Essential Facility Doctrine of EU Law

1. Introduction

The essential facilities doctrine (EFD) holds that dominant firms may incur antitrust liability if they do not provide access to their facilities, even to competitors, on a non-discriminatory basis where sharing is feasible and the competitors cannot obtain or create the facility on their own. In other words, the essential facilities doctrine is a remedy which tackles the abuse of market power by a firm which holds a dominant position and refuses to deal with other competitors trying to have an access to the market.

The essential facility doctrine was applied for the first time by the Supreme Court Decision in “U.S.A. v. Terminal Railroad Association” in 1912. In the case, a group of rail firms that owned bridges, ferries, terminals and other crucial infrastructure in the St. Louis area came together to prevent competing rail firms from providing transport services in the region. The Supreme Court held that this conduct constituted a concerted attempt to monopolise the rail transport market in St. Louis, in violation of Article 1 of the Sherman Act. Consequently, it required that the defendants grant non-discriminatory access to third parties, or alternatively to divest the essential infrastructure.

The European Union was the first jurisdiction outside the United States to rely on the essential facilities doctrine to impose liability for denial of access. In the European Union, the essential facilities doctrine emerged from the refusal to deal jurisprudence which developed in cases like “United Brands” (1978) and “Commercial Solvents” (1974). The expression “essential facility” was first used by the European Commission in the Sea Containers v. Stena Sealink (1992) decision.

2. Abuse of Dominant Position and EFD

Article 102 TFEU states that:

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

According to Article mentioned above, a dominant position in the relevant market is not itself illegal, nor is it prohibited and incompatible with the general purposes of the rules set out for the common market. “It is consumer welfare that is at the heart of the European Commission’s competition policy” and therefore, as long as consumers’ choice and product quality are not affected by the presence of a single player or a company which has a dominant position in the market, this is not prohibited by the European competition policy. It is the abuse of such dominant position that is proscribed by Article 102.(4)

Under the European Union Law, the development of the essential facilities doctrine has been based on Article 82 of the EC Treaty (now Article 102 TFEU) which prohibits abuses of dominant position within the common market. Besides the provisions stated by Article 102 TFEU, a refusal to deal can indeed constitute an abuse of dominant position under Article 102. The European Commission's 2008 Guidance(5) on the enforcement of Article 82 (now Art. 102) uses a particularly broad definition of when access is required:

“The concept of refusal to supply covers a broad range of practices, such as a refusal to supply products to existing or new customers, to license intellectual property rights, including when this is necessary to provide interface information, or to grant access to an essential facility or a network.”

The Guidance continues with:

“The Commission does not regard it as necessary for the refused product to have been already traded: it is sufficient that there is demand from potential purchasers and that a potential market for the input at stake can be identified. Likewise, it is not necessary that there is to be actual refusal on the part of a dominant undertaking: "constructive refusal" is sufficient. Constructive refusal could, for example, take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply.”

The Guidance concludes:

“The Commission will consider these practices as an enforcement priority if all the following circumstances are present:

- the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market;

- the refusal is likely to lead to the elimination of effective competition on the

- the refusal is likely to lead to consumer harm.”

The circumstances in which a refusal to supply infringes Article 82 EC are controversial. This is even further complicated by different types of refusal to supply and because such refusals may take a number of different forms. In particular, a refusal to supply may be “unilateral” or “concerted”(6) ; the refusal
may be to supply a competitor or a customer who is not an actual or potential competitor. A refusal to supply a competitor may be a “first-time” refusal to supply (7) or may consist in the termination of an existing business relationship (8). In each of these different situations an undertaking in question may refuse to supply, or it may make a “constructive” refusal to supply by an offer on very disadvantageous terms. (9) Moreover, a refusal may be a refusal to supply tangible products, to provide access to certain physical infrastructure, to provide services or to license intellectual property rights (IPRs) (10). Many commentators criticize the law in this area as being uncertain, specifically lacking a proper conceptual framework and economic rigour. There is a necessity for clarity and legal certainty - rules must be predictable. This is a firmly established principle of the EC law. (11)

3. Conclusion

The essential facilities doctrine should hold that a dominant firm may incur antitrust liability if it does not provide access to one of its assets (physical facilities and eventually intellectual property rights), even to direct competitors, on a non-discriminatory basis, where sharing is feasible and when the proof is provided that competitors cannot obtain or create any alternative facilities by themselves. (12) In other words, the essential facilities doctrine imposes a special responsibility on undertakings in a dominant position who either own or control access to an essential facility and places them under a duty to allow other entities access to that essential facility on a non-discriminatory basis. This responsibility is particularly important where the owner or operator of an essential facility itself uses that facility. (13)

And, in the last years, the Commission has made extensive use of essential facility doctrine to introduce competition in markets where the existence of essential facility constitutes an insuperable barrier to entry. While this doctrine was initially applied to port infrastructures, it has now been expanded to a large number of facilities such as telecommunications, electricity, gas, railways, the postal sector, oil and gas pipelines, airports, ground-handling services, set-top boxes, computer reservation systems, international networks for transferring payment messages, etc.

Bibliography


2. Organisation for Economic Co-operation and Development, 23.08.2010-“Competition Principles in Essential Facilities” Background Paper, p.5, prg.6


6. US v. Terminal Railroad 224 U.S. 383 (1912); Associated Press v. United States, 326 U.S. 1 (1945), or collective boycott cases


11. [I]t is necessary to emphasize, as the Court has already done on several occasions, that Community legislation must be unequivocal and its application must be predictable for those who are subject to it.” Case 70/83, Gerda Kloppenburg v. Finanzamt Leer (Kloppenburg), [1984] ECR 1075, para.11
