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## The essential facilities doctrine

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### ***Competition law in mature markets assures all players fair access to must-have utilities***

RECENTLY, newspapers reported that the government was mulling over the granting of licences to providers of natural gas to homes. The issue under debate was the provision of exclusive rights for fixed tenure to incentivise the laying of pipelines. While some entrepreneurs preferred to separate the provision of pipelines from supply of gas, others argued that investment in pipelines would only come if exclusivity was granted.

Another story which appeared in newspapers in the recent past is the sharing of towers by cellular phone operators. According to reports, the concerned minister had to intervene, asking service providers to get together in order to finalise a scheme for sharing the towers.

It goes without saying that pipelines are essential for the supply of natural gas to homes, and that telecom operators need to either instal more towers or share the existing towers to improve and widen service coverage . Can these issues be addressed under India's competition law?

Business competition is usually defined as a process of rivalry with the objective of garnering higher market share or more profit. The outcome of a competitive process is expected to result in lower prices, higher output, better quality and innovation. Sometimes, the competitive process faces obstacles when a market player does not have access to certain facilities without which it cannot compete effectively. These are known as 'essential facilities'. For example, a new airline cannot compete unless it has access to existing runways and parking facilities. It is obvious that essential facilities pose problems in infrastructure or network industries.

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The doctrine of essential facilities evolved in the United States in the beginning of the 20<sup>th</sup> century, not long after the enactment of the Sherman Act. Certain railroad companies owned both the railroad terminal as well as the only bridge link to the terminal. A new player, intending to provide competition to the existing players, was denied access to both the bridge as well as the railroad terminal. The existing players argued that the new player needed to build similar facilities and incur the relevant cost to be able to compete. The US Supreme Court [US vs. Terminal Railroad Association of St. Louis, (1912) 224 U.S. 383] held this as a case of monopolization, and directed the existing players to provide access to essential facilities - namely, the bridge and the railroad terminal - to enable the new player to compete effectively. One should not misconstrued this as a ruling that every investment made by an entrepreneur would be subjected to third party access. Such misgivings would kill the incentive to make investments in the first place.

Essentially, the essential facility doctrine is only invoked in certain circumstances, such as existence of technical feasibility to provide access, possibility of replicating the facility in a reasonable period of time, distinct possibility of lack of effective competition if such access is denied and possibility of providing access on reasonable terms.

The conditions precedent for the invocation of this doctrine were reiterated in 1978 in a famous football case [Hetch vs. Pro Football Inc. [(1978) 436 U.S. 956]. A rival football club was denied access to the stadium owned by the incumbent. It was held by the Court that it was not possible to construct another stadium in a reasonable timeframe and denying such access would be against the Sherman Act (the doctrine has been recently diluted in the Verizon vs Trinko case).

This doctrine is recognized in the European Union as well. While deciding the case involving access to a seaport [B&I vs. Sealink 1992 5 CMLR255], the court held that while providing access to essential facilities, the owner has to play under fair rules. In this particular case, the owner of the seaport providing access to a third party which had smaller vessels. The timings of access to the facility were so determined that the movement of larger vessels of the owner would not permit convenient loading and un-loading of the competitor's smaller vessels. The third party took the matter to the competition agency, and invoked the essential facility doctrine successfully.

This doctrine has been widely recognized in Australia as well. The Hilmer Committee Report, 1994 suggested that it be incorporated into the law itself. Consequently, the Trade Practices Act of 1974 now incorporates this doctrine as one of its essential features. On disputes over whether the facility is an essential one or not, the National Competition Council intervenes. Once a facility has been declared essential, third party access on fair terms is guaranteed.

In India's Competition Act of 2002, one of the abuses of one's dominant position is to indulge in any practice or practices that result in denial of market access in any manner (as the proposed Competition Amendment Bill of 2006 puts it). The intention of the law-makers seems to be an implicit recognition of the doctrine of essential facilities. Recently, the report of the Working Group on Competition Policy, constituted by the Planning Commission, has also recommended a recognition of the essential facilities doctrine in no uncertain terms.

Coming back to the newspaper stories, gas pipelines as well as communication towers can both be possibly regarded as essential facilities. In that case, third party access must be allowed, provided it is technically feasible.