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HARMONIZING ESSENTIAL FACILITIES

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The United States and the rest of the world have taken markedly different views of the essential facilities doctrine in recent years. Although the essential facilities doctrine has many defenders in the United States, it has been criticized by the U.S. Supreme Court in dicta, in the report of the Antitrust Modernization Commission, and in the now withdrawn monopoly report of the Bush administration Justice Department.

The situation is quite different in most jurisdictions outside the United States. In Europe, the essential facilities doctrine¹ has been applied over the past thirty years by the European Commission, the Court of First Instance (now known as the General Court), the European Court of Justice, and increasingly the national competition agencies and courts of the twenty-seven Member States. In addition, the European Commission's recently issued draft guidelines on the abuse of dominance endorse the doctrine and sensibly describe its application and limitations.

The situation is similar in many countries outside the European Union. Most jurisdictions, both common law and civil law, apply some

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¹ The European Union applies its version of the essential facilities doctrine as part of the broader provisions of Article 82 of the Treaty Establishing the European Community (now Article 102 TFEU). Treaty on the Functioning of the European Union, art. 102, May 9, 2008, 2008 O.J. (C 115) 47 (effective Dec. 1, 2009). For ease of reference, we will continue to use the prior numbering.

Article 82 prohibits the abuse of a dominant position and covers a variety of practices that would not fall within the scope of Section 2 of the Sherman Act. This essay will not discuss EU or Member State development of Article 82 beyond the context of the essential facilities doctrine itself.

form of the essential facilities doctrine to unjustifiable denials of access to infrastructure² and other forms of facilities that are impossible to duplicate but nonetheless essential for competition.

Of course, just because everyone does something does not make it right. However, there is a growing international consensus that it is sometimes appropriate to require a regime of non-discriminatory access to infrastructure and related facilities. The extent to which the international community is applying some version of the essential facilities doctrine in a thoughtful and consistent manner suggests that the United States is an outlier and should rethink its position. A revitalized essential facilities doctrine more in line with the international consensus would be beneficial domestically as well as internationally.

In this essay, we look briefly at the law of the essential facilities doctrine in the United States and abroad in order to analyze which jurisdictions have applied the essential facilities doctrine in a sensible and economically efficient manner and which have used the doctrine in a more ad hoc and arbitrary fashion. In Part I, we analyze the situation in the United States. In Part II, we examine the law of essential facilities and unilateral refusals to deal in the European Union and its Member States. In Part III, we look at the rest of the world and the variety of approaches followed in the diverse common and civil law jurisdictions that have examined this question. In Part IV, we look at the prospects for harmonization of these divergent approaches through the International Competition Network and the more constructive role that the United States must play if these efforts are to be successful. In Part V, we offer substantive suggestions to better harmonize U.S. law and practice with the developing consensus that antitrust should play an important role when dominant firms deny access to essential facilities in economically and socially harmful ways.

² This essay draws on a body of literature that uses infrastructure in a technical economic sense to indicate certain resources for which it is efficient to manage access in an open, non-discriminatory manner based on the downstream spillovers that are generated through a regime of open access. Infrastructure theory was developed by Professor Brett Frischmann and applied to antitrust issues by Professor Waller in previous work. Infrastructure theory is summarized in Part V of this article and set forth in further detail in Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1 (2008); Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 WIS. L. REV. 359 (2008); Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007); Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005) [hereinafter *An Economic Theory*].

I. THE DECLINE OF THE ESSENTIAL FACILITIES DOCTRINE IN U.S. COMPETITION DISCOURSE

The essential facilities doctrine has a long history in the United States. However, it is now on the verge of irrelevance as a result of recent developments. Until recently, the Supreme Court and the lower courts had imposed antitrust liability when individual firms or groups of firms controlled facilities essential to competition and denied access to those facilities to competitors.³ Although the Supreme Court has avoided imposing liability explicitly under the rubric of the essential facilities doctrine, every circuit court of appeals has done so explicitly.⁴ Most follow some version of the test set forth in the Seventh Circuit's *MCI* decision, which held that a firm with monopoly power violates Section 2 of the Sherman Act when:

1. the monopolist controls access to an essential facility,
2. the facility cannot be reasonably duplicated by a competitor,
3. the monopolist denies access to a competitor, and
4. it was feasible to grant access.⁵

Most courts also have recognized that a valid business justification will protect a firm from liability, which was only implicit in the *MCI* decision.⁶

The cases granting access to competitors produced a vigorous academic debate over the desirability and scope of the essential facility doctrine.⁷ Despite strong arguments that a carefully crafted essential

³ *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 404 (1912); *Associated Press v. United States*, 326 U.S. 1, 17–18 (1945); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 382 (1973).

⁴ Einer Elhauge, *Defining Better Monopolization Standards*, 56 *STAN. L. REV.* 253, 261–62 (2003) (collecting cases).

⁵ *MCI Comm'ns Corp. v. AT&T Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983). The Seventh Circuit reversed liability on certain other theories and remanded for a new trial on damages. *Id.* at 1174. The case subsequently settled.

⁶ See Waller, *Areeda, Epithets, and Essential Facilities*, *supra* note 2, at 378.

⁷ Compare Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 *ANTITRUST L.J.* 841 (1990); Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 *GEO. L.J.* 395, 397–403 (1986); Richard J. Gilbert & Carl Shapiro, *An Economic Analysis of Unilateral Refusals to License Intellectual Property*, 93 *PROC. NAT'L ACAD. SCI. USA* 12,749 (1996); Keith N. Hylton, *Economic Rents and Essential Facilities*, 1991 *BYU L. REV.* 1243; Allen Kezsbom & Alan V. Goldman, *No Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine*, 1996 *COLUM. BUS. L. REV.* 1; Abbott B. Lipsky & Gregory Sidak, *Essential Facilities*, 51 *STAN. L. REV.* 1187 (1999); Paul D. Marquandt & Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson & Hooks*, 70 *ANTITRUST L.J.* 847 (2003); David McGowan, *Regulating Competition in the Information Age: Computer Software as an Essential Facility Under the Sherman Act*, 18 *HASTINGS*

facilities doctrine can preserve competition in downstream markets and produce significant socially beneficial spillovers,⁸ the Supreme Court and the Bush-era Justice Department have in recent years gone out of their way to disparage and limit the doctrine.

In *Trinko*, although it neither endorsed nor repudiated the essential facilities doctrine, the Supreme Court spoke disparagingly of the doctrine and limited it to situations where regulation had not already addressed access to the essential facility at issue.⁹ Three years later, in 2007, the Antitrust Modernization Commission recommended that “[r]efusals to deal with horizontal rivals in the same market should rarely, if ever, be unlawful under antitrust law, even for a monopolist.”¹⁰ The next year, the Department of Justice recommended the outright abolition of the doctrine in its now disavowed and withdrawn report on monopoly power.¹¹ Finally, in *linkLine*, the Supreme Court reached beyond serious

COMM. & ENT. L.J. 771 (1996); Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433 (1987); David J. Gerber, Note, *Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities,"* 74 VA. L. REV. 1069 (1988), with Daniel E. Troy; Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441 (1983); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 124–31 (2d ed. 2006); Marina Lao, *Networks, Access, and "Essential Facilities": From Terminal Railroad to Microsoft*, 62 SMU L. REV. 557 (2009); Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443 (2002); James R. Ratner, *Should There Be an Essential Facility Doctrine?*, 21 U.C. DAVIS L. REV. 327 (1988); Glen O. Robinson, *On Refusing to Deal with Rivals*, 87 CORNELL L. REV. 1177 (2002).

⁸ See Frischmann & Waller, *Revitalizing Essential Facilities*, *supra* note 2; Waller, *Areeda, Epithets, and Essential Facilities*, *supra* note 2, at 378; Frischmann & Lemley, *Spillovers*, *supra* note 2; Frischmann, *An Economic Theory*, *supra* note 2.

⁹ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410–11 (2004) (discussing commentary).

¹⁰ ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 101–04 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

¹¹ U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 127–29 (2008), available at <http://www.justice.gov/atr/public/reports/236681.htm>. The report was the outcome of what were originally joint hearings on single firm conduct by the Antitrust Division and the Federal Trade Commission. The FTC refused to sign onto the report, and upon its release a majority of the Commissioners joined in a stinging critique of it. Statement of [FTC] Commissioners Harbour, Leibowitz and Rosch on the Issuance of Section 2 Report by the Department of Justice 1 (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf> (“At almost every turn, the Department would place a thumb on the scales in favor of firms with monopoly or near-monopoly power and against other equally significant stakeholders.”). The essential facilities doctrine was not specifically discussed in that FTC critique. *Id.* The report was subsequently disavowed by the new head of the Antitrust Division in the Obama Administration. See Christine A. Varney, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *Vigorous Antitrust Enforcement in this Challenging Era*, Remarks Prepared for the United States Chamber of Commerce 5–14 (May 12, 2009), available at <http://www.usdoj.gov/atr/public/speeches/245777.htm>.

questions of mootness and procedural error to opine on the merits of a price squeeze claim and endorsed the basic thrust of *Trinko* as to the limits of the essential facilities doctrine.¹² In the post-*Trinko* era, cases raising essential facilities claims have survived only where there has been a change in behavior by the dominant firm in an unregulated market.¹³

II. ESSENTIAL FACILITIES AND REFUSALS TO DEAL IN THE EUROPEAN UNION AND ITS MEMBER STATES

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. 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. 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 integral goal of EU competition law.

The European Commission began its use of the doctrine with a series of decisions imposing liabilities where owners of ports, harbors, tunnels, and related facilities used their control of such infrastructure to prevent the emergence of downstream competition.¹⁴ For example, several of the key early decisions involve situations where the operator of a port also operated a ferry service and denied access to (or severely discriminated against) a competing ferry service. In these cases, the port facility could not be duplicated and the integrated monopolist was required to grant non-discriminatory access to its unintegrated downstream competitor. The European Court of Justice extended these principles to exclusive privileges based on intellectual property rights in “exceptional circumstances.”¹⁵ Similarly, the Commission and the courts required open access to information necessary for interconnection to dominant

¹² Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109, 1117, 1119–20 (2009).

¹³ See, e.g., Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048, 1113–14 (D. Colo. 2004).

¹⁴ See Case IV/34.174—B&I Line PLC v. Sealink Harbours Ltd. & Sealink Stena Ltd., 5 C.M.L.R. 255 (1992); Case COMP/IV/34.689—Sea Containers v. Stena Sealink, Comm'n Decision, 1994 O.J. (L 15) 8; Case COMP/94/119/EC—Port of Rodby, Comm'n Decision, 1994 O.J. (L 55) 52; Case COMP/IV/32.490—Eurotunnel, Comm'n Decision, 1994 O.J. (L 354) 66.

¹⁵ Joined Cases C-241/91 P & C-242/91 P, Radio Telefis Eireann & Indep. Publ'ns Ltd. v. Comm'n, 1995 E.C.R. I-743, ¶ 50 (Eur. Ct. Justice) (*Magill*).

networks in *Microsoft*.¹⁶ The European Court of Justice notably has declined to extend the essential facilities doctrine where the firm seeking access can create its own facility either on its own or in conjunction with other market participants.¹⁷

The European Commission's 2008 Guidance on the enforcement of Article 82 uses a particularly broad definition of when access is required:

The concept of refusal to supply covers a broad range of practices, such as a refusal to supply products to existing or new customers, to license intellectual property rights, including when this is necessary to provide interface information, or to grant access to an essential facility or a network.¹⁸

The Guidance continues with language that stands in direct contrast to *Trinko*'s treatment of the essential facilities doctrine:

The Commission does not regard it as necessary for the refused product to have been already traded: it is sufficient that there is demand from potential purchasers and that a potential market for the input at stake can be identified. Likewise, it is not necessary that there is to be actual refusal on the part of a dominant undertaking; "constructive refusal" is sufficient. Constructive refusal could, for example, take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply.¹⁹

The Guidance concludes:

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

- the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market;
- the refusal is likely to lead to the elimination of effective competition on the downstream market; and
- the refusal is likely to lead to consumer harm.²⁰

The potential for enforcement activity is even greater at the national level. After the modernization of EU competition law, the Member

¹⁶ Case COMP/C-3/37.792—*Microsoft Corp.*, Comm'n Decision, Art.5 (Mar. 24, 2004) (summary at 2007 O.J. (L 32) 23), available at <http://ec.europa.eu/competition/antitrust/cases/decisions/37792/en.pdf>, *aff'd*, Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3601 (Ct. First Instance).

¹⁷ Case C-7/97, *Oscar Bronner GmbH & Co. v. Mediaprint Zeitungs*, 1998 E.C.R. I-7791 (Eur. Ct. Justice).

¹⁸ European Comm'n, DG Competition, *Guidance on the Commission's Official Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* ¶ 77 (Dec. 3, 2008), available at <http://ec.europa.eu/competition/antitrust/art82/guidance.pdf>.

¹⁹ *Id.* ¶ 78.

²⁰ *Id.* ¶ 80.

States apply both Article 82 and their own national competition laws. In addition, they are authorized 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.²¹

One of the first applications of the essential facilities doctrine by a national court of an EU Member State appears to have taken place in the United Kingdom as early as 2005.²² In *Attheraces Ltd. v. British Horseracing Board* the defendant supplied Internet, television, and other audio-visual coverage of British horse racing.²³ It also supplied pre-race data regarding British horse racing to a variety of clients.²⁴ The plaintiff, a prior purchaser of the defendant's pre-race data, was unable to negotiate a new license on acceptable 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 without objective justification by refusing to supply the plaintiff, regardless of whether the defendant was an actual or potential competitor of the plaintiff. The judge held that the defendant's control of the pre-race data constituted an essential facility and that the refusal to supply the data was an abuse of dominance under both EU and UK law. Although the decision was reversed on the basis that the price charged did not amount to an abuse, the English Court of Appeals affirmed the lower court's holding that the data were an essential facility. It also made clear that, under British law:

[a]buse 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. It may also consist of the refusal to grant a licence of an IP right.²⁵

Subsequent to *Attheraces*, the UK High Court granted interim measures requiring T-Mobile to connect calls from a Voice-Over-Internet

²¹ THE EUROPEAN COMMUNITY COMPETITION LAW HANDBOOK: ACCESS TO FACILITIES (2008/2009 ed.), available at <http://mailing.concurrences.com/e-Comp-ECCLH-25.cfm?WL=2727> (discussing the cases from Austria, Belgium, Cyprus, Czech Republic, France, Estonia, Germany, Hungary, Greece, Ireland, Italy, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom).

²² Louisa Penny, *Dominance: Excessive Pricing, Access to Data and Essential Facilities. Attheraces Ltd. v. British Horseracing Board*, 17 ENT. L. REV. 128, 130 (2006).

²³ *Attheraces Ltd. v. British Horseracing Bd. Ltd.*, [2005] EWHC (Ch) 3015 (Eng.).

²⁴ Unlike in the *Magill* case, the defendant did not enjoy any intellectual property rights over the data in question. *Id.*

²⁵ *Attheraces Ltd. v. British Horseracing Bd. Ltd.*, [2007] EWCA (Civ) 38, [108] (Eng.).

provider.²⁶ The Court relied, in part, on the earlier EU decisions applying the essential facilities doctrine to traditional physical infrastructure.²⁷

The UK Office of Fair Trading (OFT) also had considered several matters raising the issue of access to other infrastructural facilities and applied the essential facilities doctrine on a limited basis to networks and related infrastructure. For example, the OFT used the essential facilities doctrine to require the incumbent operator of bus service in the Isle of Wight to allow its principal competitor to use the only hub bus station on the island.²⁸

The OFT recognized, but declined to use, the essential facilities doctrine in a case involving film for the production of holograms. In a 2003 decision involving DuPont, the OFT stated:

Refusing access to an essential facility may, depending on the circumstances, amount to an abuse of a dominant position. The OFT considers that treating [hologram film] as an essential facility would be too broad an interpretation of that concept. The essential facilities concept is generally applied to facilities such as ports utility distribution networks and some telecommunication networks (for example) where access is indispensable in order for the would-be customer to compete and duplication of the facility is impossible or extremely difficult. . . . The effect of treating every new product which, at the time of its discovery, had unique properties as an essential facility (if this product was a necessary input into a downstream market), would be to permit an excessive degree of interference with the freedom of undertakings to choose their own trading partners. As stated above, competition law should have this effect only in exceptional circumstances.²⁹

The OFT also relied on the fact that DuPont was in the process of exiting the downstream market, making it unlikely that the refusal to deal would injure the complainant or eliminate competition in that market.³⁰

²⁶ *Software Cellular Network Ltd. v. T-Mobile (UK) Ltd.*, [2007] EWHC (Ch) 1790, ¶ 58 (Eng.). T-Mobile has a relatively low market share in the United Kingdom, but the court pointed out that interconnection with each phone provider was critical to a prospective telecommunications provider. *Id.* ¶¶ 21–24.

²⁷ *Id.* ¶ 40 (citing *Sea Containers Ltd. v. Stena Sealink Ports & Stena Sealink Line*, 4 C.M.L.R. 84 (1995)).

²⁸ Derek Ridyard, *Essential Facilities and the Obligation to Supply Competitors Under the UK and EC Competition Law*, 17 EUR. COMPETITION L. REV. 438, 443–44 (1996).

²⁹ *E.I. du Pont de Nemours & Co.*, [2003] No. CA98/07/2003, Case CP/1761/02, ¶ 29 (OFT) (U.K.) (citations omitted).

³⁰ *Id.* ¶ 33. UK regulators have used the essential facilities doctrine in a cautious, but relatively uncontroversial manner in their attempts to inject competition in the transmission of natural gas and electricity. Press Release, Gas & Elec. Markets Auth., Case Closure Statement, Following an Investigation Into Non-Compliance by EDF Energy Networks (LPN) plc, EDF Energy Networks (EPN) plc and EDF Energy Networks (SPN) plc with

Germany is one of the few EU Member States to deal with this issue by statute. In addition to a general prohibition on abuse of a dominant position,³¹ the German Act Against Restraints contains a provision dealing specifically with unjustified refusals to permit access to essential facilities:

An abuse [of a dominant position] exists in particular if a dominant undertaking as a supplier or purchaser of certain kinds of goods or commercial services

.....

refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate remuneration, provided that without such concurrent use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market; this shall not apply if the dominant undertaking demonstrates that for operational or other reasons such concurrent use is impossible or cannot reasonably be expected.³²

The German courts have clarified that this statute requires dominance in the upstream market only and does not require dominance in the downstream market.³³ Outside the context of networks and infrastructure, Section 20(1)—which prohibits discriminatory commercial conduct by dominant firms³⁴—has been held to prohibit a firm's refusal to license an intellectual property right where the licensor had made the license available to the complaining party's competitors.³⁵

Standard Licence Condition 4C of Their Electricity Distribution Licences (July 13, 2007). The UK regulators have been far more reluctant to use the essential facilities doctrine to require access to data in regulated industries. For more on UK refusal-to-deal law, see OECD, COMPETITION COMMITTEE, POLICY ROUNDTABLES: REFUSALS TO DEAL 189–92 (2007) [hereinafter OECD RTD ROUNDTABLE], available at <http://www.oecd.org/dataoecd/44/35/43644518.pdf>.

³¹ Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Act Against Restraints of Competition], June 30, 2005 RGBI. I at 499, § 19(4), ¶ 4 (F.R.G.) (“the abusive exploitation of a dominant position by one or several undertakings shall be prohibited”).

³² *Id.* § 19(4). For a critique of the application of this provision to excessive pricing claims in the German electricity market, see Martin F. Hellwig, *Competition Policy and Sector-Specific Regulation for Network Industries* 9 (Max Planck Inst. for Research on Collective Goods, Preprint 2008/29, July 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275285.

³³ Florian Wagner-von Papp, *The German Federal Court of Justice Clarifies That Access to an Essential Facility Does Not Require a Dominant Position in the Up- or Downstream Market in the Electricity Sector (Arealnetze)*, e-Competitions (Inst. of Competition Law) No. 488 (June 28, 2005) (summarizing the German court's decision in *Arealnetze*). For more on Germany's approach to unilateral refusals to deal, see OECD RTD ROUNDTABLE, *supra* note 30, at 139–44.

³⁴ GWB, *supra* note 31, § 20(1) (F.R.G.).

³⁵ Bundesgerichtshof [BGH] [Federal Supreme Court] July 13, 2004, 170 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 299 (F.R.G.) (English translation available at 36 INT'L REV. OF INTELL. PROP. & COMP. L. 742 (2005)).

Irish national authorities recognize wrongful denial to essential facilities as an “[a]buse of dominant position” under Section 5 of the Irish Competition Act of 2002.³⁶ There is only one case directly discussing the doctrine on the merits.³⁷ In 2004, the Irish High Court rejected the argument that denial of access to an insolvency fund for non-member credit unions by the dominant association of Irish credit unions could amount to an unlawful abuse of dominance.

In its discussion of the essential facilities doctrine, the Irish High Court cited Professor Richard Whish’s warning that application of the doctrine should be sensitive to free-rider concerns.³⁸ The Court noted that the term “essential facility” is particularly appropriate in cases involving “physical infrastructure such as a port, airport or pipeline where the essential requirement for access may be self-evident,” but did not limit the doctrine to these situations, finding “there may be an obligation to supply a raw material, spare parts, intellectual property rights, or proprietary information, where the expression ‘essential facility’ is less appropriate.”³⁹ After refusing to apply the essential facilities doctrine to the facts presented, the Court found that the defendant had abused a dominant position on other grounds.⁴⁰

In addition, a wide variety of new EU Member States, preferential trading partners, and aspirants have all adopted the essential facilities doctrine, with different degrees of sophistication.⁴¹ The Czech Competition Authority appears to be the most active, with several cases both accepting and rejecting the essential facilities doctrine as a basis of liability. In one case the Czech Competition Authority held that a refusal to grant a competitor access to use the only regional bus station was not an abuse of dominance where the competing bus lines were not competitively disadvantaged in using other locations for bus stops.⁴² In an-

³⁶ Irish Competition Act, 2002, § 5 (Act No. 14/2002) (Ir.), available at <http://www.irishstatutebook.ie/2002/en/act/pub/0014/sec0005.html#partii-sec5>. See *Competition Auth. v. O’Regan*, [2007] 4 IR 737 (Ir.), ¶ 5.

³⁷ *Competition Auth. v. O’Regan*, [2004] I.E.H.C. 330 (H. Ct.) (Ir.), *rev’d on other grounds*, [2007] IR 737 (Ir.).

³⁸ *O’Regan*, [2004] I.E.H.C. 330, at 146, 148 (citing RICHARD WHISH, *COMPETITION LAW* 670 (5th ed. 2003)), available at <http://www.bailii.org/ie/cases/IEHC/2004/330.html> (for a paginated version of the *O’Regan* High Court decision, select “printable RTF version” at the URL provided and view in “print preview” to see page numbering).

³⁹ *Id.* at 148.

⁴⁰ *Id.* Ireland’s law on refusals to deal was outlined in the OECD Roundtable on Refusals to Deal. OECD RTD ROUNDTABLE, *supra* note 30, at 149–52.

⁴¹ See, e.g., Victor Chimienti, *The Abuse of Dominance in the New Albanian Competition Act*, 26 EUR. COMPETITION L. REV. 151, 160 (2005).

⁴² Robert Pelikán & Jan Prevrátil, *The Czech Office for the Protection of Competition Declares that the Refusal of Access to a Bus Station to Competing Bus Line Operators Does Not Amount to an*

other bus case, the Authority held that access to a different regional bus station was not indispensable to competition, but that denial of access could still constitute an abuse of a dominant position.⁴³

Perhaps the broadest use of the essential facilities doctrine occurred in Austria, where a distributor of motion pictures was held liable for refusing to supply rival movie theater owners with copies of its films.⁴⁴ This outcome is particularly difficult to justify given the earlier ECJ *Bronner* decision refusing to require a dominant Austrian newspaper to distribute its rivals' products.⁴⁵

Other recent applications of the essential facilities doctrine by EU Member States include:

- Cyprus: in two different cases, fining the incumbent telecommunications operator for denying access to downstream competitors;⁴⁶
- Estonia: prohibiting discriminatory pricing charges for a port;⁴⁷
- Greece: affirming a refusal to grant access to a motor vehicle distribution network on the grounds that the dealer was insolvent;⁴⁸

Abuse of Dominant Position (AS Service), e-Competitions (Inst. of Competition Law) No. 534 (Nov. 25, 2005) (summarizing *AS Service*).

⁴³ Jan Prevrátil, *The Czech Office for the Protection of Competition Maintains that the Refusal of Access to a Non-Essential Facility—a Bus Station—May Amount to an Abuse of Dominant Position (CSAD Liberec)*, e-Competitions (Inst. of Competition Law) No. 23195 (May 16, 2006). The Competition Authority also held that a city-owned operator of the municipal cemetery violated the essential facilities doctrine when it refused to rent the on-site funeral chapel to a competing funeral service provider. Robert Pelikán, *The Czech Office for the Protection of Competition Confirms the Abuse of Dominant Position by the Operator of a Municipal Cemetery by Refusing to Grant Access to a Funeral Chapel (TSP/PSM)*, e-Competitions (Inst. of Competition Law) No. 23199 (Dec. 13, 2005) (summarizing *TSP/PSM*).

⁴⁴ Axel Redlinger & Heinrich Kühnert, *The Austrian Supreme Court Finds, on the Basis of the Essential Facilities Doctrine, that a Distributor Abused Its Dominant Position on the Market for Film Distribution by Refusing to Supply Competitors (Constantin-Film)*, e-Competitions (Inst. of Competition Law) No. 23200 (Apr. 4, 2005) (summarizing *Constantin-Film*).

⁴⁵ Case C-7/97, *Oscar Bronner GmbH & Co. v. Mediaprint Zeitungs*, 1998 E.C.R. I-7791 (Eur. Ct. Justice).

⁴⁶ Antigoni Lykotrafiti, *The Cyprus Competition Authority Fines the Telecommunications Incumbent and a Subscriber Channel for a Restrictive Cooperation Agreement on the DSL Market (CYTA/LTV)*, e-Competitions (Inst. of Competition Law) No. 13241 (Aug. 4, 2006); Anastasios Antoniou, *The Cypriot NCA Holds the Telecommunications Incumbent to Have Abused Its Dominant Position in the SMS Market (Thunderworx/Cyprus Telecommunications Authority)*, e-Competitions (Inst. of Competition Law) No. 23182 (Dec. 21, 2008).

⁴⁷ Vaido Põldoja, *The Estonian Competition Board Brought Proceedings to an End Against the Tallinn Port and Established Discriminatory Pricing for Access to an Essential Facility (Termoil)*, e-Competitions (Inst. of Competition Law) No. 16445 (June 7, 2002).

⁴⁸ Ioannis Lianos, *The Greek Competition Commission Refuses to Adopt Interim Measures Against a Refusal to Access to a Motor Vehicle Distribution Network, The Insolvency of the Distributor Being Considered as a Valid Commercial Justification, Which Is Not Sanctioned by EC Reg. No.*

- Luxembourg: affirming denial of access to storage tanks of a dominant rival on the grounds that no additional storage capacity was available;⁴⁹
- Lithuania: fining a state-run airport for restricting access to airport facilities.⁵⁰

III. THE REST OF THE WORLD

Some of the more interesting and comprehensive applications of the essential facilities doctrine have arisen in Australia. In 1996, after Australian courts had declined to explicitly adopt the doctrine under the general terms of Australia's then-existing competition statutes, Australian authorities adopted a unique statutory and regulatory scheme to regulate essential facilities called the National Access Regime (NAR). The NAR gives numerous state and federal agencies wide discretion to compel owners of essential facilities to deal with competitors on fair and non-discriminatory terms.⁵¹ In addition to the NAR, the Australian legislature has adopted a number of industry-specific regimes that operate similarly to the NAR.⁵² Finally, the Australian High Court, while stopping short of expressly endorsing the essential facilities doctrine by name, arguably has adopted it in principle.⁵³

1400/2002 (*Auto Service/Technocar*), e-Competitions (Inst. of Competition Law) No. 433 (May 18, 2004).

⁴⁹ Philippe-Emmanuel Partsch & Vincent Wellens, *The Luxembourg Competition Council Renders Its First Ever Decision and Negatively Applies the Essential Facilities Doctrine in the Sector of Distribution of Domestic Heating Fuel While Holding that Trade Between Member States Is Not Affected (Rock Fernand Distributions/Tanklux)*, e-Competitions (Inst. of Competition Law) No. 23190 (Apr. 23, 2007).

⁵⁰ Sarunas Keserauskas, *The Lithuanian Competition Authority Fines the State-Controlled Airport for Abusing Its Dominance by Restricting Access to the Airport Facilities (Vilnius Airport/RSS)*, e-Competitions (Inst. of Competition Law) No. 14177 (June 7, 2007).

⁵¹ Trade Practices Act, 1974, Pt. IIIA (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/; see also NAT'L COMPETITION COUNCIL, ANNUAL REPORT 2006–2007, at 3–4 (2007), available at <http://www.ncc.gov.au/images/uploads/AR0607.pdf>; NATIONAL COMPETITION COUNCIL, ANNUAL REPORT 2005–2006, at xiv (2007), available at <http://www.ncc.gov.au/images/uploads/AR0506-001.pdf> (describing operation and application of the National Access Regime in Australia).

⁵² Brenda Marshall, *Pricing Third Party Access to Essential Infrastructure: Principles and Practice*, 24 AUSTL. RESOURCES & ENERGY L.J. 172 (2005).

⁵³ See, e.g., *Queensland Wire Indus. Proprietary Ltd. v. Broken Hill Proprietary Co.*, (1989) 167 C.L.R. 177, ¶ 30 (Austl.) (finding abuse of market power under the Trade Practices Act, 1974, § 46 (Austl.) where a dominant steel products producer refused to sell a certain rural fence component to a downstream competitor); *NT Power Generation Proprietary Ltd. v. Power & Water Auth.*, (2004) 219 C.L.R. 90, ¶¶ 112–121, 150, 153 (Austl.) (finding that the Australian Power and Water Authority had violated Section 46 by refusing to allow a competitor to access its electricity distribution system, and explicitly declining to apply *Trinko*).

In New Zealand, unilateral refusals to deal are controlled exclusively by Section 36 of the Commerce Act, which was amended in 2001 as part of an effort to harmonize the country's competition law with that of Australia.⁵⁴ Section 36 accordingly tracks the language of its Australian counterpart, Section 46 of the Trade Practices Act.⁵⁵ Section 36 reads:

A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of—

- (a) restricting the entry of a person into that or any other market; or
- (b) preventing or deterring a person from engaging in competitive conduct; or
- (c) eliminating a person from that or any other market.⁵⁶

Section 36 violations are established with the same analysis employed by Australian courts construing the Trade Practices Act. The defendant will be found to have violated Section 36 if (1) it is dominant in the relevant market, (2) the challenged actions were made possible by virtue of the firm's dominance,⁵⁷ and (3) the challenged actions were undertaken for one of the reasons prohibited in the statute.⁵⁸ Where a firm is shown to have denied access to an essential facility, a court may infer

⁵⁴ Brenda Marshall & Rachel Mulheron, *Access to Essential Facilities Under Section 36 of the Commerce Act 1986: Lessons from Australian Competition Law*, 9 CANTERBURY L. REV. 248, 248–52 (2003). Historically, New Zealand courts applied the Rule of Prime Necessity as a common law restriction on excessive pricing (*id.* at 251–52) but since 1999 they have held that the rule is displaced in essential facility situations by the Commerce Act. *Id.*; see also *Vector Ltd. v. Transpower New Zealand Ltd.*, [1999] 3 N.Z.L.R. 646, ¶ 64 (C.A.) (holding that the Doctrine of Prime Necessity was pre-empted by Section 36 of the Commerce Act for purposes of access to electricity distribution infrastructure). Unlike Australia, New Zealand has not enacted statutory access regimes (Marshall & Mulheron, *supra*, at 248), though a number of industries have voluntarily adopted rules for access on the threat that regulation would be adopted if necessary. *Id.* at 248 n.6.

⁵⁵ Trade Practices Act, 1974, § 46 (Austl.).

⁵⁶ Commerce Act 1986, § 36 (N.Z.). New Zealand has not yet adopted certain subsequent amendments to the Australian TPA.

⁵⁷ Australian and New Zealand courts have analyzed “abuse” using the “counterfactual test,” i.e., a firm does not abuse a dominant position if it would have taken the same action in a competitive market. Mark Berry, Review, *Competition Law*, 2005 N.Z. L. REV. 267, 268–69 (2005); *Telecom Corp. of N.Z. v. Clear Commc'ns Ltd.*, [1995] 1 N.Z.L.R. 385, 403 (P.C.) (N.Z.) (adopting counterfactual test, finding “[i]f the terms [the defendant was] seeking to extract were no higher than those which a hypothetical firm would seek in a perfectly contestable market, [the defendant] was not using its dominant position”). The counterfactual test has been the focus of some controversy. The most modern cases tend to suggest a more nuanced approach for certain situations. See Berry, *supra*, at 268–69.

⁵⁸ See, e.g., *Union Shipping NZ Ltd. v. Port Nelson Ltd.*, [1990] 2 N.Z.L.R. 662, 706–07, 711 (H.C.) (N.Z.).

that it has done so for the purpose of producing an anticompetitive effect.⁵⁹

In practice, New Zealand courts have taken a “cautious,” “hesitant” approach to the essential facilities doctrine,⁶⁰ commonly finding a right of access under Section 36, but simultaneously allowing owners of key infrastructure leeway to set prices that include monopoly profits.⁶¹ In 1999, the High Court declined to adopt the U.S. essential facilities doctrine “as is.”⁶² However, that case and others apply the past U.S. decisions on essential facilities as persuasive authority.⁶³ New Zealand courts commonly express a desire to converge New Zealand and Australian competition law,⁶⁴ so Australian judgments pertaining to unilateral refusals to deal are also very influential.⁶⁵

South Africa, in contrast, has adopted a two-pronged approach to unilateral refusals to deal by dominant firms. The first, Section 8(b) of the South African Competition Act,⁶⁶ prohibits dominant firms from “refus[ing] to give a competitor access to an essential facility when it is

⁵⁹ *Telecom*, [1995] 1 N.Z.L.R. at 402 (reasoning that “[i]f a person has used his dominant position it is hard to imagine a case in which he would have done so otherwise than for the purpose of producing an anti-competitive effect; there will be no need to use the dominant position in the process of ordinary competition”).

⁶⁰ THE LAWS OF NEW ZEALAND: COMPETITION § 120 (2008).

⁶¹ For cases finding a right of access, see *Auckland Reg'l Auth. v. Mut. Rental Cars (Auckland Airport) Ltd.*, [1987] 2 N.Z.L.R. 647, 651, 679-680 (H.C.) (N.Z.) (finding airport had duty to rent space to rental car company); *Union Shipping*, [1990] 2 N.Z.L.R. at 706-07, 711 (enforcing right to access the only wharf in a particular region). In *Telecom*, the Privy Council (New Zealand's highest court until 2004) found that Section 36 only ensures a modicum of competition and is not intended to allow the courts to eliminate a dominant firm's monopoly profits. [1995] 1 N.Z.L.R. at 407.

⁶² *Union Shipping*, [1990] 2 N.Z.L.R. at 705-06.

⁶³ See, e.g., *id.* at 704-06 (collecting important U.S. essential facilities cases and analyzing the doctrine as applied in the United States); *Telecom*, [1995] N.Z.L.R. at 402-03 (quoting *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986)); *Auckland Regional Authority*, [1987] 2 N.Z.L.R. at 679-80 (quoting *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977)).

⁶⁴ THE LAWS OF NEW ZEALAND, *supra* note 60, § 12; see also *Fisher & Paykel Ltd. v. Commerce Comm'n*, [1990] 2 N.Z.L.R. 731, 756 (N.Z.) (“[T]here is a wealth of Australian precedent on which New Zealand Courts have drawn and should continue to draw. The close relationship between the New Zealand Act and the Australian Trade Practices Act 1974, the goal of harmonisation of commercial statutes and an increasingly shared interpretation of commercial law in both common law and statutory areas, makes reliance on Australian precedent almost inevitable.”).

⁶⁵ See, e.g., *Union Shipping*, [1990] 2 N.Z.L.R. at 701 (analyzing *Queensland Wire Indus. Proprietary Ltd. v. Broken Hill Proprietary Co.*, (1989) 167 C.L.R. 177 (Austl.)); *Telecom*, 1 N.Z.L.R. at 403 (citing *Queensland Wire*).

⁶⁶ Competition Act 89 of 1998, § 8(b) (S. Afr.). Section 8 applies only to dominant firms as defined under the Act. *DW Integrators CC v. SAS Institute (Pty) Ltd.*, [2000] ZACT 16, ¶ 23 (S. Afr.), available at <http://www.saflii.org/cgi-bin/disp.pl/za/cases/ZACT/2000/16.pdf>.

economically feasible to do so.”⁶⁷ This is a per se rule. Once the plaintiff has shown it has been refused economically feasible access to an essential facility, the defendant is not permitted to justify the denial with competitive or social benefits.⁶⁸ The Act defines an essential facility as “an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers.”⁶⁹ The leading case, *Glaxo Wellcome (Pty) Ltd. v. National Association of Pharmaceutical Wholesalers*, held that “infrastructure or resource” as used in Section 8(b) excluded any “products, goods or services.”⁷⁰ *Glaxo* also set forth five elements that must be established by the plaintiff before the “per se” prohibition applies:

1. the dominant firm concerned refuses to give the complainant access to an infrastructure or resource;
2. the complainant and the dominant firm are competitors;
3. the infrastructure or resource concerned cannot reasonably be duplicated;
4. the complainant cannot reasonably provide goods or services to its competitors without access to the infrastructure or resource; and
5. it is economically feasible for the dominant firm to provide its competitors with access to the infrastructure or resource.⁷¹

By limiting Section 8(b) to infrastructure defined in this fashion, *Glaxo* considerably reduced the scope of this otherwise strong prohibition. Since *Glaxo*, few plaintiffs have sought to invoke this provision.

The prerequisites for the second prong, Section 8(d)(ii), are easier to meet. Section 8(d)(ii) prohibits a dominant firm from “refusing to supply scarce goods to a competitor when supplying those goods is economically feasible,” unless “the firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effects of its act.”⁷² Thus, Section 8(d)(ii) lowers the threshold from “essential facility” to “scarce good;” but reduces the conclusive per se prohibition to a rebuttable presumption in favor of the plaintiff. The defendant may defeat the presumption by showing the conduct had a net procompetitive effect.

Other jurisdictions take a more ad hoc approach, prohibiting unilateral refusal to deals on a case-by-case basis. For example, Section 29 of

⁶⁷ Competition Act 89 of 1998, § 8(b) (S. Afr.).

⁶⁸ *Glaxo Wellcome (Pty) Ltd. v. Nat'l Ass'n of Pharm. Wholesalers*, [2002] ZACAC 3, ¶ 29 (Comp. App. Ct.) (S. Afr.), available at <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACAC/2002/3.html&query=glaxo>.

⁶⁹ Competition Act 89 of 1998, § 1(vi) (S. Afr.).

⁷⁰ *Glaxo*, [2002] ZACAC 3, ¶ 53.

⁷¹ *Id.* ¶ 57.

⁷² Competition Act 89 of 1998 § 8(d) (S. Afr.).

Israel's Restrictive Trade Practices Law of 1988 provides: "A monopoly may not unreasonably refuse to provide or purchase an asset or a service" ⁷³ In addition, Section 29 operates as an independent control on firms in conjunction with Section 29A, which prohibits monopolists from "[a]buse of a dominant position," using language inspired by Article 82 of the EU Treaty. ⁷⁴

The leading Israeli case on the essential facilities doctrine is not available in English but is discussed extensively by Professor Michal Gal in her book, *Competition Policy for Small Market Economies*. ⁷⁵ In *Antitrust Authority v. Dubek*, the defendant held a 72 percent market share of Israeli cigarette sales, and was the only domestic cigarette manufacturer in Israel. A foreign firm, Elishar, held a 26 percent share. The defendant, Elishar, and two small cigarette importers initially shared a single distribution network for all cigarettes sold in Israel. Later, the defendant attempted to pull out of the joint distribution network and establish another for its exclusive use. Elishar would have been able to set up its own distribution network, and thereby survive the defendant's action, but the two small firms would not be able to operate their own distribution networks efficiently. The court, "based on an essential facility doctrine," ordered the defendant to grant the small competitors access to its distribution network. ⁷⁶ As Professor Gal explains, *Dubek* is remarkable because it applies the essential facilities doctrine even though one of the defendant's competitors would have been able to survive without access to the supposed essential facility. ⁷⁷

Where jurisdictions lack specific statutory schemes or robust case law on the subject, they often proceed through the issuance of guidelines. For example, Canada, which has a limited body of case law on abuse of dominance generally, has just issued draft revised guidelines that contain an appendix dealing specifically with unilateral refusals to deal. The Canadian guidelines state that a refusal to deal by a dominant firm will be unlawful where:

⁷³ Restrictive Trade Practices Law, 5748-1988, 42 LSI 135 (1987-88), § 29 (Isr.). Section 29 encompasses tying and bundling as well. Israel Antitrust Auth., Israel Antitrust Authority Answers to Questionnaire Prepared for the International Competition Network's Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 1 (2008).

⁷⁴ *See id.* at 2 ("Section 29A, inspired by Article 82 of the EC Treaty, was enacted in 1996 to supplement § 29.").

⁷⁵ MICHAL GAL, *COMPETITION POLICY FOR SMALL MARKET ECONOMIES* (2003).

⁷⁶ *Id.* at 140.

⁷⁷ *Id.* at 140-41.

- (i) A vertically integrated firm has market power in the downstream (or retail) market for the market in which the facility is used as an input in the time period following the denial;
- (ii) a denial of access to the facility has occurred for the purpose of excluding competitors from entering or expanding in the downstream market or otherwise negatively affecting their ability to compete; and
- (iii) the denial has had, is having or is likely to have the effect of substantially lessening or preventing competition in the downstream market.⁷⁸

The essential facilities doctrine also has spread to a variety of non-common law countries. For example, the Japanese Anti-Monopoly Law (AML) covers unilateral refusals to deal, although there has been little use of the doctrine by the Japanese Fair Trade Commission (JFTC). Article 2(9) of the AML allows the JFTC to designate unfair trade practices, including those which “[u]njustly treat other entrepreneurs in a discriminatory manner” or “[deal] with another party on such conditions as will unjustly restrict the business activities of the said party.”⁷⁹ Pursuant to those powers, the JFTC has designated both concerted and unilateral refusals to deal as potential violations of the AML.⁸⁰ More specifically, unilateral refusals to deal are an unlawful unfair trade practice if there is “unjust refusing to trade, or restricting the quantity or substance of goods or services pertaining to trade with a certain entrepreneur, or causing another entrepreneur to undertake any act that falls under one of these categories.”⁸¹

The JFTC elaborated on these ambiguous requirements in the 1991 Distribution Guidelines.⁸² The Guidelines recognize the general principle of freedom of choice in trading partners but also acknowledge that a refusal to deal may violate the AML when it results in the exclusion of its competitors from a market.⁸³ The Guidelines also specifically identify a situation where an upstream firm “influential in a market” withholds

⁷⁸ Competition Bureau, Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) 39 [hereinafter Competition Bureau 2009 Draft Guidelines] (draft Jan. 2009), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf/\\$FILE/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf/$FILE/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf).

⁷⁹ Shiteki Dokusen no Kinshi to Kosei Torihiki no Kakuho ni Kansuru Horitsu [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 54 of 1947, art. 2, no. (9), available at http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf.

⁸⁰ Japan Fair Trade Comm’n, JFTC Public Notice No. 15, Designation for Unfair Trade Practices 1 (1982).

⁸¹ *Id.* ¶ 2.

⁸² Japan Fair Trade Comm’n, Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act (1991), available at <http://www.jftc.go.jp/e-page/legislation/ama/distribution.pdf>.

⁸³ *Id.* at 9.

materials that have been supplied to finished product manufacturers.⁸⁴ The leading English language treatises identify only one older case in which liability has been imposed for a unilateral refusal to deal by a powerful firm, but each treatise concludes that such conduct violates the AML.⁸⁵ A leading comparative competition casebook similarly has concluded that “Japan makes a unilateral refusal to deal with rivals or those who deal with rivals illegal if the refusal is unjust and tends to impede competition and exclude competitors.”⁸⁶

Countries as diverse as Guatemala, Turkey, and Russia also have relied on the essential facilities doctrine in various substantive and procedural forms. An article by an Irish competition official describes how Guatemala handles essential facilities situations.⁸⁷ As an alternative to lengthy litigation proceedings, the Guatemalan law utilizes “baseball”-style arbitration to determine access questions as quickly as possible.⁸⁸ The Turkish Competition Board imposed a substantial fine over denial of access to the electrical grid to competing power producers.⁸⁹ Finally, even Russia appears to have used at least the concept of the essential facilities doctrine, if not the precise legal doctrine, in requiring the monopoly gas pipeline operator Gazprom to grant access to a competing natural gas producer.⁹⁰

⁸⁴ *Id.* at 10.

⁸⁵ MITSUO MATSUSHITA, INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN 150–51 (1993) (citing *In re Osaka Burashi Kogyo Kumiai*, 7 SHINKETSUSHU 99 (JFTC Sept. 20 1955)); HIROSHI IYORI & AKINORI UESUGI, THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN 111–13 (1994). See also Eriko Watanabe, *Regulation on Setting Technology Standards Under the Antimonopoly Law of Japan*, 1 WASH. U. GLOBAL STUD. L. REV. 263, 272 n.21 (2002) (“According to the essential facilities doctrine discussed in Japan but not yet discussed in court precedents or JFTC decisions, if plural firms are going to set technology standards jointly, and if refusing access to third parties to the technology potentially could exclude competitors, then the plural firms must provide open access to third parties in the resulting technologies.”).

⁸⁶ EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 456 (2007). For more on Japanese refusal-to-deal law, see OECD RTD ROUNDTABLE, *supra* note 30, at 153–58.

⁸⁷ Patrick Massey & Tony Shortall, *Competition and Regulation in Public Utility Industries 14* (Competition Auth. (Ir.), Disc. Paper No. 7, 1999), available at http://www.tca.ie/images/uploaded/documents/Discussion_Paper_7.pdf.

⁸⁸ Under this regime, there is a government-imposed mediation process wherein the parties negotiate for four months. If no agreement is reached, the parties submit final, sealed bids, and the arbitrator chooses the more reasonable of the two. *Id.*

⁸⁹ Remy Fekete, *The Turkish Competition Board Fines 5 M Euro an Abuse of Dominant Position by Applying the “Essential Facility” Doctrine in the Energy Distribution Sector (Enerjisa and Toros/CEAS)*, e-Competitions (Inst. of Competition Law) No. 23178 (Feb. 8, 2007) (summarizing *Enerjisa and Toros/CEAS*).

⁹⁰ Rachel Morarjee & Andrey Panov, *Russia’s Stock Market Slumps to 2-Year Low*, FIN. TIMES, Sept. 9, 2008, available at <http://virtualcollector.blogspot.com/2008/09/russias-stock-market-slumps-to-2-year.html>.

IV. A DIFFERENT KIND OF HARMONIZATION

Given the many different national and regional regimes that govern global business behavior, there have been numerous efforts to harmonize the substance, procedure, and enforcement of competition law. These efforts began in earnest after World War II and continue today, most notably through the International Competition Network (ICN). This section briefly surveys the historical efforts at harmonizing competition law and explains why the role of the United States in this process must change if efforts are to be successful for issues like the essential facilities doctrine, for which the United States' current position is out of step with international practice.

The United States frequently approaches the international harmonization of competition law as a one-way exercise, exporting U.S. norms while simultaneously rejecting foreign insight. The U.S. advice, most of it quite well intentioned, comes in many forms from both public and private sources.

From the drafting of the Havana Charter after World War II through the efforts to adopt trade and competition provisions in the World Trade Organization, the United States traditionally has been uncomfortable with international competition initiatives where it could be outvoted or otherwise not control the outcome of the negotiation of either hard or soft legal principles.⁹¹ It prefers technical assistance, bilateral understandings, non-binding resolutions, or fora requiring consensus where U.S. views could dominate or at least block any mandatory result contrary to U.S. preferences.

On the private side, it is frequently assumed that the rest of the world should follow the lead of the United States as the senior statesman in the competition field. The ABA CEELI project in the 1990s, as applied in the competition field and elsewhere, contained numerous examples of this tendency. Newly independent nations were given much advice on how to conform their statutes and enforcements to a U.S. model.⁹² In

⁹¹ See, e.g., US HEGEMONY AND INTERNATIONAL ORGANIZATIONS 131 (Rosemary Foot, S. Neil MacFarlane & Michael Mastanduno eds., 2003) (explaining that during drafting negotiations for the WTO, "fear of the loss of sovereignty had prompted some in the U.S. Congress to seek . . . a so-called 'three-strikes agreement,' which would allow the United States to withdraw upon the third finding in five years by U.S. circuit court judges that the WTO acted unreasonably against the interests of the United States); Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 344-45 (1997).

⁹² See John C. Reitz, *Export of the Rule of Law*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 429, 461 n.81 (2003); Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179 (1999) (inherent problem of chauvinism in programs like CEELI); Mickey

more recent times, the antitrust transition report for the Obama Administration prepared by the ABA Antitrust Section repeatedly implies that the United States should continue to make efforts to promote modeling of its antitrust regime abroad.⁹³ For example, the Antitrust Section report notes that international cooperation may include U.S. leadership in international competition bodies, transparency in U.S. enforcement processes, “soft” cooperation in case handling and technical assistance, and both bilateral and multilateral cooperation agreements.⁹⁴

When the United States reflects on its own competition law, foreign competition law experience is rarely studied in detail. None of the “blue ribbon” reports and studies on U.S. antitrust law has drawn heavily on foreign, comparative, or international law sources to chart the future of U.S. competition policy. The one exception was the 2000 International Competition Policy Advisory Committee (ICPAC) report that explicitly had an international focus but ultimately emphasized the need for harmonization of procedures and enforcement cooperation rather than merely promoting the substance of U.S. competition law.⁹⁵

Most importantly, the ICPAC report called for the creation of a Global Competition Initiative (GCI) as a forum for further harmonization of competition law.⁹⁶ While the GCI did not come into existence as envisioned by the ICPAC, this recommendation did eventually lead to the creation of the International Competition Network discussed below.⁹⁷

Harmonization EU-style proceeded in a different manner. Here, competition law followed the flag. As the European Union expanded, so did

Davis, *Harmonization*, BOSTON REV., June–Aug 1993, available at <http://www.bostonreview.net/BR18.3/davis.html> (raising concern that CEELI program “amounts to imperialism of a subtle—and dangerous—sort”).

⁹³ See, e.g., ABA SECTION OF ANTITRUST LAW, 2008 TRANSITION REPORT 17–19 (2008), available at <http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf>.

⁹⁴ *Id.* at 17. Demonstrating less concern for U.S. global antitrust hegemony, the American Antitrust Institute instead proposes evaluating other countries’ regimes in an attempt to further improve and streamline U.S. policy. This is particularly true for areas like cartel enforcement, where regimes like Korea and the United Kingdom have created innovative strategies to root out and prosecute anticompetitive behavior that could also be successful in the United States. AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE’S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES 24 (Albert A. Foer ed., 2008).

⁹⁵ INT’L COMPETITION POLICY ADVISORY COMM. TO THE ATT’Y GEN. AND THE ASSISTANT ATT’Y GEN. FOR ANTITRUST, ANTITRUST DIV., U.S. DEP’T OF JUSTICE, FINAL REPORT (2000), available at <http://www.usdoj.gov/atr/icpac/finalreport.htm>.

⁹⁶ *Id.* at 281 (included in ch. 6), available at <http://www.justice.gov/atr/icpac/chapter6.pdf>.

⁹⁷ See *infra* notes 101–104 and accompanying text.

the *acquis communautaire* in the competition field.⁹⁸ Soon enough, twenty-seven Member States were directly subject to EU competition rules, others by virtue of the European Economic Area,⁹⁹ still others by preferential trade agreements,¹⁰⁰ or their desire to someday obtain one of these favored statuses or otherwise emulate EU competition provisions.¹⁰¹ This approach led inexorably to EU proposals to include trade and competition rules in the WTO itself,¹⁰² an approach that eventually clashed and crashed in response to opposition from the United States and the many other problems with the completion of the Doha Round of WTO negotiations.¹⁰³

To a large extent, the International Competition Network (ICN) is the meeting ground for these two approaches:

The ICN provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns. This allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community.¹⁰⁴

Founded in 2001, the ICN is a voluntary consensus-driven virtual organization with no permanent home or secretariat but an agenda to work toward procedural and substantive competition law harmonization in an increasingly integrated global economy, thus to some extent accommodating the needs of the United States and the European Union as leading jurisdictions. However, over seventy jurisdictions now participate in ICN activities and annual meetings.

⁹⁸ The *acquis communautaire* consists of the elements of EU law that new Member States must accept in addition to the formal treaty provisions which include the acts of the Community institutions, such as the European Commission, as well as the complete case law of the Court of Justice and the Court of First Instance. See generally PAOLO MENGOZZI, EUROPEAN COMMUNITY LAW: FROM THE TREATY OF ROME TO THE TREATY OF AMSTERDAM 4 (2d ed. 1999).

⁹⁹ Agreement on the European Economic Area, arts. 53–60, Mar. 17, 1993, 1994 O.J. (L 1) 3.

¹⁰⁰ See, e.g., Euro-Mediterranean Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and the State of Israel, of the Other Part, arts. 36–38, Nov. 20, 1995, 2000 O.J. (L 147) 3.

¹⁰¹ See Jamie E. Fernandez, *Antitrust Regulation in Latin America*, 30 INT'L LAW. 521 (1996) (summarizing competition law changes in Brazil, Argentina, Columbia, and Chile modeled after EU law).

¹⁰² Daniel Pruzin, WTO, *EU Outlines Goals for WTO Talks on Services, IP, Competition Policy*, 16 INT'L TRADE REP. (BNA) 968 (June 9, 1999).

¹⁰³ Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383 (2007); *Enforcement: WTO Will Not Be Conducting Competition Policy Negotiations*, 87 ANTITRUST & TRADE REG. REP. (BNA) 151 (Aug. 6, 2004).

¹⁰⁴ About the International Competition Network, <http://www.internationalcompetitionnetwork.org/about.aspx>.

The ICN is organized into working groups, which have tackled such issues as Advocacy, Antitrust Enforcement in Regulated Sectors, Cartels, Competition Advocacy in an Economic Downturn, Competition Policy Implementation, Market Studies, Mergers, Telecom, and Unilateral Conduct.¹⁰⁵ The typical pattern in the working groups has been to survey member practices in an area and then work toward the drafting of general principles, recommendations, and best practices for the members to adopt as they see fit. The ICN recommendations and best practices have been adopted by new and established jurisdictions to varying degrees, but conformance is increasing. Not surprisingly, there has been easier progress in procedural areas and in areas like cartel enforcement where the pre-existing consensus was the strongest.

The question of the fate of the essential facilities doctrine and other forms of unilateral refusals to deal will be a difficult one if the ICN chooses to address the topic in the future. The unilateral conduct working group has already had probably the widest difference of views on the areas that have been surveyed so far, which include proof of market power, state-created monopolies, predatory pricing, and exclusive dealing.

As set forth above, the U.S. views on the essential facilities doctrine are out of step with most of the rest of the world and are unlikely to be the focal point for harmonization or the generation of general policies and best practices. If there is to be a consensus on this issue, it will require more of a two-way street than has been the case in the past, a significant change from the past position of the United States on unilateral conduct issues, or a very serious effort to paper over differences that would most likely result in mushy generalities.

V. BETTER PRACTICES FOR AN ESSENTIAL FACILITIES DOCTRINE

Drafting meaningful best practices for unilateral refusals to deal in the ICN or elsewhere will be difficult but not impossible. The legitimate fear is that the essential facilities doctrine can be misused as an “epithet”: a seat-of-the-pants determination of when to grant access untethered to cabining principles or attention to the incentives for either incumbents or new entrants.¹⁰⁶ These concerns are important, but insufficient to justify the recent positions of the U.S. Supreme Court and Bush administration agencies questioning whether the essential facilities

¹⁰⁵ The International Competition Network—Document Library, <http://www.internationalcompetitionnetwork.org/index.php/en/library/working-group>.

¹⁰⁶ Areeda, *supra* note 7.

doctrine should be a meaningful part of U.S. competition law. As a matter of practice, most jurisdictions that do apply this doctrine do so in a sensible manner in the majority of cases. Even the newer Member States of the European Union have applied the essential facilities doctrine to traditional and modern infrastructure, particularly where the facilities in question were the exclusive province of the state or private firms enjoying special privileges from the state.¹⁰⁷ Where they have strayed, more often than not, has been a matter of laxity in determining whether the new entrant can as a legal and practical matter duplicate the facility at issue.¹⁰⁸

If the goal is to have a thoughtful regime of open access when that will be beneficial to society, Australia—with its statutory national access regime, supplemented with industry specific rules as needed, and the general competition law as a backstop—comes closest to being a potential model. If such a comprehensive regime is not possible or desirable, then at least a detailed statutory provision in the competition law is superior to a more open-ended discretionary system that can be over- or under-enforced by competition enforcers and courts.

Equally important are limiting principles so that access is granted only when access to the facility is truly essential, competition can be maintained or enhanced, and social welfare is increased. The infrastructure theory that Brett Frischmann and Spencer Waller (an author of this article) have written about in different contexts is one way to obtain these goals.¹⁰⁹

As noted:

Infrastructure theory adds a demand-side component to the traditional supply-side considerations that underlie the essential facilities doctrine. The term *infrastructure* generally conjures up the notion of physical resource systems made by humans for public consumption. A list of common examples includes (1) transportation systems, such as highway and road systems, bridges, railways, airline systems, and ports;

¹⁰⁷ Eleanor M. Fox, *An Anti-Monopoly Law for China—Scaling the Walls of Government Restraint*, 75 ANTITRUST L.J. 173 (2008); Spencer Weber Waller, *Bringing Globalism Home: Lessons from Antitrust and Beyond*, 32 LOY. U. CHI. L.J. 113, 120–24 (2000); Symposium, *The Globalization of Law, Politics, and Markets: Implications for Domestic Law Reform*, 1 IND. J. GLOBAL LEGAL STUD. 409, 423–24 (1994).

¹⁰⁸ See *supra* notes 43–44 and accompanying text. At a 2007 OECD Roundtable focusing on refusals to deal, it was clear to at least one delegate that nearly every country's competition authority recognized some limitation on refusals to deal. OECD RTD ROUNDTABLE, *supra* note 30, at 238.

¹⁰⁹ Waller, *Areeda, Epithets, and Essential Facilities*, *supra* note 2; Frischmann & Waller, *Revitalizing Essential Facilities*, *supra* note 2; Frischmann & Lemley, *Spillovers*, *supra* note 2; Frischmann, *An Economic Theory*, *supra* note 2. This section draws on the earlier work of both Professors Waller and Frischmann (with permission of Frischmann).

(2) communication systems, such as telephone networks and postal services; (3) governance systems, such as court systems; and (4) basic public services and facilities, such as schools, sewers, and water systems.¹¹⁰

Increasingly, various forms of technology, particularly platform technologies and certain technological standards, have become the infrastructure of the modern age. However, the key feature of all types of infrastructure resources is that they generate value as inputs into a wide range of productive processes, often supporting many uses, applications, and downstream markets.

The infrastructure resources that historically have been available on non-discriminatory terms tend to satisfy the following demand-side criteria: (1) the resource may be consumed non-rivalrously; (2) social demand for the resource is driven primarily by downstream productive activity that requires the resource as an input; and (3) the resource is used as an input into a wide range of goods and services, including private goods, public goods, and/or nonmarket goods.¹¹¹ Traditional infrastructure, such as roadways, telephone networks, and electricity grids, satisfy this definition, as do a wide range of resources not traditionally considered as infrastructure resources, such as lakes, ideas, certain software platforms, and the Internet.

These criteria help illustrate how open access to infrastructure resources create social value. Infrastructure resources typically are intermediate goods that create social value when utilized downstream. While some infrastructure resources may be consumed directly to produce immediate benefits, most of the value derived from the resources results from productive use rather than consumption. By definition, the market undervalues the public and non-market goods that are created by these spillovers. Thus, from an economic perspective, it makes sense to manage certain infrastructure resources in an openly accessible manner because doing so permits a wide range of downstream producers of private, public, and non-market goods to flourish.

Most infrastructure represents some combination of commercial, public, and social goods. For example, the Internet is a combination of all three types of infrastructure and thus is a mixed infrastructure. The analytical advantage of this general categorization is that it provides a means for understanding the social value generated by these infrastruc-

¹¹⁰ Waller, *Areeda, Epithets, and Essential Facilities*, *supra* note 2, at 371 (derived from the arguments set forth in Frischmann, *An Economic Theory*, *supra* note 2, and Frischmann & Waller, *Revitalizing Essential Facilities*, *supra* note 2).

¹¹¹ Frischmann, *An Economic Theory*, *supra* note 2, at 956.

ture resources, identifying different types of market failures, and formulating the appropriate rules to correct such failures. The issue of open access to infrastructure is ubiquitous, and infrastructure theory creates an important lens to address the essential facilities doctrine and other legal doctrines of open access.

Looking at unilateral refusals to deal comparatively through an infrastructure lens suggests a number of possible best (or at least better) practices that are compatible with the historical basis of the essential facilities doctrine in the United States:

- Limit liability for unilateral refusals to deal to traditional and modern infrastructure. Such infrastructure will tend inevitably to satisfy the condition that the existing facilities cannot legally and practically be duplicated.
- Reject the *Trinko* gloss that the presence of regulation by itself should shield unilateral refusals to deal from liability under competition law. Automatically deferring to that regulatory system or assuming that the regulatory system provides an effective access remedy is factually suspect and misses the opportunity to use competition and regulatory law in tandem to provide socially useful regimes of open access and meaningful administrative remedies.
- Treat unilateral refusals to deal the same as concerted refusals to deal with respect to infrastructure. There may be sound reasons to be more concerned about horizontal agreements between competitors to exclude competitors or choke off sources of supply in general, but not with respect to infrastructure. If society is truly worse off due to a denial of access, the form of the ownership or control of the bottleneck should be irrelevant.
- Treat infrastructure based on intellectual property rights the same as physical or traditional infrastructure. Access to technological standards, software platforms, and interconnection information is the 21st century equivalent of the bridges, roads, and ports that gave rise to the essential facilities doctrine in the first place. There is a trend throughout competition law to treat intellectual property the same as personal or real property. This needs to work in both directions and occasionally be a sword as well as a shield.
- Apply competition law principles and open access requirements equally to private and public bottlenecks. International experience has shown the value of generally applying competition law to public actors as well as private firms. The United States needs to catch up

to this way of thinking, particularly in light of the increased role of the public sector envisioned by the economic recovery plan.

- Be sensitive to the downstream spillovers that open access enables. While the dominant firm typically will be a competitor in the downstream market, it need not be in order for society to benefit from requiring a regime of open access for true infrastructure.
- Open access does not mean free access. We typically pay for access to the postal system, utilities, and a wide variety of networks, platform technologies, and other types of infrastructure.
- Be mindful of demonstrable concerns about the limits of institutional capabilities, but do not assume that the courts or agencies cannot administer a remedy. They have done so in the United States and elsewhere for decades. There will often be real-world external and internal transactions that provide a benchmark for a court or agency to use to determine the terms of access. Courts and agencies are certainly capable of determining whether a competitor is being treated less favorably than another party without being forced to act like “regulators.” Courts and agencies also are capable of determining fines or damages for past behavior without exceeding their institutional capabilities. In the handful of situations presenting challenges beyond the abilities of courts or competition agencies, expert regulatory bodies can help craft cooperative solutions.
- Do not assume that open access regimes automatically create undesirable incentives, but be open to demonstrated instances of perverse incentives.
- Do not assume that access will lead to collusion, but continue to police downstream markets for anticompetitive outcomes. If the firms had wanted to collude in the first place, there would have been no reason to deny access. More fundamentally, every competition authority has tools to deal with collusion.

VI. CONCLUSION

The United States is entering an era where it has as much to learn from the rest of the world in competition law as it can teach. Harmonization often has been an exercise in exporting the law of the dominant system to more junior partners.¹¹² That may not be possible at this time

¹¹² See Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557 (1994).

in the essential facilities area for several reasons. The U.S. Supreme Court has questioned a doctrine that the rest of the world has embraced. If the United States seeks to export this narrow and self-defeating vision of the essential facilities doctrine, it will be and should be unsuccessful. History, doctrine, and economic theory indicate that the essential facilities doctrine can be applied under certain circumstances to open bottlenecks and permit competition in downstream markets for the benefit of consumers and society at large. The essential facilities doctrine has become an accepted part of the toolkit in most competition jurisdictions. It is time to study that experience seriously and apply the best part of that new learning to our always evolving antitrust needs.

