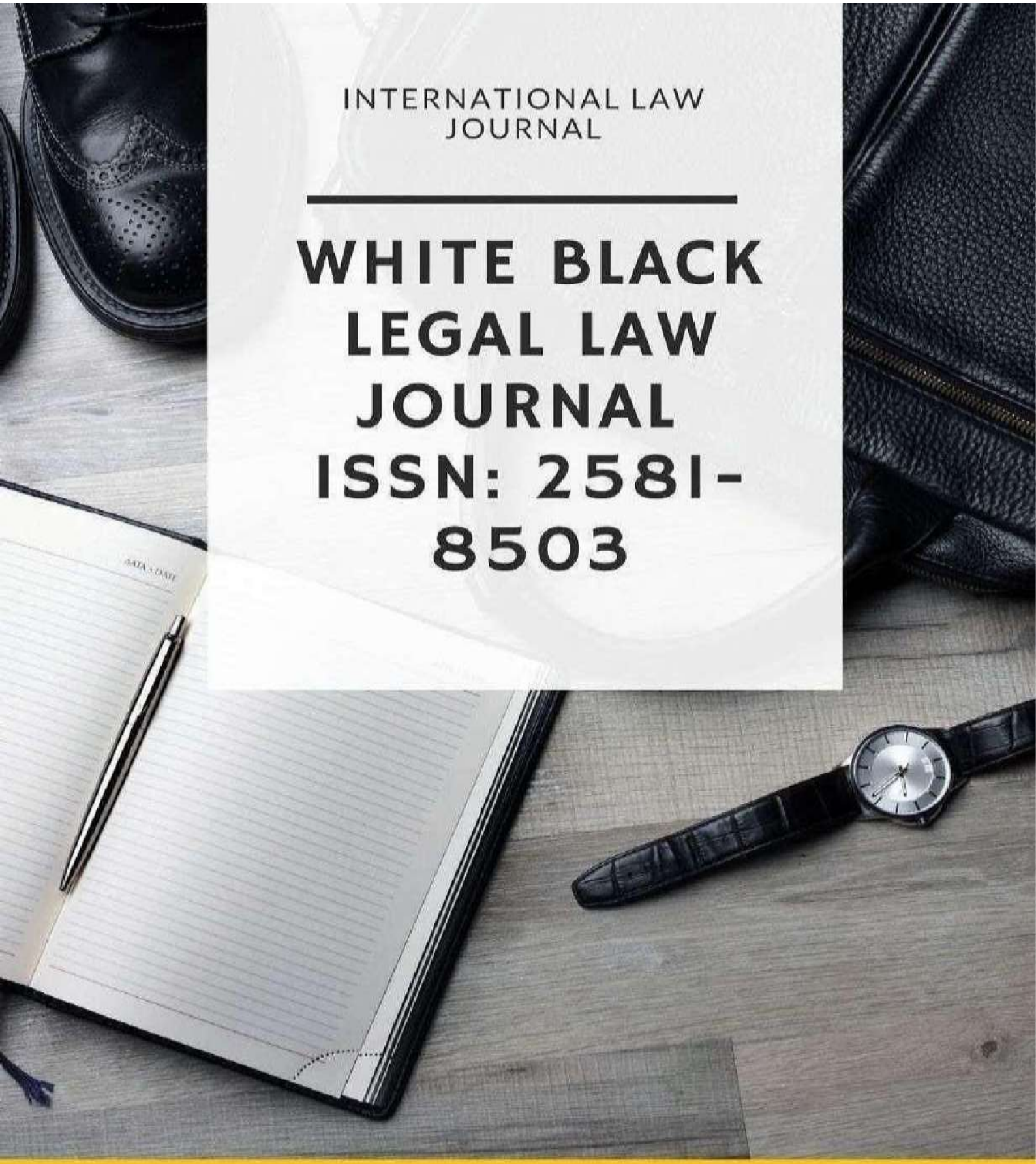

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

DISCLAIMER

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer

Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and a professional diploma in Public Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.

Senior Editor

Dr. Neha Mishra

Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi, Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.

Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur,
M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM
Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.
More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.

Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

ESSENTIAL FACILITY DOCTRINE: INDIA AND ABROAD

AUTHORED BY - AAKRITI SINGH,
LLB- 3rd Year, Amity Law School, Amity University Noida.

ABSTRACT

It's a well established principle of competition law that a simple possession of monopoly power is not ipso facto unlawful, on the contrary, it is an essential characteristic of a free-market system that many countries subscribe to. To have a chance at enjoying the benefits of monopoly, power is the exact force that drives attraction of business acumen and facilitates risk taking that lies at the heart of innovation and economic progress. Resultantly, the competition regulators get into action for their primary objective of preventing monopolists from preserving their monopoly in the market by any unlawful means or use that power to expand into any another market by making use of conceptual tools such as, refusal to deal/supply, price squeezing, monopoly leveraging, etc.

Further, competition laws across the globe unequivocally acknowledge that an organisation is free to act in any manner it deems fit within the scope of the law. This indicates that the organisations are free to deal with whomsoever they want and, contrarily, may also refuse to deal with whomsoever they want. However, it would be wrong to affirm that the right of refusal to deal implies a right that has no exceptions. Determining when a refusal to deal is equates to abuse of dominance and when it is lawful is one of the most unresolved issues in the antitrust laws.

This paper particularly explores the Essential Facility Doctrine, which urges a firm controlling an essential facility whose duplication is not possible or feasible to deal with its competitors, this doctrine come with the objective of providing them access to such a facility. This paper further attempts to outline the applicability of the Essential Facility Doctrine in India, followed by a cross country analysis of the doctrine with respect to USA, Europe, UK and Australia.

KEYWORDS: Competition Law, Essential Facility Doctrine, Monopoly, Abuse Of Dominant Position, Competition Act, Anti-Trust Laws, Refusal To Deal

1. INTRODUCTION: MEANING AND CONCEPT

Essential Facility Doctrine as a term and a concept emerged first in United States' antitrust case law and now has evolved to hold multiple meanings, while what remains common is the essence, that is, mandating access to something, by those who do not have access otherwise. Among different countries, the meaning and application differ, but we can simply understand[1] Essential Facilities Doctrine (also known as Third-Party Access) as a framework in competition policy where a dominant firm cannot deny the grant of access to other firms to an essential facility that it controls and is difficult to replicate by other firms.

In laymen's language, the doctrine simply holds that the owner of an essential facility is required to provide an access to that facility at a reasonable price to other firms which cannot replicate that facility. Typically cases relating to the Essential Facilities Doctrine arise when a vertically integrated firm that stands as a natural monopolist in a market refuses to provide access to a monopolised input or a facility to a market rival or competitor present in the same market.

Now the question as to what kind of facility will be considered an essential facility under the doctrine? [2]To consider a facility as "essential", one needs to determine certain factors like:

- Whether the access to the facility is essential for competition,
- Whether to facilitate access sufficient capacity is available
- Whether the owner of the facility is failing to satisfy a market demand or is impeding competition in the market and
- Whether the firm that is demanding access to the facility is agreeing to pay a reasonable fee for

1 Yugank Goyal, Jayant Malik & Gaurav Sharma, Essential Facility Doctrine Cuts-ccier.org (2013), https://cuts-ccier.org/pdf/Essential_Facilities_Doctrine.pdf (last visited Jun 12, 2022).
2 Manu Garg & Tanisha Agarwal, The Doctrine of Essential Facilities: How Essential it is, in the Indian Market | SCC Blog SCC Blog (2022), https://www.scconline.com/blog/post/2022/01/05/ doctrine-of-essential-facilities/ (last visited Jun 14, 2022).

- its access.

In India, the mandated presence of the Essential Facilities Doctrine can be initiated into the regulations of selected industries, but it is not an easily replicable work. Further, it is noteworthy that a case particularly and specifically relating to the Essential Facility Doctrine has not crossed the table of antitrust authority in India, as yet. However, The Competition Act, of 2002, has adequately empowered the judicial system to invoke the doctrine if the need arises.

The doctrine doesn't find its place in the act, but similar to the European Legislation, the act contains a clause that prohibits the abuse of dominant position, further Competition Commission can take[3] cognisance of section 18 under which the commission is duty-bound to eliminate practices and actions having adverse effects on competition.

Further, the commission can take cognisance under Section 64(1) to bring about a regulation that could provide free access to common facilities under the Essential Facilities Doctrine. Taking this breadth of scope in our understanding we can see can conclude that it is in the hands of the judiciary to invoke the doctrine in those cases that require it.

Furthermore, Section 4 of the Competition Act, 2002 prohibits Abuse of Dominant Position, the section further provides five instances when the conduct of an enterprise or group amount to an Abuse of Dominant Position, further the act defines dominance as a position of strength that is enjoyed by an undertaking in the relevant market.

Following are the various interpretations of the Essential Facilities Doctrine seen through the eyes of different nations:

The [4]European Union was the first jurisdiction after the United States to use the doctrine in imposing liability for denial of access. Subsequently, under the modernisation of EU competition

3 Manu Garg & Tanisha Agarwal, The Doctrine of Essential Facilities: How Essential it is, in the Indian Market | SCC Blog SCC Blog (2022), https://www.scconline.com/blog/post/2022/01/05/ doctrine-of-essential-facilities/ (last visited Jun 14, 2022).

[4] Competition policy | Fact Sheets on the European Union | European Parliament, Europarl.europa.eu, https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy (lastvisited Jun 20, 2022).

law, the Member States apply both Article 82 and their national competition laws. In addition, they are authorised to apply their national abuse of dominance provisions even more strictly than Article 82. Recent unilateral refusal-to-deal cases have come out of the courts or competition authorities of at least twenty of the EU Member States

One of the primary applications of the essential facilities doctrine by a national court of an EU Member State seems to have taken place in the United Kingdom as early as 2005, In [5]Attherances Ltd. v. British Horseracing Board, the defendant provided Internet, television, and other audio-visual telecast and coverage of British horse racing. It also provided pre-race data observing British horse racing to a variety of clients. The plaintiff, a previous purchaser of the defendant's pre-race data, was unable to negotiate a new license on reasonable terms. The defendant had a monopoly over a database of pre-race information that was not replicable and was necessary for downstream providers of racing television shows, Web sites, and lawful bookmaking operations. According to the judge, the British Horseracing Board abused its dominance.

The judge held that the defendant's control of the pre-race data consisted of an essential facility and that the refusal to supply of the data was an abuse of dominance under both EU and UK law. It also made clear that under British law:

"Abuse of a dominant position by refusal to supply may occur ... as a result of the cutting off of an existing customer, or refusing to grant access to an essential facility unless the act or refusal is objectively justified."

Some interesting and extensive applications of the essential facilities doctrine have arisen in Australia. Australian authorities adopted a one-of-a-kind statutory and regulatory scheme to govern essential facilities called the National Access Regime (NAR). The NAR gives various state and federal agencies broad discretion to compel owners of essential facilities to deal with competitors on fair and non-discriminatory terms. In addition to the NAR, the Australian legislature has adopted several industry-specific rules that regulate similarly to the NAR. Finally, the Australian High Court has also adopted it in principle.

[5] [2007] EWCA Civ 38

CONCEPT OF ESSENTIAL FACILITY CONCERNING INTELLECTUAL PROPERTY RIGHTS

Even though the essential facilities doctrine has not yet been explicitly invoked in India in the context of competition law, the doctrine however is by no means a tabula rasa in the Indian legal system. The clearest manifestation of the doctrine can be found in Patents Act, of 1970.

The compulsory licensing regime under the Indian Patents Act in its most rudimentary form is an authorisation by the state that enables a third party to access a patented invention without taking any consent from the holder of the patent. We can extend the horizon of compulsory license to include the concept of Essential Facility Doctrine, as it cannot only mandate the sharing of assets enjoying the protection of intellectual property that are essential facilities, but it can also be used to mandate the sharing of facilities that are of great public value, an example of which could be life-saving drugs and inventions for the protection of the environment. On the far end of the spectrum, the Essential Facility Doctrine can also be viewed as a broader concept as it can be invoked to mandate the sharing of a large array of assets, not only those relating to intellectual property.

Furthermore, Section 84 of the Indian Patents Act of 1970, delineates three circumstances in which a compulsory license can be granted after three years of the grant of the patent: If the reasonable requirement of the public for the product that is patented is not satisfied, and if the invention is not made available to the public at a reasonably affordable price and, finally, if the invention in issue is not "worked" in the Indian territory.

In this context, Compulsory Licensing can be viewed as a remedy against the patent holder's refusal to deal, and it also compels the holder to transact with the third party that is in question. We can see that Indian Patent Act has wisely takes corrective steps against the actions of patent holders that are not in line with the interest of the public.

The Indian IP regime is thriving and expanding day by day. The Government is enforcing changes in the IP regime as far as its accessibility, governance and rights of the owner are concerned. Yet, there are particular sectors in India where it is crucial for the invocation of the essential facilities doctrine into the principles of IP. These are the sectors which are found abusing or misusing their

dominant position.

The doctrine can be applied in sectors such as:

- Pharmaceuticals: This enterprise is evolving and India is recognised as the niche for the development of generic medicines. It can be asserted that this industry has a higher number of patent. The industry is the manufactory of medicinal drugs which are used to treat an ailing person. Therefore, it is fundamental to invoke the essential facilities doctrine because manufacturers get their drugs patented and sell the same at a relatively high price. To deter this exercise and to enforce the very objective of consumer welfare of the IP laws and competition law, it becomes appropriate to enforce the doctrine.
- Automobiles: It is observed that there are few automobile industries which fail to provide their services in the secondary market abuse their intellectual rights and are frequently abusing their market dominance. Hence, it is suitable under such occurrences to oversee the working of these industries. These objectives can only be accomplished with the enforcement of essential facilitiesdoctrine in the particular market or industry.
- Information technology: This sector is highly ambiguous. Almost all the members of this industry owe some of the other IPs and are always abusing or misusing the same. Hence, it is crucial to regulate their activities and provide justice and welfare to their end-users i.e., the customers by way of embodying the principles of the essential facilities doctrine.

2. HISTORICAL DEVELOPMENT

WORLD:

The genesis of this doctrine can be followed in the [6]Terminal Railroad Association Case of 1912 by the US Supreme Court. The court contemplated whether the Terminal Railroad Association that has control over every railroad access to St. Louis would be a combination in restraint of trade, the court found that since no non-member could pass through or enter St. Louis without using the facility due to the geographical and topographical conditions, relying on the evidence of the expert witness the court came to conclude that the facilities were 'public utility and any denial or refusal toaccess would adversely impact the trade and commerce, and therefore non-discriminatory accesshas to

[6] 224 U.S. 383 (1912)

be provided to all the users. However, the doctrine has not been greatly appreciated in the U.S., the critics have expressed the opinion that the doctrine restraining the procedure of anti- competitive activities has lost traction in the USA. This is given the common case concerning [7]Verizon Communications Inc v. Law Offices of Curtis V. Trinko, LLP ("Trinko Case") in the United States.

The European Commission started its practice of the doctrine with a sequence of decisions inflicting liabilities where holders of ports, harbours, tunnels, and related facilities used their control of such infrastructure to prevent the emergence of downstream competition. For example, various early decisions involved situations where the operator of a port also operated a ferry service and rejected access to (or harshly discriminated against) a rivalling ferry service. In these cases, the port facility could not be duplicated and the integrated monopolist was required to award non-discriminatory access to its unintegrated downstream rival.

In the context of the European Union, the EU Commission has taken a more conservative point of view on "access to common facilities" and ruled in the Sealink case that a dominant undertaking should not leverage its dominant position in one market to protect its position in another market and where the competitor is already subject to a certain level of disruption by the dominant undertaking there is a duty on the dominant undertaking not to take any action which will result in further disruption. The commission observed that a competitive disadvantage could not be imposed by the dominant firm. The commission further defined an essential facility means a facility that is indispensable to provide services to consumers as opposed to a facility that is required to improve the computing among the competitors if access is given.

In the context of Australia, it is fair to say, as [8]Australian judges have the essential facilities doctrine 'evolved as a 'gloss' upon the succinct terms of the *Sherman Act.* Australia interestingly has explicitly institutionalised the Essential Facility Doctrine by using the path of mandated law rather than through the interpretation of competition law or regulatory laws. An important outcome of this was that the Australian government formed the Independent Committee of Inquiry into Competition Policy in

[7] 540 U.S. 398 (2004)

[8] Brenda Marshall & Rachael Mulheron, "Access to 'Essential Facilities' Under Part IIIA of the Trade Practices Act: Implementing the Legislative Regime" [1998] BondLawRw 6; (1998) 10(1) Bond Law Review 99 Classic.austlii.edu.au (1998), http://classic.austlii.edu.au/au/journals/ BondLawRw/1998/6.html (last visited Jun 17, 2022).

Australia which brought about the Hilmer Report that suggested a legislative regime to promote third-party access to 'essential facilities'. Given the judicial pronouncement on the relation between Section 46 of the Trade Practices Act 1974 and essential facilities, the Hilmer Report (in contrast to other jurisdictions such as the US and EU) believed that access issues and disputes were adequately settled with an administrative solution rather than by counting on a judicial mechanism. In tandem with the Report, Part IIIA of the Trade Practices Act 1974 was incorporated into the prevailing Australian competition law to create a national access regime. Thus, it is apparent that Australia follows a national access regime whereby access requirements are limited to the natural monopolies and the entire process is overseen by an administrative rather than a judicial process.

The [9]political, economic and social milieu of India is quite distinct and unique from the western world and this is appropriate when such a doctrine is applied to the Indian context. Until the early 1990s, India was governed by the License Raj which penalised businesses for generating more than the quantities prescribed in the license. Additionally, state-funded and owned enterprises were permitted a monopoly in most industries from bread, oil and gas, power, and telephones to airlines. When reforms were introduced in 1991, public sector enterprises had passage to their exceptional resources that were not made available to private enterprises, which had to invest serious sums running into billions of dollars in building their infrastructure but managed to develop profits overtime.

Section 4 of the Competition Act gives that curbing market practices resulting in a denial of market access and leverage to protect another market are specific instances of abuse of dominant position. In the context of India, the Essential Facility Doctrine was first examined in the case of [10]*ArshiyaRail Infrastructure Limited*, where the CCI opined that Container Corporation of India (CONCOR)was not dominant in the relevant market but as an obiter on the issue of access of terminals of CONCOR maintained that essential facilities doctrine can be only be invoked in certain situations:

1. Technical feasibility to provide access;
2. Possibility of replicating the facility in a reasonable period of time,
3. Distinct possibility of lack of effective competition if such access is denied and

---

[9] Sundar Ramanathan, The destiny of essential facilities in India Lakshmisri.com (2012), https://www.lakshmisri.com/newsroom/archives/The-destiny-of-essential-facilities-in-India# (last visited Jun 20, 2022).
[10] Arshiya Rail Infrastructure Ltd. v. Ministry of Railways & Ors., Case No. 64/2010 & 12/2011.

4. Possibility of providing access on reasonable terms.

INDIA

The Essential Facilities Doctrine can be understood as a "facility or infrastructure without access to which competitors cannot furnish services to their consumers". therefore, in cases where an input, facility or infrastructure owned by an enterprise in a dominant position is crucial to secure effective competition in the downstream market and when it is not legally, technically or economically possible to find an alternative for this input, facility or infrastructure, an obligation to supply this input, facility or infrastructure to competitors in the downstream market is imposed on the kind of undertakings through the Essential Facility Doctrine".

In [11]*Arshiya Rail Infrastructure Limited (ARIL*). The CCI held that Container Corporation of India (CONCOR) was not dominant in the relevant market but as an obiter on the issue of access of terminals of CONCOR held that essential facilities doctrine can be only be invoked in certain circumstances:

1. technical feasibility to provide access;
2. possibility of replicating the facility in a reasonable period of time,the distinct possibility of lack of effective competition if such access is denied and
3. possibility of providing access on reasonable terms.

Further, in the landmark judgement of [12] *Shamsher Kataria v. Honda Siel Cars India Ltd*., it was decided that spare parts, diagnostic tools, manuals, etc., of each OEM, would comprise essential facilities for the autonomous repairers to be able to deliver the consumers with effective after-sale repair and maintenance work. This would be crucial for independent repairers to be able to effectively play against the authorized dealers of the OEMs.

The Commission spoke of the essential factors to be taken into account in defining whether spare parts of each OEM would make up essential facilities:

a) control of the essential facility by the monopolist;

[11] Arshiya Rail Infrastructure Ltd. v. Ministry of Railways & Ors., Case No. 64/2010 & 12/2011.

[12] Shamsher Kataria v. Honda Siel Cars India Ltd C-03/2011

b) The inability to duplicate the facility;
c) The denial of the use of the facility; and
d) The feasibility of providing the facility.

3. COMPARATIVE STUDY

It is already well stated in the discussion above as to what is meant by Essential Facility Doctrine, although its text-book definition remains the same across the world, the application varies, from country to country, at places we may encounter a rigid or strict application of the doctrine, while some places we may encounter a rather flexible application. Following is a cross country analysis of the applicational aspects of the Essential Facility Doctrine in US, Europe, UK, Australia and India.

United States of America

The essential facilities doctrine has a conflicted role as a part of U.S. antitrust law. Typically viewed as arising from Supreme Court's 1912 decision in [13]United States v. Terminal Railroad, where the Supreme Court and lower courts invariably have applied the essential facilities doctrine. U.S. courts have long acknowledged that the general rule that a firm is not obliged to deal with its rivals, yet there are certain exceptions. [14]The essential facility doctrine, in the States, has been expressed as a subset of the so-called "refusal to deal" lawsuits which put constraints on a monopolist's ability to prohibit actual or potential rivals from competing with it. The doctrine is one long-standing limitation on the general rule that a firm is not obligated to deal with its competitors in a market.

The Supreme Court first articulated this doctrine in [15]United States v. Terminal Railroad. In Terminal Railroad, a group of railroads controlling all railway bridges and switching yards into and out of St. Louis prevented striving railroad services from giving transportation to and through that destination. As per the court this constituted both an unlawful restriction of trade and an endeavour to monopolise.

[13] 224 U.S. 383 (1912)
[14] Donna Patterson, Robert Pitofsky & Jonathan Hooks, The Essential Facilities Doctrine Under United States Antitrust Law Scholarship. law. georgetown. edu (2002), https:// scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1342&context=facpub (last visited Jun 22, 2022).
[15] 224 U.S. 383 (1912)

Since Terminal Railroad, the Supreme Court has reached similar decisions in a series of cases, like:

- In [16]Associated Press v. United States, the Supreme Court establish that the Associated Press by laws infringed the Sherman Act by curbing membership in the organisation and thereby accessto its copyrighted news services.
- In [17]LorainJournal Co. v. United States, the Supreme Court contemplated whether the defendant newspaper, which was the only local business distributing news and advertisements in the town, overstepped the Sherman Act by declining to accept advertising from businesses that placed advertisements with a small radio station. The Court issued an order requiring the newspaper to accept advertisements.
- In [18]Otter Tail Power Co. v. United States, the Supreme Court found that the defendant, an electrical utility that sold electricity at the retail level (directly to consumers) as well as the wholesale level (to municipalities that sought to resell electricity at retail), had monopolised in infringement of the Sherman Act by refusing to supply electricity at wholesale so that it could rather service customers directly itself.

The US courts have established that the essential facilities doctrine stands acceptable in those extraordinary circumstances where one firm stand in its power to eliminate actual or potential competitors. For example, in [19]MCI Communications v. AT&T CO., the Court pertained to the essential facilities doctrine to compel the monopolist telecommunications provider to provide access to its local service network to competitions in long-distance services.

Similarly, in [20]Aspen Highlands Skiing Corp. v. Aspen Skiing Co the court applied the essential facilities doctrine to a ski resort's decision to discontinue its long-standing participation with a competitor ski resort, in selling a "multi-area" ski ticket that gave customers flexibility to promote any of the area's ski resorts at a discounted price. The court described the "multi-area" ticket as an "essential facility" to which the defendant was denying access, with the objective to monopolise by laying the competitor ski resort out of business. The court therefore found adequate evidence to inflict

[16] 326 U.S. 1 (1945).
[17] 342 U.S. 143, 146-49, 156 (1951)
[18] 410 U.S. 366, 377-79 (1973).
[19] 708 F.2d 1081, 1132-33 (7th Cir. 1983).
[20] 738 F.2d 1509, 1520-21 (10th Cir. 1984)

antitrust liability for refusal to deal.

The essential facilities doctrine is applied cautiously, generally in exceptional circumstances that meet strict requirements. [21]Because the doctrine embodies a divergence from the general rule that even a monopolist may select with whom to deal, therefore, precisely, in USA, to establish antitrust liability under the essential facilities doctrine, a party must prove four factors:

i. control of the essential facility by a monopolist;
ii. a competitor's inability practically or reasonably to duplicate the essential facility;
iii. the denial of the use of the facility to a competitor; and
iv. the feasibility of providing the facility to competitors.

This test for antitrust liability has been accepted by practically every court to deem an essential facilities claim.

EUROPE

[22]The European Union recognises essential facilities as a principle related with the abuse of dominant position (Article 82 of the Treaty of Rome), so much so that recent European guidelines on abuse of dominance consciously endorse the doctrine. However, until 1998, the ECJ had not officially granted limitation force to Essential Facility Doctrine. In the last 15 years the European economies have been vastly affected by regulatory reforms intending for introducing competition in markets where the existence of essential facilities makes up a hard barrier to entry in natural monopoly industries such as telecommunications, electricity, gas, railways, and the postal sector, etc. [23]The first case in Europe (European Union) was the [24]Commercial Solvents Corp v. Commission of the European Communities to apply the principle. This 1974 judgment said that a dominant supplier of an input

[21] Donna Patterson, Robert Pitofsky & Jonathan Hooks, The Essential Facilities Doctrine Under United States Antitrust Law Scholarship. law. georgetown. edu (2002), https:// scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1342&context=facpub (last visited Jun 22, 2022).
[22] Singh, Jaivir. 2013. Is there a Case for Essential Facilities Doctrine in India? CIRC Working Paper No. 04. New Delhi: CUTS Institute for Regulation and Competition.
[23] ESSENTIAL FACILITIES IN THE EUROPEAN UNION: BRONNER AND BEYOND, Jonesday.com, https://www.jonesday.com/files/Publication/e2d79ea9-8440-49e6-a879-c834f4b0b557/Presentation/PublicationAttachment/9cf89b02-295b-43cf-8a00-3cbea13a85bf/ Article%20essential%20facilities.pdf (last visited Jun 20, 2022).
[24] Commercial Solvents, 1974 E.C.R. at 223

abused its dominant position when it refused to supply the input to a customer, the supplier's competitor in the downstream market, 'with the object of reserving such raw materials for manufacturing its own derivatives, and therefore risks eliminating allCompetition' from that rival firm. Over time, among other things, the European Commission has imposed liabilities on owners of ports, harbours, tunnels etc. who prevented downstream competition through their control of the infrastructure.

The European Union has likewise introduced the idea of 'exceptional circumstances' to contradict the privileges of intellectual property rights (IPRs) when such rights are perceived to counter competition. One of the early cases in this regard was [25]Volvo v. Vengo where it was decided that the dominant firm's refusal to grant a licence of its 'protected design' for car body panels, independently or solely, could not constitute abuse of dominant position, since the right to exclude 'constitutes the very subject-matter of the IP holder's exclusive right' under Intellectual Property law. Yet in this case it was also held that such a refusal could be deemed abusive in limited situations, including an 'arbitrary refusal to supply spare parts to independent repairers'.

The impression that a higher standard must be fulfilled before a dominant firm can be obliged to licence its IPRs was more clearly expressed in [26]Magill and [27]IMS Health, In these two cases, the courts were of the belief that 'exceptional circumstances' must exist for any refusal to licence IPRs to be countered.

The exceptional circumstances prerequisite was clarified into a three-part test:

1) The refusal deterred the emergence of a 'new product', which the dominant firm did not offerand for which there was potential consumer demand;
2) The refusal enabled the dominant firm to reserve for itself 'the secondary market by excluding all competition on that market'; and
3) The refusal was unjustified.

[25] Volvo v. Erik Veng (UK) Ltd, Case 238/87, 1988 E.C.R. 6211, [1989] 4 C.M.L.R. 122
[26] Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission, Joined Cases C-241/91 P & C-242/91 P, 1995 E.C.R. I-743, [1995] 4 C.M.L.R. 718
[27] Order of the President of the Court of Justice of April 11, 2002, NDC Health GmbH & Co. KG and NDC Health Corporation v Commission, Case C-481/01 P(R), 2002 E.C.R. I-3401, [2002] 5 C.M.L.R. 1.

IMS Health further illustrated that the circumstances must be total for 'exceptional circumstances' to be established. Thereafter such arguments were tried to require open access to information for interconnecting with the dominant Microsoft networks. While the European Commission has been formulating the essential facilities doctrine in this manner, it has also notably not extended open access in cases where firms can build their own facility either on their own or in cooperation with other producers. It can thus be maintained that all over, the European Union has applied the Essential Facility Doctrine requiring access to infrastructure largely for cases where there are significant downstream externalities.

UNITED KINGDOM

[28]The concept of an 'Essential Facilities Doctrine' is gaining an increasing importance in a number of decisions made by competition authorities throughout the world because of the liberalisation of utility markets which showcase a number of possible essential facilities; and the desire of governments to bring in new infrastructure that is funded by private investment.

In the United Kingdom, a range of facilities have been viewed as "essential", these are:

- railways (track, stations);
- airports (slot allocation; ground handling services) and airline computer reservations systems; - ports;
- utility distribution networks e.g. electricity wires and gas pipelines;
- bus stations;
- some intellectual property rights

One of the primary applications of the essential facilities doctrine in the United Kingdom was as early as 2005, In [29]Attherances Ltd. v. British Horseracing Board, the defendant provided Internet, television, and other audio-visual telecast and coverage of British horse racing. It also provided pre-race data observing British horse racing to a variety of clients. The plaintiff, a previous purchaser of

[28] The Essential Facilities Concept, Oecd.org (1996), https://www.oecd.org/competition/abuse/1920021.pdf (last visited Jun 22, 2022).
[29] The Essential Facilities Concept, Oecd.org (1996), https://www.oecd.org/competition/abuse/1920021.pdf (last visited Jun 22, 2022).

the defendant's pre-race data, was unable to negotiate a new license on reasonable terms. The defendant had a monopoly over a database of pre-race information that was not replicable and was necessary for downstream providers of racing television shows, Web sites, and lawful bookmaking operations. According to the judge, the British Horseracing Board abused its dominance.

The judge held that the defendant's control of the pre-race data consisted of an essential facility and that the refusal to supply of the data was an abuse of dominance under both EU and UK law. It also made clear that under British law, "Abuse of a dominant position by refusal to supply may occur ... as a result of the cutting off of an existing customer, or refusing to grant access to an essential facility unless the act or refusal is objectively justified."

As per the laws in United Kingdom in relation to Essential Facility Doctrine, if a facility is legitimately designated as essential there should be a mandated right for competitors to have access at economically efficient prices in order to compete in a related market. The manner with which third-party access is given to an essential facility will be based on the availability of spare capacity within the facility.

Commenting on the [30]Commercial Solvents case, John Temple Lang observed:

- The case involved refusal to supply a downstream competitor, with important effects on competition: the customer was the only competitor of Commercial Solvents in the Community in the production of the downstream product;
- Commercial Solvents was easily able to supply the competitor's needs: it had spare capacity and
- Did not need all its production for its own use;
- No other justification for the refusal to supply was suggested.

[30] 1974 E.C.R. at 223.

AUSTRALIA

[31]In [32]Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd. The defendant Broken Hill Party who was the producer of 97 percent of Australia's steel, manufactured Y-bar steel which it sold solely to its subsidiary Australian Wire Industries. In return Australian Wire Industries manufactured fence posts from the raw materials and sold them. Queensland Wire Industries, who was the plaintiff, sought steel from Broken Hill Party to competitively generate fence posts for the rural market but the prices that came with it were so lofty that the plaintiff moved the courts withthe plea that this equates to a 'refusal to sell'.

Regardless, the judiciary was not convinced about this being an act that misused market power and more importantly went on to categorically say that the Essential Facility Doctrine is not accommodated by the terms of Section 46. The significant consequence of this was that theAustralian government set up the Independent Committee of Inquiry into Competition Policy in Australia which drew the Hilmer Report that recommended a legislative regime to enable thirdparty access to 'essential facilities'.

As described in the Hilmer Report, 'essential facilities' are facilities which demonstrate monopolistic traits, on the basis that they cannot be reproduced economically. Classic illustrations like electricity transmission grids, telecommunications networks, gas and water pipelines, railroad terminals and tracks, airports, ports and wharves. Access to such facilities is *essential to facilitate* effective competition in upstream or downstream markets.

Given the judicial pronouncement on the association between Section 46 of Trade Practices Act 1974 and Essential Facilities, the Hilmer Report (in contrast to other jurisdictions such as the USand EU) was based on the belief that access issues and disputes were better settled with anadministrative solution in contrast to the judicial mechanism. Along with the Report, Part IIIA ofthe Trade Practices Act 1974 was incorporated in the prevailing Australian competition law to createa national access regime. This regime strives to balance the interest of both the suppliers as well as the

[31] Singh, Jaivir. 2013. Is there a Case for Essential Facilities Doctrine in India? CIRC Working Paper No. 04. New Delhi: CUTS Institute for Regulation and Competition.
[32] [1989] HCA 6; 167 CLR 177; 83 ALR 577

purchasers and firms with natural monopolies that are vertically integrated are liable to provide access.

The access regime furnishes provisions for commercial negotiations of terms and conditions. Arbitration is sought on failure, from Australian Competition and Consumer Commission. Thus, it is visible that Australia pursues a national access regime whereby access requirements are restricted to the natural monopolies and the entire process is governed by an administrative rather than the judicial process.

INDIA

With the dawn of industrialisation, the concern that transpires is whether these companies can now be obliged to share their facilities, built at a huge cost on a fair and non-discriminatory basis, with fresh entrants in the brand of encouraging competition.

As per Section 4 of the Competition Act, it provides that limiting market practices resulting in a denial of market access, and leverage to protect another market are particular instances of abuse of dominant position. It can be perceived as the transfer of profit from one organisation to another. Thedoctrine should be referred to in a situation when the conduct is likely to eliminate all effective competition in the market.

The essential facilities doctrine has not been explicitly invoked in India. However, the tenets underlying the doctrine can be pursued under various Indian laws and regulations. Mixed arguments are going in favour and against the application of the doctrine in India. Nonetheless, the telecom sector, natural gas sector, and electricity sector are amongst few which acknowledge the concept of essential facilities doctrine.

[33]In India, following acts and regulations indirectly recognises the essence of the essential facilities doctrine:

1) TRAI Act, 1997

[33] Gayatri Iyer, Essential Facilities Doctrine.docx Academia.edu, https://www.academia.edu/38044155/Essential_Facilities_Doctrine.docx (last visited Jun 22, 2022)

2) Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004
3) Petroleum and Natural Gas Regulatory Board Act, 2006
4) Electricity Act, 2003
5) The Competition Act, 2000

Within the scope and concern of the paper, I will lay focus on Competition Act, of 2002. Under the Competition Act, 2002, the essential facilities doctrine has been referred to in cases of denial of market access by a dominant enterprise, under Section 4 of the Act. The Competition Commission of India (CCI) has on various occasions addressed the applicability of the essential facilitiesdoctrine.

One of the significant causes for the relevancy of the doctrine in India is the NSE case. In this case, a complaint was filed by [34]MCX Stock Exchange Ltd. opposing National Stock Exchange (NSE) for abusing its dominant position in the market for the 'currency derivatives' (CD) segment.

CCI, in this case, has implicitly acknowledged the doctrine of an essential facility. MCX and NSE were operating platforms for the trade-in CD segment. Financial Technologies of India Ltd. (FTIL), promoter of MCX delivered software under the name ODIN that was used by various stock exchanges for trading in numerous commodities comprising the CD segment. Later, NSE brought up its own software by the name NOW for the CD segment. MCX alleged that NSE denied sharing its application program interface code with FTIL, consequently disabling ODIN users from connecting to the NSE CD segment. The Competition Commission of India held that the softwares in issue was the essential facility for trading on the stock exchange and accordingly held NSE accountable for abuse of dominance.

Hence, it can be identified from the above-discussed litigations that CCI has not expressly incorporated the essential facilities doctrine, however, it has implicitly referred to the essence of the doctrine in these litigations.

If we take the reference of Section 4, Abuse of a dominant position transpires when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate a

[34] CASE NO. 13/2009

competitor or to dissuade future entry by fresh competitors, with the consequence that competition is staved off or lessened substantially. An enterprise in a dominant position fulfils any of the following acts, whether directly or indirectly, inflicts unfair or discriminatory practices, limits or restricts the production of goods or provision of any services in any form.

Section 4(2) of the Act provides that there shall be an abuse of a dominant position if an enterprise or a group:

- directly or indirectly imposes unfair or discriminatory conditions or prices in the purchase or sale of goods or services;
- restricts or limits the production of goods or services in the market; etc.
- As per Section 4(2)(c) of the Act, there shall be an abuse of dominant position if an enterprise indulges in a practice resulting in a denial of market access in any manner.

The description of 'abuse of dominant position', under Section 4 of the Act, 2002, as well as its connection with the essential facilities doctrine, is relevant. It is an accepted principle of jurisprudence in competition law that domination itself does not overstep competition law, the dominant firm is though conferred a particular duty when it comes to other firms serving in the same domain/field/market. It cannot be contemplated as a basis to apply the doctrine unjustly or unfairly when it comes to the duty of preventing misuse of the dominant position.

Experts have also forewarned that courts and CCI must be observant and vigilant when inferring Section 4 of the Act, particularly in light of clashing arrangements and implementation of the doctrine in the United States of America and the European Union. Further, the Indian Competition Act 2002 defines the refusal to deal as, "Refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or fromwhom goods are bought.

Though popularly, each business may agree on with whom they desire to transact, there are some situations when a refusal to deal may be deemed an unlawful anti-competitive practice, if it staves off or reduces competition in a market. The unlawful behaviour may comprise two or more companies refusing to use, buy from or otherwise deal with a person or business, such as acompetitor, to cause

some economic loss on the victim or contrarily force them out of the market. Arefusal to deal (also known as a group boycott) is barred in some countries which have restricted market economies, though the actual acts or situations which may constitute such undesirable behaviour may vary significantly between jurisdictions.

4. CRITICAL ANALYSIS OF ESSENTIAL FACILITY DOCTRINE

As the competition law regime in India is still in a developing phase, the essential facilities doctrine has not been explicitly invoked by the CCI in any case so far. Numerous arguments have been formulated in favour of and against the application of the doctrine in India. Those who are against the doctrine make the following fundamental assertions to contend that the doctrine can have several deleterious effects and that it is sub-optimally theorised and articulated.

The first argument that comes is based on the assertion that the doctrine extensively undermines dynamic efficiency in that it reduces the encouragement to innovate because dominant undertakings can be coerced to share the fruits of their innovations with competitors who lack the technological prowess to make those innovations.

Further argument goes stating that Competition law, in common, is opposed to the idea of cooperation between competitors, whereas this doctrine, on the other hand, ask for cooperation which, the argument goes, could result in the creation of bigger, and potentially more destructive, monopolistic systems that could undermine, rather than, reinforcing, the vitality of competitive forces. The critics further allege that there is substantial divergence in the enactment of the doctrine by courts across the globe in some cases it includes hundreds of parties whereas others just two. Some courts adopt a lean and strict interpretation of the doctrine whereas others impose a broad duty to deal on the dominant undertaking. Therefore, it is speculated that there is no workablemodel of the doctrine that can be admitted into India. And lastly, it is argued that sectoral regulatorshave adequate power to correct problems of this nature; there is no need for the competition regulator to tinker into these issues.

However, there are many explanations why the essential facilities doctrine can be a suitable remedy to deal with contemporary challenges in the field of competition law. An examination of the literature pertaining to competition law clearly implies that the fundamental goal of the competition law regime

in India is to empower the CCI to enact policy instruments and to embark strategic interventions to facilitate a culture of competition. Therefore, broader application of the doctrine would be flawlessly in harmony with the philosophy of our competition policy.

Moreover, even though some sectoral regulators can order the sharing of essential facilities, their interventions stand as ex-ante in nature which means that they are meant to deter 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 means that they can take corrective measures to mend the damage that is caused by lack of access to essential facilities. This ex-post role is of special significance, as not all cases of denial of access can be envisaged in advance, so it is necessary to prepare the CCI with the doctrinal device essential for untangling the Gordian knot of sophisticated sectoral regulations to undo the damage caused to competition.

Further, maximum arrangements relating to the building of infrastructure assets in India are founded on the Build Operate Transfer (BOT) model which suggests that private entities have to transfer their assets to the government after a particular time period. Thus, since the extent of the right to control infrastructure assets is so exclusive, adoption of the essential facilities doctrine would not lead to the curtailment of that right. Further if we look at the right to property under the Indian constitution, it no longer a stands as a fundamental right; it is just a legal right. This means that the state has greater power to take away that right in the interest of public welfare.

5. CONCLUSION

From the aforesaid discussion it can be summarised that business and competition plane varies, in different jurisdictions. This paper also makes us ponder about the emerging and developing economies such as India, where the resources are limited, owing to which replication may not always be feasible and sharing of resources, hinders the efficiency of a business and establishes a deterrent for investors to invest in it.

This doctrine inflicts an anti-monopoly obligation on the dominant entities to share their facilities for the greater public good and this becomes a difficult task particularly when the replication of the facility cannot be constructed or is not feasible. It can be easily imagined that In prospective time

there will be a bigger use of doctrine as the firms are entering into joint ventures in order to attain greater competitive benefits along coupled with higher efficiencies. This doctrine calls for cordial settlement for the solution in case of dispute between firm holding monopoly and others who lacks the same. If we view the doctrine with a broader perspective, we can ascertain that the function of applying this doctrine shall be consumer welfare. Therefore, it can be relevant in order to prevent exploitation of consumer and to ensure the sharing of facility and prevention of monopolisation.

As the Indian economy grows and evolves it is impending that for an expansive and more complete encouragement of competition, the Essential Facility Doctrine will need to make its way in from the Competition Commission and competition law which is sufficiently structured to uphold the doctrine. It is therefore for both the competition authority and the courts to level the economic and competitive interests of the parties that are involved, for the interest of the public and also to open the market for competition.

REFERENCES:

1. Yugank Goyal, Jayant Malik & Gaurav Sharma, Essential Facility Doctrine Cuts-ccier.org (2013), https://cuts- ccier.org/pdf/Essential_Facilities_Doctrine.pdf (last visited Jun 12, 2022).
2. Manu Garg & Tanisha Agarwal, The Doctrine of Essential Facilities: How Essential it is, in the Indian Market | SCC Blog SCC Blog (2022), https://www.scconline.com/blog/post/2022/01/05/doctrine-of-essential-facilities/ (last visited Jun 14, 2022).
3. Manu Garg & Tanisha Agarwal, The Doctrine of Essential Facilities: How Essential it is, in the Indian Market | SCC Blog SCC Blog (2022), https://www.scconline.com/blog/post/2022/01/05/doctrine-of-essential-facilities/ (last visited Jun 14, 2022).
4. Competition policy | Fact Sheets on the European Union | European Parliament, Europarl.europa.eu, https:// www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy (last visited Jun 20, 2022).
5. [2007] EWCA Civ 38
6. 224 U.S. 383 (1912)

7. 540 U.S. 398 (2004)
8. Brenda Marshall & Rachael Mulheron, "Access to 'Essential Facilities' Under Part IIIA of the Trade Practices Act: Implementing the Legislative Regime" [1998] BondLawRw 6; (1998) 10(1) Bond Law Review 99 Classic.austlii.edu.au (1998), http://classic.austlii.edu.au/au/journals/BondLawRw/1998/6.html (last visited Jun 17, 2022).
9. Sundar Ramanathan, The destiny of essential facilities in India Lakshmisri.com (2012), https://www.lakshmisri.com/ newsroom/archives/The-destiny-of-essential-facilities-in-India# (last visited Jun 20, 2022).
10. Arshiya Rail Infrastructure Ltd. v. Ministry of Railways & Ors., Case No. 64/2010 & 12/2011.
11. Arshiya Rail Infrastructure Ltd. v. Ministry of Railways & Ors., Case No. 64/2010 & 12/2011.
12. Shamsher Kataria v. Honda Siel Cars India Ltd C-03/2011
13. 224 U.S. 383 (1912)
14. Donna Patterson, Robert Pitofsky & Jonathan Hooks, The Essential Facilities Doctrine Under United States Antitrust Law Scholarship.law.georgetown.edu (2002), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi? article=1342&context=facpub (last visited Jun 22, 2022).
15. 224 U.S. 383 (1912)
16. 326 U.S. 1 (1945).
17. 342 U.S. 143, 146-49, 156 (1951)
18. 410 U.S. 366, 377-79 (1973).
19. 708 F.2d 1081, 1132-33 (7th Cir. 1983).
20. 738 F.2d 1509, 1520-21 (10th Cir. 1984)
21. Donna Patterson, Robert Pitofsky & Jonathan Hooks, The Essential Facilities Doctrine Under United States Antitrust Law Scholarship.law.georgetown.edu (2002), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi? article=1342&context=facpub (last visited Jun 22, 2022).
22. Singh, Jaivir. 2013. Is there a Case for Essential Facilities Doctrine in India? CIRC Working Paper No. 04. New Delhi: CUTS Institute for Regulation and Competition.
23. ESSENTIAL FACILITIES IN THE EUROPEAN UNION: BRONNER AND BEYOND, Jonesday.com, https:// www.jonesday.com/files/Publication/e2d79ea9-8440-49e6-a879-c834f4b0b557/Presentation/PublicationAttachment/ 9cf89b02-295b-43cf-8a00-

3cbea13a85bf/Article%20essential%20facilities.pdf (last visited Jun 20, 2022).

24. Commercial Solvents, 1974 E.C.R. at 223
25. Volvo v. Erik Veng (UK) Ltd, Case 238/87, 1988 E.C.R. 6211, [1989] 4 C.M.L.R. 122
26. Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission, Joined Cases C-241/91 P & C-242/91 P, 1995 E.C.R. I-743, [1995] 4 C.M.L.R. 718
27. Order of the President of the Court of Justice of April 11, 2002, NDC Health GmbH & Co. KG and NDC Health Corporation v Commission, Case C-481/01 P(R), 2002 E.C.R. I-3401, [2002] 5 C.M.L.R. 1.
28. The Essential Facilities Concept, Oecd.org (1996), https://www.oecd.org/competition/abuse/1920021.pdf (last visited Jun 22, 2022).
29. EWCA Civ 38
30. 1974 E.C.R. at 223.
31. Singh, Jaivir. 2013. Is there a Case for Essential Facilities Doctrine in India? CIRC Working Paper No. 04. New Delhi: CUTS Institute for Regulation and Competition.
32. [1989] HCA 6; 167 CLR 177; 83 ALR 577
33. Gayatri Iyer, Essential Facilities Doctrine.docx Academia.edu, https://www.academia.edu/38044155/ Essential_Facilities_Doctrine.docx (last visited Jun 22, 2022)
34. CASE NO. 13/2009