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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 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

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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

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.

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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 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 less advantageous existed and

[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.

[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

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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 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

[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

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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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CIRCULARS & RULES

Forex retention limit in EEFC, reduced

The limit for retention of forex earnings in the EEFC account with any AD in India has been amended by the Reserve Bank of India. Now an exchange earner is eligible to retain 50% (as against the previous limit of 100%) in such non-interest bearing accounts. The balance 50% has to be surrendered for conversion to rupee balances. A.P. DIR Circular No. 124 dated 10th May, 2012 issued in this regard states that the EEFC account is only to enable exchange earners to save on conversion/transaction costs while undertaking forex transactions in future and not to maintain assets in foreign currency, as Indian Rupee is not fully convertible on Capital Account. EEFC account holders will be permitted to access the forex market for purchasing foreign exchange only after utilizing fully the available balances in such accounts. It has been further clarified by RBI Circular No. 128, dated 16-5-2012 that available balances in the EEFC account for conversion may be arrived at by netting off earmarked amounts on account of outstanding forward/option contracts booked before May 10, 2012.

Utilization of ECB proceeds for Rupee expenditure

ECB proceeds are available to be utilized for permissible foreign currency expenditure and Rupee expenditure. As per RBI A.P. (DIR Series) Circular No. 119 dated 7th May 2012, it has been decided that at the time of availing Loan Registration Number (LRN) from the Reserve Bank, borrowers should provide bifurcation of the utilization of the ECB proceeds towards foreign currency and Rupee expenditure in Form-83. They should also ensure, along with the AD bank, that ECB proceeds meant for Rupee expenditure are repatriated in India for credit to Rupee account immediately after drawdown.

Foreign Direct Investment – RBI issues circulars to implement FDI policy

In line with the latest consolidated FDI Circular issued by the Department of Industrial Policy and Promotion in the Ministry of Commerce, RBI, by Circular No. 120, dated 8th May, 2012, states that equity shares/preference shares cannot be issued under the Government route against import of second hand machinery. The restriction is intended to promote use of latest technology which is environment-friendly and energy efficient. By

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Circular No. 121, dated 8-5-2012, RBI clarifies certain other changes notified in the FDI document last month when it states that Government approval would not be required for investment by registered FIIs in commodity exchanges and that FDI is permitted only in 'financial leases' (financial leasing activity) and not in 'operating leases' (operating leasing activity) in case of NBFC activities wherein FDI up to 100 per cent is permitted under the automatic route, subject to minimum capitalisation norms.

Specified information acceptable from defaulting companies

Information from defaulting companies cannot be accepted by Registrar of Companies as per earlier instructions till such companies file updated balance sheet and annual returns. These instructions were modified to provide for acceptance of certain event-based information. In another round of relaxation, by Circular No. 9/2012 dated 15th May, 2012, Ministry of Corporate Affairs has stated that Form No. 8 and Form No. 10 (for modification of charges under SARFEASI Act) and Form No. 17 on particulars of satisfaction of charge, will be accepted from defaulting companies.

Unclaimed amounts of investors – New rules notified

New Investor Education and Protection Fund (Uploading of Information regarding Unclaimed and Unpaid Amounts lying with Companies) Rules, 2012 have been notified from 20th May, 2012. As per these provisions, every company shall, within the specified period, identify and upload information on unclaimed amounts of investors. Such information shall be made available using the specified form in both the company's website as well as MCA's website. For the FY ended 31st March, 2012, such information shall be provided by 31st July, 2012.

RATIO DECIDENDI

Land development qualifies as 'Service' under Consumer Protection Act

The Supreme Court of India, in a recent judgment, has held that a company which promotes ventures for development of lands into house-sites would qualify as a 'service provider' under the Consumer Protection Act, 1986. The Court while upholding the judgment passed by the lower court observed that the company, in the present case, offering plots for sale to its customers/members with an assurance of development of infrastructure/amenities, lay-out approvals etc. was providing "service" within the meaning of clause (o) of Section 2(1) of the Consumer Protection Act and would, therefore, be within its purview. It was observed that the nature of the transaction involved much more than a simple transfer of a piece of immovable property and that further it was not a case where the company was selling the given property with all advantages and/or disadvantages on "as is where is" basis. The Court noted that assurances were made to the purchasers as to the nature and extent of development that would be carried out by the company as part of the package under which sale of fully developed plots with assured facilities was to be made for valuable consideration and hence the company had undertaken to provide service and that deficiency or defect in such service would make the company accountable before the competent consumer forum [*Narne Constructions Pvt. Ltd.* v. *Union of India* – C.A. No. 4432-4450 of 2012, decided on 10-5-2012].

Regulations of Motion Picture Association held anti-competitive

The Competition Commission of India has held that the Motion Picture Association through its terms of Memorandum and Article of Association had entered into anti-competitive agreement which was causing an appreciable adverse effect on competition inasmuch as they limit and control the distribution and exhibition of films in its areas of operation. The Commission before holding so, while relying on an earlier order in the case

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of the party, also held that the conduct of the Association cannot be subject matter of examination under Section 4 and Section 3(4) of the Competition Act as the Association was not an 'enterprise' within the meaning of Section 2(h) and there was no vertical agreement between the association and the informer. The Commission however held that the rules, regulations and byelaws of EIPMA which are in essence forms of various trade practices carried on by the association and are manifestation of collective decisions of its constituent members are liable for examination under Section 3(3). The Commission therefore passed a 'Cease and Desist' order directing the Motion Picture Association to dispense with the rules that are anti-competitive. The Commission however did not impose a penalty as a penalty had been imposed previously on a similar issue [*UTV Software Communications* v. *Motion Pictures Association* – Case No. 9/2011, decided on 8-5-2012].

'Debarred from accessing capital market' – Scope clarified

The Securities Appellate Tribunal, in a recent order, has held that the words 'debarred from accessing the capital market' in Regulation 4(2) of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 will take within its fold, the words 'restraint on issue of equity shares or any other instrument convertible into equity shares or altering the capital structure in any manner'. In the present case SEBI (Board) had passed an order restraining one of the promoters of the appellant from issuing equity shares or other instrument convertible into equity shares or altering its capital structure in any manner. The application of the appellant for rights issue was rejected by the Board relying on Regulation 4(2) ibid. which prohibits an issuer from making a public issue or rights issue of specified securities if the issuer or any of the promoters, promoter group or directors or persons in control of the issuer are debarred from accessing the capital market by the Board. The Tribunal while holding that the Board was justified in denying clearance to the offer document, observed that the word 'debarred' used in Regulation 4(2) cannot be given a restricted meaning of complete prohibition only and that such prohibition can be partial, interim, ad-interim or in any other form during the time when request for public issue or rights issue is under consideration either with the Board or filing of the document with the Registrar of Companies [*SRM Energy Ltd.* v. *SEBI* – Appeal No. 77 of 2012 decided on 18-5-2012].

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