

**ESSENTIAL FACILITIES AND ABUSE OF DOMINANCE IN
SOUTH AFRICAN COMPETITION LAW.**

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DECLARATION

I declared that this research project is my own work. It is submitted in partial fulfilment of the requirements for the degree of Master of Law at the University of Pretoria. It has not been submitted for any degree or examination in any other University. I further declare that I have obtained the necessary authorisation and consent to carry out this research.

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SUMMARY

The Competition Act 89 of 1998 prohibits abuse of its dominance by a firm that is dominant within a specific market. The abuse of dominance prohibitions are set out in section 8 of the Act. This dissertation focuses on section 8(b) which prohibits a dominant firm from refusing to give access to an essential facility that belongs to the dominant firm or to which the dominant firm has access, in circumstances where it is economically feasible for the dominant firm to provide such access. The concept of an “essential facility” is problematic in South African competition law and this dissertation probes into the characteristics of such a facility and the requirements of proving a contravention of section 8(b). A comparative study of the US and EU is undertaken and it is eventually concluded that the South African Competition Authorities should lean more towards the US approach to the essential facilities prohibition.

TABLE OF CONTENTS

Chapter One: Background

1.Introduction.....	1
2.Nature and scope of research.....	3

Chapter Two: Overview of dominance provisions and contextualization of essential facilities

1.When is a firm dominant?.....	4
2.The dominance provisions in section 8.....	5
3.The distinction between rule of reason and per se prohibitions.....	6
4.What is an essential facility?.....	9
5. Refusing access to an essential facility to a competitor.....	10
6. Practical application of the essential facility doctrine.....	14
7. The concept of essential facility as interpreted by the courts.....	16
8. Defence.....	18

Chapter Three: Comparative Jurisdictions on Essential Facilities

1.The US Approach.....	19
2.The EU Approach.....	31

Chapter Four: Conclusion

1. Concluding Remarks.....	33
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BIBLIOGRAPHY	36
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CHAPTER ONE

BACKGROUND

1. INTRODUCTION

The aim of competition policy is to promote competition, make markets work better and contribute towards improved efficiency in individual markets and enhanced competitiveness within the South African competition market.¹ One of the main reasons for government involvement in the market place is that free markets do not always produce the socially efficient quantities of goods at socially efficient prices.² Therefore South Africa has also opted to employ legislation to regulate various aspects of competition in the consumer market.

The Competition Act³ has a major influence on how we do business in South Africa. The Act ensures the way businesses compete with each other is as fair as possible. Furthermore, it creates a framework within which companies can compete against each other both locally and internationally.

The Competition Act is unique in that it is the product of South Africa's economic, social and political history. It was enacted in October 1998 and came into force in 1999. It forms an important part of reforms to both address the historical economic structure in South Africa and encourages broad-based economic growth.⁴ The general aim of the Act is to ensure that businesses can compete fairly and effectively. Section 2 of the Act sets out its purposes in more detail, namely:

- a) to promote the efficiency, adaptability and development of the economy;
- b) to provide consumers with competitive prices and product choices;

¹ Neuhoff *et al A practical Guide to the South African Competition Act* (2006) 12 [hereinafter Neuhoff].

² Ibid.

³ 89 of 1998.

⁴ Neuhoff 25.

- c) to promote employment and advance the social and economic welfare of South Africans;
- d) to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;
- e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy;
- f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

The Competition Act applies to all economic activity within, or having an effect within, the Republic of South Africa⁵ and regulates the following conduct:

- Interaction between competitors, in other words horizontal practices⁶;
- interaction between suppliers and their customers, in other words vertical practices⁷;
- behavior of firms with market power, in other words dominant firms⁸;
- pricing behavior and
- mergers.

In order to achieve its objectives the Act regulates and prohibits certain conduct/practices by insisting on fair pricing to promote affordability and job creation and it affords all persons an equal right to participate in the economy.

In the fourteen years since the Act was promulgated, the Commission and Tribunal have considered numerous mergers and investigated and brought an end to a number of South African cartels and anti-competitive practices that flourished in the economic climate prior to the coming into operation of the Act.

In order to sustain a competitive market it is imperative to address and penalize conduct that threatens competition in such market. The abuse of dominance by a firm that is dominant in a specific market constitutes conduct

⁵ s3(1).

⁶ According to s1 of the Act a horizontal relationship means “a relationship between competitors”.

⁷ In terms s1 of the Act a vertical relationship means “the relationship between a firm and its suppliers, its customers or both.

⁸ A firm with a market share above a certain threshold, or that has market power.

which the competition authorities seek to root out as it creates a monopoly which stifles competition in that market.⁹ Such abuse may take various forms which are listed in sections 8 and 9 of the Competition Act. These provisions focus on the unilateral (independent) exercise of market power with regard to buyers and competitors by a single dominant firm.¹⁰

2. Nature and Scope of Research

Within the context of abuse of dominance, the abuse of dominance by a dominant firm in refusing a competitor access to an essential facility is dealt with under section 8(b) of the Competition Act. The purpose of this dissertation is to investigate how the concept of essential facility is dealt with in South African competition law, to consider how it is dealt with in comparative jurisdictions and to eventually make recommendations as to the appropriate manner in which the South African competition authorities should deal with refusal by a dominant firm to allow a competitor access to an essential facility.

⁹ Neuhoff 109. It is to be noted that the Act does not prohibit dominance but that it prohibits abuse of dominance.

¹⁰ Ibid.

CHAPTER TWO

OVERVIEW OF ABUSE OF DOMINANCE PROVISIONS AND CONTEXTUALIZATION OF ESSENTIAL FACILITY

1. When is a firm dominant?

In order for a firm to contravene the provisions of the Competition Act that deal with abuse of dominance, it must first be established that such firm is dominant in the specific market where the conduct that is complained of has occurred or is occurring. Section 7 of the Act sets out the test for dominance and indicates that a firm is dominant in a market if:

- it has at least 45% of that market;
- it has at least 35% but less than 45% of that market, unless it can show that it does not have market power, or
- it has less than 35% of that market, but has market power.

The first stage of the analysis into contravention of section 8 accordingly requires the Competition Commission to determine whether a firm is dominant using the statutory dominance test contained in section 7 of the Act. The determination of dominance entails the following three elements:¹¹

- definition of the relevant market;
- calculation of market shares; and
- depending on the size of the calculated market shares, determination of market power.

The Act defines market power as the “power of a firm to control prices, or to exclude competition or to an appreciable extent independently of its competitors, customers or suppliers”¹². Section 7 creates a connection between market power and market shares by introducing a dominance based on a combination of market share thresholds and the presence of market power.

¹¹ Neuhoff 108.

¹² S1.

A firm with a market share of more than 45% cannot escape the dominance definition and will be considered dominant *per se*.¹³ However Neuhoff points out that for those firms with market shares of less than 45% their market share is only one aspect that needs to be considered.¹⁴ If a firm has a market share of between 35% and 45%, the onus is on the firm to show that it does not have market power and if the firm cannot prove that it does not have such market power, it will be considered to be dominant based on its market share.¹⁵ Likewise a firm with less than¹⁶ 35% of a market may be considered to be dominant if it has market power but in this case the onus is on the complainant to show that the firm has market power.

In order to determine a firm's market share it is firstly necessary to determine the relevant market in which the firm operates.¹⁷ Market share usually refers to the sales revenue of the firm in relation to the turnover of the whole market.¹⁸

Market power is defined as the ability to control prices, exclude competition or behave to an appreciable extent independently of competitors, customers or suppliers.¹⁹ Neuhoff explains that the market power of a firm may thus be reflected in variables such as pricing and profits.²⁰ Also where it is difficult for new entrants to enter into a market, the existence of market share is more probable.²¹

2. The dominance provisions in section 8

In terms of section 8 of the Act, it is prohibited for a dominant firm to:

- charge an excessive price to the detriment of consumers;²²

¹³ Neuhoff 108.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Neuhoff 109.

¹⁸ Ibid. However in some instances market share may be calculated on the basis of capacity or units sold. See further *Competition Commission v South African Airways (Pty) Ltd SAA* case 18/CR/Mar01.

¹⁹ S1.

²⁰ Neuhoff 109.

²¹ Ibid.

²² s8(a).

- refuse to give a competitor access to an essential facility when it is economically feasible to do so;²³
- engage in an exclusionary act, other than an act listed below if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain;²⁴ and
- engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act:
 - requiring or inducing a supplier or customer to not deal with a competitor;²⁵
 - refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;²⁶
 - selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;²⁷ and
 - buying-up a scarce supply of intermediate goods or resources required by a competitor.²⁸

3. The distinction between *rule of reason* and *per se* prohibitions

When one deals with section 8 of the Competition Act it is important to bear in mind that some of the prohibitions in the section are so-called “rule of reason”-prohibitions whilst others are so-called “per se”-prohibitions. The Competition Act prohibits certain exclusionary acts by dominant firms, requiring or inducing exclusive dealing, refusing to supply scarce goods to a competitor, tying or forcing unrelated contract conditions, selling below marginal or average variable cost, and refusing the supply of intermediate

²³ s8(b).

²⁴ s8(c).

²⁵ s8(d)(i).

²⁶ s8(d)(ii).

²⁷ s8(d)(iv).

²⁸ s8(d)(v).

goods needed by a competitor to compete in a specific market.²⁹ These acts are presumed to be harmful, but a rule of reason applies.

A dominant firm could avoid liability for prohibited conduct to which a rule of reason applies by showing that the net effect of the conduct on competition in the relevant market is positive.³⁰ Under rule of reason prohibitions the dominant firm has the burden of showing that the anti-competitive effect outweighs the pro-competitive gains to technology or efficiency.³¹

Per se prohibitions on the other hand, do not allow respondents the right to defend their alleged illegal acts on technological, efficiency or pro-competitive grounds.³² Literally, the competition authorities only have to prove that the respondent has engaged in the alleged illegal act in order to prove that the contravention has been committed.

Neuhoff points out that there are several benefits to the adoption of per se rules in competition legislation³³:

- it provides certainty regarding the legality of certain types of conduct;
- it deters conduct known to pose severe competitive harm. The temptation to engage in certain types of conduct, such as price fixing, can be strong. If there was any doubt as to the legality of such conduct or if such conduct were justifiable, that could leave considerable scope to test the boundaries of permissible conduct and;
- it obviates the need for courts, businesses and enforcement agencies to engage substantial resources in case-by-case evaluations of conduct that the effects are assumed to be, with negligible exceptions, pernicious.

²⁹s8(d).

³⁰ Neuhoff 16.

³¹s8(c).

³² Neuhoff 16.

³³ibid.

“Rule of reason” clauses thus differ from per se clauses, because they are structured to allow the respondent to defend its alleged illegal actions, based on proof that significant pro-competitive side effects occurred as a result of the act under consideration.³⁴

It is important to note for purposes of this discussion that the prohibition in section 8(b) against refusing a competitor access to an essential facility when it is economically feasible for the dominant firm to give access, is a per se prohibition.

The distinction between these rule-of-reason matters and the per se prohibitions is carefully policed. The competition Appeal Court in *Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers*³⁵ (hereinafter *Glaxo*) has reversed the Tribunal’s effort to interpret a refusal to deal as denial of access to an essential facility. The Tribunal contended that the two concepts, namely refusal to deal and refusal of access to an essential facility, were equivalent as a matter of economics, but the Competition Appeal Court (CAC) was more concerned that different characterisations would lead to sharply different treatment as a matter of law.³⁶ *Glaxo* also set out five elements that must be established by the plaintiff before the “per se” prohibition kicks in, namely³⁷:

- a) the dominant firm involved refuses to give the complainant access to an infrastructure or resources;
- b) the complainant and the dominant firm are competitors;
- c) the infrastructure or resource concerned *cannot reasonably be duplicated* (my emphasis);
- d) the complainant cannot reasonably provide goods or services to its competitors without access to the infrastructure or resources; and

³⁴ Ibid.

³⁵ *GlaxoWellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers*, case no. 15/CAC/Feb02.

³⁶ At par 65.

³⁷ Ibid.

- e) it is economically feasible for the dominant firm to provide its competitors with access to the infrastructure or resource.³⁸

4. What is an essential facility?

Once it is established that a firm is dominant in a specific market and that the complainant and such dominant firm are competitors it is necessary to establish that the facility in respect of which the complaint has been filed does indeed constitute an essential facility for purposes of the Act. An “essential facility” is defined as an infrastructure or resource that cannot be reasonably duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers.³⁹

In the *Glaxo*-case, when assessing the meaning of the word “resource” in the context of the distribution of pharmaceutical products, the court held that:

“For reason already stated “resources” was not meant to be interpreted as products, goods or services. I cannot agree with the complainants that pharmaceutical products qualify as essential facilities or resources for anti-trust purposes”.

The requirements for an essential facility are cumulative and both rest on the conception of reasonableness: first, it must be an infrastructure or resource that cannot reasonably be duplicated; secondly, without access to such an infrastructure or resource a competitor cannot reasonably provide goods or services to its customer’s.⁴⁰ The definition of essential facility must meet a second test of reasonableness that without access a competitor cannot reasonably provide goods or services to its customer’s.⁴¹ A refusal to give a competitor access to an essential facility is prohibited only when it is economically feasible to give such access.⁴²

³⁸ Ibid 57.

³⁹ S1.

⁴⁰ Brassey M, Competition Law, Juta,(2002) 22(hereinafter Brassey).

⁴¹ Brassey 22.

⁴² S8(b).

The burden of thus proof rests on the complainant to prove contravention of the essential facilities prohibition by proving the following elements:⁴³

- a dominant firm;
- that refuses to give access;
- to a competitor;
- to an essential facility;
- when it is economically feasible to do so.

Neuhoff indicates that most of the structures found by the courts to be essential facilities have fallen into one of the following three categories:⁴⁴

- natural monopolies⁴⁵ or joint venture arrangements subject to significant economies of scale , such as a postal delivery network;
- structures, plants or other valuable productive assets that were created as part of a regulatory regime, whether or not they are properly natural monopolies- such as airports or ports;
- structures that are owned by the government and whose creation or maintenance is subsidized.

The common feature of all these structures is that those who have control over them or access to them may have a significant cost advantage over those who do not due thereto that it is usually too costly to duplicate these structures.⁴⁶ Neuhoff points out that in addition no alternatives, including alternatives that face cost disadvantages, are usually available that would allow the competitors of the owner of the essential facility to compete with it.⁴⁷ Thus competitors are unable to reasonably provide goods or services to their customers without access to the dominant firm's infrastructure or resource.⁴⁸

⁴³ Ibid.

⁴⁴ Neuhoff 115.

⁴⁵ Ibid. A natural monopoly , as explained by Neuhoff, is a market or industry where market demand is sufficient to allow only one firm to produce at its minimum efficient scale.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

5. Refusing access to essential facility to a competitor

The refusal to supply an essential facility to a competitor may constitute an abuse of dominance and as indicated, there is no justification once such conduct is established.⁴⁹

Market definition is important in determining whether or not an asset is essential.⁵⁰ If a facility is considered essential, the Competition Commission expects that competitors should be allowed to have access to it at economically efficient prices in order to compete in the related market.⁵¹

Brassey remarks that the elements of the definition of essential facility should be interpreted in light of the constitutional property clause, balanced against the importance of increasing competition, particularly in markets dominated by former state sponsored monopolies.⁵²

In *DW Integrator CC v SAS Institute (Pty) Ltd*⁵³, the respondent was a large software firm that owned valuable intellectual property, while the claimant was a firm that provided consulting services to the licensees of the respondent. It required respondent to issue a licence to its intellectual property to the claimant, as the claimant maintained that the software in question was an essential facility.⁵⁴ Thus, the claimant argued, the respondent's refusal to grant a licence amounted to a violation of section 8(b) of the Act.⁵⁵ The Competition Tribunal however held that the complainant had failed to accurately define the relevant market⁵⁶. The Tribunal was thus not required to make a finding on the claimant's allegations that use of the respondent's software was an essential facility.⁵⁷

⁴⁹Section 8(b).

⁵⁰ Neuhoff 116.

⁵¹ S18 and 19.

⁵² See also *GlaxoWellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers 15/CAC/Feb02* where the CAC cautioned that the doctrine should not be unreasonably widened (at par 54).

⁵³ 1999-2000, CPLR 191 (CT) ("DW Integrators").

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Par 23.

⁵⁷ Par 29.

In the large merger in *Telkom SA Ltd and TPI Investments v Praysa Trade 1062 (Pty) Ltd*⁵⁸, a third party, Infracom, and competitor to TPI Investments, sought to participate in the Tribunal hearing as an interested party.⁵⁹ Infracom, a telecommunications company, averred that the merger, and specifically Telkom's decision to terminate its exclusive contract with Infracom in favour of its merging partner TPI Investments, constituted a refusal to deal as the Telkom contract was considered to be an essential facility.⁶⁰

Infracom alleged that the services that it provides are highly specialized and focus on telecommunications facilities, and that its existence depended upon the renewal of its contract with Telkom.⁶¹ The Tribunal held that the claim that the Telkom contract constitutes an essential facility was without merit.⁶² This was because Telkom is not the only provider of telecommunications services.⁶³ Moreover, the Tribunal was not persuaded that the services provided by Infracom were so narrowly defined that they could not be redirected at servicing other facilities.⁶⁴

The Tribunal contended that, even if these claims were valid, this would simply establish the commercial importance of Telkom contract and not render it an essential facility.⁶⁵ The Tribunal stated that the importance of the Telkom contract would certainly not constitute the basis for a claim that every service provider that put itself up as a provider of facility management services to the telecommunications industry would be entitled to demand a share of the servicing of Telkom's facilities.⁶⁶ The approach taken by the Tribunal in this case is indicative of a narrow view of the doctrine.

⁵⁸1999-2000, CPLR, 116 (CT).

⁵⁹Par 16.

⁶⁰Ibid.

⁶¹Ibid.

⁶²Ibid.

⁶³Par 17.

⁶⁴Ibid.

⁶⁵Ibid.

⁶⁶Par 36.

The large merger in *DCD Dorbyl (Pty) Ltd and Globe Engineering Works (Pty) Ltd*⁶⁷, was conditionally approved by the Tribunal. Both the merging parties were providers of ship repair services in the Cape Town harbour.⁶⁸ Prior to the merger, the two firms had an existing relationship with one other firm through two joint ventures.⁶⁹ The one relevant to this discussion is the proposed joint venture to lease the working area of a part of the Cape Town harbor known as “A-berth”.

A-berth has unique features which make it particularly suitable for oil and gas repairs which, according to the Competition Commission, make it an essential facility.⁷⁰ The Competitors of the merging parties were against the merger as it would have granted the merging parties exclusive use of A-berth to the detriment of the competitors.⁷¹ The competitors also contended that there were no other areas in the port of Cape Town that could be used for a large oil and gas repair work.⁷² Hence, the crucial question in this matter was whether other areas in the port of Cape Town could be used for a large oil gas repairs work, that is, whether there is reasonable duplicability of the facility.⁷³ The Tribunal noted:⁷⁴

“Although this is not an abuse of dominance case and section 8(b) is therefore not applicable, the A-berth does seem to have the characteristics one would generally associate with an essential facility. It cannot be easily duplicated and the evidence indicated that competitors cannot reasonably provide services to large oil and gas vessels and structures without access to A-Berth”.⁷⁵

The Tribunal approved the merger on condition that the merging parties only leased 50% of A-berth so that competitors had sufficient access to the facilities of A-berth in order to continue with their businesses.⁷⁶

⁶⁷2009, 1 CPLR 122 (CT).

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Par 65.

⁷¹ Ibid.

⁷² Par 66.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Par 72.

⁷⁶ Par 81.

6. Practical application of the essential facilities doctrine

The concept essential facility implies the existence of two markets:⁷⁷

- an upstream market (The market where an input the essential facility) is owned/controlled by the vertically integrated dominant firm), and
- a downstream market (where the competitor seeking access is competing).

Where such a vertically integrated firm refuses to deal at one of these levels with a firm that wishes to engage in either the upstream or the downstream market alone, there is a concern that competition will be prevented in the relevant market.⁷⁸ For example, where the owner of a national railway lines refuses to permit other freight train operators to lease that line, competition in the market for rail freight might be impeded.⁷⁹

According to Nunkoo, the practical application and analysis of the essential facilities doctrine include the following steps:⁸⁰

- define the downstream market in order to establish whether the dominant firm and the firm seeking access are really competitors.
- define the upstream market, thus the market in which the essential facility lies. This market must be reasonably defined taking into account supply and demand side substitutes.
- The firm operating in both markets must be dominant in the upstream market in which the competitor is seeking access.
- There must be barriers to entry in this upstream market. If there are barriers to entry, then entry is likely and competition can be enhanced through entry and innovation.
- Ownership or control over a “facility”: The “monopolist” or dominant firm must have control over the facility.

⁷⁷Sutherland and Kemp, *Competition law of South Africa*, LexisNexis, (Service issue 15) 170, (hereinafter Sutherland and Kemp).

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰Nunkoo “Policy and Research: Chapter 4 Essential Facilities Doctrine” *Competition News* Edition 9 at 22(hereinafter Nunkoo).

-Essentiality of a facility: Access to the facility must be essential for the competitor to conduct its business.

According to Nunkoo this implies that:⁸¹

-Access to the facility must be essential or crucial for the competitor seeking access to survive in that market.

-The refusal of access to that facility must constitute a barrier to entry.

-The facility must be of a nature that it would not be possible for the competitor or anyone else, to duplicate it.

-The facility cannot be reasonably duplicated: The facility must be extremely difficult or impossible to duplicate due to physical constraints, geographical constraints, or legal constraints. If a competitor can duplicate the facility at reasonable cost, then granting access of the facility is not considered to be essential for its competitive viability. The competitor seeking access must have no other reasonable alternative.

-The competitor seeking access to the facility deemed essential must have been refused access to that facility by the dominant firm. It must be impossible or impractical for the competitor to duplicate the facility. Denial of access to a facility must create a handicap so that the competitor's activities in the relevant market are impossible, or seriously uneconomic, thereby creating a huge barrier to entry.

-No objective justification for the refusal: The onus of objective justification for the refusal rests on the facility owner.

-A feasibility test should always consider whether granting access to an essential facility would enhance competition or hinder competition in the relevant market.

As indicated above, refusal to give a competitor access to an essential facility is prohibited only when it is feasible to give such access.⁸² Brassey remarks that this condition gives expression to the qualification, which ought to have enjoyed greater scope in the drafting of this provision, that a dominant firm is not required to compromise its own legitimate business interests in deference

⁸¹ Ibid.

⁸² Ibid.

to a competitor.⁸³ It may not be economically feasible to grant access to an essential facility where there is no spare capacity on the facility, or where the firm seeking access is not creditworthy or is technically incapable of using the facility in a proper manner.⁸⁴ The respondent should not be forced to grant access to a competitor where it would impede the respondent in its ability to service its own customers adequately.⁸⁵

It is questionable whether the allegation that it is economically feasible to give access can be refuted by showing that granting access would deprive the dominant firm of the legitimate rewards of its innovation or investment, and therefore create a disincentive for investment in a desirable facility.⁸⁶ Further, it is not clear whether a respondent can be required to extend its facility to enable a competitor to have access.⁸⁷

7. The concept of essential facility as interpreted by the courts

In the cases mentioned above, the concept of an essential facility was not properly considered by the courts *inter alia* due to other impediments in the said cases which had the effect that the matters were disposed of on other points and without the need to actually consider whether the facility in question was an essential facility. Therefore in South Africa, there is very little case law on the essential facilities prohibition compared to other countries like the US where it contended that the equivalent US prohibition is not a “per se” rule in any sense as discussed later in this dissertation.⁸⁸ The first substantive South African case concerning section 8(b) was *Competition Commission v Telkom SA Ltd.*⁸⁹ In this case Telkom was the monopoly supplier of telecommunications infrastructure and PSTS services in the relevant period.⁹⁰

⁸³ See Brassey p206.

⁸⁴ Ibid.

⁸⁵ Neuhoff, p116.

⁸⁶ Ibid.

⁸⁷ No case law has suggested such obligation in SA.

⁸⁸ See ch 3 herein.

⁸⁹ 11/CR/Feb04.

⁹⁰ Ibid.

It was also active in the downstream market for the supply of the value added network services (“VANS”) where it competed with independent VANS providers.⁹¹

The Tribunal found that Telkom’s conduct in requiring the independent VANS providers to accept conditions of supply that caused huge inconvenience to them and their customers, and adversely impacted on their businesses, amounted to a refusal to give access to an essential facility in breach of section 8(b).⁹²

In this case Telkom did not deny the conduct in question but argued only that it was entitled to exclude its competitors in this way by virtue of its alleged statutory monopoly over services that the VANS providers sought to supply.

In *National Association of Pharmaceutical Wholesalers and others/GlaxoWelcome (Pty) Ltd and Others*,⁹³ it was held on appeal that when assessing the meaning of the word “resource” in the context of the distribution of pharmaceutical products:

“For reasons already stated “resources” was not meant to be interpreted as products, goods or services. I cannot agree with the complainants that pharmaceutical products qualify as essential facilities and resources for anti-trust purposes.”

In *South African Fruit Terminals (Pty) Ltd (SAFT)/ Portnet and Others*⁹⁴ the complainant, SAFT provided agency and logistical services for the export of citrus and deciduous fruit from South Africa.⁹⁵ Its largest competitor is Capespan. The citrus and deciduous fruit market can be broken down into two segments, sterilized (steri) and non-sterilised (non-steri).⁹⁶

⁹¹ Ibid.

⁹² Ibid.

⁹³ 45/CR/Jul01.

⁹⁴ 52/IR/Sep01.

⁹⁵ At par 9.

⁹⁶ Ibid.

SAFT alleged that Portnet was engaged in various forms of anti-competitive conduct.⁹⁷ While SAFT competes with Capespan in the non-steri market, its does not compete in the steri market, although it wishes to do so.⁹⁸

SAFT claimed that it is unable to compete because it does not have access to quayside cold storage facilities, which it alleges is an essential prerequisite to enter this market.⁹⁹ SAFT claimed that, in order to enter the market, portent should lease it appropriate space at the quayside so it could have an arrangement similar to that of Capespan, or Capespan should be required to lease it part of its existing facilities.¹⁰⁰

SAFT alleged that neither has been willing to enter into such an arrangement and that each had blamed the other as the cause of the SAFT's predicament.¹⁰¹

SAFT therefore sought relief in the form of temporary access to an essential facility against Capespan.¹⁰² However the essential facilities aspect of the complaint was abandoned on the final day of the hearing and was therefore not adjudicated by the Competition Tribunal.¹⁰³

8. Defence

Because section 8(b) constitutes a per se prohibition which means that one the conduct is established, there is no defence available for the dominant firm, it appears that the only way that a dominant firm can avoid being found to have contravened the section is if:

- it cannot be proved that the alleged dominant firm is in fact dominant or
- that the complainant and the dominant firms are not competitors in a spesific market or
- that the facility is not an essential facility or

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ At par 11.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

-that it is not economically feasible for the dominant firm to give the complainant access to the said essential facility.

9. Remedies

To date, no court has ordered a firm to provide access to an essential facility following a finding that section 8(b) has been infringed. In the Telkom-case, the Tribunal decided that since it had received no proposals on a behavioral or other appropriate remedy from the respondent or the Commission, the only remedy it should consider was that of an administrative penalty.¹⁰⁴

The interesting point to investigate further is thus how the Tribunal should make orders in these respects if and when it imposes a behavioral remedy in respect of a breach of section 8(b).

¹⁰⁴ *Competition Commission v Telkom SA Ltd* 11/CR/Feb04 at par 177.

CHAPTER THREE

COMPARATIVE JURISDICTIONS ON ESSENTIAL FACILITIES

1. The US Approach

As indicated, an ‘essential facility’ is generally a facility or infrastructure without access to which competitors cannot provide services to their customers. The owner of an essential facility, which uses its power in one market in order to protect or strengthen its position in another, related market gains a competitive disadvantage over its competitor.¹⁰⁵ To date, in both the EC and the UK, the essential facility doctrine has been most prominent in decisions concerned with the operation of transport networks, although it is likely to have an increasing impact on the utilities and telecommunications sectors, especially in the context of deregulation.¹⁰⁶

Like many aspects of competition law the essential facilities doctrine has its origins in US practice, and can be traced to the case of *United States v Terminal Railroad Association*.¹⁰⁷ In this case the 38 defendants, owners of a vital network of St Louis transport connections, denied non-owner railroads access to the facilities.¹⁰⁸ Delivering the judgment of the court, Lurton MJ offered the defendants the option either of restructuring their mutual contracts so as to allow the admission of new firms into the network, or of dissolving the combination.¹⁰⁹ While the court did not make explicit the creation of an essential facilities doctrine, it recognized the threat to competition posed by ‘a unified system unless it is the impartial agent of all who are compelled to use its facilities.’¹¹⁰

¹⁰⁵ *Sea Containers v Stena Sealink* 94/19 (1994) OJ L15/8, at para. 66.

¹⁰⁶ Nagy “ *Refusal to Deal and the Doctrine of Essential Facilities in US and EC Competition Law: A Comparative Perspective and a Proposal for a Workable Analytical Framework*” 2007 *European Law Review*, Vol. 32 No 5 at 664.

¹⁰⁷ 224 US 383 (1912); USSCR 56 L. Ed. 810.

¹⁰⁸ At 224.

¹⁰⁹ At 225.

¹¹⁰ Par 405.

Section 2 of the Sherman Act prohibits the acquisition or maintenance of monopoly power.¹¹¹ In *United States v Colgate & Co*¹¹², however, the Supreme Court said that in the absence of any purpose to create or maintain a monopoly a private trader may freely ‘exercise his own independent discretion as to parties with whom he may deal’ and the US courts have consequently been generally reluctant to condemn refusal to deal. There has been a controversy in US antitrust law as to whether the doctrine is really part of the recognised exceptions to the *Colgate* principle, or whether it is a separate principle.¹¹³

In *Otter Tail Power Co v United States*¹¹⁴, Otter Tail had a local area monopoly over an electric power transmission service.¹¹⁵ Upstream, it generated power, which it supplied over its transmission grid; downstream, it held local area monopoly franchises for distribution of electricity, supplied by the transmission grid, to customers within the area.¹¹⁶

When several municipalities attempted to establish their own retail distribution systems and sought to acquire cheaper power from other sources for transmission over Otter Tail’s electricity network, Otter Tail refused either to supply its own generated power at wholesale rates or to transmit power over its monopoly transmission grid, sourced from independent power generators, to these municipalities¹¹⁷. In finding a breach of section 2 of the Sherman Act, the Supreme Court ruled that Otter Tail – being, on the one hand, a competitor in the downstream market for retail electricity distribution and, on the other hand, owner of the network facility – had to grant access to the

¹¹¹ Sherman Act of July 2, 1890. Section 2 reads “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine or imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

¹¹² 250 US 300, 39 S.Ct 465 9 (1919).

¹¹³ *Sutherland and Kemp* 168.

¹¹⁴ 410 US 366 (1973).

¹¹⁵ The company, a single firm public utility, was the sole means by which electricity could be transmitted to local municipalities. Thus, the case provides an example of the ‘monopolist’ category of decisions.

¹¹⁶ At 377-379.

¹¹⁷ At 378.

municipalities on equal terms.¹¹⁸ The Court decreed that the company had to sell its power to the municipalities at wholesale rates and transmit other wholesale power to those municipalities that desired it for their distribution systems.¹¹⁹

The Otter Tail-case illustrates the willingness of US courts to invoke the essential facilities doctrine when they see monopolists seeking to reap the advantage of vertical integration.¹²⁰ Anti-competitive motives are thus readily ascribed to monopolists engaged in leveraging their power from one market to another.¹²¹

*Hecht v Pro-Football Inc*¹²², in which the term ‘essential facilities’ was used for the first time, is noteworthy for encapsulating the doctrine in the following succinct way:

... where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility ... To be ‘essential’, a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants.¹²³

¹¹⁸At 379.

¹¹⁹At 380.

¹²⁰Areeda “*Essential Facilities: An Epithet in Need of Limiting principle*” (1990) 58 *Antitrust law Journal* 841, 847 (hereinafter Areeda). See, further, the note ‘Refusal to deal by vertically Integrated Monopolies’ (1974) 87 *Harvard Law Review* 1720. In cases involving a refusal by a vertically integrated firm with a monopoly in one market to deal with its competitors in an upstream or downstream market, the essential facility is said to represent a bottleneck by which the monopolist ‘can extend monopoly power from one stage of production to another, and from one market into another’: *MCI Communications Corp v American Telephone and Telegraph Co* 708 F 2d 1081 (1983), 1132 (Court of Appeals, Seventh Circuit).

¹²¹As the Court of Appeals (Second Circuit) said in *Berkey Photo Inc v Eastman Kodak Co* 603 F 2d 263 (1979), 291, ‘it is improper... for a firm with monopoly power in one market to gain a competitive advantage in another by refusing to sell a rival the monopolized goods or services he needs to compete effectively in the second market.’ However, market leverage theory is not without its critics, who complain that it involves a double counting of the same degree of market power. According to this argument, there is only one monopoly profit to be made in a chain of production, so that a firm, which monopolises one market, cannot increase its profits by extending or leveraging into a vertically adjacent market.

¹²²570 F 2d 982 (1977).

¹²³At 993.

In *Hecht*, the promoters of a new professional football team challenged a restrictive covenant in a lease agreement that prevented the use of a football stadium by any team other than the Washington Red Skins.¹²⁴ Based on the fact that a stadium of such size could not easily be duplicated by potential competitors and that use of the stadium by another team was possible without interference to the Washington Red Skins, the restrictive covenant was held to amount to illegal restraint of trade.¹²⁵ In effect, the use of the stadium was considered essential to the operation of the new professional football team.¹²⁶

The requirement that the facility be truly essential was clearly grasped in *Alaska Airlines Inc v United Airlines Inc*.¹²⁷ In this case, the plaintiff claimed that the defendant was charging excessive prices for use of its computer-reservation system, thereby denying the plaintiff reasonable access to an essential facility.¹²⁸ The Court of Appeals rejected the claim, holding that the plaintiff was unable to show that the defendant's control of the facility carried the power to eliminate competition in the downstream market for airline transportation.¹²⁹

Areeda points out that the specific reference to the *Otter Tail*-case in the *Alaska Airlines* decision clarifies the link between the requirement in the latter case that control of the facility carry the power to eliminate competition in an upstream or downstream market and the (second) MCI criterion that the facility not be practically or reasonably capable of duplication.¹³⁰

¹²⁴ At 994.

¹²⁵ At 994.

¹²⁶ Similarly, in *Fishman v Wirtz* 807 F 2d 520 (1986), a sports stadium, because of its unique facilities, was held to be 'essential'. In this case, access to the stadium was necessary in order physically to enter the market. The stadium was the only stadium in the Chicago area during the relevant time period that was suitable for exhibition of professional basketball. The Court of Appeals (Seventh Circuit) said, 'Here the defendants, through the economic leverage provided by their stadium monopoly, succeeded in driving out all competition for ownership of the Bulls. They used a monopoly in one market to foreclose competition for ownership in another – a classic violation of the antitrust laws. The potential competition ... consisted of all those who might have a bid for the Bulls had they not faced the insuperable obstacle of the defendants stadium monopoly'.

¹²⁷ 948 F 2d 536 (1991).

¹²⁸ At 748.

¹²⁹ At 752.

¹³⁰ Areeda at

He indicates with regard to the facts of the *Otter Tail*-case, that the power company had baldly refused to deal with its potential downstream competitors.¹³¹ Given the difficulty of duplicating Otter Tail's electricity network, this refusal did more than merely impose some handicap on potential competitors, as it eliminated all possibility of competition in the downstream market for retail electricity.¹³²

The operation of the doctrine was clarified by the court in *MCI Communications Corp and MCI Telecommunications Corp v American Telephone and Telegraph Co.*¹³³ In this matter AT&T, a dominant telecommunications company, refused to interconnect MCI with the local distribution facilities of Bell operation companies, thus limiting the range of services that MCI could offer its customers.¹³⁴ The court held that:¹³⁵

“[a] monopolist’s refusal to deal under these circumstances is governed by the so-called essential facilities doctrine. Such a refusal may be unlawful because a monopolist’s control of an essential facility (sometimes called a ‘bottleneck’) can extend monopoly power from one stage of production to another, and from one market into another. Thus the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.”

A fourfold test was put forward for the doctrine: (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.¹³⁶

¹³¹ Ibid.

¹³² 948 F 2d 536 (1991), 543.

¹³³ 708 F.2d 1081 (1983).

¹³⁴ At 1088.

¹³⁵ Para 31.

¹³⁶ Par 32.

The focus on the denial of use means that the doctrine is better considered as a specific example of the wider category of cases in which there is a unilateral refusal to supply or deal.¹³⁷

Although the essential facility doctrine has many defenders in the United States, it has been criticized by the Supreme Court in the report of the Antitrust Modernization Commission¹³⁸, and the Monopoly Report¹³⁹ of the Bush administration Justice Department.

In *Verizon Communications Inc v Trinko LLP*¹⁴⁰, customers who received local telephone services from competing local exchange carriers (LEC) brought an action against the incumbent LEC alleging that it had breached its duty to share under the Telecommunications Act 1996 and that its failure to share violated section 2 of the Sherman Act.¹⁴¹ The Supreme Court held that the duties under the 1996 Act could not be enforced through section 2 claims, but the Act did not affect any liability, which the LEC had under general antitrust law.¹⁴² It therefore examined the customers' claims under antitrust law. The court held that even if the essential facilities doctrine existed it served no purpose here as the question of access was taken care of by the 1996 Act.¹⁴³

2. The EU Approach.

In Europe, the essential facilities doctrine, also called “unilateral refusals to deal”, has been applied over the past thirty years by the European Commission, the Court of First Instance, the European Court of Justice, and increasingly courts of the twenty seven members States.¹⁴⁴

¹³⁷ Mark Furse, *Competition Law of the EC and UK*, 4th, 2004, Oxford University Press, 270, (Furse).

¹³⁸ 02 April 2007.

¹³⁹ 08 July 2012.

¹⁴⁰ 124 S. Ct. 872, 2004.

¹⁴¹ Par 5.

¹⁴² Par 11.

¹⁴³ Par 6.

¹⁴⁴ See Spencer W and William T, *Harmonizing Essential Facilities and Refusals to Deal*, p1.

The EU and the US have diverged considerably in their applications of the doctrine.¹⁴⁵ In the EU the doctrine is governed by the Article 102 of the Treaty on the Functioning of the European Union¹⁴⁶ in the EU. The EU Commission has been keen to embrace the doctrine, which may be applicable under article 101 of the EU Treaty¹⁴⁷, but is more likely to be of relevance to article 102 cases as the holding of an essential facility is strong evidence of dominance.

In *British Midland/Aer Lingus*¹⁴⁸, the Commission found that those holding dominant positions should not 'withhold facilities which the industry traditionally provides to all other airlines'.¹⁴⁹ Aer Lingus, the dominant undertaking in the market for the London-Dublin air route, was ordered to resume its interline facility with British Midland, having previously withdrawn it. In the 22nd *Annual Report on Competition Policy*¹⁵⁰, the Commission made it clear that the decision was taken with specific reference to a time period in

¹⁴⁵ Massadeh, *The Essential Facilities Doctrine Under Scrutiny: EU and US Perspective 2001 UEA Law Working Paper No: 2011-AM-1*.

¹⁴⁶ 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 contract 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.

¹⁴⁷ It consists of two steps: the first step, under Article 101(1), is to assess whether an agreement between undertakings, which is capable of affecting trade and has anti-competitive object or actual or potential restrictive effects on competition. The second step, under Article 101(3), which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1), is to determine the pro-competitive benefits produced by that agreement and to assess whether these pro-competitive effects outweigh the restrictive effects on competition.

¹⁴⁸ 92/213 (1992) OJL96/34.

¹⁴⁹ Par 18.

¹⁵⁰ (1992), point 73-76. Interlining is essentially based on an IATA agreement pursuant to which most of the world's airlines have authorized the other signatories to sell their services. As a result travel agents can offer passengers a single ticket providing for transportation by different carriers (e.g leaving on the airline issuing the ticket and returning on another airline serving the same route, or continuing to destinations not served by the issuing airline. In addition, airlines recognize each other's authority to change a ticket so that passengers can change reservations or routings on airlines after the ticket has been issued. These changes would normally require the consent of the airlines indicated on the ticket for the sector concerned, but most airlines have agreed to waive this requirement in practice. As a result the airline system benefits airlines, travel agents and passengers alike, it enable the issuing

which air transport was being liberalized, and argued that airlines making use of the new opportunities for competition should be given a fair chance to develop and sustain their challenge to established carriers.¹⁵¹

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 to essential facilities. Furse indicates that for the most part, the European Union has sensibly applied its version of the essential facilities doctrine requiring access to the type of infrastructure that is most likely to produce the type of downstream spillovers and other externalities that justify a regime of open access.¹⁵² He comments that this is particularly important in the European Union where much of the essential infrastructure is part of the legacy of past state ownership or exclusive privileges granted by the state and the establishment of downstream competition is now an internal goal of EU competition law.¹⁵³

The European Commission began with a series of decisions imposing liabilities where owners of ports, harbors, tunnels and related facilities used their control of the infrastructure to prevent the emergence of downstream competition¹⁵⁴. The European Court of Justice extended these principles to exclusive privileges based on intellectual property rights in “exceptional circumstances”.¹⁵⁵

The Commission and the courts similarly required open access to information necessary for interconnection to dominant networks in Microsoft.¹⁵⁶

of travel documents for complex journeys and allows flexible use of these documents with minimal constraints.

¹⁵¹ Ibid.

¹⁵² Furse at 272.

¹⁵³ Furse at 273.

¹⁵⁴ See, Case IV/34.174, *B&I Line PLC v Sealink Harbours Ltd. & Sealink Stena Ltd*, 5 C.M.L.R. 255 (1992).

¹⁵⁵ Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann v Comm'n* 1995 E.C.R. I-743.

¹⁵⁶ *Microsoft Corp v Comm'n*, 2007 O.J (C269) 80.

Importantly, the European Court of Justice has declined to extend open access requirements where the firms can create its own facility either on its own or in conjunction with other market participants.¹⁵⁷

The 2008 Guidance on the Enforcement of Article 82 is similarly broad. It states:¹⁵⁸

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

The Commission expanded the doctrine further, and suggested that when a company is in a position such as that of Sealink in this case¹⁵⁹, it cannot normally expect to fulfill satisfactorily its duty to provide non-discriminatory access and to resolve its conflicts of interest unless it takes steps to separate its management of the essential facility from its use of it.¹⁶⁰

The leading case on the operation of the essential facilities doctrine is now *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*.¹⁶¹ In this case Advocate General Jacob sounded a warning note about the expansion of the doctrine. Bronner was a publisher in Austria of a daily newspaper, *de Standard*, with a market share of 3.6 per cent of circulation whilst Mediaprint was the publisher of papers with a combined market share of 46.8 per cent.¹⁶² Bronner argued that it could not feasibly develop its own home delivery service in view of its small market share, and that only such a delivery service would allow it to survive.

¹⁵⁷ Par 96.

¹⁵⁸ Communication from the Commission: Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 78 (2008).

¹⁵⁹ *B & I v Sealink* 1992, 5 CMLR, 255.

¹⁶⁰ *Ibid.*

¹⁶¹ C-7/97 (1999) 4 CMLR 112).

¹⁶² *Ibid.*

It claimed, in effect, that Mediaprint's delivery service constituted an 'essential facility' to which it should have access.¹⁶³ The court was however not prepared to hold that the said delivery service constituted an essential facility. It consequently laid down the following test for determining whether there has been a refusal to give access to an essential facility:

- the refusal would have to be likely to eliminate all competition in the downstream market
- the refusal must be inescapable of objective justification
- the access must be indispensable to carry on the requester's business and
- there must be no actual or potential substitute for the product in question.

In the case of *HIS Health GmbH & Co OHG v NDC Health GmbH & Co KG*¹⁶⁴, the European Court of Justice laid down a three fold test in order to determine whether the doctrine applies. In this case, IMS owned intellectually property rights in respect of a database¹⁶⁵ and had refused to grant competitors a licence thereto. The ECJ held that this licence was vital for competition in the market. In doing so, the court laid down the following relevant factors:

- the refusal is preventing the emergence of a new product for which there is a potential consumer demand;
- the refusal is not justified by an objective consideration; and
- the refusal will exclude any or all competition or will eliminate any or all competition in a secondary market.¹⁶⁶

Massadeh¹⁶⁷ suggests that this test makes it clear that the EU approach requires either the prevention of the emergence of a new product or the

¹⁶³ *ibid.*

¹⁶⁴ 2004 E.C.R. I-5039.

¹⁶⁵ IMS Health had built a structure in 1860 geographical zones to formal its reports on sales medicines which it sold in Germany to the pharmaceutical companies. This structure was a copyrighted database (Derclaye *The IMS Health Decision: A Triple Victory* (2004) Selected Works of Estelle Derclaye at 2).

¹⁶⁶ Note 18 at par 38 and 52.

¹⁶⁷ Massadeh at 7.

removal of competition in a secondary market, neither consideration which is discussed in the US case law.

It should also be noted that in the EU, establishing liability under the doctrine thus depends heavily on the ability of the claimant to establish two markets. In all essential facilities cases there are upstream and downstream markets and the definition of the upstream market is influenced by that of the downstream one. The applicability of the doctrine is thus dependent upon an accurate definition of the market. For example, in *Commercial Solvents v Commission*¹⁶⁸, the complainant sought access to raw materials (upstream market) that were essential in the production of a certain drug (downstream)¹⁶⁹. This was described as “vertical foreclosure”. As market definition plays a decisive role, a precise definition of the markets involved is critical in deciding whether there was a refusal of access to an essential facility.¹⁷⁰

3. Comparison of the US and EU approaches

The position taken in the EU can be contrasted to that of the US where the establishment of two markets is not mandatory. In the US, there is only one case in which two vertically integrated markets were present. Instead, the US focus is on the underlying intention. Where the intention is to limit competition, the complainant should be granted right to use the essential facility.¹⁷¹ The application of the doctrine in the US is however not barred by the absence of two markets.¹⁷²

As indicated, the definition of the market is essential in both the EU and US, but the EU requires the existence of two markets due to the fact that the concept of the market is defined more narrowly than in the US.

¹⁶⁸1974 ECR 223, 1974 1 CMLR.

¹⁶⁹Massadeh at 8.

¹⁷⁰Ibid.

¹⁷¹At 9.

¹⁷²Ibid.

It is submitted that the narrower definition increases the possibility of finding dominance in a market, but the overall assessment remains more rigid than in the US.

It also appears that the EU takes a more political, social and market based approach to the refusal of access to an essential facility, whilst the US is more consumer-welfare orientated. Hence, the EU approach to the doctrine is less flexible than that of the US. Moreover, the EU courts attempt to follow the same decisive factors in applying the doctrine, while the US does not.

In the context of the US law, Seelen¹⁷³ suggests that:

“a facility should be deemed essential in situations where the facility is absolutely indispensable, and the only way to determine that is when public necessity justifies treating that facility as a public utility”.

He further concludes that the following factors are irrelevant when considering whether a facility is essential:¹⁷⁴

- the needs of the competitor;
- the preference of the consumer; and
- the analysis of the market.

It appears that the favoured method for establishing and administering access to essential facilities in the US, and EU involves reliance on general competition legislation supplemented by industry-specific access regimes¹⁷⁵. The US is entering an era where it has as much to learn from the rest of the world in competition law as it can teach.¹⁷⁶ That may be possible at this time in the essential facilities area for several reasons. The US courts, have, at least partially, rejected a doctrine that the rest of the world has embraced.¹⁷⁷

¹⁷³ Seelen, ‘*The essential facilities doctrine: what does it mean to be essential*’ 1997 *Marquette Law Review* 1117.

¹⁷⁴ *Ibid.*

¹⁷⁵ Ezrachi, *EU Competition Law* (3rd edition) 221.

¹⁷⁶ *Ibid.*

¹⁷⁷ *ibid.*

CHAPTER FOUR

CONCLUSION

Although much can be gained from the approaches taken in the US and the EU, it must be borne in mind that all law in South African has to be measured against the Constitution.¹⁷⁸ All legislation must be therefore be interpreted through the prism of the Constitution. This means that although the law of foreign jurisdictions can be taken into account, the overall assessment of the courts must be based on a balancing of the various applicable rights enshrined in the Constitution.¹⁷⁹

In the Competition laws of the entire jurisdiction studied, the size of a firm or its dominant position as such is not prohibited. However, abuses of dominance are considered bad under all competition laws despite the difference in concepts enumerated in the law and manner of determination. As indicated, the first step in determining whether there is an abuse of dominance as defined in the relevant market is to determine the specific market at stake.¹⁸⁰ In defining the relevant market, both the relevant product market and the relevant geographic market have to be defined.¹⁸¹ The second step is then determining whether the concerned undertaking/enterprise/firm is dominant or has monopoly power or a substantial degree of market power.

It is submitted that South African courts, in order to provide flexibility to this balancing act, should take a fact-specific approach to essential facilities cases.

¹⁷⁸Act 108 of 1996.

¹⁷⁹Section 39(1), when interpreting the Bill of Rights, a court, tribunal or forum-

- (a) must promote the value that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

¹⁸⁰Section 7 of the Act.

¹⁸¹*Competition Commission v South African Airways (Pty) Ltd Case 18/CR/Mar01-* The Competition Tribunal noted the following: Dominance in a market may be calculated using various determinants. Most commonly the method is based on the relative sales revenues of the firms in the particular market. Whilst sometimes other figures are used, number of goods sold, etc, this is often because sales revenue figures are not available, rather than the fact that they are not considered a reliable statistic for the purpose of determining market share.

While it is necessary that a general set of guidelines should be formulated and followed, it is advisable that each case's facts determine its outcome as the specific facts in the end may play a determining role as to whether a facility can be regarded as essential. It is submitted that the facts of a case may illustrate whether a facility, that may objectively appear to be essential, is indeed also subjectively essential for a competitor of a dominant firm to compete in the market where access to the facility is required.

It is submitted that the nature of essential facilities-cases demands that the South African competition authorities should follow the approach of the US courts with regard to essential facilities.¹⁸² According to Pitofsky¹⁸³, liability rarely results under this application of the doctrine according to the US approach, because:

“ courts require a showing that the facility controlled by the defendant firm is truly essential to competition-i.e, constitutes an input without which a firm cannot compete with the monopolist”¹⁸⁴

Furthermore, as stated in *Alaska Airlines, Inc v United Airlines, Inc*:¹⁸⁵

“the essential facilities doctrine impose liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first” .

In the US, the Supreme Court cases indicated that the doctrine could be linked to a unilateral refusal to deal. This is a departure from the position under South African law. This would render the refusing party subject to a potential claim on the basis of monopolization under section 2 of the Sherman Act.

¹⁸²The US courts focus heavily on monopolies as opposed to mere dominance in a market. A monopoly is where one firm has exclusive control over the supply of a product or service in the market. As a result, monopolies can influence the market price of that product or service.

¹⁸³Par 449.

¹⁸⁴ Ibid.

¹⁸⁵948 F. 2d 536, 542 (9th Cir.1991).

The other factor, the feasibility of providing access to competitors, acts as a safeguard which ensure that if the sharing of the facility would either inhibit the ability of the denying party to serve its customers or be impractical, US competition law does not require that the essential facility be shared.¹⁸⁶

It is submitted that the requirements that need to be satisfied to invoke the doctrine in the EU are too stringent. This is especially so in the requirement that there must be elimination of all competition in markets downstream from the competitor requesting access to the facility. Although this approach is too strict, it should however be cautioned that an approach that is too lenient is equally inadequate as it would not effectively guard the right to property.

It is further submitted that the approach that has been followed thus far in South Africa courts is too narrow and does not allow for flexibility. South African courts should not rule out vast categories of potential essential facilities, but rather consider each case independently.

In the light of constant technological advancements, South African courts should shy away from considering only traditional infrastructure as essential facilities as this may result in the proliferation of anti-competitive behavior in non-traditional infrastructure industries and a decrease in overall consumer welfare. In addition, inventions that would fall into a previously ruled out category, but nevertheless possess all the characteristics of an essential facility will be exempt from the ambit of the Act.¹⁸⁷

Regarding the enquiry as to when it is economically feasible for a firm to be obliged to grant access to the essential facility, it is submitted that considerations of capacity, feasibility and duration be incorporated into the assessment as possible justifications for not sharing the facility in question with competitors. The considerations fall broadly under the umbrella of practicality.

¹⁸⁶ *Hecht v Pro-Football, Inc*, 570 F .2d 982.

¹⁸⁷ Section 8(b).

If the sharing of the facility would hinder the dominant firm from servicing its customers adequately or would be generally impractical, the firm should not be obliged to provide access to the facility. Or, for instance, if the dominant firm is using the facility to its full capacity, that firm should not be required to grant access to the facility to competitors even if it is “essential”.

Feasibility should also be considered. If granting access to the essential facility to the competitor should not be infinite. The determination of the appropriate duration of the access would have to be a factual assessment based on the nature of the product. These enquiries will disincentive competitors from free riding and, instead, encourage innovation.

The ambit of the South African Act is sufficiently open-ended to incorporate the abovementioned suggestions. The wording of the Act provides a platform for the courts to lay down a broader, fact specific approach which will allow for the necessary leeway as well as provide a safeguard in ensuring that the businesses of firms is not compromised in the process.

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