

THE ESSENTIAL FACILITIES DOCTRINE - A POTENT TOOL FOR MITIGATING THE RIGOURS OF SOCIALLY PERNICIOUS BEHAVIOUR OF MONOPOLISTS

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ABSTRACT

Since its inception in 2009, the Competition Commission of India, (“CCI”), has played a proactive role in promoting the vitality of market forces and has spearheaded a fast-growing competition law regime with remarkable clarity and foresight to protect the market from incipient challenges. The decisions of the CCI are symbolic of the regulator’s desire to repair the damage emanating from years of protectionist laws and to bring the Indian competition law regime at par with its western counterparts. Even though the CCI’s quality of analysis and clarity of decisions has been widely appreciated, the regulator has garnered intense criticism for its reticence in using more complex and sophisticated doctrines in order to fully appreciate the nuances that shape and influence the decisions and policies of competitors in a market. This inability has prevented the CCI from fully effectuating the idea of fostering a culture of competition and innovation that undergirds the competition law regime in India. This paper seeks to analyze one such doctrine which the CCI hasn’t fully utilized for realizing the fundamental tenets of the Competition Act, 2002 – the essential facilities doctrine. In its most basic form, this doctrine seeks to provide a competitor access to an indispensable facility without which it cannot compete in the market. Succinctly put, it recognizes that monopolists can gain an unfair advantage in a sector by denying their competitors access to a resource which is necessary for effectively competing in that market.¹ The doctrine, which is more than a century old, has been the subject of intense debate and discussion among competition lawyers, academicians and

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¹ T.A. Piraino, Jr., *An Antitrust Remedy or Monopoly Leveraging by Electronic Networks*, 93 N W. U. L. REV. 1, 6-7 (1998).

researchers² and is of immense contemporary relevance. This paper seeks to explore the efficacy of this doctrine in the Indian context. It is divided into 3 principal sections. In addition to mapping the evolution of the doctrine from a historical perspective, the first section seeks to lay bare the legal position pertaining to the doctrine in some key jurisdictions. The second section succinctly examines extant laws in India in which the doctrine finds expression and explores their efficacy and ramifications. In the third section, the authors argue that the doctrine can act as a potent tool for countervailing the pernicious effects of anti-competitive behaviour. Apart from expatiating upon the principal arguments in favour of and against its wider application, they succinctly describe the cases in which the CCI has dealt with the doctrine and discuss the modalities for its implementation in India.

1. THE ESSENTIAL FACILITIES DOCTRINE: AN ANALYSIS OF ITS CONTOURS

It is a well-settled principle of competition law that mere possession of monopoly power is not *ipso facto* unlawful. On the contrary, it is a crucial element of the free-market system that many countries subscribe to. The opportunity to enjoy the advantages of monopoly power is what attracts business acumen and promotes risk taking that lies at the heart of innovation and economic progress.³ That being said, when that dominant position is used to employ “methods different from those which condition normal competition”, abuse of dominance takes place.⁴ As a result, the actions of competition regulators are actuated by the primary objective of preventing monopolists from preserving their monopoly in a market by unlawful means or using that monopoly power to expand into another market by resorting to a constellation of satellite concepts such as refusal to deal/supply, price squeeze, monopoly leveraging, etc. Competition laws across the globe unequivocally recognize that an organization is free to act in any manner it deems fit within the confines of the law. This implies that the organizations are free to deal with whomsoever they want and, conversely, to refuse to deal for justifiable business reasons.⁵ However, it would be fallacious to assert that the high importance attached to the right of refusal to deal implies

² R. Whish, *Competition Law*, 691 (6th Edn., 2009).

³ *Verizon Communications v. Law Offices of Curtis V. Trinko LLP* 540 U.S. 398 (2004, Supreme Court of the United States).

⁴ J. Faull and A. Nikpay, *The EC Law of Competition*, 350 (2nd Edn. 2007).

⁵ *United States v. Colgate & Co.* 250 U.S. 300 (1919, Supreme Court of the US).

that the right has no exceptions.⁶ Determining when a refusal to deal is tantamount to abuse of dominance and when it is lawful has been “one of the most unsettled and vexatious issues in the antitrust law.”⁷ An analysis of all the contexts in which a refusal to deal amounts to abuse of dominance is beyond the scope of this paper. This paper specifically analyzes circumstances in which the refusal to deal pertains to a facility sans which a certain kind of business cannot be conducted.⁸

The essential facilities doctrine obliges a firm controlling an essential facility whose duplication is not possible or feasible to deal with its competitors with the goal of providing them access to such a facility.⁹ Cases involving the essential facilities doctrine are a subset of the refusal to deal cases.¹⁰ Let us take an example from the aviation sector. In order to be able to function effectively, an airline requires access to landing lanes and underground pipes that are needed for refueling aircrafts. In such a case, the essential facilities doctrine is invoked to mandate the sharing of these facilities.¹¹ Notably, this doctrine can only be invoked if the competitor wanting to access the essential facility can show that the facility is not available elsewhere. Furthermore, the doctrine is not an independent cause of action; it has to be part of a monopolization claim.¹² A highly contentious issue is the determination of what constitutes an essential facility. Herbert Hovenkamp divided essential facilities into 3 principal categories:

- i. Natural monopolies or joint venture arrangements that constitute significant economies of scale;
- ii. Productive assets possessing considerable value such as plants or structures that came into existence as a part of a regulatory regime; and

⁶ *Twin Labs v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990).

⁷ *Byars v. Bluff City News Co.* 609 F.2d 843, 846 (6th Cir. 1979).

⁸ S V Siclen, Background Note, *OECD Roundtable on the Essential Facilities Concept* OCDE/GD (96)113, 1996 available at <http://www.oecd.org/dataoecd/34/20/1920021.pdf>, last seen on 14/09/2014.

⁹ A. Massadeh, *The Essential Facilities Doctrine under Scrutiny: EU and US Perspective*, UEA Law School Working Paper Series, Working Paper Number UEA LAW WPS 2011-AM-1, UEA Law School (2011).

¹⁰ J. S. Venit and J. J. Kallaugher, *Essential Facilities: A Comparative Law Approach*, Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy (1994).

¹¹ *Supra* 4, p. 358-59.

¹² *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 257 (S.D.N.Y. 1995).

- iii. Facilities those are owned, maintained and subsidized by the government.¹³

When the doctrine was in its infancy, it was mostly applied in the context of infrastructure assets and networked goods.¹⁴ However, in recent years, it has also been applied to mandate the sharing of intellectual property assets.¹⁵ Debates about the essential facilities doctrine seek to address issues such as a situation in which sharing of the essential facility becomes necessary, the modalities for granting access to such facilities and the circumstances in which the justification of the dominant undertaking for denying access should be overlooked for the greater good.¹⁶

2. HISTORICAL PERSPECTIVE

The genesis of the doctrine can be traced back to the enactment of the Sherman Act in the United States. Even though the Act makes no direct reference to the essential facilities doctrine, it is believed that one of Congress's primary objectives at the time of enacting the Sherman Act in 1890 was to prohibit the Standard Oil Trust from denying other oil refiners access to pipelines and rail transportation facilities which were required for bringing their products to market.¹⁷ In the year 1912, the doctrine came up for consideration for the first time before the US Supreme Court in the case of *US v. Terminal Railroad Association of St. Louis*¹⁸. In the instant case, a group of 14 railroad companies, known as the Terminal Railroad Association, exclusively controlled the railroad terminal as well as the bridge linked to it in St. Louis. In a bid to thwart the competition, the Railroad Association tried to prevent competing railroads from offering transportation through the terminal. The court noted that it was impossible for any train to enter into or to pass

¹³ H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, (3rd Edn. 2005); also see Herbert Hovenkamp, *Unilateral Refusals to Deal, Vertical Integration, and the Essential Facility Doctrine*, University of Iowa Studies Research Papers Series, Working Paper Number 08-31, University of Iowa (2008).

¹⁴ B. Frischmann and S. W. Waller, *Revitalizing Essential Facilities*, 75 *Antitrust Law Journal*, 1, 8 (2008).

¹⁵ C. Ritter, *Refusal to deal and Essential facilities: Does intellectual property require special deference compared to tangible property?*, 28(3), *World Competition*, 281, 282 (2005).

¹⁶ A. Jones and B. Surfin, *EU Competition Law*, 489 (4th Edn. 2011).

¹⁷ R. Chernow, *Titan: The Life of John D. Rockefeller, Sr.*, 283-98 (1998).

¹⁸ *US v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912, Supreme Court of the US).

through St. Louis without accessing the facility that was controlled by the Terminal Railroad Association.¹⁹ Moreover, no undertaking could become a member of the association without obtaining the consent of all existing members.²⁰ The Supreme Court unequivocally recognized the indispensable role that is played by terminal companies for effectuating the goal of public welfare²¹. Against this backdrop, the Supreme Court held that, in the prevailing circumstances, it was necessary for the Association to act in an impartial manner so as to preserve the freedom of trade and commerce among states.²² As a result, the court asked the Association to provide all non-members access to the terminal facility on just and reasonable terms in order to allow them to compete on a footing of equality with the companies controlling the terminal²³. Interestingly, the court did not specifically refer to the essential facilities doctrine by name. The second significant case which is often cited in modern literature pertaining to the doctrine was the *Associated Press case*.²⁴ The Associated Press (hereinafter “AP”) had a discriminatory policy of sharing the news that it collected only with its members. Moreover, existing members were given complete authority to block the entry of new members²⁵. The Supreme Court emphatically asserted that this policy of the AP was in restraint of trade as it was clearly designed to stifle competition in the market²⁶. Justice Frankfurter, who delivered a concurring opinion in the case, hinted to the essential facilities doctrine by emphasizing the obligation of the AP to freely disseminate the news that it possessed for public welfare²⁷. This was the first case in which a non-infrastructure asset i.e. membership of the AP was viewed as an essential facility for competing in a market. Similarly, the first case in which the principles of the doctrine were invoked in the European Union was the *Commercial Solvents case*.²⁸ The aforementioned case pertained to a fact situation in which Commercial Solvents, a chemical firm, refused to supply raw materials to the players in the downstream market for manufacturing in which Commercial Solvents was itself a

¹⁹ Ibid, 397.

²⁰ Id, 399-400.

²¹ Id, 402.

²² Id, 405.

²³ Id, 411.

²⁴ *Associated Press v. US*, 326 U.S. 1 (1945, Supreme Court of the US).

²⁵ Id, 10-11.

²⁶ Id, 19.

²⁷ Id, 29.

²⁸ Cases 6/73 and 7/73, *ICI and Commercial Solvents v. Commission* ECR 223, CMLR 309 (1974, European Court of Justice).

player through a subsidiary. Although the European Court of Justice did not directly invoke the essential facilities doctrine, its decision in holding that Commercial Solvents' refusal to deal was unlawful has been interpreted as recognition of the raw materials in question as an essential facility.

3. LEGAL POSITION OF THE ESSENTIAL FACILITIES DOCTRINE IN THE US

Even though cases like the Terminal Railroad case, and the Associated Press case grappling with the "refusal to deal" principle are believed to be within the auspices of the essential facilities doctrine. The first case in which the doctrine was clearly articulated by a US court was *MCI Communications Corp. v. ATT*.²⁹ In this case, MCI contended that ATT had refused to allow MCI to connect its telephone lines to ATT's nationwide telephone network which was an indispensable facility for MCI to be able to compete in the long-distance telephone business. The court laid down a 4-factor test for cases grappling with the essential facilities doctrine. The factors are:

1. Control of the essential facility by a monopolist;
2. A competitor's inability practically or reasonably to duplicate the essential facility;
3. The denial of the use of the facility to a competitor; and
4. The feasibility of providing the facility.

After applying these factors, the Court concluded that it was technically and economically feasible for ATT to provide MCI access to its facility and that ATT's actions amounted to unfair monopolization. American courts have generally adopted a narrow interpretation of the 4-factor test. They have held that a facility does not become essential merely if it is economical, so "a plaintiff must show more than inconvenience, or some economic loss; he must show that an alternative to the facility is not feasible"³⁰. So, for example, access to a hospital's facilities is not considered essential if the plaintiff can treat a large portion of his patients in his own clinic.³¹ An absolute denial to provide access to the

²⁹ *MCI Communications Corp. v. ATT*, 708 F.2d 1081, 1132 (7th Cir.), Cert. Denied, 464 U.S. 891 (1983, Supreme Court of the US).

³⁰ *Supra* 6.

³¹ *McKenzie v. Mercy Hosp. of Independence Kan.*, 854 F.2d 365 (10th Cir. 1988).

facility as well as a constructive denial i.e. providing access at an exorbitant rate or on unreasonable terms would satisfy the third factor laid down in the test.³²

The determination of the fourth factor has to be made in accordance with the facts of every case; no consistent themes have appeared in competition law jurisprudence so far in this regard. Scholars in the United States have repeatedly sought to problematize the use of the doctrine and have vehemently argued in favour of clearly defining its scope and limits.³³ Furthermore, many experts have subscribed to the view that the refusal to deal principle should be suitably altered to provide adequate remedies against the abuse of dominance instead of formulating doctrines whose use may have many unintended consequences.³⁴ Similarly, courts have been averse to the idea of holding undertakings that refuse to share their patented or copyrighted inventions liable under the Sherman Act.³⁵ In a move that was widely hailed by critics of the doctrine, the US Supreme Court in the case of Verizon Communications Inc.³⁶ stated that it had never officially endorsed or accepted the doctrine, which, it claimed, was crafted entirely by lower courts.³⁷ In this case, the question that the court was required to address was if Verizon's refusal to share its telecom network which it was mandated to share in accordance with the Telecommunications Act of 1996 was violative of the Sherman Act or not. The court cited the uncertain virtues of forced sharing and the difficulties associated with curbing anticompetitive conduct by single firms as justifications for its circumspect approach in the context of the doctrine.³⁸

Finally, the court stated that the application of the doctrine would not only reduce the incentive for businesses to invest in infrastructure assets, but would also require the court to closely supervise sharing arrangements and to act as central planners for the industry. Even though the Court did not completely repudiate the doctrine, it significantly undermined the potential of this doctrine being invoked

³² Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 544-545 (4th Cir.), cert. denied, 502 U.S. 814 (1991, Supreme Court of the United States).

³³ P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 (3) *Antitrust Law Journal*, 841-853 (1989).

³⁴ *Supra* 13, 336.

³⁵ American Bar Association, *Antitrust Law Developments*, 266 (6th Edn. 2007).

³⁶ *Supra* 3.

³⁷ *Ibid*, 410-411.

³⁸ *Id*, 407-408.

against monopolists. The hostile approach of US courts to the doctrine can be attributed to several important factors. First, the US is believed to be a vehement supporter of the Chicago School of Antitrust Analysis, which is predicated on the notion that markets are self-correcting mechanisms, and, therefore, regulators should not interfere with their functioning unless it is absolutely necessary to do so.³⁹ Second, the United States has traditionally been one of the strongest advocates of stricter norms to protect the interests of large investors, so the idea of the essential facilities doctrine is inconsistent with the worldview that the US subscribes to. Finally, it is believed that sectoral regulators possess the expertise to provide industry-specific solutions and are, therefore, ideally positioned to deal with such issues.⁴⁰

4. LEGAL POSITION OF THE DOCTRINE IN THE EUROPEAN UNION

On the other side of the Atlantic, courts have viewed the doctrine more favourably and have openly embraced its virtues in several contexts. Scholars believe that courts in the EU have consistently subscribed to the view put forth by the ECJ in the *Commercial Solvents* case mentioned earlier.⁴¹ The first case in which the ECJ explicitly dealt with the doctrine was the *Sealink* case⁴². In the instant case, the defendant, Sealink, not only ran its own ferries, but also owned and controlled the Holyhead Port. In exercise of its powers as the controller of the port, Sealink decided to alter the sailing time of its ferries as a result of which BI, one of Sealink's competitors, had to endure considerable hardship. More specifically, the loading and unloading of BI's ferries was constantly interrupted by the arrival and departure of Sealink's ships. After carefully analyzing the facts, the ECJ held that any efforts made by the undertaking controlling a facility, without which its competitors cannot compete in a given market, to either deny to its competitors access to such a facility or to provide access on terms less favourable than those that govern the dominant undertaking's access to such a facility is unlawful. An interesting case in which the ECJ was required to rule on

³⁹ R. A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 938-44 (1979).

⁴⁰ R. Pitofsky, *At the Glasser Legal Works Seminar on Competitive Policy in Communications Industries*, Washington, D.C., Competition Policy in Communications Industries: New Antitrust Approaches (10/03/1997).

⁴¹ *Supra* 15.

⁴² *Sealink/BI Holyhead: Interim Measures* (1992, European Court of Justice).

the applicability of this doctrine in the context of intellectual property was *IMS Health*⁴³. In the instant case, IMS Health refused to share the 1860 Brick Structure that it had developed for collating and analyzing market data pertaining to the German pharmaceutical industry with its competitors. The court opined that the conduct of IMS Health was tantamount to denial of access to an essential facility and ordered the sharing of the Brick Structure. Another important case, which sheds some light on the standard of essentiality that the ECJ has adopted, is the *Magill* case.⁴⁴ Magill, an Irish publisher of TV guides, tried to obtain copyrighted program listings from the 3 stations that published their own program guides for preparing its weekly TV guide. The ECJ noted that the information contained in the program guides was indispensable for the publication of weekly TV guides and held that the refusal of the broadcasters to provide access to the information without any reasonable justifications amounted to abuse of dominance. Courts in the EU have generally adopted a 3-step test to deal with cases of this sort. The steps are:

- i. The refusal is preventing the emergence of a new product for which there is a potential consumer demand;
- ii. The refusal is not justified by an objective consideration; and
- iii. The refusal will exclude/eliminate any or all competition in the secondary market.

The capacious scope of the doctrine in the EU is clearly evidenced by the decision of the court in the *Microsoft case*.⁴⁵ The court held that Microsoft's refusal to supply interoperability information which was necessary for software developers to allow their applications to work on the Windows operating system amounted to abuse of dominance and directed Microsoft to supply the information within the prescribed time period. The liberal interpretation of the doctrine by European courts can be attributed to three principal factors. First, the highest goal of the competition law regime in the European Union is to preserve competition and to remove any impediments that may impede market competition. This is in sharp contrast with the approach adopted by some other jurisdictions in which the competition law regime serves the

⁴³ *IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG* ECR I-5039 (2004, European Court of Justice).

⁴⁴ *Case C-241/91 P & 242/91 PRTE & ITP v. Commission* [1995] 4 CMLR 718 (1995, European Court of Justice).

⁴⁵ *Case T-201/04, Microsoft v. Commission* [2007] ECR II (2007, European Court of First Instance).

primary purpose of consumer welfare. Second, dominant undertakings in the EU have special responsibilities which prevent them from acting like non-dominant undertakings.⁴⁶ As a result, they have a peremptory obligation not to engage in any action which results in the distortion or foreclosure of competition.⁴⁷ Finally, the threshold that must be met for an undertaking to be considered a dominant undertaking is relatively lower in the EU in comparison to the US.⁴⁸ However, it would be incorrect to say that European courts have given themselves *carte blanche* to apply the doctrine without appreciating the facts of every case. This is best evidenced by the decision of the court in the *Oscar Bronner case*.⁴⁹ The court was faced with the challenge of deciding whether a national newspaper home delivery service was an essential facility. The court held that the doctrine cannot be invoked when the access is merely convenient or desirable; it must be indispensable to stay alive in the market. Since other modes of newspaper delivery were available, the court refused to invoke the doctrine. Recent guidelines issued by the Commission reaffirm the Commission's commitment to invoking the doctrine as an enforcement priority when consumers or competitors are likely to be harmed by lack of access to the essential facility.⁵⁰

5. LAWS IN INDIA MANDATING SHARING OF FACILITIES

Even though the essential facilities doctrine has not yet been explicitly invoked in India in the context of competition law, the doctrine is, by no means, a *tabula rasa* in the Indian legal system. The clearest manifestation of the principles underpinning the doctrine can be found in the Indian Patents Act, 1970. Similarly, many sectoral laws also explicitly recognize the doctrine. The open access regimes that these laws entail have been designed in accordance with market structures, technological frameworks, ownership patterns and regulatory experiences of each sector.

⁴⁶ E. Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law*, 71 (2010).

⁴⁷ Case C-322/81 NV Nederlandsche Banden-Industrie Michelin v. Commission [1983] ECR 3461, para. 57 (ECJ).

⁴⁸ See B. A. Facey and D. H. Assaf, *Monopolization and abuse of Dominance in Canada, The United States and The European Union: A survey*, 70 *Antitrust Law Journal*, 513 (2003).

⁴⁹ Case C-7/97 Oscar Bronner v. Mediaprint Zeitungs (1998) ECR I-7791 (1998, European Court of Justice).

⁵⁰ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 24th February, 2009, available at http://eurlex.europa.eu/legalcontent/EN/TXT/?uri=uriserv:OJ.C_.2009.045.01.0007.01.ENG, last seen on 30/09/2014.

5.1 Compulsory licensing regime under the Indian Patents Act

In its most rudimentary form, a compulsory license is an authorization by the state that enables a third party to access a patented invention without the patent holder's consent. In one sense, a compulsory license can be viewed as a broader concept than the essential facilities doctrine because it can not only mandate the sharing of assets enjoying intellectual property protection that are essential facilities, but can also be used to mandate the sharing of facilities that are of great public value such as life-saving medicines and inventions for the protection of the environment. On the other end of the spectrum, the essential facilities doctrine can also be viewed as a broader concept because it can be invoked to mandate the sharing of a large array of assets, not just intellectual property. Section 84 of the Indian Patents Act, 1970 delineates 3 conditions in which a compulsory license can be granted after three years of the grant of the patent: If the reasonable requirements of the public for the patented product are not satisfied, if the invention is not made available to the public at a reasonably affordable price and, finally, if the invention is not "worked" in the territory of India. The Act also makes it very clear that an application for a compulsory license should be filed only if all efforts to acquire a voluntary license fail. Compulsory licensing can be viewed as a remedy against the patent holder's refusal to deal inasmuch as it compels the patent holder to transact with the third party in question. The compulsory licensing provision has been wisely used by the Indian patent regulator to take corrective steps against the actions of patent holders that are inconsistent with the interest of the public at large. This is best evidenced by the recent *Natco Pharma Ltd. v. Bayer Corporation*⁵¹ case in which Bayer refused to provide Natco Pharma, a generic drug manufacturer in India, access to its patented anti-cancer drug Nexavar which Bayer was selling in the market at an exorbitant price. Natco filed an application to the Controller General of Patents and Designs for the grant of a compulsory license. After reviewing the pertinent facts, the Controller General granted Natco a compulsory license to sell the drug in the market at a comparatively cheaper price.⁵² The Intellectual Property Appellate Board reaffirmed the decision of the Controller General.⁵³

⁵¹ *Natco Pharma Ltd. v Bayer Corporation*, Compulsory License Application No. 1/2011 (Indian Patent Office, 09/03/2012).

⁵² A. Pandey, *Compulsory License Granted To NATCO*, Mondaq (15/05/2012), available at <http://www.mondaq.com/india/x/177328/Patent/Compulsory+License+Granted+To+NATCO>, last seen on 27/09/2014.

⁵³ *Bayer Corporation v. NatcoPharma Ltd.*, Order No. 45/2013 (Intellectual Property Appellate Board, 04/03/2013).

5.2 The Telecom Sector

The idea of open access has greater importance in the telecom sector because of the peculiar features of the sector that necessitate collaborative efforts among different undertakings in order to ensure that the fruits of innovation and progress reach the last man in the line. More specifically, it is essential to create a regime that provides for the sharing of different forms of technology such as links, nodes, communication units, systems and networks.⁵⁴ Moreover, as a few monopolists have traditionally dominated the telecommunications sector, it is essential to provide other competitors access to their facilities in order to promote facility-based competition.⁵⁵ One of the primary reasons why the Telecom Regulatory Authority of India was set up was to facilitate interconnections and other collaborative efforts among stakeholders in the telecom sector.⁵⁶ As a result, Section 11(1) (b) (ii) along with Section 11(1) (b) (iii) of the Telecom Regulatory Authority of India Act, 1997 impose an obligation on the TRAI to ensure interconnection and technical compatibility between the services that are provided by various players in the telecom sector. The TRAI is also mandated to maintain a register encompassing details of interconnection agreements between service providers u/s 11 (1) (b) (vii).

In order to facilitate sharing of resources, TRAI enacted the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations in 2004. The regulations set out the provisions governing interconnection arrangements among service providers as well as the modalities for revenue sharing. Every broadcaster is mandated to provide cable operators, direct to home operators, multi system operators, and others access to its signals on a non-discriminatory basis. Similarly, in order to streamline the procedure for interconnections, TRAI enacted the Telecommunication Interconnection (Reference Interconnect Offer) Regulations, 2002. The Regulations exhaustively enumerate details for structuring interconnection arrangements between dominant undertakings and their competitors seeking interconnection. The regulations also contain a model reference interconnect offer which sets out the terms and conditions upon which an undertaking may share its network with others. Undertakings are free to either accept the model offer entirely or to

⁵⁴ J. Singh, *Is there a Case for Essential Facilities Doctrine in India?* CIRC Working Paper Series, 11, Working Paper No. 04, Cuts Institute for Regulation and Competition, New Delhi (2013).

⁵⁵ *Supra* 11.

⁵⁶ *Supra* 54, at 11-12.

formulate an individualized interconnection offer that can meet their peculiar needs. There was considerable ambiguity about the pricing of such interconnection arrangements.

Initially, TRAI directly stipulated the price for interconnection arrangements instead of laying down cogent principles for determining an appropriate price. This led to several complications as it was difficult to know the basis upon which TRAI had stipulated the price.⁵⁷ In order to remedy this problem, TRAI came out with the Telecommunication Interconnection Usage Charges (IUC) Regulations, 2003. The regulations explicitly state that interconnection charges should be determined by adopting a cost-based approach which would be applied uniformly on a non-discriminatory basis. TRAI regularly consults all major stakeholders in the telecom industry to modify its interconnection regime in accordance with changing needs. The impact of this regime has been twofold. First, it has cultivated growth and innovation in the telecom sector and has played a pivotal role in making India's telecommunication network the second largest in the world.⁵⁸ Second, it has profoundly and fundamentally transformed the structure and composition of the telecom sector and has allowed new entrants to access facilities that were hitherto inaccessible to them.

5.3 Oil and natural gas sector

In the pre-liberalization era, the gas transmission grid in India did not extend beyond the western, northern, central and north eastern regions due to lack of participation of private players. In addition, the Gas Authority of India Limited owned 70% of the market share.⁵⁹ Therefore, it was necessary to develop a framework to provide new entrants access to essential facilities in order to solve what is commonly referred to as the 'access problem'.⁶⁰

In pursuance of this goal, the Petroleum and Natural Gas Regulation Board Act ("PNGRB Act"), 2006 was enacted to clearly spell out provisions to mandate the sharing of essential resources. Section 2 (j) of

⁵⁷ Supra 54, 11.

⁵⁸ S. Bafna, *Indian Telecom Network Becomes the 2nd Largest In The World*, *Telecom Talk* (15/09/2010), available at <http://telecomtalk.info/indian-telecom-network-becomes-the-2nd-largest-in-the-world/40619/>, last seen on 28/09/2014.

⁵⁹ Supra 54, 12.

⁶⁰ W. Tye, *Competitive Access: A Comparative Industry, Approach to the Essential Facility Doctrine*, 8 *Energy Law Journal* 337, 344 (1987).

the PNGRB Act empowers the Petroleum and Natural Gas Board to declare any pipeline for the transportation of petroleum, petroleum products or natural gas a “common carrier” which allows multiple entities to access such pipelines on a non-discriminatory basis. It is pertinent to note that pipelines that are constructed for supplying petroleum products or natural gas to a specific consumer or for the supply of crude oil cannot be declared a “common carrier”. Similarly, Section 2 (M) empowers the Board to declare a pipeline for transporting petroleum, petroleum products or natural gas a contract carrier which would allow multiple entities to access the aforementioned facilities in accordance with a firm contract. As per the explanation to Section 2 (J), a contract carrier shall be treated as a common carrier if it has surplus capacity over and above the resources that are employed in accordance with firm contracts or after the firm contract expires. The actions of the Board in this regard must be actuated in pursuance of 5 cardinal objectives: Promoting competition, preventing infructuous investments, increasing supplies, ensuring equitable distribution of resources and finally, ensuring that petroleum, petroleum products and natural gas are available in an adequate quantity u/s 20(5) of the PNGRB Act. The Board is empowered to fix the terms and conditions upon which the resources would be accessed, but its orders must be in consonance with public interest, competitive transport rates and the right of first use u/s 20(2). It is believed that the spirit of cooperation and competition that this framework has engendered has considerably quickened the growth of this sector and has led to the development of liquefied natural gas terminals at places like Dabhol and Kochi.⁶¹

5.4 Electricity sector

The electricity sector, like most other sectors in India, is experiencing a transition from an antiquated regulatory paradigm to a pro-competitive environment. In this context, the Electricity Act, 2003 can be viewed as a transitory piece of legislation which aims to foster competition and cooperation and thereby to fundamentally alter the landscape of the electricity sector in India. The Act includes within its ambit the essential facilities doctrine for effectuating these goals. Section 2 (47) of the Act empowers the appropriate commission to issue regulations for the non-discriminatory use of transmission lines or distribution systems by licensees, consumers and all other entities involved in electricity generation. Section 38 (2) (d) and Section 39 (2) (d) of the Act impose a

⁶¹ Supra 54, 12.

duty on the Central Transmission Utility and the State Transmission Utility respectively to provide non-discriminatory access to their transmission facilities to licensees or generating companies by imposing the necessary transmission charges and the prescribed surcharge in accordance with the provisions mandating open access. Similarly, Section 40 (c) of the Act imposes an obligation on transmission licensees to provide access to their transmission facilities on the payment of the required charges and surcharge. However, no surcharge should be levied for providing access to those who have established their own captive power plants for transmission of electricity to the destination of their use. Such open access is subject to the availability of adequate transmission facilities which is determined by the party controlling the facility. Any disputes in this regard are adjudicated upon by the Appropriate Commission. The concerned State Electricity Regulatory Commissions have been empowered to invoke the open access provisions in a phased manner upon the terms and conditions that they deem fit. They must also determine the extent to which open access should be granted in every phase and the charges for wheeling. The Commission must take cognizance of operational constraints, cross subsidy requirements and other relevant factors while invoking the doctrine.

6. AN ANALYSIS OF THE POSITION OF THE ESSENTIAL FACILITIES DOCTRINE IN INDIA

As the competition law regime in India is still in a nascent stage, the essential facilities doctrine has not been explicitly invoked by the CCI in any case so far. Several arguments have been made in favor of and against the application of the doctrine in India. Those who are against the invocation of the doctrine make 4 principal arguments to claim that the doctrine can have several deleterious effects and that it is under theorized and unarticulated.⁶²

6.1 Dynamic efficiency

The doctrine greatly undermines dynamic efficiency in that it reduces the incentive to innovate because dominant undertakings can be

⁶² M. Lao, *Networks, Access, and Essential Facilities: From Terminal Railroad to Microsoft*, 62 SMU. Law Review 557, 558 (2009).

compelled to share the fruits of their innovations with competitors who lack the technological prowess to make those innovations.⁶³

6.2 Fear of collusion

Competition law, in general, is averse to the idea of cooperation between competitors. This doctrine, on the other hand, necessitates cooperation which, the argument goes, could lead to the creation of larger, and potentially more destructive, monopolistic structures that could undermine, as opposed to reinforcing, the vitality of competitive forces.

6.3 Lack of uniformity in implementation

There is considerable divergence in the implementation of the doctrine by courts across the globe in some cases it involves hundreds of parties whereas others just two. Some courts adopt a narrow interpretation of the doctrine whereas others impose a broad duty to deal on the dominant undertaking.⁶⁴ Therefore, it is believed that there is no workable model of the doctrine that can be imported into India.

6.4 Powers of sectoral regulators

Finally, it is argued that sectoral regulators have sufficient power to rectify problems of this nature; there is no need for the competition regulator to dabble into these issues.

However, we respectfully submit that these arguments are predicated on flawed assumptions and that suitable safeguards can be put in place to address these concerns. There are several reasons why the essential facilities doctrine can be an appropriate remedy to deal with contemporary challenges in the field of competition law.

6.5 In accordance with competition philosophy

An analysis of the literature pertaining to competition law clearly indicates that the primary goal of the competition law regime in India is

⁶³ See E. Elhauge, *Defining Better Monopolization Standards*, 56 Stanford Law Review 253, 300-305 (2003).

⁶⁴ S. M. Maurer, & S. Scotchmer, *The Essential Facilities Doctrine: The Lost Message of Terminal Railroad*, TSE Working Papers Series, Working Paper Number 14-476, Toulouse School of Economics (2014).

to empower the CCI to enact policy instruments and to undertake strategic interventions to foster a culture of competition. Therefore, wider application of the doctrine would be perfectly in consonance with the philosophy of our competition policy.

6.6 Need for ex-post interventions

Even though some sectoral regulators can mandate the sharing of essential facilities, their interventions are *ex-ante* in nature i.e. they are meant to prevent stakeholders in a certain market from denying access to certain facilities. On the contrary, the interventions by the CCI are *ex-post* in nature, which implies that they can take corrective measures to repair the damage that is caused by lack of access to essential facilities.⁶⁵ This *ex-post* role is of particular significance, as not all cases of denial of access can be envisaged in advance, so it is necessary to arm the CCI with the doctrinal tool essential for unravelling the Gordian knot of complex sectoral regulations to undo the damage caused to competition.

6.7 Build Operate Transfer model

Most arrangements relating to the construction of infrastructure assets in India are based on the Build Operate Transfer (BOT) model which implies that private entities have to transfer their assets to the government after a certain time period. Therefore, since the scope of the right to control infrastructure assets is so limited, adoption of the essential facilities doctrine would not lead to the curtailment of that right. In addition, the right to property under the Indian constitution is no longer a fundamental right; it is merely a legal right. This implies that the state has greater power to take away that right in the interest of public welfare.

6.8 Ladder of investment approach

In order to strike a balance between the interests of monopolists and competitors, CCI can adopt the ladder of investment approach developed by Martin Cave.⁶⁶ Under this approach, new entrants would be initially provided a lift upon the investment ladder by providing them

⁶⁵ F. Marie-Anne, *Regulation versus Competition*, I-1.30 The Journal of Regulation, 550-560 (2011).

⁶⁶ M. Bourreau, P. Dogan and M. Manant, *A Critical Review of the 'Ladder of Investment' Approach*, Telecom ParisTech Working Paper Series, Working Paper Number ESS-09-06, Telecom ParisTech, (2009).

access to facilities controlled by dominant undertakings that are essential for competing in a particular market. Then, as they climb up the investment ladder and amass greater wealth, the price of accessing the facility would steadily increase which would compel the undertaking to build its own facility. This would foster facility-based competition while ensuring that new entrants do not take undue advantage of the facilities controlled by the dominant undertaking.

7. MODALITIES FOR IMPLEMENTING THE DOCTRINE IN INDIA

A close inspection of the Indian Competition Act, 2002 clearly shows that the legislation is broad enough to bring the essential facilities doctrine within its fold. More specifically, Section 4 (2) (c) unequivocally prohibits dominant firms from engaging in any activity that results in the denial of market access in any manner. This provision is capacious enough to cover the denial of access to facilities which are critical for competing in the given market within its ambit. In addition, Section 4 (2) (e) prevents an undertaking from using its dominance in one market (upstream/downstream) to establish a footing or to protect its position in another market. Another provision into which the essential facilities doctrine can be read is Section 3 (4) (d) of the Act which prohibits the refusal to deal by dominant undertakings when it can create an appreciable adverse effect on competition. Viewed through this lens, the doctrine can be construed as a part of the refusal to deal clause in the Act. Thus far, the doctrine has come up for consideration in 3 important cases. First, in the case of Arshiya Rail Infrastructure Limited (ARIL),⁶⁷ CCI faced the challenge of deciding whether the essential facilities doctrine could be invoked to compel CONCOR, a cargo carrier and terminal operator, to share its terminals with new container train operators (CTOs) in the market. The CTOs contended that it would be very costly as well as unnecessary for them to construct new terminals and requested the CCI to declare CONCOR's terminals as an essential facility for competing in the relevant market. Rejecting the CTO's argument, the CCI held that as a pioneer in the market, CONCOR was able to build the terminals at a comparatively lower cost. It further held that it would be unfair to provide access to CONCOR's terminals to the CTOs when there was no concrete reason why the CTOs couldn't build

⁶⁷ Arshiya Rail Infrastructure Limited (ARIL) v. Ministry of Railways (MoR), Case No. 64 of 2012 (CCI, 14/08/2012).

their own terminals. The second case was of Ms. Anila Gupta,⁶⁸ where CCI had to decide whether it was legally permissible for a customer of a government electricity provider i.e. BEST to switch over to a private electricity provider i.e. TPCL. Even though this case wasn't directly related to the essential facilities doctrine, one of the judges, R. Prasad, invoked the doctrine in his dissenting opinion. He opined that it would not be in the economic interest of the country or consumers for different electricity distributors to lay down their own supply networks. It was his view that TPCL should, therefore, be allowed to access BEST's supply network on payment of required charges so as to prevent wasteful expenditure involved in the construction of a separate supply network. Finally, in a recent case of *Shri Shamsheer Kataria*,⁶⁹ CCI was required to decide whether the refusal of 14 car manufacturers to provide independent repairers access to their spare parts and diagnostic tools amounted to abuse of dominance and/or anticompetitive conduct. In his report, the Director General contended that the spare parts and diagnostic tools were essential facilities sans which the local repairers couldn't perform their functions efficaciously and advocated in favour of the invocation of the essential facilities doctrine. The CCI accepted that it was essential to provide independent repairers access to essential inputs such as spare parts and diagnostic tools to create a more competitive system and imposed a fine of INR 2544 crores on the 14 car manufacturers for their anticompetitive conduct as well as abuse of dominance. It did not, however, explicitly invoke the essential facilities doctrine.

As these cases clearly reflect, the CCI has always chosen to deal with cases involving the use of this doctrine on an *ad hoc* basis as opposed to formulating a coherent and consistent policy that is critical for ushering in a greater degree of uniformity and certainty in the decision making process. Therefore, we are of the considered opinion that the CCI should exercise the powers bestowed upon it under Section 64 (1) of the Competition Act and should release a broad policy statement which should clearly set out the intricacies of providing access to essential facilities.⁷⁰ As the Supreme Court noted in the case of *Kilpest Pvt. Ltd. v.*

⁶⁸ Ms. Anila Gupta v. Best undertaking, Case Number 06/2010 (CCI, 11/01/2012).

⁶⁹ Shri Shamsheer Kataria v. Honda Siel Cars India Ltd. & Ors, Case No. 03/2011 (CCI, 25/08/2014).

⁷⁰ Piyush Joshi and Anuradha R.V., *Study on Competition Concerns in Concession Agreements in Infrastructure Sectors*, (June 2009).

*Shekhar Mehra*⁷¹, it is always in the fitness of things to adapt and modify legal principles enunciated by courts in other countries in accordance with the idiosyncrasies of the Indian society. Therefore, the CCI should adopt a hybrid model of the US and EU approaches which should be based on a 4-pillar approach: encouraging the sharing of tangible as well as intangible assets; attaching greater emphasis on the sharing of assets in the infrastructure sector where there is scarcity of resources; ensuring that access is provided on reasonable terms and encouraging competitors to develop their own facilities, if possible, in the medium to long term in conformity with the ladder of Investment approach.⁷²

8. CONCLUSION

At the heart of any thriving liberalized economy lies a robust and flexible competition law regime. If such a regime is not suitably modified to meet contemporary challenges, monopolistic structures would continue to go unchecked which would have a large array of corrosive effects on the health of the economy.⁷³ Therefore, it is our earnest belief that the essential facilities doctrine should be applied on a large scale in order to place fetters on activities that whittle competition and to lend greater robustness to our competition law regime. In the post-liberalization era, many sectors that were hitherto controlled by state-owned enterprises are gradually being exposed to the volatility of market forces in India. It would, therefore, be apposite to compel monopolists who control certain indispensable facilities in such sectors to share these facilities with others so as to eliminate production and supply bottlenecks, reduce costs and improve the quality and productivity of goods and services by harvesting the synergies of different undertakings. If properly implemented, this doctrine can emerge as a strong pillar to support and strengthen the edifice of Indian

⁷¹ *Kilpest Pvt. Ltd. v. Shekhar Mehra* (1996) 10 SCC 696.

⁷² K. Vaishali, *Competition issues in the infrastructure sector- with special reference to Indian electricity sector*, Internship report for the Competition Commission of India, (July 2012), available at http://cci.gov.in/images/media/ResearchReports/Competition%20Issues%20in%20the%20Infrastructure%20Sector_With%20Special%20reference%20to%20the%20Indian%20Electricity%20Sector.pdf, last seen on 30/09/2014.

⁷³ M. Mehra, *Competition Law and Inclusive Growth*, the Economic Times, (04/11/2009), available at http://articles.economictimes.indiatimes.com/2009-11-04/news/2766_2326_1_competition-law-maintenance-of-monopoly-power-fdi/2, last seen on 30/09/2014.

competition law. While it is true that some developed countries have been averse to the idea of widening the scope of the doctrine, it is essential to remember that the problem of scarcity of resources poses a far greater threat to the growth of developing economies like India as opposed to developed economies that possess abundant resources. Not only does this doctrine have the potential of efficaciously dealing with this threat, but it is also firmly embedded in Article 39 (b) of the Constitution of India which imposes an obligation on the State to ensure that the ownership and control of all material resources is distributed in such a way as to subserve the common good.