

The Resurrection of Essential Facilities Doctrine and Its Applicability in India



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The controversial essential facilities doctrine recently seems to have resurfaced amidst recent developments in competition law. The doctrine is typically applied in abuse of dominant cases where a dominant enterprise denies access to its essential facility. Since its inception in 1912, this concept has faced severe criticism to the extent of being redundant. From being formally legitimized to reaching its outer limit, the doctrine seems to have now come full circle in finding implicit application; particularly in abuse of dominance cases.

This article attempts to outline the applicability of essential facilities doctrine in India and the trends likely to follow.

I. THE CONCEPT OF ESSENTIAL FACILITIES DOCTRINE

An essential facilities doctrine specifies when the owner(s) of an essential or bottleneck facility is mandated to provide access to that facility at a "reasonable" price. Typically, considered a sub-set of refusal to deal cases; the doctrine finds its origin in the U.S. Supreme Court decision in *United States v. Terminal Railroad Association*.² Subsequent developments through case-law have laid down the test to establish liability under essential facilities doctrine that shall satisfy the following four elements:³

- a. control of the essential facility by a monopolist;
- b. a competitor's inability practically or reasonably to duplicate the essential facility;
- c. the denial of the use of the facility to a competitor;
- d. the feasibility of providing the facility.

Over the years, the doctrine has been heavily criticized for being undertheorized and typecast as an "epithet" whose contours are unclear.⁴ Incidentally, the U.S. Supreme Court itself in *Trinko* strongly hinted

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² *Terminal Railroad Co. v. US*, 224 US 383 (1912)

³ *MCI Communications Corp. v. AT&T*. (708 F.2d 1081, 1132 (7th Cir.)

⁴ Philip J. Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 Antitrust L.J. 841 (1989)





that the doctrine had at the very least reached its outer limits and might not exist at all.⁵ Even in the European Union (“EU”), where arguably the doctrine has found stronger support, formal application has been relatively limited.⁶ The main reason for such reluctance could be attributed to the general conundrum in determining whether a facility is essential and consequently whether there is a duty to share the facility with others.

Notably however, recent developments indicate an increasing focus on the essential facilities doctrine. Specifically, the doctrine has found itself right in the center of the hotly debated interface between competition law and intellectual property rights (“IPRs”). For instance, the applicability of enforcement guidelines and rules for China’s Anti-Monopoly Law with respect to IPRs contain provisions extending the essential facilities doctrine to IPRs.⁷ Even in the EU, the Court of Justice of the European Union (“CJEU”) recently in the *Huawei*⁸ case held that the holder of a Standard Essential Patent (“SEP”) may be found in breach of the competition rules by seeking an injunction against a potential licensee in certain circumstances. Particularly, when attributing liability in cases relating to IPRs, the CJEU expressly observed:

It is, in this connection, settled case-law that the exercise of an exclusive right linked to an intellectual-property right — in the case in the main proceedings, namely the right to bring an action for infringement — forms part of the rights of the proprietor of an intellectual-property right, with the result that the exercise of such a right, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute an abuse of a dominant position.

However, it is also settled case-law that the exercise of an exclusive right linked to an intellectual-property right by the proprietor may, in exceptional circumstances, involve abusive conduct.

These findings seem to indicate an increasing inclination of assessment of conduct of IPR holders within the contours of the essential facility doctrine. While the conventional applicability is still relatively arguable, the reemergence of the concept is quite evident through these developments.

Indian competition law, while still in its teething stage, has been gaining significant traction in terms of enforcement. Predictably, there has been a recent uptick in the number of cases relating to abuse of dominance cases. The Competition Commission of India (“CCI”/“Commission”) has also addressed the essential facilities doctrine in some of these cases.

⁵ *Verizon Comms., Inc. v. Law Offices of Curtis v. Trinko*, 540 U.S. 398 (2004), Also see: *Aspen Skiing v. Aspen Highlands Skiing*, 421 U.S. 585 (1985)

⁶ See: *Magill TV Guide/ITP, BBC & RTE*, Decision of December 21, 1989, OJ L 78, 43, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeinungs-und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-779

⁷ Yong Huang, Elizabeth Xiao-Ru Wang, & Roger Xin Zhang “Essential Facilities Doctrine And Its Application In Intellectual Property Space Under China’s Anti-Monopoly Law” 22 *George Mason Law Review* 1103-1126, 2015

⁸ *Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH*, Case C-170/13





II. INDIAN CASE-LAW ON ESSENTIAL FACILITIES DOCTRINE

Under the Competition Act, 2002 (“Competition Act”), essential facilities doctrine has been applied in cases relating to denial of market access by a dominant enterprise.⁹ An exposition of case-law reveals that current jurisprudence is at the **expansionary phase** of the doctrine explained by Professor Areeda.¹⁰

A. NSE Case — Doctrine By Implication

The NSE case¹¹ was one of the first cases where the Commission dealt with abuse of dominance. The prime focus of the case was conduct relating to predatory pricing by the National Stock Exchange (“NSE”). However, the CCI in this case also seemed to implicitly recognize essential facilities.

In this case, allegations were made against NSE for abusing its dominance in the market for currency derivatives (“CD”) segment. The complaint was filed by MCX Stock Exchange Limited (“MCX”) — a competitor of NSE in the CD segment. Both MCX and NSE operated exchange platform for trades in the CD segment. In addition, Financial Technologies of India Limited (“FTIL”) — the promoter company of MCX — also provided software product under the brand name ODIN that was use across multiple stock exchange platforms for trading in various products including the CD segment. Subsequently, NSE introduced its own software NOW for its CD segment. NOW and ODIN were substitutable with respect to the NSE CD segment. It was alleged that NSE refused to share its application program interface code (“APIC”) with FTIL; thus disabling ODIN users from connecting to the NSE CD segment. The CCI held this conduct, i.e. NSE’s denial of APIC to FTIL as an abuse of dominance. Interestingly in this case, the Commission observed that it was the software (ODIN and NOW) which were essential facilities for trading in stock exchange.

It is important to note that this case is generally not considered to be precedence for the doctrine. However, the basic principle — of attributing liability to NSE for denying APIC to MCX that would enable them to create ODIN compatible with NSE CD segment — resonates with the EU’s decision in the Microsoft case.¹²

B. Arshiya Case — A Circumscribed Approach

The concept of essential facilities doctrine was first formally considered by the Commission in *Arshiya*.¹³ Unsurprisingly, like most other jurisdictions, this was a case that dealt with infrastructure facility. In this case, allegations were brought against CONCOR a public sector company handling rail freight services through container trains for the Indian railways. The main allegation in this case was that CONCOR was denying access to terminal and sidings owned and exclusively used by CONCOR to other container train operators (“CTO”). In this case the Commission held that CONCOR was not dominant in the relevant market. Nevertheless, the CCI made the following observations on applicability of essential facilities doctrine:

[T]he essential facility doctrine is invoked only in certain circumstances, such as existence of technical feasibility to provide access, possibility of replicating the facility in a reasonable period of time, distinct possibility of lack of effective competition if such access is denied and possibility of providing access on reasonable terms.

In this case the CCI held that there were no technical or economic reasons as to why the CTO could not create their own terminals or similar facilities. Thus, in this case the CCI seemed to have applied the generally limiting principle when determining whether the facility was essential.

⁹ Section 4, Competition Act proscribes abuse of dominance by an enterprise

¹⁰ See Philip J. Areeda, *supra* n. 4

¹¹ *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd. & Ors.*, Case No. 13/2009

¹² *EC Commission v. Microsoft*, Case COMP/C-3/37.792,

¹³ *Arshiya Rail Infrastructure Limited v. Ministry of Railways & Ors.*, Case No. 64/2010 & 12/2011





C. Auto-Manufacturers Case — The Expansionary Phase

The second case where the doctrine was expressly dealt with was the auto-manufacturers case.¹⁴ This was a case in sharp contrast to the limiting principles established in the Arshiya case. In this case, various auto-manufacturers were found to have abused their dominance in the market for their spare parts, diagnostic tools, manuals, etc. The conduct in question was denial of access to original spare parts to independent repairers.

In the investigation report, the Office of the Director General (“DG”) concluded that spare parts, diagnostic tools, manuals, etc. of each Original Equipment Manufacturer (“OEM”) constitutes essential facilities for the independent repairers to be able to provide consumers with effective after sale repair and maintenance work and for such independent repairers to effectively compete with the authorized dealers of the OEMs. The DG has pointed out that the essential factors to be taken into account in determining whether spare parts, diagnostic tools, manuals, etc. of each OEM would constitute essential facilities for the independent repairers, are: (a) control of the essential facility by the monopolist; (b) the inability to duplicate the facility; (c) the denial of the use of the facility, and (d) the feasibility of providing the facility.

Applying this test, the DG report concluded that the auto-manufacturers had indeed abused their dominance and denied market access to independent repairers

What is perhaps most peculiar in this case is the fact that unlike typical cases, the OEMs in this case did not compete with the independent service providers in the aftermarket. Generally, denial of an essential facility is considered to be an abuse of dominance when the dominant enterprise is also competing in the market for the downstream market. However, in this case, the DG did not seem to consider the presence in the aftermarket (i.e. market for after sale repair and maintenance work) as a pre-requisite.

The Commission concurred with the conclusions in the DG report and held the auto-manufacturers to have abused their dominance. Interestingly, however, the Commission did not expressly countenance the DG’s applicability of the doctrine. This again is in line with the general practice of supporting the doctrine only by implication. Nevertheless, this case appears to have substantially expanded the scope of the essential facilities — not only in terms of defining the facility essential but also when considering denial to be unreasonable with duplication being impractical. Moreover, this also seems to contrast with the decisional practice set by the Competition Appellate Tribunal (“COMPAT”) in the *Kansan News case*,¹⁵ where it held that denial of market access can only be abusive when the dominant undertaking is denying access to its competitor.

III. ESSENTIAL FACILITIES IN INDIA — THE RULE AND NOT THE EXCEPTION

These cases are indicative of a loosely constructed theory of essential facilities doctrine. The CCI has generally refrained from expressly using the established test but seemed to have implicitly applied the doctrine in principle. Notably, the development of case-law indicates a shift from a reluctant to a more enthusiastic enforcement of the doctrine. Perhaps the main reason for the wide application stems from the responsibility attached to a dominant enterprise. The CCI has in numerous cases held that a dominant enterprise has a special responsibility vis-à-vis others.¹⁶

¹⁴ *Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors.*, Case No. 3/2011

¹⁵ *Fast Way Transmission Pvt. Ltd. & Ors. v. Competition Commission & Ors.*, Appeal No. 116 of 2012

¹⁶ *In Re. M/s HT Media Limited & M/s Super Cassettes Industries Limited*, Case No. 40/2011; *Belaire Owners' Association vs DLF Limited, HUDA & Ors.*, Case No. 19/2010





This special obligation attached to the dominant enterprise seems to invert the entire exceptionality of essential facilities — making it more of a rule where one is supposed to share its creation with others. Future trends are also likely to mirror this interventionist approach by the CCI. Here it is also important to remember that in India not only exclusionary but exploitative conducts are considered abusive.¹⁷ Resultantly, liability is attached not only when an essential facility is denied but also in situations where it is provided on unfair or discriminatory terms. These enforcement priorities are likely to strongly reinforce application of essential facilities in future cases. In line with international developments, interface between competition law and IPR is also the center-focus in abuse of dominance cases in India. Currently, the Commission is investigating allegations of abuse of dominance by Ericsson that primarily deals with its conduct relating to SEPs owned by Ericsson.¹⁸ Additionally, in January 2016 the Commission decided to order an in-depth investigation of Monsanto's conduct.¹⁹ In this case, the main allegation was that Monsanto was licensing its Bt cotton technology on unfair terms. These cases are classic illustrations of the tug of war between an IPR holder's right to exploit its right to the exclusion of others; and the obligation of the monopolist to deal with others.

It is going to be interesting to see how the Commission deals with these cases. While it is unlikely that the sanctity of IPRs are going to be completely disregarded, the decisional practice nevertheless does indicate a relatively restricted freedom in asserting such rights.

¹⁷ Ibid

¹⁸ *Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ)*, Case No. 50/2013; *Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson*, Case No. 76/2013; and *M/s Best IT World (India) Private Limited (iBall) v. M/s Telefonaktiebolaget L M Ericsson (Publ) & Ors.*, Case No. 04/2015

¹⁹ *Department of Agriculture, Cooperation & Farmers v. M/s Mahyco Monsanto Biotech (India) Limited & Ors.*, Ref. 02/2015 & 107/2015

