

*Comparative Competition Law Conference, Sept. 21st, 2015  
Essential Facilities, Regulators, and Lessons for Latin America*

**Interview with Prof. Richard Whish,  
(Kings College, London)**

***What are your views and recommendations regarding essential facilities regulation?***

**Richard Whish:** My view on this is that, of course there are very strong policy reasons for interfering in the market as little as possible. Where people have invested and taken risks, one shouldn't allow free-riders to come along and take a piggy-back ride on somebody else's investment - that seems to me to be a statement of the obvious.

However, I also think it's obvious that there are such things in this world as 'essential facilities'. And what I mean by that is something that cannot - I stress, cannot - be duplicated, either because it's physically impossible to do it, or because it's environmentally impossible, or in some cases economically impossible. And I think if something is an essential facility, and if denial of access to that facility is going to be harmful to competition in a downstream or neighboring market, it seems to me perfectly legitimate to have a law that says -subject to appropriate conditions, including obviously the price - that third-parties should be able to ask for access to that facility. So I don't find that controversial myself.

Obviously however, if you have a competition authority or indeed a regulator with the power to make that kind of determination, they have to do so responsibly, they have to make decisions on the basis of all the available evidence, and they have to exercise their judgment. But subject to the above, I don't have a problem with the existence of an essential facilities doctrine.

**Could Uber and similar platform-based services be related to this? Could these platforms, or the Taxi services they displace, be considered under essential facilities rules?**

**RW:** I don't find that particularly convincing, I see it in a different light. I think sometimes, companies in the position of Uber are entering the market in a way that enables them to challenge and exercise competitive constraint upon well-entrenched, local, powerful positions. Very often powerful because there's regulation that entrenches their position in the market.

So we're talking here obviously about the phenomenon of disruptive innovation, and in so far as the disruptive innovator is challenging privileged incumbents and arguably making the market more efficient -enabling consumers to get lower prices -

far from seeing them as an essential facility I see them as being the new entrant that is exercising a competitive constraint over the people who are already in the market.

But, what is an essential facility, in the end, it is a question of fact. Is there a facility which is not capable of duplication. And if I've created one platform I don't see that that in itself creates something that cannot be duplicated. If it was that easy to create that platform, presumably other people can create competing platforms.

***Two competing trends regarding regulator structures - those that concentrate into a 'Mega-regulator' and those which split up between sector-specific regulators. What would be your preference or recommendation to authorities considering one of these options?***

**RW:** I don't think you can make a single recommendation as to this, because every country is different, and what needs to be regulated may be different from one country to another, so I don't think one can make broad, sweeping generalizations. One thing I would say, however, is that when we're talking about economic regulators - as opposed to technical, or environmental, or prudential supervision regulations - but if we're talking about economic regulators it seems to me there's a huge amount of commonality between what a competition authority is trying to do and what a regulator is trying to do, because I think that ultimately both competition authorities and economic regulators are concerned about the possible existence of market power. And if there's market power, and if that market power is going to be enduring, then I dare say *ex ante* regulation is appropriate.

If it is market power where there is the possibility of entry and competitive constraints then maybe you leave it to *ex post* competition law. But there is a great deal of commonality in the economic phenomenon of market power. And so, at the very least I think competition authorities and economic regulators should be talking the same language, and it seems to me to go without saying that if you've got separate institutions they should work together as closely as possible.

And of course, there are some circumstances in which it may be appropriate to fold the regulator into the competition authority; in other circumstances maybe do what we do in the UK, which is to have concurrent powers that are exercised both by the competition authority and the economic regulator, and then put in place sensible memoranda of understanding or whatever, to work out in any particular case, which is the best institution to carry out any particular investigation. So I don't think there's a one-size-fits-all answer to this, but I do think that competition law and economic regulation are very closely related to one another.

***Of the recent competition cases reviewed by European authorities, which do you think could be most useful, and should be more closely watched, by Mexican and Latin American competition authorities?***

**RW:** Obviously there's been a big fuss lately about standard essential patents and all

this kind of stuff. But I doubt myself that Mexico and similarly placed authorities should spend a lot of time on these issues, because if intervention at EU level causes the Samsungs and Motorolas of the world to change their licensing behavior, I really wonder if it's a sensible use of Mexico's resources to start pursuing those cases. I suspect there are higher priorities at this moment in time.

Clearly, however, we've had lots of cases in the EU in the utility sectors, where you get variants of "refusals to deal", 'constructive refusals to deal', discrimination, margin squeeze, etc. Well I would think that there's a great deal that Mexico can learn from the pretty considerable experience that we have obtained in the EU over the last 10-15 years, and this could be a good place to concentrate one's attention.