



**BEWARE
OF
ZOMBIES**

BY JOHN M. TALADAY¹



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By John M. Taladay

At its core, the essential facilities doctrine (“EFD”) invariably involves property rights. The idea is that a party that indisputably owns rights to certain property must provide access to that property to another party (that otherwise has no rights to that property and presumably has made no investment in that property) in order to facilitate competition by the other party. But, because we tend to hold the idea of property rights in high regard as a law-abiding society, a doctrine forcing a party to give up its property rights has been, understandably, narrowly construed and applied only in the higher standard of “exceptional circumstances.” This is consistent with the *Colgate* and *McGill* rights to discretion in business affairs in the U.S. and the EU, respectively. Nonetheless, recent developments relating to the overwhelming power of certain very large tech companies to call this orthodoxy into question.

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I. INTRODUCTION

In most post-apocalyptic zombie movies, the dead bodies slowly rise up, infected by the disease of humanity's past sins, and shamble forward – groaning and lurching – seeking to devour the brains of the living and pass on the infection that has devoured the minds of the zombified . . . just like the essential facilities doctrine.

A growing raft of literature is pushing the idea of using the essential facilities doctrine as a tool to attack perceived competition harms, particularly in digital markets. The argument often goes something like this: “It is put forward that the essential facilities doctrine should be rethought in order to be effectively applied in the [] digital economy, in particular by aligning its application with the underlying economic interests.”² Or like this: “It is high time to revive, renew, and expand the essential facilities doctrine in the digital economy.”³

If we are to apply a competition doctrine to a major sector of our economy, we should choose one that is stable, predictable, adaptable and well-regarded as competition policy. As we shall see, the essential facilities doctrine has none of these attributes. Why would anyone want to exhume this decayed, diseased doctrine and let it devour robust, healthy antitrust minds? Are we, like the movie industry, condemned to merely “reboot” old concepts rather than turning to ideas informed by the economics of today? As explored below, there is not much left to the essential facilities doctrine – if there was ever much there in the first place – and it certainly is not suitable as an organizing principle to solve a new variety of competition concerns.

At its core, the essential facilities doctrine (“EFD”) invariably involves tampering with somebody’s property rights. Historically, as a law-abiding society, we tend to hold the idea of property rights in high regard, ensuring that the property owner is entitled to their peaceful enjoyment of it, and the freedom to determine when they will grant access, with whom they transact business, and on what terms they are willing to do so.⁴ The idea of the EFD is that the property owner, who does not wish to transact with a particular party, must nonetheless provide access to that party (i.e. a party who otherwise has no rights to the property and presumably has made no investment in it) in order to facilitate competition by the other party, normally to compete against the property owner. Not surprisingly, a doctrine forcing a party to give up its property rights has been narrowly construed and applied only in “exceptional circumstances.” And for good reason.

One of those reasons is that forced access is not always consistent with competition. As the U.S. Supreme Court noted, “Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. . . . We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing.”⁵ This view is consistent with the *Colgate* right of a private party to “exercise his own independent discretion as to parties with whom he will deal.”⁶ This tension is also evident in the EU, with the inconsistency between the European Court of Justice cases on EFD and margin squeeze.⁷ But even the ECJ’s EFD decision in *McGill* made clear that the refusal by a party to grant access (in that case a license to intellectual property) cannot constitute an abuse absent exceptional circumstances.⁸

As background, it is interesting to note that while first application of the EFD is often traced back to Supreme Court’s decision in the 1912 *United States v. Terminal Railroad Ass’n*⁹ case, which actually involved a group boycott, the first known use of the phrase “essential facilities doctrine” by the judiciary did not occur until 1977 in *Hecht v. Pro-Football, Inc.*¹⁰ Moreover, the U.S. Supreme Court arguably has never recognized the EFD as a theory of harm. “We have never recognized such a doctrine, and we find no need either to recognize it or to repudiate

2 Inge Graef, *Rethinking the Essential Facilities Doctrine for the EU Digital Economy 2* (TILEC Discussion Paper No. DP2019-028, 2019), <https://ssrn.com/abstract=3371457>.

3 Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237, 238 (2021).

4 Cf., *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

5 *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-408 (2004).

6 *Colgate*, 250 U.S. at 307.

7 See Pablo Ibáñez Colomo, *Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping*, 10 J. COMPETITION L. & PRAC. 532 (2019).

8 Joined Cases C-241/91 P & C-242/91 P, *RTE & ITP v. Comm’n*, 1995 E.C.R. I-743, ¶¶ 49-50.

9 224 U.S. 383 (1912).

10 570 F.2d 982 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978). See Tad Lipsky, *Essential Facilities Doctrine: Access Regulation Disguised as Antitrust Enforcement*, in THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 769, 771, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733729.

it here,” they said in *Trinko*.¹¹ Instead, the doctrine that has become the “essential facilities” concept was really developed by several U.S. Courts of Appeal.

In those cases, courts applied a stringent test before utilizing the EFD to force access to a dominant party’s facilities. The U.S. Courts of Appeal that have adopted the EFD (which does not include all of them) generally apply a four-pronged test: “(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.”¹² Even the first prong of this test, however, is a loaded one. Recall that a *prima facie* showing of monopoly power in the U.S. typically requires market shares in excess of 70 percent, and courts almost never find monopoly power when shares are less than 50 percent.¹³ Also, U.S. courts have been clear that the standard for essentiality is a high one. A dominant firm will almost always possess something its competitors, or potential competitors, want or envy. But courts have been clear that the facility must be more than merely helpful or even highly useful. As the Ninth Circuit noted, a facility is essential “only if control of the facility carries with it the power to eliminate competition in the downstream market.”¹⁴ Thus, even getting past prong one of the assessment is an extremely high hurdle. Competitors also must show that the “duplication of the facility would be economically infeasible” and that denial of a facility would place the competitor at a “severe handicap.”¹⁵

The EU courts also do not go lightly into the ether of the EFD. Under the conditions imposed in the *Bronner* case, in addition to the requirements for dominance, it is necessary that: (1) the refusal is likely to eliminate all competition in the market on the part of the person requesting the service; (2) the refusal be incapable of being objectively justified, and (3) the service in itself be indispensable to carrying out that person’s business, i.e. there is no actual or potential substitute to the requested input.¹⁶ Again, like its U.S. counterpart, there is a lot baked-in to this test, with each factor having its own internal pre-conditions. If anything, the EU courts have been narrowing the EFD doctrine over time. As recently as January 2023 the ECJ refused to apply *Bronner* outside of its narrow facts. Although it had the opportunity to apply the EFD to the intentional destruction of a facility used by a competitor, EFD application was reserved to “in essence, a refusal of access to infrastructure, whereby, ultimately, the dominant undertaking reserves the infrastructure which it has developed for its own use. . . . [and] reserves for itself in pursuit of an immediate benefit.”¹⁷ That was true even where the facilities in question were financed by means of public funds, not by the dominant undertaking itself.¹⁸

Many of the cases that have applied the EFD, both in the U.S. and in Europe, have involved utilities like railroads, ports, telecommunications, and electricity that were constructed either with public funds or through the use of public rights of way.¹⁹ There have been far fewer cases that have applied the EFD to force access to purely private facilities. One prominent example in the U.S. — if you want to call it an essential facilities case — is *Aspen Skiing*,²⁰ a case that sparked considerable controversy and has been declared to be “at or near the outer boundary of [the antitrust laws].”²¹ Thus, one would be wading in very shallow waters by using past experience to further extend the EFD to private facilities like digital platforms.

To contort the rigid, unforgiving framework of the EFD onto the silhouette of modern digital platforms would require some impressive gymnastics. The new raft of papers promoting the EFD as a solution to digital competition problems envisions the mutation of the doctrine, or at least the relaxation of the stringent requirements that courts have imposed. For example, one commentator proposed applying the doctrine and allowing access rights to third parties “[w]here the market provides insufficient alternatives to independent vendors that cannot reasonably

11 *Trinko*, 540 U.S. at 411 (citation omitted).

12 *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

13 See ABA ANTITRUST LAW SECTION, ANTITRUST LAW DEVELOPMENTS 230-31 (9th ed. 2022).

14 *Alaska Airlines v. United Airlines*, 948 F.2d 536, 544-45 (1991).

15 *Twin Labs, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568, 570 (2d Cir. 1990) (citing *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C.Cir.1977)).

16 Case C-7/97 *Bronner*, ECLI:EU:C:1998:569, ¶ 41 (Nov. 26, 1998).

17 Case C-42/21 P, *Lietuvos geležinkeliai v. Comm’n*, ECLI:EU:C:2023:12, ¶ 82 (Jan. 12, 2023).

18 *Id.* at ¶ 87.

19 See, e.g. *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383 (1912) (railroads); Case C-42/21 P, *Lietuvos geležinkeliai v. Comm’n*, ECLI:EU:C:2023:12 (Jan. 12, 2023) (railroads); Case IV/34.689—*Sea Containers v. Stena Sealink*, 1994 O.J. (L 15) 8 (ports); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (wholesale electricity); *MCI Commc’ns v. AT&T*, 708 F.2d 1081 (7th Cir. 1983) (telecommunications).

20 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

21 *Trinko*, 540 U.S. at 409.

replicate the facility themselves. . . .”²² This approach would effectively dispense with any finding of dominance or essentiality, instead requiring only “insufficient alternatives.” Presumably the test to find alternatives to be “insufficient” is a much lower hurdle than to find a facility to be “essential.”

Thus, if there are “insufficient alternatives” to a particular online sales platform, and the platform elects to offer only 52 brands of heavy-duty staplers, then stapler sellers number 53 and up would have an actionable essential facilities claim, irrespective of whether there are in fact other sales channels, other marketing alternatives, or even whether adding that 53rd stapler brand to the mix would have any conceivable competitive benefits.²³ This construction of the law becomes nothing more than a formula for meaningless legal wrangling and vexatious litigation without any promise of improving competition.

Finally, some commentators – perhaps all of them – espouse the use of a modified essential facilities doctrine. They would alter the definition of “essential,” or “refusal,” or “dominant” to make it easier to apply to the “new” economy. This is just saying that we should use the familiar name “essential facilities” but change the legal requirements – in which case all we are doing is creating confusion with the original doctrine. Plus, with a change in the EFD requirements of this magnitude it is not even recognizable as the EFD anymore, but more akin to a barely recognizable spin-off that is given a familiar name, like “Fear The Walking Dead” instead of “The Walking Dead.”

Others would seem to require the passage of new legislation as a mechanism for implementing the EFD to control digital markets, e.g. “regulators and courts must bar discrimination and self-preferencing by platforms and create access rights for third parties.”²⁴ Bear in mind that, to the extent that new regulation is proposed, the adoption of a new regulatory scheme designed to end-run the limits placed on competition law – limits that have been recognized in the law and by the courts applying that law – is the antithesis of competition law. It is giving up on competition law principles and deciding, instead, to dictate an outcome. There are times in our society that it may be necessary to do so, but we should be sure to identify these short-cut solutions for what they are: creatures of governmental market intervention, not tools of competition policy.

I suspect what attracts some commentators to apply the EFD to digital markets is the fact that the EFD, where applicable, grants access to the competitor, and the complaints of some digital market participants often center on access. But the attractiveness of the EFD remedy – i.e. the granting of access – does not imply that the elements of the doctrine are satisfied; that is literally saying that the ends justify the means.

The EFD is not the right cure for digital markets. Let’s not disturb the dead – it never turns out well.

²² Guggenberger, *supra*, note 3, at 317.

²³ In fact, a recent search revealed that the particular online sales platform offers 233 results for “heavy duty staplers.”

²⁴ Guggenberger, *supra*, note 3, at 306.



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