The destiny of essential facilities in India

By **Sundar Ramanathan**

Introduction

In the first three years, the Competition Commission of India (CCI) has pro-actively adjudicated a large number of matters and issued large penalties, which are under appeal but has made industry sit up and take notice[1]. CCI is now increasingly viewed as a key player in ensuring free play of market forces in our economy.[2] In the coming days, the CCI is expected to address several key policy and regulatory issues, particularly the litigious issue of 'essential facilities'. The question is *"whether the facilities developed by enterprises be shared with others who wish to enter a market* and *want to compete in it."* What are the parameters for a facility to be termed as 'essential' and when should access to such a facility be granted and on what terms? Answers to these questions will pave the way for antitrust jurisprudence in India and also determine the extent of the free market system.

International application of the doctrine

The genesis of this doctrine is traceable to the *Terminal Railroad Association* case[3], rendered in 1912 by the US Supreme Court[4]. The court considered whether a terminal railroad association that obtained control over every means of railroad access to St. Louis would be a combination in restraint of trade. The Court found that since no non-member could pass through or enter St. Louis without using the facilities as a result of the geographical and topographical conditions and as the facilities were also allowed only with the unanimous consent of all members, the actions of the terminal company would be anti-competitive. Relying on the evidence of the expert witness, the US Supreme Court concluded that the facilities were "public utility" and denial of access would adversely impact trade and commerce, accordingly that non-discriminatory access had to be provided to all users. The

[1] Section 3 and 4 were notified exactly three years ago on 20.05.2009
[2] Views of the Minister of Corporate Affairs Mr. Veerappa Moilly, available at <http://pib.nic.in/newsite/erelease.aspx?relid=84220>
[3] 224 US 383
[4] Although the case by itself does not refer to the essential facilities doctrine

next important case on the aspect of essential facilities was the *Associated Press* case[5]. The matter related to the admission policy of Associated Press (AP), an organisation of 1200 newspapers as members and whose bye laws prohibited the sale of news to non-members and additional conditions were imposed on those wishing to gain admission[6]. Justice Black rendered the majority opinion that the action was anti-competitive and would result in blocking new entrants into the market[7]. However, Justice Frankfurter who joined with the majority in his concurring majority observed that the AP unlike other commercial entities that worked for profit had a relation to public interest in dissemination of information and further turned down the objection that this would turn AP into a public utility (as opposed to a private club) because such a categorization should not come in the way of access to news and information[8].

In 2004, the US Supreme Court in *Verizon Communications Inc* v. *Law Offices of Curtis v Trinko LLP* held that the Supreme Court has never recognised the essential facilities doctrine[9]. The challenge was to the refusal to share network with competitors as mandated under the Telecommunications Act, 1996. Verizon was providing access to its network on a discriminatory manner to the detriment of the competitors and was therefore acting contrary to the provisions of the Sherman Act (the competition law statute in USA). The Court ruled that for an attempt to monopolise it is necessary to demonstrate that in addition to being a monopoly power in the relevant market[10], "the willful acquisition or maintenance of that power *as distinguished* from growth or development *as a consequence of a superior product, business acumen, or historic accident*." [11] The Court further observed that directing / compelling firms to share their infrastructure would not be in line with the underlying purpose of antitrust (competition) law as it may lessen the incentive for enterprises to invest in economically beneficial facilities. Furthermore, it will also require the Court to act as the central planners for the industry[12] and facilitate collusion among the parties[13] and impede the

[5] 326 US 1
[6] Id at Pg 10-11
[7] Id at Pg 13-14
[8] Id at Pg 29
[9] Id at Pg 410 and 411 – The Court observed they have never recognised such a doctrine (as in the essential facilities doctrine) but also observed that they do not feel the need to recognise it or to repudiate it in the circumstances of the case at hand.
[10] Comparable to the dominant position under Section 4 of the Competition Act, 2002
[11] Id at Pg 407
[12] Court observed that in such a role the Court will have to identify the proper price, quantity, and other terms of dealing - a role for which they are ill suited.
[13] Id at Pg 407 – 408. Furthermore, the Court also observed that the virtues of forced sharing are uncertain and it is difficult to identify and remedy the anticompetitive conduct.

objective of the Sherman Act. The Court also noted that because of these uncertain virtues, very cautiously and only under very limited exceptional circumstances will sharing be mandated. The Court noted that the case did not fall within these exceptions.[14] Further, it would be necessary to prove that there was no alternative access, which was not applicable in the present case."

The EU Commission has taken a more conservative position on "access to common facilities" and ruled in the *Sealink* case that the dominant undertaking should not leverage its dominant position in one market to protect its position in another market (as in the present case operating harbours and running ferries) and where the competitor is already subject to certain level of disruption by the dominant undertaking *there is a duty on the dominant undertaking* not to take any action which will result in further disruption[15]. The Commission observed finally that a competitive disadvantage could not be imposed by the dominant undertaking by altering its own schedule. It will be interesting to note that the Commission indicated that the essential facility would mean a facility which is indispensible to provide services to consumers as opposed to facility that is required to improve the competition among the competitors if access is given.

In another landmark judgment of *Magill*[16] , the European Court of Justice held that the TV broadcasters were the *only sources of the basic information* which was *indispensable* for the emergence of the new product (viz. weekly TV Guide) for which there was consumer demand and this was determinant for the relevance of the term "essential facilities". Furthermore, the Court found that there was no substitute for the said product and there was no justification for the refusal by the TV broadcasters to grant licenses for weekly TV listing and by doing so they were reserving the entire secondary market of weekly TV guides to themselves[17]. In another important case of *Oscar Bronner*, the ECJ observed that the refusal to supply raw materials or services (*which were indispensible to carry on the rival's business*) to an undertaking competing with the dominant undertaking was previously held abusive by the ECJ in the context where the conduct was likely to eliminate all competition on that part of the undertaking[18]. The Court held that other modes for distributing newspaper even though

[14] Id at Pg 409-410
[15] Id at Para 41 and 42
[16] Cases C-241/-1/91, P, RTE & ITP v Commission [1995] 4 CMLR 718
[17] Id at Para 37
[18] Id at Para 41

less advantageous existed and was used by other newspaper publishers[19] and there were not technical, legal or economic obstacles for the newspaper publishers to develop their own nationwide home delivery scheme for distributing newspapers[20]. In this background, it was held that the refusal by the dominant undertaking to provide access to its distribution / home delivery system was not an abuse of a dominant position.

In the judgment of the Court of First Instance (CFI) in the *Microsoft* case[21], relating to the non-disclosure by Microsoft of interoperable information, the Court held that the standard that has to be used is with reference to what is necessary to *remain viable on the market*[22]. The CFI justified this on the basis of the jurisprudence of ECJ which imposed *a special responsibility on the dominant undertakings* not to impair genuine undistorted competition in the market[23]. The CFI then found that the finding of the Commission that the 'interoperability with the client PC operating system is of significant competitive importance in the market for work group server operating systems' was correct and Microsoft could not prove otherwise[24]. The CFI held that the objective would not be served if the Commission were to wait till there is no competition in the market and the test to be applied was whether the refusal was "likely to eliminate all effective competition"[25]. Finally the Court observed that such practice would amount to an abuse of a dominant position. It will be relevant to observe that the Microsoft judgment has to be viewed in the light of the specific market situation it dealt with (viz. software and high technology market which was characterised by network effects) and that the actions of Microsoft would have had an effect in future on the market.

Applicability of the doctrine in India

The political, economic and social milieu of India is quite different and distinct from the western world and this is relevant when such a doctrine is applied to the Indian context. Until the early 1990s India was governed by the License Raj that penalised industries for producing more than the quantities prescribed in the license. Moreover, state funded and owned enterprises were allowed a monopoly in most industries from bread, oil and gas, power, telephones to airlines. When reforms were introduced in 1991, public sector

[19] Id at Para 43
[20] Id at Para 44
[21] Case T-201/04, Microsoft v Commission [2007] ECR II-2601
[22] Id at Para 229
[23] Ibid
[24] Id at Para 381
[25] Id at Para 563

enterprises had access to their own unique resources that were not made available to private enterprise, which had to invest significant sums running into billions of dollars in creating its own infrastructure but managed to generate profits over time. The question is whether these companies can now be compelled to share their facilities built at a huge cost on a fair and non-discriminatory basis to new entrants to piggy back on their investment in the name of promoting competition. Another larger question is: in a resource scarce country like India, whether it is prudent to duplicate facilities or compel companies to share the same but on terms that are reasonable and fair to all concerned. Where does one draw the line and is it within the scope of CCI to go beyond legalese and rule on equity and efficiency? 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 are specific instances of abuse of dominant position. Whether essential facilities can be covered under any of these categories will be one of the issues at the forefront. The US SC in *Verizon* has also identified that there are uncertain virtues in forced sharing. Furthermore, it will only be a basis for substitution/transfer of profit of one organisation to another organisation. The next would be when should the doctrine be applied – should the infrastructure be a public utility or be of great public importance for the development of commerce and trade in India. It is necessary to balance the interest of the innovators and the investors in 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 (*Magill* or *Oscar Bronner*) or it is likely to eliminate all effective competition in the market (as in *Microsoft* judgment).

Furthermore, regard should be had 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 the effects and measures to protect the common market in Europe. It will also not be out of place to mention that the Indian legislators / policy makers too have, wherever felt necessary, specifically mandated access to information / resources like in the case of the interconnection agreements for telecom and open access in the case of the electricity distribution. Therefore, the CCI may well have to go beyond the law and opine on policy as well, which it may be well equipped to do, since many of its members have been in very senior positions in the government and have in the past formulated policy. It will be interesting to see how the CCI

applies this doctrine and the author feels that instead of applying the doctrine in the form developed in the western jurisdictions, the Indian economic, social and market conditions are taken into consideration while adjudging upon the essential facilities doctrine for this is where the destiny of the essential infrastructure in India lies.

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