos? It has been argued that as human rights are meant to be a form of protection against state authorities, this may seem to contradict the concept of a "right" to communicate, since it implies certain standards to which private entities would have to adhere. For example, this right implies access to both infrastructure and content.¹²⁰ However, it is not rare in European courts or within the ECtHR's jurisprudence for a fundamental right to be used against a private party, as in some cases interference with or restrictions of fundamental rights do not come from states but from another private party. States, however, usually have a positive obligation to prevent such interference by or restrictions from another party. In *Von Hannover*, where the ECtHR decided between the protection of an applicant of contemporary society "*par excellence*" and the tabloid press's freedom of expression, the ECtHR held that states have an obligation to adopt measures designed to secure respect for private life even in the sphere of the relations of individuals amongst themselves.¹²¹ In the current case, however, the right

¹¹⁹ Ibid, para.12.

¹²⁰ Hamelink and Hoffmann (2008) *supra* n 114: 13.

¹²¹ *Von Hannover v Germany*, (2004) App no. 59320/00, ECHR 2004-VI, para. 57.

to communicate involves not only the private telcos' negative undertaking not to restrict such rights but also positive conduct to supply telecoms services. This is not similar enough to cases such as *Von Hannover* and thus the right to communicate should not be stretched as such. However, in light of the above, in the assessment of proportionality *stricto sensu*, as stated earlier, in balancing all costs, the court has to consider all the benefits, not just rights. Therefore, even if the right to communicate is not recognised as such, it still plays an important role in the court's scrutiny.

Even if, on the other hand, the right to communicate is not recognised as a fundamental right, the imposition of interconnection can, nonetheless, positively affect the freedom of expression of citizens. This is especially true when considering the current development of the Internet, as technological innovations in information and communications technology have created new opportunities for individuals to disseminate information to a mass audience and have had an important impact on the participation and contribution of citizens in decision-making processes.¹²² Indeed, as noted in an ECtHR case involving *Times Newspapers*, the Court of Human Rights states that: "In light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general."¹²³

It should be further noted, however, that although the imposition of interconnection, as stated above, is closely related to access to services of general economic interest, and plays an important role in the supplying of ubiquitous telecoms services, the

¹²² See: Council of the European Union, (2014) *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, Foreign Affairs Council Meeting.

¹²³ *Times Newspapers Ltd v the United Kingdom* (2009) App nos. 3002/03 and 23676/03, ECHR 27. See also the aforementioned *Ahmet Yildirim*.

guaranteeing of freedom of expression and a "right" to communicate and access the Internet is not the main task of interconnection; but it is important in the domain of universal service. To clarify further, the main function of interconnection is to ensure connectivity among telcos, so that smaller telcos or late market entrants can share the network effect and thus compete with dominant ones. At the same time, this may also benefit citizens – who already enjoy telecoms services – by connecting to one another. Service of general economic interest, or more specifically universal service, on the other hand, aims to provide services to those who cannot otherwise be served, especially in situations of market failure or geographical difficulties. This can be seen in the great differences between the recitals of the Access Directive and the Universal Service Directive.¹²⁴ In fact, the sheer distinction between these two Directives explains that, at least in the field of telecoms, interconnection and universal service serve different functions.¹²⁵

Lastly, regarding the benefits of, interconnection the ensuring of telecoms interconnection and limitations on, managing or even the denial of access to the Internet, especially concerning certain networks, content and digital flows, such as the practices in the cases cited above, also relate to the issue of Net neutrality, though the latter is in fact more closely related to the transmission of digital data on telecoms networks – i.e. transit, which is beyond the remit of this thesis. New regulation on Net neutrality has recently been introduced into the EU telecoms regulatory framework, shortly before the completion of this thesis, and its effects must stand the test of time. That said, interconnection or forced access in general may still affect and be affected

¹²⁴ See the discussion in Chapter Two.

¹²⁵ As opposed to the situation in energy-industry regulation, where the universal-service obligation is included in major Directives, such as Parliament and Council Directive 2009/72/EC concerning Common Rules for the Internal Market in Electricity and repealing Directive 2003/54/EC, 2009 OJ L 211/55.

by Net neutrality, as can be observed from the following aspects: (i) As stated by BEREC, remedies to promote effective competition, such as the forced-access mechanisms targeted in this thesis, are fundamental in the Net neutrality context, as BEREC has recognised that telcos/ ISPs may have an incentive to discriminate competitors' equivalent services.¹²⁶ (ii) The management of digital flows is not always commerce-oriented, but due rather to the physical limitations and capacity (bandwidth) of telecoms networks. It is essential that national regulators promote or offer enough incentives for investment in new networks by imposing forced access mechanisms in a sophisticated way.

The weighing of the benefits and costs of interconnection, i.e. striking a balance between access to services of general economic interest, the right to communicate, freedom of expression and the telcos' property rights, as well as the freedom to conduct a business have been best demonstrated in the aforementioned *Scarlet Extended*.¹²⁷ In its reasoning, the Court of Justice first recognised the importance of property rights protection, but reinstated that such rights are not inviolable and absolute.¹²⁸ The Court then recalled its case law, such as *Promusicae*, and stated that the protection of the fundamental right to property must be balanced against the protection of other fundamental rights,¹²⁹ and it stressed that national authorities and courts must strike a fair balance between the protection of property rights and protection of the fundamental rights of individuals who are affected by such measures.¹³⁰ Therefore, a general restriction that has no time limit, such as the

¹²⁶ See the BEREC Work Programme 2011, available at: http://berec.europa.eu/files/text/bor_10_43_1.pdf. (accessed April 2016).

¹²⁷ *Scarlet Extended SA v Société belge des auteurs*, Case C-70/10 [2011] E.C.R. I-11959.

¹²⁸ *Ibid*, para. 43.

¹²⁹ *Ibid*, para. 44.

¹³⁰ *Ibid*, para. 45.

filtering system in this case, while at the same time constituting a serious infringement of the freedom of the ISP concerned to conduct its business, may affect the rights of future and unspecified citizens.

The imposition of interconnection as discussed above has the benefit of promoting access to services of general economic interest and the rights to communicate and have freedom of expression. On the other hand, it does have the following disadvantages. First, while interconnection as discussed above can be deemed to be a service of general economic interest and of a public-service nature, it imposes a restriction on competition to the benefit of undertakings charged with SGEI, to the extent necessary to perform their public service tasks. This does not mean the public interest (as provided by a service of general economic interest) and market freedom are necessarily in conflict, as opening up services to competition frequently leads to lower prices and a greater range of choices for consumers; however, this binary system complicates efforts to introduce competition, either gradually or partially,¹³¹ hence caution should be exercised. It has therefore been suggested that it appears to be consistent with the EU-law principle of proportionality to limit the application of the service of general economic interest concept to those cases where it is clear, in advance, to enable the undertaking(s) charged with a service of general economic interest to provide those services that could not otherwise be provided to the requisite standard. Where this is not the case, reserving particular services to specific undertakings would simply not be necessary – and should therefore fail the proportionality standard that is explicitly included in Article 106(2) TFEU.¹³² In other words, the principle of proportionality, among other benefits and costs, should be

¹³¹ Sauter (2007), *supra* n 108: 2.

¹³² Sauter (2007), *supra* n 108: 16.

applied when examining the aforementioned three-step approach to a service of general economic interest.

Another cost or disadvantage that should be considered is the imposition of interconnection restrict the telcos' use of their own property. Such restrictions, however, are relatively less burdensome on telcos' right to property, since besides the interconnection obligation, the said telcos are still free to dispose of their networks or put them to other uses which are not prohibited. This is especially true considering the following two features of interconnection: First, under the current European telecoms regulatory framework, only telcos enjoying significant market power have an obligation of interconnection (telcos without SMP status, on the other hand, should arrange interconnection via negotiation).¹³³ This does somehow add weight to the public interest regarding fair competition and the restrictions requested on telcos' rights. Another feature is that interconnection fees should be cost-oriented; in other words, such fees should be calculated based on the costs incurred in the process of interconnection. As discussed in Chapter Two, the fees and costs of interconnection play an important role in interconnection agreements. Cost-oriented interconnection pricing does not just protect telcos that seek to interconnect, it also protects those telcos so that they will not suffer any economic loss by being required to fulfil interconnection obligations.

It should be further noted here that the costs incurred in the process of interconnection should be construed as including a reasonable profit for the provider of the

¹³³ See Article 8 Access Directive.

interconnection service. In *T-Mobile Czech and Vodafone Czech*,¹³⁴ where the Court of Justice decided whether the "loss" or "net cost" in the Universal Service Directive¹³⁵ includes a reasonable profit for the provider of a universal service, the Court of Justice held that according to the second paragraph of Part A of Annex IV to the Universal Service Directive, the net cost is to be calculated as the difference between the net cost to a designated undertaking operating with the universal service obligations and operating without the universal service obligations. For the purposes of that calculation, the cost of loans or equity capital must be taken into account where the designated undertaking has had to rely on capital in order to make the investment needed to provide a universal service;¹³⁶ although the Directive at issue does not contain any express reference to the possibility of including the cost of equity capital or "reasonable profit" in the calculation of the net cost borne by the undertaking providing a universal service, a teleological interpretation of that directive nevertheless does permit the conclusion to be drawn that such items may be included.¹³⁷ In addition, despite not being a binding rule, the Commission's Communication on the application of European Union State aid rules to compensation granted for the provision of services of general economic interest¹³⁸ and Article 5(5) of Decision 2012/21¹³⁹ give guidance on how to evaluate a "reasonable profit", which is defined as the rate of return on capital. Much like the universal service, one of the major policy aims of interconnection, as analysed above, is to provide ubiquitous telecoms services to the consumer, and so the same approach of calculation indicated

¹³⁴ Case C-508/14, *Český telekomunikační úřad v T-Mobile Czech Republic and Vodafone Czech Republic*, [2015] OJ C 389/11.

¹³⁵ Recital 18, Articles 12 and 13 of the Universal Service Directive.

¹³⁶ *T-Mobile Czech and Vodafone Czech*, *supra* n 134, para. 34.

¹³⁷ *Ibid*, para. 36.

¹³⁸ Commission Communication on the application of European Union State aid rules to compensation granted for the provision of services of general economic interest, 2012 OJ C 8/4.

¹³⁹ Commission Decision No.2012/21/EU, 2011 OJ L 7/3.

above should apply by way of analogy.

It should be noted, however, that the Court of Justice in *Scarlet Extended* seems to suggest that restrictions on or interference in the rights of an unspecified group of people may require more important justification. In the case of interconnection, this may play an important role in the court's scrutiny, especially due to the fact that many consumers may be affected.¹⁴⁰ However, as stated earlier, in *Hutten-Czapska*, the ECtHR held that the public interest, especially regarding vulnerable individuals, does not necessarily outweigh the fundamental rights and freedoms infringed, and thus a balance should be sought on a case-by-case basis.¹⁴¹

From the discussion above, we can conclude that the harm and costs brought about by implementing interconnection do not outweigh the benefits it seeks. Thus the criterion of proportionality *stricto sensu* should be deemed to be met.

E. Respecting the Essence

For a Union regulatory measure that may affect fundamental rights and freedoms to be legitimate, it should not only ensure proportionality but also respect the essence or substance of the said rights and freedoms.¹⁴² However, the Court of Justice rarely directly defines what constitutes excessive interference with the essence of fundamental rights and freedoms. This is partly because this requirement is difficult to separate from the principle of proportionality,¹⁴³ and partly because the different natures of fundamental rights and freedoms make it difficult to apply a general rule in

¹⁴⁰ See for reference, *Conseil constitutionnel* Decision No. 2009- 580DC, *supra* n 118 para.16.

¹⁴¹ *Hutten-Czapska v Poland* (2005) *supra* n.99.

¹⁴² Article 51(1) CFR.

¹⁴³ Peers *et al.* (2014) *supra* n 49:1480.

every case. Some examples of the jurisprudence of European Courts can, however, still be drawn on in reference to this issue. For instance, Advocate General Kokott cited ECtHR case law in her Opinion in *Schindler Holding*, including *Mamidakis*¹⁴⁴ and *Buffalo*,¹⁴⁵ extremely large fines may impose an excessive burden on the right to property in that they have a *de facto* expropriatory character, and thus impair the very substance of the fundamental right to respect for property.¹⁴⁶ In *Alemo-Herron*, where the Court of Justice dealt with national legislation obliging the transferees of employment contracts to take on board subsequent changes in those contracts which were negotiated collectively, the Court held that the deprivation of rights to participate in a collective bargaining body and negotiate conditions of working seriously reduced the freedom to conduct a business – of which contractual freedom forms a part – to the point that such a limitation is liable adversely to affect the very essence of the freedom to conduct a business.¹⁴⁷

But with regard to the freedom to conduct a business, as discussed in Chapter Eight, the Court of Justice seems to suggest that it may be subject to a broader range of interventions by Union Institutions, other than fundamental rights and freedoms,¹⁴⁸ i.e. regulatory intervention is less likely to affect the essence of the freedom to conduct a business.

In the present case, the telcos' right to property and the freedom to conduct a business are only marginally affected by the imposition of interconnection, as the mechanism

¹⁴⁴ *Mamidakis v Greece* (2007) App no.35533/04, § 44, 11 January 2007.

¹⁴⁵ *Buffalo S.r.l. en liquidation v Italy* (2003) App no. 38746/97.

¹⁴⁶ Opinion of Advocate General Kokott in Cases C-501/11 P *Schindler v Commission* [2013] OJ C 260/7, para. 213.

¹⁴⁷ Case C-426/11, *Alemo-Herron v Parkwood Leisure* [2013] OJ C 260/6, para.s 34–5.

¹⁴⁸ *Sky Österreich supra* n 50 paras. 45–66.

merely requires the telcos to comply with obligations such as revealing the interface and costing information, or setting the interconnection tariff arbitrarily, and does not constitute an excessive burden on, or severely restrict telcos from exercising their right to property and freedom to conduct their businesses.

2.2.1.2 Example of National Practice in the Member State

*TDC v Teleklagenævnet*¹⁴⁹

A. Facts and Legislation

In this case, TDC, a telco with SMP status, challenged a decision taken by Teleklagenævnet, the Danish national telecoms regulatory authority (NRA), in accordance with national legislation, i.e. Law No. 780 of 28 June 2007 on competition and consumer matters in the telecommunications market (*Lov om konkurrence – og forbrugerforhold på telemarkedet*). The national legislation and the decision were adopted to implement the interconnection obligation in Article 8(1) of the Access Directive. Specifically, they require the relevant telcos to set up new infrastructure so that the applicant telcos' cable networks can access the requested telcos' fibre-optic networks. TDC asserted that the concept of "access" in the Access Directive does not cover the installation of such infrastructure, and such an obligation involves a considerable financial burden and therefore does not observe the principle of proportionality set out in Article 8(1) of the Access Directive.¹⁵⁰ Teleklagenævnet, however, stated that a fibre-optic network, unlike other networks (copper, coaxial), is not connected directly to the end-user at the time of its initial installation, and the obligation to install drop cables does not constitute an obligation to establish new infrastructure, but rather a technical adaptation to the existing fibre-optic network. It

¹⁴⁹ Case C-556/12, *TDC v Teleklagenævnet* [2014] OJ C 282/7.

¹⁵⁰ *Ibid*, para. 22.

also stated that the size of the initial investment by the owner of the installation was taken into account in the assessment of the proportionality of the measures envisaged when it imposed the said obligation.¹⁵¹

B. Court's Ruling

The Court of Justice first identified that the objectives of the national regulation were those enumerated in Article 1(1) of the Access Directive, whose aim was to establish "a regulatory framework ... that will result in sustainable competition, [the] interoperability of electronic communications services and consumer benefits".¹⁵²

The Court went on to cite *TeliaSonera Finland*¹⁵³ and identified that Teleklagenævnet, being the NRA, is entitled to assume responsibility for ensuring adequate access and interconnection, the interoperability of services¹⁵⁴ and imposing obligations on SMP telcos to meet reasonable requests for access to, and use of, specific network elements and associated facilities on a case-by-case basis, in the light of objectives set out in Article 8 of the Framework Directive.¹⁵⁵ With that in mind, the Court did not apply the margin of appreciation doctrine but went on to examine the substance of the decision instead.

The Court then reiterated the principle of proportionality by stating that the obligations in Article 8 of the Access Directive imposed by NRAs must be based on the nature of the problem identified and be proportionate and justified in light of the

¹⁵¹ Ibid, para. 23.

¹⁵² Ibid, para. 38.

¹⁵³ Case C-192/08 *TeliaSonera v iMEZ* [2009] E.C.R. I-10717, para. 58.

¹⁵⁴ *TDC supra* n 149, para. 41.

¹⁵⁵ Ibid, para. 42.

objectives set out in Article 8(1) of the Framework Directive.¹⁵⁶ To assess the proportionality of interconnection, the Court stated that it should take into account: the technical and economic viability of using or installing competing facilities, in light of the rate of market development, and the nature and type of interconnection and/or access involved; the feasibility of providing the access proposed for the purpose of assessing the proportionality of the obligations imposed on operators with significant market power in a specific market; and the need to safeguard competition in the long term, paying particular attention to economically efficient infrastructure-based competition.¹⁵⁷

In this particular case, the Court paid special attention to the following two points. First, regarding the competitive situation in the market, the Court pointed out that because of the particular way in which TDC's fibre optic network was constructed, this gave it a definite competitive advantage in the acquisition of new customers in the retail market. Thus the installation of new infrastructure was an essential condition for telcos competing with TDC to be able to acquire customers, by enabling them to offer services distributed by means of the fibre-optic network under conditions of equal competition with TDC.¹⁵⁸ Second, the Court also considered the first mover advantage/ disadvantage¹⁵⁹ by stating that while Article 13(1) of the Access Directive provides that NRAs may impose obligations relating to cost recovery and price controls on undertakings with significant market power, in order to encourage investment by telcos (including in next-generation networks,), NRAs have to take into account the investment made by the telcos and allow them a reasonable rate of return

¹⁵⁶ Ibid, para. 44.

¹⁵⁷ Ibid, para. 50.

¹⁵⁸ Ibid, para. 46.

¹⁵⁹ See discussion in Chapter Two.

on their capital employed, taking into account any risks specific to a particular investment project.¹⁶⁰

2.2.2 Local Loop Unbundling

2.2.2.1 Proportionality Test

B. Legitimate Aims

As discussed above, an objective of a regulatory measure is legitimate if it serves the public good or the protection of rights and freedoms of other persons. The objectives of local-loop unbundling, besides those shared with interconnection as discussed above, can also be seen in the Framework Directive, as it states that the objectives of the Directive are to promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services,¹⁶¹ to help the development of the internal market,¹⁶² and promote the interests of citizens of the European Union.¹⁶³ To be specific, local-loop unbundling aims to enhance competition in the local-loop market, ensure economic efficiency and bring the maximum benefit to users.¹⁶⁴ These policy objectives are again in line with the provisions in Article 100a of the Treaty establishing the European Economic Community (TEEC, now Article 114(1) TFEU), whereby the Council should adopt measures that approximate provisions laid down by law, and regulations or administrative actions in Member States which have as their object the establishing and functioning of the internal market, and the ensuring of free movement of services as stipulated in Article 8a TEEC (now Article 21(1) TFEU), and

¹⁶⁰ *TDC supra* n 149, para. 51.

¹⁶¹ Article 8(2) Framework Directive.

¹⁶² Article 8(3) Framework Directive.

¹⁶³ Article 8(4) Framework Directive.

¹⁶⁴ Recital (2) in the preamble to local-loop unbundling Regulation.

thus should be regarded as legitimate.

C. Suitability (appropriateness)

The criterion of suitability, as discussed above, requires a regulatory measure to realise or advance the underlying purpose of legislation, and the use of such a regulatory measure would rationally lead to the realisation of the legislation's purpose. In the present case, while the unbundling of local loops into elements to be leased to competing telcos may not be the only way to achieve the policy objectives stated above, there is no denying that this mechanism does help to achieve this and thus is fit for the purpose the said measure was designed to fulfil; thus, the requirement of suitability is met.

D. Necessity

To satisfy the requirement of necessity, the regulatory measure adopted has to be the least restrictive amongst all the regulatory measures that are suitable for the stated policy objectives. In the present case, local-loop unbundling, which once seemed critical and necessary to address the competition issue in local-loop markets, is now facing the effects brought about by rapidly developing telecoms technologies, as there are now many vehicles that can provide the functions served by traditional local loops. Cable-television operators, for example, can use the cables that extend into their customers' premises to provide high-speed broadband services.¹⁶⁵ Similarly, new technologies, such as satellite, can also offer high-speed wireless Internet access. And the latest developments in 3G and 4G services also overwhelmingly change the

¹⁶⁵ For example, the cable internet services offered by Virgin Media UK can reach the highest speed of 200Mbps, exceeding those provided by the incumbent BT. See: <http://store.virginmedia.com/broadband/compare-broadband/index.html> (accessed April 2016), and <https://www.productsandservices.bt.com/products/broadband-packages> (accessed April 2016).

telecoms ecology by being able to offer high-speed wireless Internet access; hence, fixed-line networks in telco premises are no longer the only option to connect to the Internet. While it has been noted in Union legislation that these alternative infrastructures do not generally offer the same functionality or ubiquity,¹⁶⁶ it is possible that, in practice, in some Member States where telecoms markets are highly developed, these new technologies are viable in terms of replacing traditional local loops in the very near future. In that case, there will exist alternatives to applying local-loop unbundling and those alternatives might impose less burden on the owners of local loops and their use.

E. Proportionality *Stricto Sensu*

Under the requirement of proportionality *stricto sensu*, in order for a regulatory measure that limits fundamental rights and freedoms to be justified, a proper relation should exist between all the benefits gained by achieving the policy objectives and the consequent harm caused to the said fundamental rights and freedoms. As for the necessity of local-loop unbundling, while it helps to achieve policy objectives as discussed above, some economists have showed their concern over the general application of this mechanism. Hausman and Sidak (1999), for example, stressed that local-loop unbundling should be mandatory only if a certain number of conditions were fulfilled.¹⁶⁷ Doyle (2000) also categorised service areas and objected to

¹⁶⁶ See: Recital (6) in the preamble to local-loop unbundling Regulation and Recital (8) of the preamble to Recommendation 2000/417/EC.

¹⁶⁷ In particular, these conditions include: (a) it is technically feasible to provide to the network services purchaser unbundled access to the relevant network in the relevant geographic market; (b) it is impractical and unreasonable for the network services purchaser to duplicate the network element through any alternative source of supply; (c) the network is controlled by a network services supplier that is a monopolist in the supply of a telecommunications service to end users for the relevant geographic market; and (d) the network services supplier can exercise market power in the provision of telecommunications services to end users in the relevant geographic market by restricting access to the network. See: Hausman, J. A. and J. G. Sidak (1999). "A consumer-welfare approach to the mandatory

imposing local-loop unbundling in densely populated urban areas, as competition between infrastructure providers was emerging.¹⁶⁸ Therefore, when weighing the benefits of imposing local-loop unbundling and the limitations on the fundamental rights and freedoms of the affected telcos, the latter seem to dominate. Doyle further noted that "[w]hile policy makers have championed ULL as a way to promote competition at the local level in telecommunications, applying mandated ULL across the whole of a country may be inappropriate and socially damaging."¹⁶⁹

Another important issue that should be taken into consideration when weighing the benefits and harms of imposing local-loop unbundling is that it may reduce the incentive to adopt new technologies and invest in and deploy new infrastructure. Here, we take the current well-developing fibre-optic networks in the local-loop section as an example. Depending on the extent to which fibre-optic networks extend into end-users' premises, there are several different kinds of fibre-optic access. In ascending order, these are from Fibre to the Node (FTTN, meaning fibre-optic networks stretching to a street cabinet), Fibre to the Curb (FTTC, similar to FTTN, but fibre-optic networks stretch even closer to end-users' premises), Fibre to the Premises/Building (FTTP or FTTB) and Fibre to the Home (FTTH). Since fibre-optic networks offer high transmission speeds and better quality than traditional metallic (copper) networks, fibre optics that stretch further offer better quality networks; however, the difficulties in deploying such networks increase in the same order (see Fig 10.2 below).

unbundling of telecommunications networks." *Yale Law Journal*: 417-505.

¹⁶⁸ Doyle, C. (2000). "Local loop unbundling and regulatory risk." *J. Network Ind.* 1: 33

¹⁶⁹ Ibid.

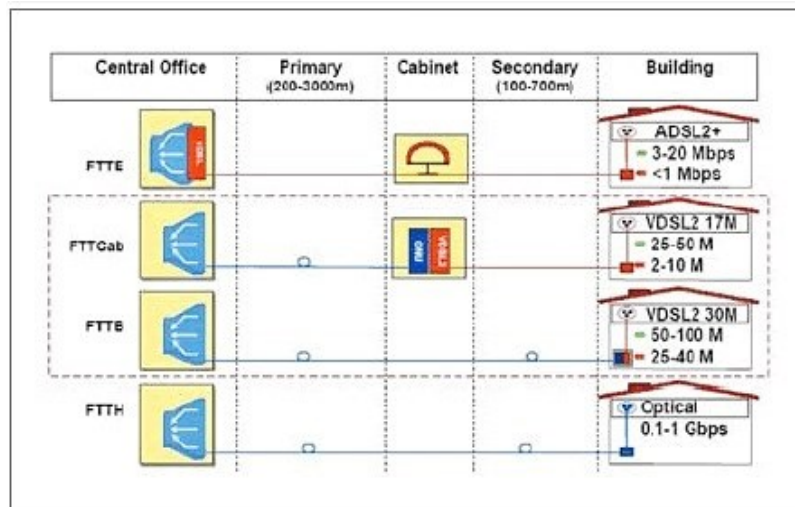


Figure 10.2: Different FTTx models. Source: http://www.en.zte.com.cn/endata/magazine/zte technologies/2008year/no10/articles/200810/t20081014_162121.html.

Here, if we impose local-loop unbundling, the incumbent telco will no longer delay or even deny access to competing telcos, so better competition is achieved in the market and competing telcos can use existing copper networks to provide their services; however, such services will be limited, and telcos will find it difficult to catch up with the rapid development of telecoms services and applications that require higher transmission speeds with better and more stable characteristics.

That said, as aforementioned, considering the great difficulty and cost of deploying their own substitute local loops, allowing competing telcos to access existing local loops may well eliminate the incentive for them to do so. The customers therefore do not benefit as they end up having to use existing and somewhat dated networks, as there are no other alternatives. This issue is of particular importance in some Member States where telecoms markets are highly developed and competing or alternative infrastructures are efficient.¹⁷⁰ Thus, in practice, it is difficult to determine whether

¹⁷⁰ Bohlin, E., S. Lindmark, *et al.* (2005). "Sweden's Telecom Liberalization and Local Loop Unbundling: Moving from Consensus to Enforcement", Paper presented at the 16th European Regional

the main policy goals of local-loop unbundling really outweigh the disadvantages that it may bring.

F. Respect the Essence

As discussed above, while the Court of Justice rarely demonstrates what constitutes interference with, or the essence of fundamental rights and freedoms, it has indicated that the freedom to conduct a business may tolerate a broader range of interference and thus its essence is less likely to be encroached upon; at the same time, the right to property is not respected when the guarantee of property is deprived of its substance, but this is not so when affected only marginally or when only the modalities of its exercise are regulated.¹⁷¹ In the present case, requested telcos are required to unbundle the elements of their local loop networks and allow them to be leased by other telcos upon request. Their enjoyment of the right to property in the said local loops and the freedom to conduct their businesses are not excessively restricted; hence this requirement is met.

2.2.2.2 Example of National Practice in the Member State

*Commission v Germany*¹⁷²

A. Facts and Legislation

One of the most notable cases in the jurisprudence of European Courts with regard to local-loop unbundling is *Commission v Germany*, in which the Court of Justice considered the balance between the adoption of new technologies in the local loop markets, the roles and responsibilities of NRAs and the national legislation of

Conference of the International Telecommunications Society (ITS), Porto, 4-6 September.

¹⁷¹ Case C-59/83, *Biovilac v EEC* [1984] E.C.R. 4057, para. 22; Case C-177/90, *Kühn* [1992] E.C.R. I-35, para. 17.

¹⁷² Case C-424/07 *Commission v Germany* [2009] E.C.R. I-11431.

Member States. While not specified in the case, Germany aimed to incentivise the incumbent telco, Deutsche Telekom, to invest in high-speed VDSL networks in local loops by introducing an amendment to German telecoms law (*Telekommunikationsgesetz*, BGBl. 2004 I, p. 1190, *TKG*) in accordance with recital 15 in the preamble to the Commission Recommendation of 11 February 2003 (Commission Recommendation),¹⁷³ point 32 of the Commission's guidelines for market analysis and assessment of significant market power under the Community regulatory framework for electronic communications networks and services ("the guidelines"),¹⁷⁴ and recital 27 in the preamble to the Framework Directive that new and emerging markets, in which market power may be found to exist because of "first-mover" advantages, should not in principle be subject to *ex ante* regulation. Thus, the new *TKG* states that new markets shall not, in principle, be subject to regulation within the meaning of Part 2 of the *TKG* submitted by *Bundesnetzagentur*, the German regulatory authority in the telecoms sector (NRA). The Commission regarded such legislation as a restriction on *Bundesnetzagentur's* discretion as laid down by Article 15(3) of the Framework Directive, and hence it brought a case against Germany to the Court of Justice.

B. Court's Ruling

The Court of Justice first cited *Arcor*¹⁷⁵ and stated that, in carrying out regulatory functions, NRAs have broad discretion to be able to determine the need to regulate a

¹⁷³ Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, OJ L 114/45.

¹⁷⁴ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165/6.

¹⁷⁵ Case C-55/06 *Arcor v Germany* [2008] E.C.R. I-2931, para. 153.

market according to each situation on a case-by-case basis.¹⁷⁶ The Court emphasised that the Framework Directive confers upon NRAs, instead of national legislatures, the task of determining the need to regulate markets.¹⁷⁷

The Court then started to dispute Germany's assertion that new markets shall not be subject to regulation as this is a principle laid down in Union legislation. First, the Court held that recital 27 in the preamble to the Framework Directive merely states that guidelines will address the issue of new markets where, *de facto*, the market leader is likely to have a substantial market share but should not be subjected to inappropriate obligations. Thus, that recital envisages that the regulation of new markets must take account of the specific characteristics of those markets. Such provisions cannot be understood as laying down a general principle for non-regulation of those markets.¹⁷⁸

The Court also held that point 32 of the guidelines merely repeats the content of recital 27 in the preamble to the Framework Directive by prohibiting the imposition of inappropriate *ex ante* obligations. Therefore, the guidelines do not lay down a general rule of non-regulation of new markets either. That finding is also confirmed by the wording of the last two sentences of point 32 of the guidelines, which state that foreclosure of emerging markets by the leading undertaking should be prevented and that NRAs should ensure that they can fully justify any form of early *ex ante* intervention.¹⁷⁹

¹⁷⁶ *Commission v Germany*, *supra* n 172, para. 61.

¹⁷⁷ *Ibid*, para. 74.

¹⁷⁸ *Ibid*, para. 69.

¹⁷⁹ *Ibid*, para. 70.

Similarly, recital 15 in the preamble to the Commission Recommendation only envisages the non-regulation of new markets where, having regard to first-mover advantages, there are undertakings with significant market power. Therefore, that provision does not mean that new and emerging markets should not in principle be subject to *ex ante* regulation, but rather there should be verification by an NRA on a case-by-case basis of the necessary conditions for a finding that a new market does require regulation.¹⁸⁰

The Court concluded that by laying down a legal provision, according to which, as a general rule, the regulation of new markets by an NRA is excluded, the new provision of the TKG encroached on powers conferred on the NRA under the EU regulatory framework, thus preventing it from adopting regulatory measures appropriate to each particular case. The German legislature cannot alter a decision of the EU legislature and cannot, as a general rule, exempt new markets from regulation.¹⁸¹

2.2.3 Separation

2.2.3.1 Applicability of Article 345 TFEU?

As discussed in Chapter Six 1, Article 345 TFEU provides that: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership." Given the meaning of the wording of this provision, the consensus is that this article only concerns the systems of property ownership of undertakings, but not the contents of ownership nor objects of rights of ownership. In other words, Article 345 is not to exclude the application of the Treaties to question of State or private ownership at all, but rather to emphasise how, according to the Treaties, these powers

¹⁸⁰ Ibid, para. 72.

¹⁸¹ Ibid, para. 75.

might belong to the Member States, but not as far as the exercise of those powers is concerned.¹⁸² This view is supported by the Court of Justice, as the Court stated in

Fearon:

"[t]hat conclusion cannot be accepted. By virtue of Article 54 (3) (e) of the Treaty, the restrictions on the acquisition and use by a national of one Member State of land and buildings situated in another Member State are among those which are to be abolished with a view to the realization of freedom of establishment. Similarly, the Council's "Programme Général pour la Suppression des Restrictions à la Liberté d'Établissement" [General Programme for the Abolition of Restrictions on the Freedom of Establishment] of 18 December 1961 (Journal Officiel 1962, p. 36) lists, among the restrictions on freedom of establishment to be abolished, provisions or practices which provide for less favourable rules for nationals of another Member State in regard to compulsory acquisition.

Consequently, although Article 222 of the Treaty does not call in question the Member States' right to establish a system of compulsory acquisition by public bodies, such a system remains subject to the fundamental rule of non-discrimination which underlies the chapter of the Treaty relating to the right of establishment."¹⁸³

Also, in *Commission v Portugal*, the Court held that:

"[h]owever, those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 222 of the Treaty, by way of justification for obstacles, resulting from privileges attaching to their position as

¹⁸² See, Ramaekers, E. (2013) *European Union Property Law*, Intersentia nv, Mortsels: 121.

¹⁸³ Case C-182/83, *Fearon* [1984] E.C.R. 3677, paras. 6-7.

shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. As is apparent from the Court's case-law (*Konle*, cited above, paragraph 38), that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty."¹⁸⁴

Therefore, European telecoms forced access mechanisms, while they may constitute interference or derogation of the content of property rights under the domestic legal order, generally do not fall within the domain of Article 345 TFEU.

It should however be noted that, in the case of structural separation, as will be discussed in Chapter Ten, If the Union legislator finds that even functional separation is insufficient to achieve its legal aims and considers structural separation, there can be two possible arrangements or models: the establishment of a separate network company or the splitting up of networks expropriated by the State and made into public network departments or companies. The latter models is actually a form of nationalisation, and therefore concerns the system of the ownership of the said undertaking—whether it is publicly or privately owned—and thus Article 345 TFEU comes into consideration.

As discussed in Chapter Six 1, whether or not the undertakings are owned publicly or privately are precluded from the scope of application of the Treaties. It has therefore been commented that this Article embeds the principle of neutrality.¹⁸⁵ However, under the case law of the Court of Justice, the rules of the Internal Market remain applicable with regard to the exercise, by the Member States, of their competence to

¹⁸⁴ Case C-367/98, *Commission v Portugal* [2002] E.C.R. I-4731, para. 48.

¹⁸⁵ Ramaekers, *supra* n182: 127.

nationalise. It has therefore been described as an existence v exercise dichotomy: the Treaties are neutral to existence, i.e, the question of nationalisation itself, but do interfere in the way in which the nationalisation take place.¹⁸⁶ For example, an expropriation or nationalisation of telecoms networks by a Member States is allowed under the rules of Treaties, but the implementation of nationalisation must be in conformity with the Treaties, such as the four freedoms and particularly competition law.¹⁸⁷ This discussion, therefore, leads to another issue: while the new publicly-owned telecoms network company may benefit the public interest by facilitating service of general economic interest, as discussed in Section 2.2.1.1, other telcos, which are private companies, could therefore be put at a disadvantage and have their fundamental rights and freedoms violated, such as freedom of competition and the right to equal treatment, as the new publicly-owned telecoms network company attains a near monopoly status in the network-access market. To avoid this, the operation of the new publicly-owned telecoms network company should be restricted to the wholesale network business and exclude the retail telecoms service. At the same time, some supplementary measures, such as a reasonable rate of return, should be adopted to ensure that sufficient incentives are in place for the new publicly-owned telecoms network company to provide such wholesale network services.¹⁸⁸

2.2.3.2 Proportionality Test

A. Legitimate Aims

Similarly to local-loop unbundling, the policy objective of separation exists mainly to

¹⁸⁶ Ibid. A somehow different opinion seems to be held by Pielow and Ehlers, as they suggested the Community legislator is not allowed to prescribe privatisation or nationalisations, see, Pielow, J. and E.Ehlers, "Ownership Unbundling and constitutional conflict: a Typical German Debate?" *European Review of Energy Markets* 2 (3): 14.

¹⁸⁷ Ramaekers, *supra* n 182: 127.

¹⁸⁸ See, for reference, the discussion about functional separation in Chapter Two (2.2).

boost competition in the local-loop market. This policy objective is again in line with the Union objectives of establishing and functioning of the internal market, and ensuring the free movement of services, and thus should be regarded as legitimate.

B. Suitability (appropriateness)

The criterion of suitability requires that a regulatory measure can realise or advance the underlying purpose of the relevant legislation, and that the use of such a regulatory measure would rationally lead to the realisation of the legislation's purpose. In the present case, either functional separation or ownership separation will help to advance the policy objectives; thus, this requirement is met.

C. Necessity

The same rationale of assessing the necessity of local-loop unbundling can be used to assess the necessity of functional separation, and even ownership separation. As discussed above, by making the access network department independent, these separation models aim to ensure the provision of fully equivalent access to products to all downstream telcos. With the developments in technology, traditional access networks (especially copper networks) are no longer indispensable for providing telecoms services, as alternatives do exist. In other words, at least in Member States where the telecoms industry is highly developed, it may become an issue whether it is justifiable to impose separation, as splitting access networks may not be the least onerous and disadvantageous regulatory measure available. However, as stated in Article 13a of the Access Directive, before imposing separation, such as functional separation, the NRAs have a series of conditions or obligations to meet, such as they should submit to the Commission the evidence that the appropriate obligations

imposed under Articles 9 to 13 have failed to achieve effective competition and that there are important and persistent competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets,¹⁸⁹ and more importantly have a reasoned assessment that there is no or little prospect of effective and sustainable infrastructure-based competition within a reasonable time-frame. In other words, the NRAs first have to establish that it is necessary to impose functional separation before they really do. Due to this legislative design, we can assume that this requirement is met.¹⁹⁰

D. Proportionality *Stricto Sensu*

Proportionality *stricto sensu* considers the balance between the benefits gained and the harms caused by imposing a regulatory measure. This requirement, as pointed out in *Sky Österreich*, means that European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and striking a fair balance between them. The Court in *Sky Österreich* then considered the economic impact, the conditions laid down, such as the maximum length of the short clips, identifying the source, and the reasonableness of costs. Thus, we know that what needs to be considered is not fixed, but subject to the characteristics of the regulatory measure at issue.

The biggest benefit brought by separation is the promotion of competition in the access market; it does not just protect the competing telcos' right to compete, but more importantly the consensus is that consumers are therefore benefited by having more choices, better quality of internet products and services with lower prices. The NRA

¹⁸⁹ Article 13 a (2) (a) of Access Directive.

¹⁹⁰ For the details of these obligations of NRAs, see Annex I.

can also save its regulatory costs in monitoring the situation in the access market.

On the other hand, besides the severe interference with telcos' property rights and freedom to conduct a business, it has been observed that separation has some drawbacks.

- a. The costs of separation are very high. For example, it has been estimated that the costs for Telstra, the incumbent telco in Australia, will be up to AUD1 billion upfront and up to AUD100 million a year for six years if Australia uses the BT separation model.¹⁹¹ Such costs are caused by the re-organisation of the company, the increased personnel costs and the separation of the current shared functions between its departments. With the establishment of a public access unit or even company, such costs will eventually be borne by consumers.¹⁹²
- b. Separation cannot reflect the need of telecoms market. As a long-term and irreversible regulatory measure, separation aims to target a monopoly on a on-going basis. This contradicts to the global trend of reducing regulation in the telecoms market. Especially, with the rapid-development of telecoms technology, the relevant regulations should be reviewed every now and then and revised where necessary.¹⁹³
- c. Separation does not necessarily reduce the costs of regulation. As observed from the experience of BT's separation in the UK, the NRA Ofcom still has to regulate

¹⁹¹ See for reference: "Worst case regulation to cost Telstra \$1.6 billion", available at: [http://www.crn.com.au/\(S\(tgobyy55fuhxqpvfjefki445\)\)/News/153004,worst-case-regulation-to-cost-telstra-16-billion.aspx#ixzz3sr8csrJK](http://www.crn.com.au/(S(tgobyy55fuhxqpvfjefki445))/News/153004,worst-case-regulation-to-cost-telstra-16-billion.aspx#ixzz3sr8csrJK) (accessed April 2016); a different but comparably high estimation, see: "Functional separation could cost \$1.2b: Telstra Chairman", available at: http://www.computerworld.com.au/article/324948/functional_separation_could_cost_1_2b_telstra_chairman/ (accessed April 2016).

¹⁹² See, Lin, P.-L. L. Y.-H. (2011). *The Research of Telecoms Regulation--A Special Note to Functional Separation*, Taiwan Institute of Economic Research.

¹⁹³ See for example: Recital (26) in the preamble of Access directive: "Given the pace of technological and market developments, the implementation of this Directive should be reviewed within three years of its date of application to determine if it is meeting its objectives."

the tariffs, service quality and investment management.¹⁹⁴ Therefore, separation does not necessary reduce regulatory costs, but the ongoing need for regulation can increase the overall costs of separation.¹⁹⁵ In addition, it is possible that NRAs may impose regulatory measures as supplementary obligations under separation.

With all of that being said, as discussed above, Article 13a (2) Access Directive enumerates a series of conditions that NRAs have to meet when they intend to impose functional separation, such as: with the evidence that the appropriate obligations imposed under Articles 9 to 13 have failed to achieve effective competition and that there are important and persistent competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets; offering a reasoned assessment that there is no or little prospect of effective and sustainable infrastructure-based competition within a reasonable time-frame; and engaging in the analyses of expected impact and of the reasons justifying that this obligation would be the most efficient means to enforce remedies aimed at addressing the competition problems/markets failures identified.¹⁹⁶ This evidence, the assessment and analyses should also be submitted for review by the Commission. In other words, the modalities and conditions of imposing separation are not arbitrary, but have been carefully defined in the Union measure. These modalities and conditions also ensure that the drawbacks above have been considered and the imposition of functional separation is proven to be the most reasonable choice. Taking

¹⁹⁴ See also: Article 13a (5) of Access Directive.

¹⁹⁵ In this regard, as the separation cannot achieve this policy object, this issue should also be examined in the suitability criterion. However, as the examination of suitability is usually not strict, and reducing the regulatory costs is just one of the policy objects, with this mechanism is suitable for other policy objects, this criteria should still be deemed met.

¹⁹⁶ Article 13a (2) of Access Directive.

into consideration all of these conditions discussed above, the Union legislature was lawfully entitled to impose the limitations on the right to property and freedom to conduct a business, as the protection of these different rights and benefits and a fair balance between them has been reconciled.

E. Respect the Essence

As discussed above, according to the jurisprudence of the Court of Justice, the essence of the right to property is disrespected when a guarantee of property is deprived of its substance, but not if the said right is only marginally affected or when only modalities of its excises are regulated. In the present case, however, functional separation requires the incumbent telco to make its access network department into an independent unit, which constitutes severe control over the use of the said property. At the same time, the obligations that accompany functional separation--such as transparency in information and costs, the setting up of a Chinese wall and the obligatory equal treatment of all downstream telcos--severely restrict the incumbent telco's participation in commercial activities, and thus severely affect its freedom to conduct its business. As discussed in Chapter Two, functional separation includes a series of arrangements, and it is possible that, in some cases, these arrangements will restrict the incumbent telco's right to property so intensively that functional separation, while not qualifying as formal expropriation but entailing similarly negative consequences for the incumbent telco's property, will be considered a deprivation of possession and constitute de facto expropriation as proposed in ECtHR case law.¹⁹⁷

However, as discussed in Chapter Six, the Court of Justice seldom, if ever, defines

¹⁹⁷ *Sporrong*, supra n 55, para. 63 and *Gianni v Italy* (2006) App no. 35941/03, para. 81.

what kinds of interferences undermine the essence of rights, especially the right to property. Expropriation, as a deprivation of possessions, is the most severe interference in the right to property, but cases involving expropriation are not always overturned by the Courts, especially by this requirement. One may reasonably assume that the more severe interference to property rights is the imposition of major expropriation without any compensation or where the compensation is apparently too low and far from proportionate. This area requires further exploration in the case law of the European courts.

2.2.3.3 Example of National Practice in the Member State?

After searching the database, there appear to be no cases regarding telecoms functional separation or ownership separation that have been submitted for review by European courts. It is admitted that, this is partly because functional separation was only introduced into the European telecoms regulatory framework in 2007, but mostly because, in reality, the implementation of functional separation, instead of being imposed by NRAs or national legislation, requires the cooperation and compliance of incumbent telcos.¹⁹⁸

That said, while considering the complexity and special technologies involved in telecoms networks, it is worthwhile investigating separation cases in other network industries for comparison. This is especially true in energy industries, such as electricity and natural gas, as there is relatively abundant EU legislation regarding the

¹⁹⁸ See the discussions in Chapter Two, see also Minister for Broadband, Communications and the Digital Economy, "Telecommunications (Acceptance of Undertaking about Structural Separation—Matters) Instrument 2011" and Ofcom, "Final statements on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002", available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/752417/statement/statement.pdf> (accessed April 2016): 57–105.

separation of networks in such industries¹⁹⁹ and, of special importance to this thesis, fundamental rights issues with regard to separation in such industries prompt much more debate.²⁰⁰

One of the most notable separation cases in the energy industry is *Essent*.²⁰¹ This case concerns the compatibility with European Union law of national legislation²⁰² concerning the following prohibitions: the prohibition of the sale to private investors of shares held in the electricity and gas distribution system operators active in the Netherlands ("the prohibition of privatization"); the prohibition of any ownership or control links between, on the one hand, companies which are members of the same group as an operator of such distribution systems and, on the other, companies which are members of the same group as an undertaking which generates/ produces, supplies or trades in electricity or gas in the Netherlands ("the group prohibition") ; lastly, the prohibition of engagement by such an operator and by the group of which it is a member in transactions or activities which may adversely affect the operation of the system concerned ("the prohibition of activity which may adversely affect the system

¹⁹⁹ Parliament and Council Directive 2009/72/EC concerning Common Rules for the Internal Market in Electricity and repealing Directive 2003/54/EC, 2009 OJ L 211/55 and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning Common Rules for the Internal Market in Natural Gas and repealing Directive 2003/55/EC, 2009 OJ L 211/94.

²⁰⁰ See for example, Brunekreeft, G. and E. Ehlers (2005). "Does Ownership Unbundling of the Distribution Networks Distort the Development of Distributed Generation?" *Annual Reports Tilburg Law and Economics Center*; Brunekreeft, G. and E. Ehlers (2006); "Ownership Unbundling of Electricity Networks and Distributed Generation", *Competition and Regulation in Network Industries* 1: 63 and Pielow, J.-C. and E. Ehlers (2008). "Ownership unbundling and constitutional conflict: a typical German debate?" *European Review of Energy Markets* 2 (3).

²⁰¹ Case C-105/12, *Nederlanden v Essent* [2013] OJ C 367/8.

²⁰² *Wet houdende regels met betrekking tot de productie, het transport en de levering van elektriciteit*, *Elektriciteitswet* 1998 (The Law regulating the production, supply and transmission of electricity, the 1998 Law on electricity), *Wet houdende regels omtrent het transport en de levering van gas (Gaswet)* of 22 June 2000, *Staatsblad* 2000 No 305; "the Law on gas" (The Law regulating the transmission and supply of gas, "the Law on gas") and the decree: *Besluit, houdende regels omtrent het verlenen van instemming met wijzigingen ten aanzien van rechten op aandelen in een netbeheerder als bedoeld in de Elektriciteitswet 1998 en in de Gaswet* (the Decree establishing the rules relating to permitting changes in rights attaching to shareholdings in a system operator subject to the 1998 Law on electricity and to the Law on Gas).

operation").²⁰³

The State of the Netherlands, as the defendant, asserted that the prohibition of privatisation constitutes a body of rules governing the system of property ownership within the meaning of Article 345 TFEU, and is therefore not prejudiced by the Treaties. The effect of that prohibition is, first, that shares held in a system operator active in the Netherlands cannot be the subject of private investment and, secondly, that the rules of the TFEU relating to the free movement of capital and freedom of establishment are not applicable. Alternatively, the State of the Netherlands maintained that the group prohibition and the prohibition of activities which may adversely affect system operation do not impede either the free movement of capital or freedom of establishment or, at the least, that a restriction on those freedoms is justified by overriding reasons in the public interest.²⁰⁴

In its ruling, the Court of Justice first pointed out that, in the Court's case law, the Treaties do not preclude, as a general rule, either the nationalisation of undertakings or their privatisation,²⁰⁵ and Member States may legitimately pursue an objective of establishing or maintaining a body of rules relating to the public ownership of certain undertakings.²⁰⁶

The Court of Justice further noted that the objective of the prohibition of privatization is to maintain a body of rules relating to public ownership in respect of those

²⁰³ *Essent*, supra n 201, para. 2.

²⁰⁴ *Ibid*, para. 24.

²⁰⁵ *Ibid*, para. 30.

²⁰⁶ *Ibid*, para. 31.

operators, and it therefore falls within the scope of Article 345 TFEU.²⁰⁷ Article 345 TFEU, however, does not mean that rules governing the systems of property ownership current in Member States are not subject to the fundamental rules of the TFEU, especially the free movement of capital, as in Article 63(1) TFEU,²⁰⁸ and must be examined in light of that article, as must the group prohibition and indeed the prohibition of activities which may adversely affect system operation.²⁰⁹

The Court of Justice considered the prohibition on the acquiring of shares and the three kinds of prohibition at issue, and it determined that they all constitute restrictions on the free movement of capital within the meaning of Article 63 TFEU.²¹⁰

The Court of Justice referred to its case law, such as *Commission v Spain*²¹¹ and *Commission v Poland*²¹², and stated that the free movement of capital may be limited by national legislation only if it is justified by one of the reasons mentioned in Article 65 TFEU or by overriding reasons in the public interest within the meaning of the Court's case law.²¹³ According to settled case law, grounds of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction on a fundamental freedom guaranteed by the Treaties;²¹⁴ however, national legislation may constitute a justified restriction on a fundamental freedom when it is dictated by reasons of an economic nature in the pursuit of an objective in the public

²⁰⁷ Ibid, para. 34.

²⁰⁸ Ibid, para. 36.

²⁰⁹ Ibid, para. 38.

²¹⁰ Ibid, para. 47.

²¹¹ Case C-274/06, *Commission v Spain* [2008] E.C.R. I-26.

²¹² Case C-271/09, *Commission v Poland* [2011] E.C.R. I-13613.

²¹³ *Essent*, supra n 201, para. 50.

²¹⁴ Ibid, para. 51.

interest.²¹⁵

The objective of undistorted competition in those markets is also pursued by the FEU Treaty, the preamble to which underlines the need for concerted action in order to guarantee, *inter alia*, fair competition, the ultimate aim of that action being to protect consumers. According to the Court's settled case law, consumer protection constitutes an overriding reason in the public interest;²¹⁶ at the same time, the objective of guaranteeing adequate investment in the electricity and gas distribution systems is designed to ensure, *inter alia*, security of energy supply, an objective which the Court has also recognised as being an overriding reason in the public interest.²¹⁷

Consequently, the objectives referred to by the referring court may, in principle, as overriding reasons in the public interest, justify the identified restrictions on fundamental freedoms.²¹⁸ However, it is also necessary that the restrictions at issue are appropriate to the objectives pursued and do not go beyond what is necessary to attain those objectives, which is for the referring court to determine.²¹⁹

While not very similar to the situation in the telecoms industry, *Essent* does, in a way, reveal a key difference between the telecoms industry and other network industries such as electricity and gas (henceforth the energy industry). The first point to be noted is that to say that the telecoms and energy industries are at different stages of

²¹⁵ *Ibid*, para. 52.

²¹⁶ The Court of Justice cited Case C-260/04, *Commission v Italy* [2007] E.C.R. I-7083, para. 27; Case C-393/05, *Commission v Austria* [2007] E.C.R. I-10195, para. 52; and Case C-458/08, *Commission v Portugal* [2010] E.C.R. I-11599, para. 89.

²¹⁷ The Court of Justice cited Case C-72/83 *Campus Oil and Others*, [1984] E.C.R. 2727, paras 34 and 35; Case C-503/99 *Commission v Belgium* [2002] E.C.R. I-4809, para 46; and Case C-174/04, *Commission v Italy*, para. 40.

²¹⁸ *Essent*, supra n 201, para. 66.

²¹⁹ *Ibid*, para. 67.

liberalisation is not as accurate as to say they are on different tracks towards liberalisation. At first glance, separation (or unbundling) in the energy industry seems to be well ahead of that in the telecoms industry, as the so-called three-way options for the unbundling of the generation and transmission systems of the energy industry, namely ownership unbundling, independent system operators and independent transmission operators were introduced in the Third Energy Package and with much more enforcing power than the functional separation in the telecoms industry. However, privatisation is implemented very thoroughly in the telecoms industry, with the telecoms industries in almost all Member States having already been privatised, whilst privatisation of the energy industry is still struggling, as can be seen in this case.

A second observation to be made is that, compared to the telecoms industry, the Commission cares more about stabilisation of the offerings of the energy service than privatising the industry, and therefore the energy industry in many Member States remains publicly owned. It is little wonder that the emphasis on the compatibility of national legislation in Member States and EU law usually concerns national measures for stabilising the offerings of the energy services and national legislation concerning limitations on privatisation, as seen in this case. On the other hand, as the telecoms industry in Member States is now largely privatised, its once public-service nature becomes a burden on private entities, and as such fundamental rights issues may arise, as this thesis intends to discuss.

3. Conclusion

In the European Union, telecom forced access mechanisms are generally subject to

broader interventions, or, in other words, they find it easier to pass the legality review. This is due to two reasons: first, they affect essentially economic rights. While fundamental rights are not absolute and their exercise is limited to their social functions, economic rights, unlike civil or political rights, generally can be expected to bear more burdens. Second, telecoms forced access mechanisms are part of telecoms regulations, which constitutes sector-specific regulation. The Courts generally recognise that legislative departments enjoy a wide discretionary power with sector-specific regulations when engaging in assessment, making decisions and choosing the relevant regulatory measures.

The facts that the rights involved are somehow "lesser" rights and there is wider discretion of choosing regulatory measures do not necessarily mean that telecoms forced access mechanisms are not subject to substantive judicial review. As pointed out in *Digital Rights Ireland*, if, taking into consideration the nature of the rights, the nature and seriousness of the interference and the objective pursued by the interference, it is possible to for the Court to engage in a substantive review of a sector-specific regulatory measure. Also in *Sky Österreich*, while the Court recognised that the fundamental freedom at issue, i.e. the freedom to conduct a business, may be subject to a broad range of interventions, it subsequently engaged in a detailed substantive review. If we take the *Digital Rights Ireland* reasoning, the key issues here become whether the nature or the importance of the rights affected by telecoms forced access mechanisms and the nature and seriousness of the interference caused by imposing of telecoms forced access mechanisms are comparable to those in *Digital Rights Ireland*.

In the view of this thesis, separation is the only contender comparable to the situation in *Digital Rights Ireland*. Although in the three mechanisms the fundamental rights affected are the same, the impairment of separation upon those rights is much stronger than interconnection and local-loop unbundling. Such a strong interference with the right to property and freedom to conduct a business does justify the lifting of the limit upon a substantive judicial review. However, as discussed above, even where a substantive legality review is engaged, separation will not necessarily be deemed illegal.

Chapter XI

Analysis (2): Taiwan

Preface

This chapter analyses the legality of telecoms forced access mechanisms in Taiwan. As in the previous chapter, the discussion in this chapter explores the scope for judicial review in this field and applies the legality/constitutionality assessment criteria used in Taiwan to examine the three central telecoms forced access mechanisms identified in Chapters Two and Three, with special consideration given to whether these mechanisms excessively restrict the fundamental rights and freedoms of the telcos upon which these regulatory mechanisms are imposed. To avoid duplication of the discussion of the European Union, the same content discussed in Chapter Ten will be referred to here.

As specified in Chapter Five, under the legal framework of Taiwan, reviewing the constitutionality or legality of a regulatory measure, especially with regard to possible infringements of property rights or the freedom to conduct a business as the main focus in this thesis, follows a normative review – the requirement of the rule of law – and a substantive review – the application of the principle of proportionality – with different intensities of judicial review depending upon the different characteristics of the fundamental rights involved. At the same time, just as with the situation in the European Union, the legislature in Taiwan also enjoys some discretion (see discussion below), and this is especially true with regard to expert or sector-specific legislation. This chapter is therefore laid out as follows.

The next section discusses the relationship between telecoms forced access mechanisms and legislative discretion. It starts by defining the nature of telecoms forced access mechanisms (section 1.1), and how these mechanisms are implemented in Taiwan (section 1.2).

The following section discusses the criteria for the review of the constitutionality of a regulatory measure in Taiwan (section 2). It starts with a review of the traditional criteria for review of the constitutionality in Taiwan, namely a proportionality test with consideration of the intensity of review – a combination of the German and American approaches (section 2.1), the latest developments of such a review system (section 2.2) and how economic rights fit into this system (section 2.3). The last section of this chapter applies the review criteria examined above to the constitutionality of telecoms forced access mechanisms (3).

1. Telecoms Forced Access Mechanisms in Taiwan

1.1 The Nature of Telecoms Forced Access Mechanisms

Under the legal framework in Taiwan, telecoms forced access mechanisms are regulatory measures within the telecoms regulatory framework that attempt to ensure better access to telecoms networks for other telecoms companies and citizens. Thus, they are regarded as a form of sector-specific (industry) regulation. But at the same time they also have the character of competition law and are generally categorised as economic law or part of economic policy.¹

¹ See for example: FTC (2015 (last updated)). "The Explanatory Notes of the Fair Trade Commission to Telecommunications Industry.", available at: <http://www.ftc.gov.tw/law/LawContentDetails.aspx?id=FL011940&KeyWordHL=&StyleType=1>.

On the other hand, telecoms forced access mechanisms, as part of telecoms regulation, also have the function of offering a public service, where the maximization of economic effect is not always the only policy objective of concern, as there should also be considerations of the wider benefits to all citizens. This feature is best demonstrated in Article 1 of the Taiwanese Telecommunications Act: "This Act is enacted to ensure the sound development of telecommunications, promote the public welfare, safeguard the security of communications and protect the rights and interests of users. Matters not provided herein shall be subject to the provisions of other applicable laws."²

The economic law nature of telecoms forced access mechanisms raises two concerns. First, the targeted industries or markets are subject to rapid change. To be regulated more efficiently, therefore the legislator usually leaves some flexibility in the provisions for the administrative institutions to make assessments and decisions. As noted by the Supreme Administrative Court:

"The character of economic law and regulation often evolves along with changes in society and the economic situation. Different behaviours constantly surface over time, and it is inappropriate precisely to regulate such behaviours by laws and regulations. This is why provisions with indefinite legal concepts exist in economic law."³

Indeed, there are numerous examples of these "indefinite legal concepts" in the

² Article 1 Taiwanese Telecommunications Act.

³ 2006 No.93 Judgment of the Supreme Administrative Court.

telecoms regulatory regime, such as "industrially applicable",⁴ "relevant market",⁵ "no competition",⁶ "effective competition in the telecommunications market",⁷ "abuse of DMP (dominant market player) status"⁸ and "not technically feasible".⁹ This raises concerns about legal certainty, i.e. will the ambiguity in these provisions contravene the requirements of the rule of law? More specifically and of more importance to the discussions in this thesis: can regulatory measures that are significantly lacking in clarity and predictability be used to restrict fundamental rights and freedoms? This issue will be further discussed in the later sections of this chapter.

The second concern is that, similar to discussions on European law, as a modern democratic State with a constitutional design and separation of powers, the legislative and administrative institutions in Taiwan enjoy a certain degree of discretion. This is especially true in the field of economic law and policy as the decisions made by relevant institutions are generally respected by the judicial department. Under the concept of a constitutional state, all statutes and regulations should be subject to review of their constitutionality. Thus, the interaction between legislative/administrative discretion and review of the constitutionality of a measure or, more specifically, how intensely telecoms forced access mechanisms should be reviewed, has become an issue.

1.2 Implementing Instruments

⁴ See Article 22 Patent Act.

⁵ See Article 5 Fair Trade Act.

⁶ Ibid.

⁷ See Article 20-1 Telecommunications Act.

⁸ See Article 26-1 Telecommunications Act.

⁹ See Article 4 Regulations Governing Network Interconnection among Telecommunications Enterprises.

The three telecoms forced access mechanisms are regulated by different legal instruments, and their supplementary obligations are sometimes imposed in a scatter-gun fashion across statutes, regulations and administrative orders.

Interconnection, for example, has its principles laid out in the Telecommunications Act,¹⁰ with most of the supplementary obligations found in the Regulations Governing Network Interconnection among Telecommunications Enterprises,¹¹ which is delegated legislation. Similarly, in local-loop unbundling, the principles are laid out in the Telecommunications Act,¹² while many obligations, such as tariff control, are also then set out in the Regulations Governing Networks Interconnection among Telecommunications Enterprises.¹³ As for separation, functional and ownership separation were first included in a draft amendment to the Telecommunications Act (2010)¹⁴ but, in a later version of the draft, the provisions about ownership separation were removed and the article was moved to Article 25. Even today, the proposal amendment remains only a draft and has never been adopted. It should however be noted that, according to this draft amendment, there are no details about the relevant obligations to be implemented, such as separation in the Telecommunications Act itself; it would be left to the regulator to draft and enact the relevant regulations.

¹⁰ Article 16 Telecommunications Act.

¹¹ See, for example: Article 4 (principles of interconnection), Article 7(principles for setting points of interconnection) and Article 11 (the arrangements of equipment configuration and maintenance, location and associated costs of interconnection) of Regulations Governing Network Interconnection among Telecommunications Enterprises.

¹² Article 31 Telecommunications Act.

¹³ See, for example Article 18(2) Regulations Governing Network Interconnection among Telecommunications Enterprises.

¹⁴ Draft amendment to Article 22 of the Telecommunications Act (2010) states: "If relevant effective competition is not achieved within a certain period that the amendment is in force, the regulator may impose on the dominant carrier in a fixed network telecommunications market a requirement to implement a structural split, functional separation or other necessary mechanisms that essentially promote effective competition (temporary translation)."

The definition of delegated regulation and its relationship to statutes and administrative orders within the Taiwanese legal framework requires an in-depth discussion about the constitutional design and balancing between legislative and administrative powers, which is beyond the scope of this thesis.¹⁵ To summarise, while delegated regulation is enacted by administrative institutions and is essentially an administrative act, because of its general nature and because the entitlement of administrative institutions to enact such regulation is framed by statutory delegation, it should be subject to similar judicial review, along with statutes.¹⁶

2. Telecoms Forced Access and Review of Constitutionality

2.1 Review of the Criteria for Constitutionality Review

2.1.1 Principle of Proportionality and the German and American approaches

As discussed in Chapter Five (2.4), the review of the constitutionality of regulatory measures that may affect fundamental rights and freedoms—usually inclusively called fundamental rights in Taiwan—is pursued in a two-step examination process. The first step is a normative review to see whether the challenged regulation meets the requirements of the rule of law. The second step—substantive review--on the other hand, differs in approach depending on the backgrounds of the Grand Justices. The traditional German approach is basically the application of the principle of proportionality with the consideration of the intensity of the review reflecting the nature of the different fundamental rights involved. This German intensity of judicial control system contains three categories:

(1) in Evidence Control, the Constitutional Court (henceforth the Court) only reviews

¹⁵ For more detailed discussions, see: Hsu, T.-L. (1995). "The Commentary of Rule of Law". *Law and State Powers*, Angle Publish: 195-. Wu, G. (2015). "Delegated Legislation". *The Theories and Practices of Administrative Law*, SanMin Publish.

¹⁶ See the dissenting opinion to No.137 Official Interpretation by Grand Justice Wang, Z.-Z..

- whether there exist apparent errors in the challenged legislation;
- (2) in Tenability Control, the Court reviews whether the decisions made by legislators are reasonable or tenable; and
 - (3) in Intensive Content Control, the Court has to review whether the legislator's assessments or predictions are highly accurate or reliable, and where there exist reasonable doubts about such accuracy or reliability, the challenged legislation should be deemed unconstitutional (see discussions in Chapter Five (2.4.2.)).

The American approach, on the other hand, also contains three categories:

- (1) the Rational Relationship Test requires that the policy objective pursued should be a legitimate governmental interest, and there should exist a rational relationship between the policy objective and the measure adopted;
- (2) the Intermediate Scrutiny Test requires that the policy objectives should pursue an important governmental interest, and there should exist a substantial relationship between the policy objective and the measure adopted; and
- (3) the Strict Scrutiny Test requires that the policy objective should pursue a compelling governmental interest, and the measure adopted should be narrowly tailored to the policy objective (see discussions in Chapter Five (2.4.2.))

2.1.2 Categorisation of Official Interpretations

Because of the different backgrounds of the Grand Justices, the two approaches above are often used interchangeably in Official Interpretations. However, observation of Official Interpretations leads to the conclusion that there exists a sort of rules for how the Grand Justices apply those approaches when they are dealing with different

subject matters or fundamental rights:

- a. if the challenged regulatory measure involves both fundamental rights and decision-making in formulating sector-specific regulations, the approach adopted is usually that of German Tenability Control;¹⁷
- b. if the challenged regulatory measure involves fundamental rights and complex policy decisions, such as the assignment of resources, environmental protection or economic structures, the approach adopted is usually German Tenability Control or an American Rational Relationship Test;¹⁸
- c. if it is about issuing emergency decrees and supplementary measures, the approach adopted is usually an American Rational Relationship Test;¹⁹
- d. if the challenged regulatory measure is not related to the core content of fundamental rights (*Kerngehalt der Grundrechten*), the approach adopted is usually an American Rational Relationship Test;²⁰
- e. if the challenged regulatory measure is related to the core content of fundamental rights, the approach adopted is usually German Intensive Content Control or an American Strict Scrutiny Test;²¹ and
- f. if the challenged regulatory measure involves the deprivation of personal freedoms and the right to life, the approach adopted is usually German Intensive Content Control or an American Strict Scrutiny Test.²²

¹⁷ See the dissenting opinion to No.389 Official Interpretation by Grand Justices Su, J.-h. and Dai, T.-h.; the concurring opinion to No.532 Official Interpretation by Grand Justice Su, J.-h..

¹⁸ See the concurring opinion to No.472 Official Interpretation by Grand Justice Su, J.-h.; the concurring opinion to No.472 Official Interpretation by Grand Justice Hsu, T.-L.; the dissenting opinion to No.579 Official Interpretation by Grand Justice Hsu, T.-L.; the partial concurring opinion and partial dissenting opinion to No.580 Official Interpretation by Grand Justice Lin, T.-Y..

¹⁹ See the concurring opinion to No.571 Official Interpretation by Grand Justice Lin, T.-Y..

²⁰ See the concurring opinion to No.569 Official Interpretation by Grand Justice Lin, T.-Y..

²¹ See the partial dissenting opinion to No.490 Official Interpretation by Grand Justice Wang, H.-H.; the concurring opinion to No.573 Official Interpretation by Grand Justice Wang, H.-H.; the dissenting opinion to No.596 Official Interpretation by Grand Justices Hsu, T.-L. and Hsu, Y.H.

²² See the partial concurring opinion and partial dissenting opinion to Official Interpretation No.588 by Grand Justices Hsu, T.-L., Wang, H.-H., Liao, I.-N., Lin, T.-Y. and Hsu, Y.H.; the partial concurring

It can therefore be concluded that, from the Grand Justices' point of view, German Tenability Control is consistent with an American Rational Relationship Test, as stated by Grand Justice Hsu: "[e]conomic fundamental rights are subject to loose judicial review in the United States and intermediate judicial review in Germany."²³ On the other hand, German Intensive Content Control is treated as equivalent to an American Strict Scrutiny Test.²⁴

2.2 Latest Developments in the Criteria for Constitutionality Review

Even in lightly-reviewed areas there is, however, a possibility that the restriction of fundamental rights is so intense that it constitutes an infringement of the core content of the said fundamental rights.²⁵ The criteria for judicial review proposed above should thus not be deemed to be a strict set of rules. Therefore, it has been suggested when reviewing the constitutionality of a regulatory measure that not only the subject matter but also the extent of fundamental rights restriction should be taken into consideration.²⁶ Chen (2000) further suggests that the "sliding-scale approach" used

opinion to Official Interpretation No.594 by Grand Justice Hsu, Y.H..

²³ See the concurring opinion to Official Interpretation No.584 by Grand Justices Hsu, T.-L..

²⁴ This common attitude can be seen in the partial concurring opinion and partial dissenting opinion to Official Interpretation No.588 by Grand Justices Hsu, T.-L., Wang, H.-H., Liao, I.-N., Lin, T.-Y. and Hsu, Y.H as despite the different legal backgrounds, the Grand Justices agreed that strict criteria should be applied in reviewing personal freedom.

²⁵ See the dissenting opinion to No.596 Official Interpretation by Grand Justices Hsu, T.-L. and Hsu, Y.H.. In this case, the issue is that the Labor Standards Act did not provide that the right to claim retirement pensions shall not be attached, transferred or secured as that in the Public Functionaries Retirement Act. Grand Justices Hsu and Hsu held that while the designing of retirement pension system involves the management of national resources and economic and social structure, and is in principle not subject to strict review; however, the retirement pension is also related to the right of survival of the civil servants in their retire life, and this a light-touch approach is not suitable.

²⁶ It has been observed that the prevailing trend of review of the constitutionality in international practices is to apply different reviewing intensities toward different subject matters, and the development of review of the constitutionality in Taiwan is coherent to this trend. See: Huang, Z. (2000). "Legislative Discretion and Judicial Review--Focused on the Reviewing Criteria " *The Constitutional Review* 26(2): 156-185, and "The development of Review of the constitutionality Criteria in Official Interpretations (1996-2011): The Adoption and Localisation of the Principle of Proportionality." *National Taiwan University Law Review* 42(2): 215-258.

in the United States should be introduced into the Taiwanese review of constitutionality system in order to make a multi-dimensional assessment of the fundamental rights involved, the intensity of interference and the subject matters to decide which criteria should be applied.²⁷

2.3 Review of the constitutionality Criteria of Economic Rights in Official Interpretations

Similar to the situation in the European Union, the Grand Justices hold that socio-economic rights – especially property rights – are not absolute but may entail social obligations. Thus, if a regulatory measure does not impose an excessive burden, such a measure should not be deemed an infringement of property rights.²⁸ The same can be said about the freedom to conduct a business, which derives from property rights and the right to work (see discussion in Chapter Nine). Thus a regulatory measure involving socio-economic rights is deemed easiest to pass a review of the constitutionality.²⁹ Indeed, as discussed above, sector-specific regulations or legislation involving economic rights are usually reviewed according to German Tenability Control or an American Rational Relationship Test.³⁰ Such a stance taken by the Grand Justices is coherent with the broad extent of legislative discretion concerning sector-specific regulations.

An exception to the situation above is the expropriation of property, for which the

²⁷ Chen, Y.-J. (2005). "The Study of the Review of the constitutionality Criteria by Grand Justices and A Commentary on No.584 Official Interpretation " *Studies in the Humanities and Social Science*(3): 112.

²⁸ See for reference: No.564 and 577 Official Interpretations.

²⁹ Chou, P.-C. (2009). "The Principle of Proportionality--The Reference of Applications in the European Court of Human Rights." *National Taipei University*: 112.

³⁰ German Tenability Control is actually the least intense substantial reviewing criteria, as Evident Control applies when there are significant errors in the challenged legislation and is in essence a normative reviewing criterion.

Grand Justices generally adopt the strict approach to review of constitutionality,³¹ as the Grand Justices have paid special attention in developing the conditions that should be met in the case of expropriation. In other words, an expropriation is only constitutional when the following conditions are met:³²

- (a) The expropriation should be provided for by law (the principle of rule of law);
- (b) The expropriation should have more than a legitimate aim;
- (c) The expropriation should be for the public interest;
- (d) There should be supplementary measures, i.e., compensation provisions about the compensation to the expropriation; and
- (e) The expropriation measures should be proportionate to their legal aims (principle of proportionality).

3. Legality of Telecoms Forced Access Mechanisms in Taiwan

3.1 Fundamental Rights and Freedoms Involved

3.1.1 Interconnection

As discussed in Chapters Two and Ten, interconnection refers to the physical and logical linkage of the public communications networks of two or more telcos in order to enable the customers of these different telcos to communicate with each other, or to access services provided by other telcos. The telcos still retain ownership of the said networks, and remain free to dispose of them or put them to other uses which are not prohibited; however, they are obliged to let such networks be linked to other telcos.

Their rights to use such networks, as part of property rights (see discussion in Chapter

³¹ Liao, Y.-H. (2008). "Unpredictable or an Inherent Order? The Review of the constitutionality Criteria Proposed by Current Grand Justices" *Academia Sinica Law Journal* 2: 220.

³² See discussions in Chapter Seven (2.2.2). See also for reference: Chou, P.-C. (2009). "The Principle of Proportionality--The Reference of Applications in the European Court of Human Rights." *National Taipei University*: 112.

Seven), are therefore affected. Likewise, their freedom to conduct a business, as part of the right to work and the right to property as stipulated in Article 15 of the Constitution,³³ is also restricted, as interconnection imposes a burden on telcos' freedom to exercise commercial activities, i.e. telcos can no longer freely decide with which bodies they wish to enter into an agreement.

3.1.2 Local-loop Unbundling

As discussed in Chapter Three (2.3), there are four types of local-loop unbundling under the telecoms regulatory framework in Taiwan since, besides full unbundling, line-sharing and sub-loop unbundling in the European Union, bitstream access is also a type of local-loop unbundling implemented in Taiwan.³⁴ Similar to the situation in the European Union, as discussed in Chapter Ten, in either type of local-loop unbundling, the incumbent telco is required to bear a burden attached to its property. This burden can be the shared use of metallic cables (full unbundling), allowing the high-frequency spectrum available on its metallic cables to be used by others (line-sharing), or allowing the co-location of another telco's device in its own facility (sub-loop unbundling). In bitstream access, while other telcos do not directly connect to the metallic cables of the local loop, it requires the incumbent telco to offer a wholesale-like bitstream service to other telcos via its local loop. While these burdens make it more difficult for the incumbent to exercise its property rights, it is still entitled and able to do so. Thus, local-loop unbundling does not constitute a deprivation of property, but merely interference with the use of property.

³³ Article 15 of Constitution reads: "The right of existence, the right of work, and the right of property shall be guaranteed to the people."

³⁴ See discussions in Chapters Two and Three.

Likewise, local-loop unbundling also constitutes interference with the incumbent telco's freedom to conduct its business, as the incumbent's rights to carry on economic or commercial activities are restricted: e.g. in being required to unbundle its local loop, it is no longer free to use its local-loop network.

3.1.3 Separation

The incumbent telco's property rights and freedom to conduct a business will be affected when separation is imposed. Functional separation, as discussed earlier, requires the access network department of the incumbent telco to be made into an independent unit so that its networks can be equally accessed by the incumbent itself and its competitors. This obligation and the many supplementary arrangements significantly limit the incumbent telco's use of its access networks, and thus constitute a restriction of its property rights. It should be noted that the concept of *de facto* expropriation is not recognised in the Taiwanese constitutionality jurisprudence as it is in the ECtHR. Therefore, even when functional separation arrangements severely restrict the incumbent telco's right to use the said property, as long as the ownership remains the same, it will not be regarded as expropriation which, as discussed above, requires the appreciation of much more intense criteria for review in Taiwan. At the same time, such an intense restriction on the use of property that plays an important role in a telco's operation of its business, i.e. providing telecoms services, thus also constitutes interference with the telco's freedom to conduct its business.

Ownership separation, on the other hand, proposes to split up access networks from the incumbent telco. As discussed in Chapter Ten, there can be two possible arrangements after such a split: the establishment of a separate network company or

the split-up networks being expropriated by the State and made into a public network department or company. In either case, ownership separation constitutes a deprivation of property; likewise, such intense interference with the use of telecoms networks that play an important role in the incumbent telco's operation of its business will also constitute interference with the telco's freedom to engage in commercial activity.

3.2 Analysis of Telecoms Forced Access Mechanisms

A review of constitutionality in Taiwan, as discussed above, is the combination of a normative review (rule of law) and a substantive review, with a selection of the German or American approach. With regard to substantive review, a different approach is taken for the discussion in this section for that in Chapter Ten (analysis of the European Union). This is because although we can at first ignore legislative discretion and consider a "classic" proportionality analysis as in the European Union, in scholarly discussions in Taiwan, the constitutionality review of a regulatory measure should be considered together with the nature of the measure, and the criteria of the review then follow. For example, if the challenged legislation is economic legislation, the reviewing intensity will be the German Tenability Control or the American Rational Relationship Test, and the Court has to review whether the decision made by the legislators is supportable or tenable, or whether there exists a rational relationship between the policy objective and the measure adopted.

It should be noted, however, that in many cases, although the Court adopts the German approach and mentions the three-step proportionality test, in reality only a proportionality *stricto sensu* test is applied by the Court with due reviewing intensity; other criteria, even when taken into consideration, are usually treated with a

light-tough approach. An example of such a criterion is the policy objective of the challenged regulatory measure, which under the Taiwanese constitutionality jurisprudence is usually included when reviewing the first criterion – suitability; this is generally reviewed with low intensity, as Grand Justice Hsu pointed out in her concurring opinion of Official Interpretation No.594:

"...the basic attitude for Grand Justices in reviewing the intensity of a constitutional review is that policy objectives of challenged regulations are reviewed with low intensity, while the effects of the challenged regulations are reviewed, depending on the different fundamental rights involved, with a different intensity."³⁵ This is perhaps because of the logical difficulties in applying a reviewing intensity within each of the three criteria or steps of a proportionality test (see discussion below).

It should also be remembered that a substantive review, i.e. the application of a proportionality test, is a gradual process; in other words, once a previous criterion has not been met, the challenged regulatory measure should be deemed unconstitutional and it is not necessary to proceed to an examination of the next criterion/criteria.³⁶ However, for the purposes of the discussion in this thesis, each criterion will be examined in this section.

3.2.1 Interconnection

(1) The Normative Review – Rule of Law

³⁵ See the concurring opinion to No.594 Official Interpretation by Grand Justice Hsu, Y. H..

³⁶ Li, H. H. (1999). *Review of the constitutionality--A Commentary*, Angle Publishing; Wu, G. (2015). "Delegated Legislation". *The Theories and Practices of Administrative Law*, SanMin Publish.

The first stage when reviewing the constitutionality of a measure is, as noted above, a normative review – the principle of the rule of law. With regard to this, Official Interpretation No.443 has established a graded statutory reserve system, as it states:

"The determination of which freedom or right shall be regulated by law or by rules authorized by the law shall depend on regulated intensity. Reasonable deviation is allowed considering the party to be regulated, the content of the regulation, or the limitations to be made on the interests or freedom. For instance, depriving people's lives or limiting their physical freedom shall be in compliance with the principle of definitiveness of crime and punishment and stipulated by law; limitations concerning people's other freedoms shall also be stipulated by law, in the case where there is authorization by the law to the administrative institutions to make supplemental rules about detailed and technical matters, the authorization shall be specific and precise."

In other words, the requirement of the rule of law should reflect the importance of the rights and the nature of the restrictions. Limitations to fundamental rights and freedoms are generally required to be stipulated by law, and only the detailed and technical supplemental rules can be delegated to administrative institutions, but such delegation, or authorization, should be specific and precise.

The legal basis of interconnection derives from the Telecommunications Act as well as the Regulations Governing Network Interconnection among Telecommunications Enterprises, which is statutorily delegated legislation. Under the rationale of Official Interpretation No.443, although imposing interconnection involves the telco's

fundamental rights, it is not unconstitutional to have these detailed and technical matters regulated in delegated legislation, as long as the authorization is specific and precise.

In the present case, the obligations, conditions, timing and fees are detailed and technical matters, and the delegating statutory provision—Article 16 (9)

Telecommunications Act—reads:

"The DGT³⁷ shall enact governing rules with respect to network interconnection, tariff calculation, negotiation, mandatory terms within interconnection agreements, arbitration procedures , and matters requiring compliance related thereto, between or among Type I telecommunications enterprises and other telecommunications enterprises."

This provision is precise and specific, thus this requirement should be deemed to be met.

(2) Substantive Review

A. The German Approach

Interconnection, as discussed above, should be defined as a regulatory measure of economic law. Therefore, the intensity of constitutionality review, or the intensity of the application of the principle of proportionality, is the German Tenability Control. In other words, the Court has to review whether the legislator's decision regarding interconnection is supportable.

³⁷ It should be noted that because of the error in the enacting process of the amendment, the regulator here remains unrevised; it should be the NCC instead of DGT. See discussions in Chapter Three.

a. Suitability (appropriateness)

In the present case, the policy objectives of interconnection are to eliminate disputes caused by unfair interconnection, to promote nation-wide telecoms services by ensuring the interconnection of telecoms networks, and to provide end-to-end interoperability of services to protect the rights of consumers.³⁸ While interconnection may not be the only measure to achieve these objectives, this measure reasonably facilitates such goals. Thus this criterion should be regarded as met.

b. Necessity

Like the situation in the European Union, the requirement of necessity is by definition a strict criterion; thus, there exists an inherent conflict when the Court chooses a light-touch or even intermediate approach such as German Tenability Control to review this requirement. It is logically difficult to envisage engaging in a light-touch review of whether the measure adopted is the least restrictive; in other words, it is questionable how the Court accepts such broad legislative decision in choosing the least onerous measure. Unfortunately, this issue has not been emphasized in constitutionality jurisprudence and scholarly discussions in Taiwan. In the present case, however, just like the situation in the European Union, interconnection is the most direct and sometimes the only way to achieve the policy objectives – such as promoting nation-wide telecoms services and providing end-to-end interoperability of services to protect the rights of consumers. This criterion should therefore be deemed met.

³⁸ See, for reference: the recital of 2002 draft bill of Regulations Governing Network Interconnection among Telecommunications Enterprises.

c. Proportionality *Stricto Sensu*

The criterion of proportionality *stricto sensu* is where, at least in the view of this thesis, the intensity of review really comes into play. Although it has indeed been reiterated by Taiwanese scholars that the intensity of a review is not another aspect of a reviewing system other than a proportionality test--it is more of a supplementary system that penetrates each of the three sub-disciplines of a proportionality test--there is no denying that the reviewing intensity is used mainly to examine proportionality *stricto sensu*: i.e., is the regulatory measure at issue proportionate to the policy objectives? In the present case, it is to see whether the legislative decision to require interconnection is proportionate to the policy objectives, and is tenable or supportable. As stated above, the policy objectives of interconnection are to promote telecoms services and ensure the end-to-end interoperability of services to protect the rights of consumers. Besides, as discussed in Chapter Ten, interconnection involves providing a service of general economic interest. This service of general economic interest or service of general interest nature of telecoms is usually known as a type of public service obligation in Taiwan, and it is frequently quoted in Taiwanese telecoms legislative acts as well as in scholarly discussions. In fact, such public service obligations cannot find their source in Taiwanese constitutional provisions,³⁹ only via the explications of scholars.

The discussion of telecoms' public service obligation in Taiwan should start with the evolution of the role of the state. In the past, providing services like telecoms, including the construction of relevant infrastructure, was regarded as being an

³⁹ The only seemingly related provision in Taiwanese Constitution is Article 144, which reads: "Public utilities and other enterprises of a monopolistic nature shall, in principle, be under public operation. In cases permitted by law, they may be operated by private citizens".

obligation of the state. In addition, in order to guarantee all citizens could enjoy such services, it was acceptable for them to be provided in the form of a public monopoly. This situation began to change with the trend towards liberalisation, and competition and market rules have become guiding principles for the supply of telecoms services. While the state is no longer the provider of such services, it should be noted that it is not exempt from all responsibilities, it has turned into the supervisor or regulator of relevant market.⁴⁰ In other words, the role of the state has changed from a productive state (*Leistungstaat*) to a guarantor state (*Gewährleistungsstaat*), hence it should design a relevant system to ensure that the public interest can be protected via the operation of the market. Therefore, a guarantor state does not abandon all obligations with respect to public services, it just withdraws from the task of implementation solely so that this can be done more flexibly, diversely and efficiently. In this regard, especially with its close relationship to a universal service, the imposition of interconnection on private telcos can be deemed as the implementation of a public service.

On the other hand, imposing interconnection does not constitute a severe infringement of a telco's use of its property and the right to operate its business, it merely requires it to offer a suitable interface, and not to arbitrarily hinder interconnection, such as charging excessive interconnection fees or delaying the process; it can be concluded that there exists reasonableness in the relationship between policy objectives and so this adopted regulatory measure is supportable.

⁴⁰ C.Franzius, "*Der Gewährleistungsstaat*" – *Ein neues Leitbild für den sich wandelnden Staat*, *Der Staat*, 42-4/2003, S.499, cited from: On the Universal Service of Telecommunications in the Guarantee State, Chia-Yang Lin, National Taipei University, 2009.

B. The American Approach

Being a form of economic legislation, if we adopt the American approach, interconnection should be subject to the Rational Relationship Test, i.e., whether it has legitimate aims, and whether imposing such a regulatory measure would rationally lead to the realisation of the legislation's policy objective.

As discussed above, the aims, or policy objectives of interconnection are to ensure the end-to-end interoperability of services to protect the rights of consumers, and thus should be deemed legitimate. In addition, the implementation of interconnection undoubtedly relates to the realisation of such policy objectives. Thus, interconnection can pass the constitutionality review.

The case of interconnection in Taiwan is even more meaningful for another reason. As discussed in Chapter Three, unlike the situation in the European Union, interconnection also includes Internet interconnection (transit), and especially charges for transit.⁴¹ While there have been arguments about to whether it is better to regulate transit in the regulatory framework or leave it to negotiations between telcos,⁴² considering this "extra" policy objective, the oligopoly situation in Taiwan's telecoms and Internet markets and the constant abuse of dominant-market player-status practices of the major telcos (such as charging excessive transit fees to their competitors in the Internet market) no matter whether assessed under German or American approach, it is even more reasonable to impose interconnection in Taiwan.

⁴¹ See, for example: Article 13 and 20 of Regulations Governing Network Interconnection among Telecommunications Enterprises.

⁴² See the opinions submitted to NCC. (2013). "The Hearing of Internet Interconnection Regulation Enactment"; Lien, Y.-N. (2011). "Analyses of the Regulation and Technique of IP Internet Interconnection IP"; Lai, I.-C. (2012). "The Net Neutrality Doctrine--The Possibility of Regulating Internet in Taiwan." National Central University: 23.

3.2.2 Local-loop Unbundling

(1) Normative Review

As with interconnection, the main provisions of local-loop unbundling are stipulated in the Telecommunications Act, with very detailed obligations then established in delegated legislation such as the Regulations for the Administration of Fixed Network Telecommunications Business. Other obligations, such as tariff control, are contained in the Regulations Governing Networks Interconnection among Telecommunications Enterprises. Under the same rationale in interconnection, this requirement should be deemed met.

(2) Substantive Review

A. The German Approach

a. Suitability (appropriateness)

In the present case, the policy objectives of local-loop unbundling are to eliminate unfair competition and discrimination in the downstream market and grant access to the network market, and consequently to benefit the consumers as they will have more choices, better products and lower prices when they are using internet services. The obligation to unbundle local-loop networks into elements to be easily leased by competitors does help to achieve these policy objectives.

b. Necessity

As discussed above (3.2.1 (2) b), there exists an inherent conflict between the requirement of necessity and the review criteria applied to economic legislation—the Tenability Control. If we ignore such conflict and engage in a classic necessity

discussion here, like the situation in the European Union, local-loop unbundling, which once seemed critical and necessary to address the competition issue in local-loop markets, is now facing the effects brought about by rapidly developing telecoms technologies, such as satellite and 3G/4G services which serve the same function as traditional local loops. This situation is especially apparent in Taiwan. Besides traditional telecoms networks, Taiwan has a relatively high CATV penetration rate; in 2014, the total number of subscriptions to CATV in Taiwan included 4.99 million households and had a penetration rate of 59.9 per cent.⁴³ While this penetration rate is not as high as traditional telephone metallic networks, which can be used to provide traditional Internet (narrowband) and modified to provide broadband services,⁴⁴ the cable networks used in CATV can be used to provide broadband services as good as the broadband services provided by modified traditional metallic networks.⁴⁵ Thus, unlike the situation in the European Union, where alternative infrastructure does not generally offer the same functionality or ubiquity,⁴⁶ internet services provided via cable in Taiwan serve as a strong competing technology to the traditional local loop.

In this regard, while local-loop unbundling may be argued to be the least onerous method to achieve the policy objective of promoting competition in the access network market, it may not be so for its ultimate policy objectives—benefiting the consumers--since consumers have many choices available that are arguably as

⁴³ See discussions in Chapter Three and Communications Statistics published by NCC, available at: http://www.ncc.gov.tw/chinese/files/14081/1979_32567_140813_1.xls (accessed April 2016).

⁴⁴ Such as the FTTx fibre optic networks discussed in Chapter Ten.

⁴⁵ For example, the highest transmission speed provided to general customers via cable in Taiwan is 300M (download)/30M (upload), provided by competing telco KBRO, whilst the highest transmission speed provided to general customers via FTTx highest speed is 300M/100M, provided by the incumbent telco CHT. See, respectively: <http://www.cable.48h.tw/Kbro/?kdc=&kdc2=> and <http://www.cht.com.tw/personal/hinet-internet-rate.html>.

⁴⁶ See discussions in Chapter Ten.

effective, so that it will not be necessary to require the telco to open its local loop to be accessed by competitors. In other words, there exists a less onerous method than imposing interconnection—which is not to impose interconnection—where the consumers will not necessarily suffer from worse products or higher prices. Hence, the question has become: what are the policy objectives of a competition law, or regulatory measure with a competition law nature, such as the interconnection requirement in this case? It would certainly appear that both the promotion of consumer welfare and the protection of a playing field for competitors are key underlying policy objectives. There is no doubt that the competitors' rights to competition have to give way to consumer welfare where they contradict each other. Such a direct contradiction, however, does not exist in this case, but only the results of necessity are different after being examined by these two standards. Regarding this, this thesis proposes that the requirement of necessity may not be met under a typical proportionality test, as in fact there does exist a less onerous measure; however, if we use the light-touch approach that is used in reviewing economic legislation, such as the German Tenability Control in this case, imposing such a regulatory measure should be deemed supportable.

c. Proportionality *Stricto Sensu*

Under Tenability Control, the requirement of proportionality *stricto sensu* is to see whether the legislative decision that the regulatory measure adopted is proportionate to its policy objectives is supportable. In this case, the policy objectives are the promotion of competition in the access network, and the improvement in consumer welfare by being offered better internet services. These benefits or public interests outweigh the harms caused by the restrictions imposed upon the telco, even though

these restrictions are not as minor as those in the case of interconnection. Thus, this requirement should be deemed met.

B. The American Approach

To pass the American Rational Relationship Test, a regulatory measure should have a legitimate aim, and the adoption of that regulatory measure is rationally related to that legitimate aim.

In the current case, LLU, as discussed above, does have legitimate aims, and the implementing of LLU is rationally related to those aims. In fact, as discussed in Chapter Five (2.4.2), legislation that falls within this category has almost never be held unconstitutional.

3.2.3 Separation

The review of the constitutionality of separation is different from the other two telecoms forced access mechanisms because of its severe restriction upon the telco's right to property. The restriction is so severe that separation should be regarded as an expropriation. As discussed in Chapter Six, there have been many theories about expropriation, and in the jurisprudence of constitutionality in the Official Interpretations and scholarly discussion consensus has been reached by focusing upon the special sacrifice (*Sonderopfer*) theory. Under this theory, the right to property has its social obligations and should bear a certain degree of restriction; but where a restriction that imposes burdens upon one that are much heavier than upon others so that such situation constitutes a violation of the principle of equity, such a restriction should be regarded as an expropriation, or a property right restriction that should be

compensated. In other words, unlike the jurisprudence of constitutionality and scholarly discussions in Germany, which limit the scope of expropriation to the deprivation of the ownership, the consensus in Taiwan is that as long as a restriction exceeds the social obligation of the right to property, such a restriction becomes an expropriation.⁴⁷

As such, after the consideration of the burdens of separation imposed upon the incumbent telco, such as the severe restrictions to exercise its right to property and other supplementary obligations, and when compared with other telcos, the said burdens constitute an excessive interference and thus violate the equality before the law. Therefore, separation should be deemed to be an expropriation under Taiwanese law.

According to the discussion in (3.3) of this chapter and Chapter Seven (2.2.2), for an expropriation to be constitutional, the consensus of Taiwanese constitutional jurisprudence and scholarly discussions is that there are some special conditions to be met, by contrast with other interferences with property rights. These conditions are:

- (1) the expropriation should be provided for by law (the principle of rule of law);
- (2) the expropriation should have more than a legitimate aim.;
- (3) the expropriation should be for compelling or distinct public interest;
- (4) there should be supplementary measures, i.e., compensation provisions about the compensation to the expropriation; and
- (5) the expropriation measures should be proportionate to their legal aims, or be imposed via the least harmful method available (principle of proportionality).

⁴⁷ See Official Interpretations No.400, No.440, No.516 and No.652.

These conditions are in fact an enhanced version of the proportionality test. Thus, the constitutionality of separation, as an expropriation, will be examined using these requirements:

(1) Provided for by Law

This requirement is the same as the normative review above—rule of law, but more specific and intensive. According to the theory of substantiality, as discussed in Chapter Five (2.4.1), the principle is that the more important the fundamental rights involved, or more severe the interference with fundamental rights, the higher the requirement of the rule of law, or statutory reserve, to be specific;⁴⁸ for substantive matters, the restrictions or interference can only be provided for by law.⁴⁹ In the case of separation, as it should be defined as an expropriation, the imposition can only be provided for by law. As stated in Official Interpretation No.440:

"...if the harm caused to people's property rights by state power exceeds the extent of social function, and constitutes a special sacrifice, a reasonable compensation should be granted..."

"...since the owner of the land cannot freely use his own land, which constitutes a special sacrifice, *the State should expropriate the land in accordance with the law and grant the compensation...*"⁵⁰(emphasis added).

⁴⁸ Official Interpretation No.443.

⁴⁹ Official Interpretation No.614.

⁵⁰ It should be noted that the "official" translation of this particular Official Interpretation is incorrect and misleading. The provisions cited here is translated by author.

In the present case, the proposed separation provision in the drafted amendment to the current Telecommunications Act is in a single article (Article 25) and states:

"To promote the substantial effective competition in the fixed network market, if a relevant effective competition cannot be achieved within a certain period of time after the amendment of this Act, the regulator may impose necessary measures such as structural or functional separation to the dominant operator in the fixed-line market. The dominant operator cannot evade or reject such obligations.

The certain period of time, the assessment of relevant effective competition, the methods of implementing structural or functional separation and the obligations of the dominant operator in the first paragraph should be decided by the regulator."

Since, in a case of expropriation, the provision should be provided for by law, such statutory delegation should not be deemed constitutional, not to mention compared to the less severe interconnection and local-loop unbundling, because such delegation is not sufficiently precise and specific.⁵¹

(2) Requires More than a Legitimate Aim

Similar to the jurisprudence of European Courts, sometimes the Grand Justices merely state one or some of the requirements of the principle of proportionality, such as a legitimate aim; in Official Interpretation No.409, the Grand Justices reaffirmed that the principle of proportionality is an objective-measure analysis. While confirming Article 108 of the Land Act and Article 48 of Urban Planning Law are to specify the

⁵¹ Compared to this, the Land Expropriation Act, which is of the same nature of expropriation, is far more detailed and precise. For example, with regard to the so-called zone expropriation, in Article 4, the implementation and delegation is clearly specified. See Annex II.

objectives of land expropriation,⁵² the Grand Justices went on to say: "[t]his does not mean that the State can arbitrarily expropriate land as long as it has declared a purpose and end use covered by these two articles" and should still meet other conditions, such as the measures specified in Article 49 of the Enforcement Act of Land Act.⁵³ It has therefore been commented that Official Interpretation No.409 has clarified that a legitimate objective is not enough for a regulatory measure to be legitimate, and a legitimate aim does not grant leeway for arbitrary measures, by requiring administrative institutions to take into consideration both the objective pursued and the measure adopted.⁵⁴

This requirement is of special importance in judicial practice, as the administrative departments have a common misunderstanding that an expropriation is constitutional or legal as long as public interests are involved.⁵⁵ Unfortunately, due to the vague legislative design in the drafted amendment of the separation provision, it is impossible to specify whether this condition will be met.

(3) Only for the Pursuit of a Distinct Public Interest

As in Official Interpretation No.580, where the Grand Justices dealt with legislation regarding the redistribution of land, the Grand Justices emphasised this condition by

⁵² Article 108 of Land Act reads: "The lessee shall not, even with the consent of the lessor, sublease the whole or part of the leased farm land to another person."; Article 48 Urban Planning Law reads: "Land reserved for public service facilities shall be expropriated or purchased by the operators of such public services according to related laws. Land for other public facilities shall be acquired by the concerned government or township, town or county city office through the following approaches:

1) Expropriation, 2) Zone expropriation, 3) Urban land readjustment."

⁵³ Article 49 of Enforcement Act of Land Act reads: "To the extent that the purpose of land expropriation is not impeded, land expropriation shall be undertaken in a manner that will cause the least loss to the locality and shall avoid choosing farmland whenever possible."

⁵⁴ Li, N.-T. (2006). *The Content of Human Rights Protection. Case Study of Constitution III* SanMin Publishing: 29.

⁵⁵ Chen, H.-M. (2002). *Explanation of the Constitution of R.O.C.*, San-Min Publishing: 299.

saying:

"...the Statute, considering the special historical background and the *distinct significance to the public interest* attainable through reasonable distribution of agricultural resources, is not in conflict with the constitutional principle of reliance protection."⁵⁶ (emphasis added)

(4) The expropriation-compensation connecting doctrine

As Grand Justice Hsieh pointed out in his opinion concurring with Official Interpretation No.579, this Interpretation, together with No.400 and No.425, specifies the need to observe the expropriation-compensation connecting doctrine; in other words, the expropriation is a State act of deprivation of property rights based on public need and interest and via legitimate procedures. The legislation for expropriation should meet the principle of necessity and should stipulate the grant of reasonable compensation within a reasonable period of time. In other words, where there is expropriation, there is compensation. The granting of compensation is indispensable to the expropriation of land, and this is called the expropriation-compensation connecting doctrine.⁵⁷

(5) An act of expropriation should be imposed via the least harmful method available

This requirement of proportionality is stated in the Reasoning of Official Interpretation No.440:

⁵⁶ See the reasoning of Official Interpretation No.580.

⁵⁷ See the concurring opinion to Official Interpretation No.579 by Grand Justice Hsieh, T.-C..

"Indeed, for the necessity of improving the public interest, competent organizations may legally expropriate land which has been designated for road use in city planning. However, such decisions to expropriate or purchase have to be made after taking into account the severity of the harm caused thereby, such as whether it has interfered with original uses or created dangers. Accordingly, prior to exercising their powers to expropriate or purchase, competent organizations may legally use existing roads or reserved land in city planning to bury underground facilities for electricity distribution, water supply or sewage systems. However, under the principle of proportionality, this can only be done in the least harmful places and with the least harmful methods."⁵⁸

It should be noted that, due to the severe interference of separation, if we apply the original proportionality test, the reviewing criteria should be the German Intensive Content Control or the American Strict Scrutiny Test. In other words, the Court has to decide whether the legislator's assessments or predictions about the appropriateness, necessity, and proportionality *stricto sensu* of imposing separation are substantially authentic or reliable (Intensive Content Control), or whether imposing separation is narrowly tailored to the policy objective pursued (Strict Scrutiny Test). Where there exist reasonable doubts about the authenticity or reliability of imposing separation, or the imposition of separation is not tailored to its policy objectives, the challenged legislation of separation should be deemed unconstitutional.

The policy objective of either functional or ownership separation, like local-loop unbundling, is to eliminate unfair competition and discrimination in the downstream

⁵⁸ Official Interpretation No.440.

access-network market. Following Grand Justice Hsu's light-touch policy-objectives reviewing approach, from a rational point of view, separating the access network to become an independent unit, to be established as a new access network company or even expropriated to be a department of government, can lead to the realisation of these policy objectives.

Like local-loop unbundling, separation aims to eliminate unfair competition and discrimination in the downstream access-network market; where less intensive local-loop unbundling has proven to be effective in achieving such policy objectives, it is not necessary to impose either functional or ownership separation. In other words, it is only when local-loop unbundling fails to eliminate unfair competition and discrimination in the downstream access-network market that separation should be considered.⁵⁹

However, as discussed above (3.2.2), in the current telecoms climate, it is gradually becoming questionable as to whether it is necessary to impose local-loop unbundling as several alternative technologies now offer the same if not better functions than traditional access networks. In other words, there exist alternatives to applying local-loop unbundling that are less burdensome to the owners of local loops. The same can be said of separation.

Lastly, with regard to proportionality *stricto sensu*, in Taiwan's case there have always been two contradicting opinions about whether a regulatory measure such as separation should be adopted or, to be more precise, whether there is a need to

⁵⁹ See the Draft amendment to Article 22 of the Telecommunications Act (2010).

encourage the deployment of a new set of networks – especially access networks. An objecting opinion – understandably from competing telcos, but also supported by some scholars – is that to deploy access networks is virtually and legally difficult and costly;⁶⁰ also, because Taiwan is a small island country, there is no need to deploy a duplicate set of access networks as that would be a waste of resources, and so existing networks – most if not all of which belong to the incumbent telco – should be opened to be used by competing telcos.⁶¹ On the other hand, supporting opinion, apparently from the incumbent but again also supported by some scholars, reckons that, first, because Taiwan is a small island country, it is more sensible, or at least much easier than in a larger country, to deploy a duplicate set of networks; secondly, encouraging the deployment of a duplicate set of access networks can promote infrastructure competition, which is in the long term more beneficial to citizens than service competition.⁶²

Such diverse points of view, of course, are because of the different stances held by different parties: the incumbent telco apparently hopes to maintain the integrity of the company and retain ownership of access networks so that it can rely on for providing broadband services; competing telcos, on the other hand, hope to avoid the cost of investing in a new set of networks as they do not know whether a reasonable

⁶⁰ For example, the existing networks were deployed in the state-owned eras with the public force, while the newly deployed networks should consider the strengthened local regulations and the factual difficulties to deploy a new set of network into the existing premises. For a more detailed discussion, see discussions in Chapter Three and Liu, Y. (2004). The Integration and Convergence of Telecommunications, Media and Internet. *Telecommunications*. Y. Liu; Liu, C.-J. (2005). "Analysis of the Opening of Local Loop Unbundling." *Socioeconomic Law and Institution Review*: 109-147; Lien, Y.-N. (2013). "Introduction to Communication Networks for Practitioner." 143-.

⁶¹ See for example the opinions submitted to the hearing of Telecommunications Act amendments by Taiwan Mobile Fixed Network and Far EasTone Telecom, available at:

http://www.ncc.gov.tw/chinese/files/12052/1760_24816_120525_1.pdf.

⁶² See discussions in Chapter Ten.

return can be expected.⁶³ Another significant case where such different stances lead to different points of view on the same thing is the recent practice in Australia of structurally separating (ownership separation) the access networks of the incumbent telco, Telstra, and constructing a new set of national networks.⁶⁴ The incumbent telco in Taiwan would argue that the rationale held by the objecting opinion above--i.e. it is difficult to deploy a new set of national networks--is sensible, as even a large country like Australia chose to do so, and therefore the competing telcos should not use the difficulties of deployment as an excuse not to deploy their own new networks, especially considering Taiwan is a much smaller country. At the same time, however, the incumbent will have a hard time defending the argument that such separation is not practical since, in addition to the United Kingdom, Sweden and Italy, another country has now chosen to do so.

Thus, in the present case, we can say that there still exist reasonable doubts about the proportionality *stricto sensu* of separation, i.e. whether imposing such severe interference with or restrictions upon the incumbent telco's property rights and freedom to conduct its business strikes a fair balance with the policy objectives it aims to achieve, i.e. to enable citizens to use more advanced telecoms services. From a strict perspective of review, it is also questionable whether the imposition of a separation mechanism would be narrowly tailored to its policy objectives. Thus, whether separation can pass an examination of this criterion is questionable.

⁶³ See for reference: Liu, C.-J., *et al.* (2013). "The Conflict and Balancing of the Privatisation and Liberalisation of Telecommunications--The Case Study Of ChungHwa Telecom."

⁶⁴ See ACCC (2011). Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan, available at <https://www.accc.gov.au/regulated-infrastructure/communications/industry-reform/assessment-of-telstra-ssu-draft-migration-plan> (accessed April 2016).

The constitutionality of the three telecoms forced access mechanisms in Taiwan can be construed as the chart below:

	Normative Review	Substantive Review Using German Approach	Substantive Review Using American Approach
Interconnection	O (detailed and technical supplemental rules can be delegated to administrative institutions; are specific and precise)	O (Tenability Control; the benefit and cost are proportionate and supportable)	O (Rational Relationship Test; with legitimate aims and the measure rationally lead to the realisation the aims)
Local loop unbundling	O (detailed and technical supplemental rules can be delegated to administrative institutions; are specific and precise)	? (Tenability Control; Necessity: a less onerous method may exist)	O (Rational Relationship Test; with legitimate aims and the measure rationally lead to the realisation the aims)
Separation ⁶⁵	X (statutory delegation is not allowed in expropriation)	Special Substantive Review in Expropriation	
		More than a legitimate aim: ? Compensation provisions: X Proportionality Test	
		? (Intensive Content Control; Necessity: a less onerous method may exist; there exist reasonable doubts about the accuracy of the measure)	? (Strict Scrutiny Test; whether the measure is narrowly tailored to its policy objectives is questionable)

Chart 11.1: The constitutionality of the three telecoms forced access mechanisms in Taiwan.

⁶⁵ Take Article 25 drafted amendment to the current Telecommunications Act for example.

Chapter XII Conclusion

This thesis has examined the legality and constitutionality of telecoms forced access mechanisms in the European Union and Taiwan. It began with an introduction to telecoms forced access mechanisms (Chapters Two and Three) and to the fundamental rights protection regimes in these two jurisdictions (Chapters Four and Five). It proceeded to a discussion about the two fundamental rights and freedoms most likely to be restricted by telecoms forced access mechanisms – the right to property and freedom to conduct a business (Chapters Six to Nine). In-depth analyses of the legality and constitutionality of such restrictions in the European Union and Taiwan were then conducted in Chapters Ten and Eleven, respectively. The results and findings of the analyses are discussed in this chapter.

Telecoms forced access mechanisms are found to restrict the right to property and the freedom to conduct a business of the telcos on which these mechanisms are imposed.¹ These rights are regarded as economic rights rather than classic civil or political rights in both the European Union and Taiwan, and, as pointed out in *Sky Österreich*, they are subject to a broad range of interventions via the legal framework of the European Union.² This is similar to the situation in Taiwan, as different intensities are applied by the Grand Justices in their reviews of the constitutionality of regulatory measures that affect different fundamental rights;³ even when regarding the same fundamental rights and freedoms, the intensity of review will differ when different fundamental rights come into play, e.g. when considering freedom of speech, commercial speech is

¹ See Chapters Six and Seven.

² See Chapter Seven.

³ See Chapter Three.

subject to broader intervention than political speeches.⁴

The jurisprudence of the European Courts recognises that Union institutions enjoy considerable judicial discretion when adopting regulatory measures, especially as regards sector-specific regulations and economic decisions; such regulatory measures will only be challenged where there exists a manifest error.⁵ Therefore, telecoms forced access mechanisms, being part of sector-specific regulations, will generally be upheld if ever they are brought before the Courts. Some recent cases such as *Digital Rights Ireland*, however, held that if an important fundamental right is involved, the discretion allowed should be limited.⁶ While this rationale does raise some issues, such as whether the marginal discretion in ECtHR case law can ever be analogous to the legislative discretion enjoyed by EU institutions, and whether such an analogy can be applied beyond other important fundamental rights, cases like *Digital Rights Ireland* did really open the way for a substantive review of sector-specific regulations, and it will be interesting to see whether the Court explores this field further in the future.

The same legislative discretion is also recognised in Taiwan.⁷ One might even argue that the manifest error test corresponds to the German Evident Control approach adopted in Taiwan.⁸ However, to say that the constitutionality of sector-specific regulations is never challenged would be incorrect, although they are rarely brought before the Court. An examination of the 733 Official Interpretations made thus far

⁴ See Chen, H.-M. (2002). *Explanation of the Constitution of R.O.C.*, ShanMin:163.

⁵ See Chapter Eight.

⁶ Ibid.

⁷ See Chapter Nine.

⁸ For the concept of the German judicial control system, see the discussion in Chapter Five.

does not reveal any cases that involve a substantive review of the constitutionality of a sector-specific regulatory measure. In fact, it is not just their constitutionality; regulations in the telecoms industry, either legislative or administrative, are rarely challenged in administrative or civil courts. As Shyr (2010) observes, no cases regarding interconnection have been brought before the Supreme Administrative Court, and only ten cases regarding interconnection have been brought before the high Administrative Court, among which perhaps only four were about substantive disputes, while the others concerned procedural issues.⁹ Such "obedience", as observed by the author, may be due to the complex politico-cultural structure of public service industries in Taiwan: e.g. the major shareholding in the incumbent telco, CHT, is held by the Ministry of Transportation and Communications (MOTC) and the latter has a strong influence on CHT's decision-making. There is also the historical relationship between the NCC and MOTC.¹⁰

However, if we disregard this reluctance to seek judicial review in this area, it is possible that a substantive constitutionality review of telecoms forced access mechanisms can be conducted under the Taiwanese constitutional framework. The sliding-scale approach, from US case law, suggests that the traditional intensity of review is not unshakeable, as the intensity of review should be considered along with the types of fundamental rights restricted and the intensity and manner of interference.¹¹ It is unknown to what extent this sliding-scale approach applies, i.e. whether it is applicable to sector-specific regulations in Taiwanese constitutional jurisprudence, and a ruling with regard to this issue by the Grand Justices would be

⁹ Shyr, H. (2010). "Objective-oriented Interconnection Regulations and Their Judicial Review", *Law Monthly* 61(6): 23–42.

¹⁰ For a discussion of these situations, see Chapter Three.

¹¹ See Chapter Nine.

welcome.¹²

Thus, the first finding of this thesis is that, unlike the traditional belief that sector-specific regulation should be prevented from judicial review due to the legislative discretion, in theory it is not just possible but sometimes even necessary to review the legality and constitutionality of telecoms forced access mechanisms. To be specific, the criteria of intensity of legality or constitutionality review of a regulatory measure is not decided by the classification of the regulatory measure--e.g., whether it is a kind of sector-specific regulation--but should be by the nature of the fundamental rights and freedoms involved, and the intensity of the interference to such fundamental rights and freedoms: If the regulatory measure at issue severely interferes with or restricts fundamental rights and freedoms, such as telecoms separation discussed in this thesis, even though it is a kind of sector-specific regulation, and the fundamental rights affected are the "weaker" economic rights, such a regulatory measure should still be subject to a strict legality or constitutionality review.

The analysis conducted in this thesis, with regard to the three telecoms forced access mechanisms identified, is based on the key assumption that a substantive judicial review is applicable. The first mechanism, interconnection, is found to be the least restrictive. Taking into account the policy objectives it aims to achieve, it is basically accepted that interconnection is not likely to be deemed illegitimate or unconstitutional.¹³ It should be noted that a major difference between the situation in

¹² Due to the very limited numbers of the Official Interpretations made, the only Official Interpretation with regards to the telecoms industry was No.613 Official Interpretation which was not really about telecoms regulation, but the constitutionality of the constitution of the commissioners in the telecoms regulator the NCC. This Official Interpretation is available at: http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=613 (accessed April 2016).

¹³ See discussions in Chapters Eight and Nine.

the European Union and Taiwan is that while Internet interconnections are not regulated in the European Union, they are included in interconnections in Taiwan. Caution, therefore, should be exerted when reviewing the relevant obligations imposed in order not to interfere with the freedoms of speech and information.¹⁴

With regard to LLU, there are three types within the regulatory framework of the European Union and four types in Taiwan.¹⁵ This diversity of standards reflects the rapid development of access technology, which may play an important role in reviewing the legality and constitutionality of LLU. For example, in Taiwan, as a relatively advanced country in the telecoms field,¹⁶ there exist many substitutes in the market, not just for traditional access networks themselves, but also for the functions of access networks.¹⁷ The more effective substitutes exist, the less likely it is that LLU obligations, as a significant interference in the fundamental rights and freedoms of the incumbent telco, will pass a proportionality test, especially the requirement of necessity.¹⁸

Similar to LLU, separation aims to promote competition in the access network market. However, as it constitutes the most significant interference in the incumbent telco's fundamental rights and freedoms, understandably, it will be the most disputed. This did not stop one of the separation models – functional separation – being included in the 2007 European "Telecoms Package", and it has been implemented by European

¹⁴ See Chapter Nine.

¹⁵ See Chapters Two and Three.

¹⁶ See Chapter Three.

¹⁷ For example, the currently prevailing 4G technology is not like cable networks, as a substitute for traditional access networks, but a technology that can be used on portable devices for the same Internet-connection function.

¹⁸ See Chapters Eight and Nine.

Union Member States such as Sweden.¹⁹ The United Kingdom even implemented functional separation before the said Telecoms Package came into force. Despite the severe restriction upon the incumbent telco's right to property and freedom to conduct a business, as discussed in Chapter Ten, separation, or at least functional separation, is not found to be an illegal measure, mainly due to the many obligations imposed upon the NRAs' to ensure that the implementation of functional separation is the last resort to solve the competition problems in the access market and eventually benefit the consumers. In fact, there is much more than the legal scope to be considered when implementing separation, especially the public service nature of telecoms services and the welfare of many customers, rather than just the property of a company itself.²⁰ This is why it has been commented that the most important factor of implementing separation is the co-operation of the telco itself.²¹ However, as the same commentator pointed out, even in countries that adopt separation, such as the United Kingdom, it is still necessary to impose tariff control and to monitor the quality of services. Therefore, separation does not really reduce the cost of regulation. Moreover, it is not impossible for the regulator to impose some important elements of separation without imposing actual separation. In such cases, the imposition of separation will not be deemed necessary.²²

Unlike the situation in the European Union, neither functional nor ownership separation is included in the telecoms regulatory framework in Taiwan but merely in a

¹⁹ See Chapter Two.

²⁰ See for reference: ACCC (2011), *Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan*.

²¹ Liu, P. (2011). *Research about Telecoms Separation*, Taiwan Institute of Economic Research.

²² For instance, the Italian telecoms regulator AGCOM has imposed the separation of information system between the network and retail departments of Telecom Italia. See: Telecom Italia, *Meeting with BEREC The Italian Model of EoO*: 6, available at: <http://berec.europa.eu/files/workshop2014/20140429Presentations/9.%20Telecom%20Italia%20presentation.pdf> (accessed April 2016).

single article of a proposed draft amendment. This thesis can only rely on the conditions in economic theories and the common provisions in jurisdictions where separation has been proposed. It should be noted, however, that the current draft amendment of the Taiwanese functional separation provision may be problematic, as it does not meet the requirements of rule of law.

Suppose that the requirement of normative review was found to be met, and a substantive review should be engaged. With regard to substantive review, being a sector-specific regulation, while severely interfering with fundamental rights, separation in Taiwanese constitutional jurisprudence would be subject to light-handed German Tenability Control or an American Rational Relationship Test if they were ever brought to the review of the Grand Justices.²³ This is, however, contradiction with the fact that separation is an expropriation, and should entail a high intensity of review.²⁴ A solution to this is the sliding-scale approach, under which the intensity of review of a regulatory measure is not dictated by the nature or categorisation of the regulatory measure at issue--e.g., whether they are sector-specific regulation or not--but instead by an overall consideration of the importance of the rights that are interfered with and the intensity of such interferences. In this regard, separation, being a severe interference with property rights and the freedom to conduct a business, should be subject to strict review. There should be solid evidence that imposing separation is directly related and necessary to the realisation of the policy objectives; there should be no lesser restrictions that can achieve the same result as effectively, and the measure adopted should not just strike a fair balance, but must be narrowly

²³ See Chapter Nine.

²⁴ See Chapters Six and Nine.

tailored to its policy objective.²⁵

Thus, another conclusion can be drawn by comparing the constitutionality and legality of telecoms forced-access mechanisms in these two jurisdictions, especially as regards separation. Compared with the other two mechanisms, separation constitutes much more severe interference with the right to property and the freedom to conduct a business. The reason why assessments of constitutionality and legality may differ in these two jurisdictions is because of the different institutional designs of the regimes. The European Union is a supranational organization aiming to create a single market, and so uniform application of EU law is required. Therefore, there are three key features of the European legal system, namely doctrines of supremacy, the primarily-ruling reference system and direct effect.

The doctrine of supremacy, or of primacy, was first introduced into the European legal system in the 1960s in *Van Gend en Loos*²⁶ and *Costa v ENEL*²⁷ in which the Court of Justice established that the Community Treaty created a new legal order that provided the Member States of the Community with only limited sovereign rights. In the later *Simmenthal* case,²⁸ the Court of Justice stated that when a conflict arose between the national law of Member States and Community law, Community law was supreme and national law should not apply. Later, in the aforementioned *Solange I*,²⁹ the Court of Justice stated that Community law was superior to all forms of national law, even including national constitutions. It was also in cases like *Solange I* that the

²⁵ See Chapter Six.

²⁶ Case C-26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] E.C.R. 1.

²⁷ Case C-6/64, *Costa v ENEL* [1964] E.C.R. 585.

²⁸ Case C-92/78, *Simmenthal v Commission* [1978] E.C.R. 1129.

²⁹ Case C-11/70 *Internationale Handelsgesellschaft v Einfuhr* [1970] E.C.R. 1125.

Community started to become aware that some Member States' constitutional courts might refuse to recognise the supremacy of Community law if they found it inadequate to protect fundamental rights in their constitutions.³⁰

The doctrine of supremacy is also supported by the Treaties of the European Union, such as Article 1–6 TEU. It is also stated in Declaration 17 of the Treaty of Lisbon that Union Treaties have primacy over the national law of Member States.

The preliminary ruling system was first adopted under Article 177 of the Treaty of Rome in 1957. Now in Article 267 TFEU, the purpose of a preliminary ruling is to ensure the uniform application of European Union law in national courts. The Court of Justice can make preliminary rulings to interpret the Treaties of the Union, and to validate and interpret the acts of Union institutions; if a question which may include a conflict between national law and EU law is raised before a national court or tribunal of a member state, that court or tribunal shall request a preliminary reference from the Court.

Another feature of the European Union's supranational nature is the direct effect of Union law. This doctrine has two kinds of meaning: the broad meaning (objective direct effect) is that the provisions of Union law have the capacity to be invoked before a domestic court; the narrower meaning (subjective direct effect), on the other hand, denotes that the provisions of Union law have the capacity to confer rights on individuals which can be enforced in national courts.³¹ The scope of the doctrine of

³⁰ See, the discussion in Chapter Four 1.2.

³¹ Craig, P. and G. de Búrca (2015). *EU law: Text, Cases, and Materials*, Oxford University Press, Oxford: 182; Arnull, A. (2006) *The European Union and its Court of Justice*, Oxford University Press,

direct effect has expanded over time: in *Van Gen en Loos*,³² the Court of Justice held that directives had to meet some conditions in order to have direct effect, but in the later *Van Colson*³³, directives did not need to meet any conditions because they were capable of indirect effect.

It should also be noted that other "soft laws", such as Communications, Notices or Guidelines published by the European Commission, which set out how the Commission intends to perform its role in the application of Treaty provisions,³⁴ while not binding, may, nevertheless, have practical effects³⁵ and, in essence, benefit the harmonisation of the European Union telecoms regulatory framework. A good example is the aforementioned Commission's Recommendation on Relevant Product and Service Markets in which the Commission defined the markets that are subject to *ex ante* regulations.³⁶

Another feature of the EU being a union of Member States that is distinct from being a single country is the principle of conferral. According to this principle, all the EU competences are voluntarily conferred on it by the Member States. The EU has no competences by right, and thus any areas of policy not explicitly agreed in Treaties remain the domain of the Member States. This principle is stipulated in Articles 4 and 5 TEU. A good example is the aforementioned Article 345 TFEU, which specifies that

Oxford: 172; Bruno Witte, B. "Direct Effect, Primacy and the Nature of the Legal Order" in Craig, P. and G. de Búrca (eds) (2011), *The Evolution of EU Law*, Oxford University Press, Oxford: 339.

³² *Van Gen en Loos*, *supra* n 26, para. 6.

³³ Case C-14/83, *Von Colson v Land Nordrhein-Westfalen* [1984] E.C.R. 1891, para. 28.

³⁴ For example, see the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services that aim to define a dominance position in Article 82 TEC (now Article 102 TFEU).

³⁵ F. Snyder, (1993) "Soft Law and Institutional Practice in the European Community", EUI Working Papers. (Law) No. 93/5.

³⁶ See discussions in Chapter Two 2.2.

the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership but the EU will only interfere in the way in which these rights are exercised. All these designs of legal system are different from those of Taiwan as a single country.

As discussed in Chapter Three, Taiwan favours both the European Union and the United States as sources for regulatory policies and approaches; while, on the one hand, some policies from one jurisdiction can be used where there is shortage of examples applying those of the other, on the other hand it can be said there is no consistent system. Therefore, the choice of important policies usually becomes a cherry-picking process. As discussed in Chapter Three, the regulator NCC tends to be demanding and sometimes even dictatorial in regulating the market, especially to the incumbent.³⁷ In addition, as the NCC is in fact responsible for drafting new telecoms bills,³⁸ the policies that it chooses to adopt are usually the ones that facilitate its regulation of the market, or the ones that increase its regulatory power. One example for this is that the NCC turned a blind eye to the fact that in the United States the FCC declared in 2005 that facilities-based wireline broadband Internet access service is an information service instead of a communications service, and providers of such services are no longer required to offer access to Title II telcos, despite the high similarity of the legislative design, e.g., the categorisation of telcos.³⁹ The introduction of functional separation into the draft Taiwanese amendment bill can be seen as a result of such regulatory philosophy.

³⁷ See Chapter Three (3.1).

³⁸ See Chapter Five (2.5.1).

³⁹ See: FCC (2005), "Notice of Proposed Rule Making in the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities", available at: <http://www.stepto.com/assets/attachments/2040.pdf> (accessed April 2016).

Of course, that is not to say that it is a mistake for Taiwan to adopt functional separation from the European Union; however, such an adoption, as discussed in Chapters Three and Eleven, is coarse, as the drafted amendment provision is not detailed and specific enough. For example, it proposes many uncertain legal concepts, such as "substantial effective competition", "relevant effective competition" and "a certain period of time". However, the definitions of these uncertain legal concepts, together with the procedural requirements of the regulator, remain unspecified in the draft amendment bill. Instead, the draft amendment bill leaves a very broad and rather vague discretion to the regulator. While the other two types of telecoms forced access mechanisms are relatively less severe and may be regarded as detailed and technical matters, and can be regulated by the administrative department via statutory delegation,⁴⁰ separation is a much intense interference with fundamental rights and should be regarded otherwise. Besides, while such legislative design may not meet the normative requirement, it also has an inherent constitutional risk that the NCC "grants" itself the right to regulate under the cover of statutory delegation. As discussed in Chapter Five (2.5.1), much sector-specific legislation, such as the Telecommunications Act, is in reality drafted by the relevant administrative institution, in this case the regulator NCC. The delegation of granting the right to restrict fundamental rights to the regulator in the drafted amendment, as commentators put it, is "giving the rights from one hand to another",⁴¹ and is in fact a crisis for the protection of fundamental rights.

In addition, such arbitrary legislation may be especially harmful in Taiwan's case. As

⁴⁰ See the discussions about Official Interpretation 443 in Chapter Nine.

⁴¹ Huang, M.-J. (2010). *Research of Telecoms Regulations*.

discussed in Chapter Three (3.1), the telecoms market in Taiwan is special with many specific characteristics, such as the very advanced telecoms technology development, the reluctance to invest and the relatively high CATV penetration rate. It is therefore doubtful whether such a sloppy legislative design can pass the proportionality test, especially considering one of the biggest benefits of imposing functional separation is to facilitate appropriate and effective regulation.

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Annex I NRAs' Obligations before Imposing Functional Separation

(Article 13 s Access Directive)

1. Where the national regulatory authority concludes that the appropriate obligations imposed under Articles 9 to 13 have failed to achieve effective competition and that there are important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets, it may, as an exceptional measure, in accordance with the provisions of the second subparagraph of Article 8(3), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity.

That business entity shall supply access products and services to all undertakings, including to other business entities within the parent company, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes.

2. When a national regulatory authority intends to impose an obligation for functional separation, it shall submit a proposal to the Commission that includes:

- (a) evidence justifying the conclusions of the national regulatory authority as referred to in paragraph 1;
- (b) a reasoned assessment that there is no or little prospect of effective and sustainable infrastructure-based competition within a reasonable time-frame;
- (c) an analysis of the expected impact on the regulatory authority, on the undertaking, in particular on the workforce of the separated undertaking and on the electronic communications sector as a whole, and on incentives to invest in a sector as a whole, particularly with regard to the need to ensure social and territorial cohesion, and on other stakeholders including, in particular, the expected impact on competition and any potential entailing effects on consumers;
- (d) an analysis of the reasons justifying that this obligation would be the most efficient means to enforce remedies aimed at addressing the competition problems/markets failures identified.

3. The draft measure shall include the following elements:

- (a) the precise nature and level of separation, specifying in particular the legal status

of the separate business entity;

- (b) an identification of the assets of the separate business entity, and the products or services to be supplied by that entity;
- (c) the governance arrangements to ensure the independence of the staff employed by the separate business entity, and the corresponding incentive structure;
- (d) rules for ensuring compliance with the obligations;
- (e) rules for ensuring transparency of operational procedures, in particular towards other stakeholders;
- (f) a monitoring programme to ensure compliance, including the publication of an annual report.

4. Following the Commission's decision on the draft measure taken in accordance with Article 8(3), the national regulatory authority shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive). On the basis of its assessment, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with Articles 6 and 7 of Directive 2002/21/EC (Framework Directive).

5. An undertaking on which functional separation has been imposed may be subject to any of the obligations identified in Articles 9 to 13 in any specific market where it has been designated as having significant market power in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), or any other obligations authorised by the Commission pursuant to Article 8(3).

Annex II Article 4 Land Expropriation Act: Zone Expropriation

Zone expropriation may be carried out in case any of the following circumstances applies:

1. Where all or part of a newly established urban area is to undergo development and construction.
2. Where an old urban area is to undergo renewal to meet its needs for public safety, sanitation, transportation or promoting reasonable land use.
3. Where an agricultural zone or protection zone of urban land is being changed to construction land or an industrial zone is being changed to residential zone.
4. Where any non-urban land is to undergo development and construction.
5. Where a rural community is to undergo renewal in order to improve its public infrastructure or improve public health, or coordinate with the agricultural development planning.
6. Other circumstances where zone expropriation may be carried out according to law. Where the area of development referred to in Subparagraphs 1 to 3 of the preceding paragraph has been approved by the Central Competent Authority, zone expropriation may be carried out first, and the urban planning shall be promulgated and implemented within one year after the zone expropriation has been publicly announced without being subject to the restriction set forth in Article 52 of the Urban Planning Act.

For a development project referred to in Subparagraph 5 of Paragraph 1 hereof, the land use applicant may, together with related authorities, propose the intended area of development, and submit a plan for the proposed undertaking that has been approved by its superior competent authority in charge of the relevant industry to the Central Competent Authority for approval, and proceed with the zone expropriation after the Central Competent Authority has granted its approval. After the required period for public announcement of zone expropriation has expired, the land use applicant shall complete the zone designation of non-urban land or change of land use zoning according to the land use plan.

The development referred to in Subparagraph 4 or 6 of Paragraph 1 hereof shall be undertaken in accordance with Paragraph 2 hereof, provided it involves the creation, extension or change of an urban planning project. Otherwise, the development shall be undertaken in accordance with the provisions of the preceding paragraph. Areas not adjoining each other may be merged together for the undertaking of zone

expropriation in accordance with the contents and scope of an urban planning project or the plan for the proposed undertaking, and the provisions of the preceding three paragraphs.

Regulations governing the implementation of matters such as the survey and selection of zone expropriation area, formulation and approval of expropriation plan, acquisition of lands, compensation for relocation, construction works, allocation design, cadastration arrangement, settlement of rights, financial settlement and coordination between zone expropriation and urban planning, etc shall be prescribed by the Central Competent Authority.