



## DEVELOPMENT OF THE ESSENTIAL FACILITIES DOCTRINE IN INDIA

*By: Durgesh Kumar Gandharve  
Hidayatullah National Law University,  
New Raipur*

### ABSTRACT

The term “Essential Facilities” originated *In* United States vs. Terminal Railroad Association. Now it has multiple meanings. Among countries the variance is even larger. An Essential Facilities Doctrine (EFD) specifies when the owner of an “essential” or “bottleneck” facility is mandated to provide access to that facility at a “reasonable” price. The concept of Essential Facilities requires there to be two markets, an upstream market as well as downstream market. The Competition Commission of India (CCI) in the last three years has pro-actively adjudicated a large number of matters and has made the industry sit up and take notice of huge penalties imposed. The political, economic and social environment of India has been very distinct from the western countries and this remains a very important parameter when a doctrine that has its origin in the western countries has to be applied in our context. The industries could develop only in accordance with the dictates of the Government, their development and regulation was significantly kept under control by New Delhi Government also gave special momentum to Public Sector Enterprises to grow and serve the dual role of free enterprise and welfare state.

### INTRODUCTION

The term "Essential Facilities Doctrine" originated in commentary *In* United States vs. Terminal Railroad Association<sup>1</sup>, the court imposed a duty upon firms controlling an essential facility to make that facility available to their rivals. And now has multiple meanings, each having to do with mandating access to something by those who do not otherwise get access. The variance in definitions is great. Indeed, commentators cannot even agree on which U.S. cases come within the purview of "essential facilities."<sup>2</sup> Among countries, the variance is even larger. The variance in this doctrine itself is another topic.

Essential facilities doctrine affects the market where some form own important inputs protected by copyright, patent or trade secret.<sup>3</sup> An "essential facilities doctrine" (EFD) specifies when the owner of an "essential" or "bottleneck" facility is mandated to provide access to that facility at a "reasonable" price. For example, such a doctrine may specify when a railroad must be made available on "reasonable" terms to a rival rail company or an electricity transmission grid to a rival electricity generator. The concept of "essential facilities" requires there to be two markets, often expressed as an upstream market and a downstream market. Typically, one firm is active in both markets and other firms are

<sup>1</sup> United States v. Terminal Railroad Association, 224 U.S. 383 (1992).

<sup>2</sup> WERDEN, Gregory J., *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS UNIVERSITY L.J. 441, 433-480 (1987).

<sup>3</sup> RICHARD, J. Gilbert & Carl Shapiro, *An Economic Analysis of Unilateral Refusals to License Intellectual Property*, 93 Proc. Acad. Sci. U.S.A. 12749.



active or wish to become active in the downstream market. A downstream competitor wishes to buy an input from the integrated firm, but is refused. An EFD defines those conditions under which the integrated firm will be mandated to supply.<sup>4</sup>

While essential facilities issues do arise out of purely private, unregulated contexts, there is a tendency for them to arise more commonly in contexts where the owner/controller of the essential facility is subject to economic regulation or is State-owned or otherwise State-related.<sup>5</sup> Hence, there is often a public policy choice to be made between the extension of economic regulation and an EFD under the competition laws. Further, the fact of regulation of pricing through economic regulation, State-control, or a prohibition against "excessive pricing" in the competition law, has implications for the nature of an EFD.

### I. APPLICATION OF THE ESSENTIAL FACILITIES DOCTRINE

The concept of "Essential Facilities" requires there to be two markets, an upstream market as well as downstream market. Typically, active or wish to become active in the downstream market. The downstream market competitor wishes to but an input form the integrated firm, but is

<sup>4</sup> KEWALRAM, Ravi P., *The Essential Facilities Doctrine and Section 46 of the Trade Practices Act: Fine-tuning the Hilmer Report on National Competition Policy*, 2 TRADE PRACTICES L.J. 198, 188-206 (1994).

<sup>5</sup> LANG, John Temple, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, 18 FORDHAM INTERNATIONAL L.J. 439, 437-524 (1994).

refused. Thus, essential facilities doctrine comes in a way to rescue the firm and restrains such refusals.

*In United States Vs Terminal Railroad Association*,<sup>6</sup> a joint venture between railroad companies to buy and run rail terminals. The joint venture denied non-members the ability to use the terminals. Another bridge was a very expensive project as not only in river broad, its course shifts and there was only the one site where such a bridge was technically feasible for many miles. Access was vital to the railroads that had arrived after the bridge was built and the development of the rail roads an important activity in the country. The Supreme Court ordered that new railroads be given access to the bridge on terms similar to those agreed between the original railroads. The court based its decision on a finding that the non-members could not compete effectively without access to these "essential facilities".

Supreme Court of United States further gave "intent to monopolize" test *In Aspen Skiing Company Vs. Aspen Highlands Skiing Corporation*<sup>7</sup> and supplemented the essential facilities doctrine. Court held that monopoly firms are generally not obliged to engage in joint marketing programmes with competitors, but the general rule can change if the monopolist's refusals to allow the competitor to participate in co-operative venture "makes an important change in a patterns of distribution" of goods.

The essential Facilities doctrine refers to a situation where a dominant firm owns or controls a facility that is indispensable to its

<sup>6</sup>*Id.* at 01.

<sup>7</sup> *Aspen Skiing Co v. Aspen Highlands Skiing Corp.*, 472, U.S.585 (1985).



competitors and refuses to grant access to that facility. Essential facilities doctrine often overlaps with “monopoly leveraging doctrine” which refers to those situations where a company uses its monopoly power in or attempts to monopolize another market.<sup>8</sup> Though both the doctrine aims at restraining abuse of dominant position, plaintiff in an essential facility lawsuit must objectively prove that access to the facility is “indispensable” in order to compete in the market with the firm that controls the facility which is not so in case of asserting monopoly leveraging doctrine.<sup>9</sup>

## II. THE ESSENTIAL FACILITY DOCTRINE IN INDIA

The Competition Commission of India (CCI) in the last three years has pro-actively adjudicated a large number of matters and has made the industry sit up and take notice of the huge penalties it has imposed.<sup>10</sup> The role of CCI in the days to come may have an impact not only on the competitors that are the subject of an antitrust scrutiny but may well pave the way for a change in the manner of operations of enterprises, the structures of different ‘markets’ and inevitably influence the market forces in our economy. Time will determine the role it will play. It will be interesting to see how the CCI will address several key policies and regulatory issues that it will face in the

days to come. There are numerous issues that it will have to face but a leader in the pack of these issues would be its treatment of the vexed and often litigious issue of ‘essential facilities’. This issue goes right down to the theoretical underpinnings of the free market system as it will decisively pave the way for not only antitrust jurisprudence in our country but also shapes the market system.

The political, economic and social environment of India has been very distinct from the western countries and this remains a very important parameter when a doctrine that has its genesis in the western world has to be applied in our context. Since independence in 1947 till the early 1990s India remained under the License Raj and the industries were regulated and tied down by various government policies. The industries could develop only in accordance with the dictates of the Government and their development and regulation was significantly kept under control by New Delhi. Furthermore, the Government also gave special impetus to Public Sector Enterprises to grow and serve the dual role of free enterprise and welfare state. During this time the Government through the Public Sector Enterprises has developed infrastructure and various facilities. Post the liberalisation era, the industries were deregulated and private participation and investment has vastly increased. However, a natural distortion existed on the level playing field as the Public Sector Enterprises had access to their own resources and which were not immediately available to the new private entrants. It will also be worthwhile to mention that since the early days of privatisation various private players have

<sup>8</sup> Berky Photo, Inc. v. Eastman Kodak Co., 444, U.S. 1093 (1980).

<sup>9</sup> James S. Venit & John J. Kallaugh, *Essential Facilities: A Comparative Approach*, 18 FORDHAM CORP L INST 315 (1994).

<sup>10</sup> Builders Association of India v. Cement Manufacturers Association, (2012) CCI, [http://www.cci.gov.in/index.php?option=com\\_content&task=view&id=150](http://www.cci.gov.in/index.php?option=com_content&task=view&id=150).



also made significant investments in various facilities. At this juncture, various entities operating or looking to enter into a market may want to have access to the various facilities and infrastructures developed by PSUs and various private enterprises who had invested in infrastructure. The question would be whether the essential facilities doctrine should be applicable in India? This is an interesting question that CCI will face.

The issues will range from the applicability of the doctrine itself in the first case. Section 4 of the Competition Act provides that limiting markets, practices resulting in denial of market access and leverage to protect another market is specific instances of abuse of dominant position. Whether essential facilities will be covered with any of these categories will be at the forefront of the applicability of the doctrine in India. The US Supreme Court has already felt the need not to recognise the doctrine. The US Supreme Court in Verizon has also identified that there are uncertain values in forced sharing. Therefore, the principle question would be whether the doctrine should actually be applied in India. Furthermore, the Courts in India have time and again cautioned from applying principles that have been developed outside India to be applied in the Indian context. Furthermore, regard should be having to the fact that the courts in Europe have applied the essential facilities doctrine in the background of the Special Responsibility of the Dominant Undertaking, a concept that is alien to Indian jurisprudence and in the light of teleological interpretation adopted to protect the common market in Europe and the overall purpose of integration of Europe.

Should the infrastructure be a public utility or be of great public importance for the development of commerce and trade in India. Furthermore, the more important question would be on the determination of 'essentiality'. Should the facility be indispensable or should it be viable for competition. This would be a key factor and it is necessary before arriving at such a decision to balance the interest in the innovators and the investors of infrastructure else free riders may take undue advantage. Last but not the least would be to check after determining 'essentiality' when can the doctrine be applied – is it in a situation when the conduct is likely to eliminate all competition or it is likely to eliminate all effective competition in the market. In addition, crucial to the determination of this issue would be the determination of the relevant market and whether the features of essentiality and applicability of other conditions are applicable in that particular relevant market. A key ingredient of determining the abuse of dominant position under Section 4 is the relevant market. Economic tools and data will have to be clearly adduced to suggest in determining the relevant market and further it has to be used in determining the viability or essentiality of a facility.

### III. CONCLUSION

This essay has made known the various approaches that have been taken to the issue of when a monopolist or dominant firm can be mandated to provide access to a facility. The economic analysis suggests that, where there is no price regulation, the static welfare effects of mandating access can be positive or negative. On the other hand, private investment is discouraged when



there is a threat from mandatory access. Where there is price regulation, there appear to be more circumstances in which mandating access would have positive effects. Hence, the relationship between an essential facilities doctrine and economic regulation is important to an efficient formulation. Finally, the objectives of competition laws and the incidence of dual regulator/commercial actor roles greatly influence the nature of an essential facilities doctrine.

It will also not be out of place to mention that the Indian legislators or policy makers too have, whenever felt necessary mandated access to information or resources like in the case of the interconnection agreements for telecom and open access in the case of the electricity distribution. Therefore, the CCI in this circumstance when it seeks to apply the essential facilities doctrine would not only be donning the role of adjudging the illegal practices on the market but may also have to wear the cap of a policy maker. It will be interesting to see how the CCI applies this doctrine and instead of applying the doctrine in the form developed in the western jurisdictions, the Indian economic, social and market conditions should be taken into consideration while adjudging upon the access to 'essential facilities' for this is where the destiny of the essential infrastructure in India lies.

2. RICHARD, J. Gilbert & Carl Shapiro, An Economic Analysis of Unilateral Refusals to License Intellectual Property, 93 Proc. Acad. Sci. U.S.A.
3. KEWALRAM, Ravi P., *The Essential Facilities Doctrine and Section 46 of the Trade Practices Act: Fine-tuning the Hilmer Report on National Competition Policy*, 2 TRADE PRACTICES L.J. (1994).
4. LANG, John Temple, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, 18 FORDHAM INTERNATIONAL LAW JOURNAL (1994).
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