COMPETITION LAW

SIBERGRAMME 2/2012

ISSN 1606-9986

21 August 2012

Senior Editor
ROBERT LEGH

Head of the Competition Law Unit of Bowman Gilfillan Inc, Johannesburg

This issue by
LAUREN RICHARDS and KHOFOLO KRUGER

Candidate Attorneys: Bowman Gilfillan Inc

Siber Ink

Published by Siber Ink CC, B2A Westlake Square, Westlake Drive, Westlake 7945.

Subscriptions: subs@siberink.co.za or fax (+27) 086-242-3206

To view Competition Tribunal judgments, see: http://www.comptrib.co.za/

IN THIS ISSUE:

ESSENTIAL MATTERS: A COMPARATIVE ASSESSMENT OF DIFFERENT APPROACHES TO THE ESSENTIAL FACILITIES DOCTRINE[1]

Introduction

Section 8 of the South African Competition Act 89 of 1998 ("the Act") is the abuse of dominance prohibition. Our focus in this article is specifically on section 8*(b)*, which prohibits a dominant firm from refusing to give a competitor access to an essential facility when it is economically feasible to do so. There is a dearth of case law articulating the essential facilities doctrine ("the doctrine"); however, an assessment of the small amount of jurisprudence available indicates that the courts tend towards a narrow interpretation of the doctrine.

We first examine the South African position and identify shortfalls in the analysis that has so far been provided by the courts. Foreign jurisdictions with more established jurisprudence in this area, such as the European Union ("EU") and the United States of America ("USA"), are then considered for guidance. We then identify principles that could aid South African courts in developing the doctrine. Any significant differences in the EU and US approaches are noted.

[1] Thank you to Jean Meijer and Paula Youens, director and senior associate at Bowman Gilfillan, respectively, for their help and guidance. The authors are most grateful.

We conclude that as the doctrine in South Africa is governed by the Constitution of the Republic of South Africa, 1996, a balancing act between different rights is required. Furthermore, considerations of capacity, feasibility and duration should be employed to guide the enquiry. We submit that the ambit of section 8*(b)* is broad enough to encompass the abovementioned suggestions.

South Africa

Section 1 of the Act defines an "essential facility" as "an infrastructure or resource which cannot reasonably be duplicated and without access to which competitors cannot reasonably participate in the market". Refusing to give a competitor access to an essential facility is a *per se* contravention[2] of the Act, and the only evidentiary requirement necessary to prove that a firm has been engaging in this conduct is the conduct itself.[3] The doctrine therefore does not allow a dominant firm to raise an efficiency defence.

In *Glaxo Wellcome (Pty) Ltd & Others v National Association of Pharmaceutical Wholesalers & Others* 15/CAC/Feb02 ("*Glaxo*"),[4] the complainants argued that pharmaceutical products amounted to "resources" in terms of the definition of an essential facility and therefore qualified as such. The Competition Appeal Court ("CAC") rejected this argument, holding that the term 'resource' was not intended to include products, goods or services.[5] Therefore, according to the CAC, pharmaceutical products do not qualify as essential facilities and resources for competition law purposes.

The CAC held that "the widening of the application and scope of the essential facilities doctrine can have harmful economic effects such as discouraging investment in infrastructure",[6] furthermore, obliging a dominant firm to allow competitors access to a facility amounts to a

[2] Minette Neuhoff (ed) et al (2006) *A Practical Guide to the South African Competition Act* at 112. ("Neuhoff").

[3] Neuhoff (note 2) at 125.

[4] *Glaxo* at [51] and [53].

[5] Ibid at [53].

[6] Ibid at [54].

considerable intervention. The ambit of section 8*(b)* has therefore been narrowed to traditional infrastructure only which includes ports, airports, electricity grids, telecommunication networks, railways and railway terminals, and pipelines.

The CAC set out the following five elements that must be alleged and proved by a complainant before the *per se* prohibition is said to exist:[7]

(i) the dominant firm involved must refuse to give the complainant access to an infrastructure or resource;

(ii) the complainant and the dominant firm must be competitors;

(iii) the infrastructure or resource concerned must not be capable of being reasonably duplicated;

(iv) the complainant must not be able to reasonably provide goods or services to its customers without access to the infrastructure or resource; and

(v) it must be economically feasible for the dominant firm to provide its competitors with access to the infrastructure or resource.

When determining the existence of an essential facility, a vital consideration is whether the infrastructure or equipment can be *reasonably* duplicated or not. The *onus* is first placed on the competitor to seek out means by which it can provide goods and services to its customers without the essential facility. If there are alternatives, even costly ones, the competitor cannot expect to free-ride[8] on the resources of the dominant firm. It should also be noted that refusing to give competitors access to an essential facility is not the same as the refusal to supply scarce goods to a competitor.[9]

The enquiry also considers whether the facility permits the dominant firm to exercise market power in the relevant market. This would occur where the competitor has no alternative but to depend on the dominant firm and, therefore, without compulsory access, cannot provide

[7] Ibid at [57].

[8] See *Mandla-Matla Publishing (Pty) Ltd v Independent Newspapers (Pty) Ltd* [2006] 2 CPLR 499 (CT) [53]-[54] for a discussion on the concept of competitors free-riding on the investments of dominant firms.

[9] *Glaxo* at [51].

the relevant goods and services.[10] Clear examples of an essential facility being incapable of being reasonably duplicated are cases of physical or regulatory impossibility.[11]

In *DW Integrators CC v SAS Institute (Pty) Ltd* [1999-2000] CPLR 191 (CT) ("*DW Integrators*"), 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's software programmes. The complainant requested a direction obliging the 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. Thus, the claimant argued, the respondent's refusal to grant a licence amounted to a violation of section 8*(b)* of the Act.

The Competition Tribunal ("the Tribunal") held that the complainant had failed to accurately define the relevant market.[12] The Tribunal was thus not required to make a finding on the claimant's allegations that the use of the respondent's software was an essential facility.[13] This marked a missed opportunity for the Tribunal to decide whether an intangible asset constituted an essential facility.

In the large merger in *Telkom SA Ltd and TPI Investments v Praysa Trade 1062 (Pty) Ltd* [1999-2000] CPLR 116 (CT) ("*Telkom SA*"), a third party, Infracom, and competitor to TPI Investments, sought to participate in the Tribunal hearings as an interested party. Infracom, a telecommunications company, averred that the merger, and more 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.

Infracom alleged that the services that it provides are highly specialised and focus on telecommunications facilities, and that its existence depends upon the renewal of its contract with

[10] Martin Brassey (ed) et al (2002) *Competition Law* at 205 ("Brassey").

[11] Ibid at 204.

[12] *DW Integrators* at [23].

[13] Ibid at [29].

Telkom. The Tribunal held that the claim that the Telkom contract constituted an essential facility was without merit. This was because Telkom is not the only provider of telecommunications services. 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.

The Tribunal contended that, even if these claims were valid, this would simply establish the commercial importance of the Telkom contract and not render it an essential facility. The Tribunal stated that the importance of the Telkom contract would certainly not constitute the basis for a claim that every service provider that set 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.[14] The approach taken by the Tribunal in this case is indicative of a narrow view of the doctrine.

The large merger in *DCD Dorbyl (Pty) Ltd and Globe Engineering Works (Pty) Ltd* [2009] 1 CPLR 122 (CT) ("*DCD Dorbyl*") was conditionally approved by the Tribunal. Both the merging parties were providers of ship repair services in the Cape Town harbour. Prior to the merger, the two firms had an existing relationship with one other firm through two joint ventures. The one relevant to this discussion is the proposed joint venture to lease the working area of a part of the Cape Town harbour 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 ("the Commission"), make it an essential facility.[15] 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 their competitors. The competitors also contended that there were no other areas in the port of Cape Town that could be used for large oil and gas repair work.[16] Hence, the crucial question in this matter was whether other areas in the port of Cape Town could be used for large oil and gas repair work, that is,

[14] *Telkom SA* at [36].

[15] *DCD Dorbyl* at [65].

[16] Ibid at [66].

whether there is reasonable duplicability of the facility.

The Tribunal noted:

> "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".[17]

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.[18]

The doctrine was cursorily addressed in the recent decision in *Competition Commission v Telkom* (Case No. 11/CR/Feb04) ("*Competition Commission v Telkom*"). The Tribunal concluded that the resource in question was, in fact, an essential facility.[19] Moreover, in its answering affidavit,[20] Telkom conceded that the facilities bought by value added network service providers ("VANS providers") from Telkom amounted to essential facilities as contemplated in section 8*(b)* of the Act.

The Tribunal held that Telkom had refused certain independent VANS providers access to an essential facility by abusing its dominance in the fixed line communication market and thereby excluding these VANS providers from competing in the downstream market for value added network services.[21] Telkom refused to supply the essential facility to the VANS providers unless they acceded to certain conditions in letters and contracts. Through the imposition of these conditions, which were premised on Telkom's interpretation of the Telecommunications Act[22]

[17] Ibid at [72].

[18] Ibid at [81].

[19] *Competition Commission v Telkom* at [3].

[20] 12 April 2012 at [13.1].

[21] *Competition Commission v Telkom* at [8].

[22] 103 of 1996.

and the provision of their licences, Telkom sought to expand its exclusivity over services which it did not lawfully enjoy. In further abuse of its dominance, Telkom intermittently froze the networks of a number of VANS providers.[23]

Telkom argued that its conduct was justified in that the VANS providers were engaged in illegal conduct ("illegality defence"). Telkom alleged that the VANS operators adopted a business model that effectively trespassed on Telkom's exclusivity rights in Public Switched Telecommunications Services (PSTS) and were in contravention with section 40(2) of the Telecommunications Ac,t read with paragraph 1.5 of its licence.[24]

The Tribunal asserted that:

> "[t]elecommunication facilities such as Diginet access lines and copper links were, and are still, an essential input in the business of VANS providers. There was no evidence put up by Telkom that it was not economically feasible for it to supply these facilities".[25]

Furthermore, Telkom's illegality defence was invalid as it was decided against by SATRA (South African Telecommunications Regulatory Authority[26]) and ICASA (the Independent Communications Authority of South Africa). The Tribunal maintained that even if the illegality defence stood, Telkom had inconsistently and selectively frozen competitors' networks thereby demonstrating that its refusal to supply was not a matter of law but a commercial strategy to stave off the competition.[27]

The Tribunal further elucidated as follows:

> "While it is unnecessary to show harm for purposes of section 8*(b)* the effect of Telkom's refusal

[23] *Competition Commission v Telkom* at [30.1.1].

[24] Telkom, *inter alia*, alleged that the regulatory framework restricted VANS providers from sub-letting or ceding control of the facilities it obtained from Telkom and Telkom's insistence that the lines be in the names of the ultimate user was an attempt to be compliant with the legislation.

[25] *Competition Commission v Telkom* at [87].

[26] ICASA's predecessor.

[27] *Competition Commission v Telkom* at [88].

> was clearly adverse to both VANS providers and their customers who relied on them for network services and ultimately the consumer who relied upon the services of these consumers."[28]

As a result, Telkom received an administrative fine of R490 000 000.00, which represents approximately 2% of Telkom's annual turnover for 2010/ 2011.

Although the Tribunal decided that Telkom had denied the VANS providers an essential facility, it did not define the scope of the definition of an essential facility or shed light on the correct approach to determining whether or not a good or service amounts to an essential facility.

Many authors, such as Kemp, express the view that the elements of the definition of an "essential facility" should be interpreted in light of the property clause in the Constitution balanced against the importance of increasing competition, particularly in markets dominated by former state-sponsored monopolies.[29] Under these parameters, the definition of an essential facility is not limited to major infrastructure; therefore, equipment would also be subject to the doctrine.

In terms of section 8*(b)* of the Act, once a resource or infrastructure is deemed an essential facility, a dominant firm may be obliged to grant competitors access to the facility only if it is economically feasible to do so. South African courts are yet to lay down a clear-cut definition of the meaning of "economically feasible" in this context. However, what is clear is that dominant firms need not compromise the viability of their own businesses for the purposes of providing the essential facility to competitors.

In order to grant relief to a firm that has been denied access to an essential facility, section 58(1*)(a)*(vii) of the Act gives the Tribunal the power to order access to an essential facility on reasonable terms. The Tribunal may also impose an administrative fine of up to 10% of a firm's

[28] Ibid at [95].

[29] Katherine Kemp and Philip Sutherland (October 2011) *Competition Law of South Africa* Service Issue 14, 7-51- 7-52 ("Kemp").

annual turnover in, into and from South Africa[30] for a first-time contravention of section 8*(b)*.[31]

The United States (US)

The United States Supreme Court ("the Supreme Court") first expressed the idea of the doctrine in the case of *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912) ("*Terminal Railroad Ass'n*"). Railroad groups prevented competing firms from using all the bridges and the switching yards. This was deemed to be both an attempt at monopolisation and an illegal restraint of trade.[32]

In *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991) (*"Alaska Airlines"*) it was held that:

> "[t]he essential facilities doctrine imposes 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 indicate that the doctrine can be likened to a unilateral refusal to deal.[33] 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 monopolisation under section 2 of the Sherman Act.[34] This is because, in the US, the doctrine is not an independent cause of action (see *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250 (S.D.N.Y. 1995) ("*Kramer*")).[35]

---

30 Section 59(1)*(a)* of the Act.

31 Neuhoff (note 2) at 127.

32 Robert Pitofsky et al, 'The Essential Facilities Doctrine under U.S. Antitrust Law' (2003) 70, *Antitrust Law Journal*, 443 at 446 ("Pitofsky").

33 Ibid.

34 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 person or 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

The 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. The case of *MCI Communications Corporation VAT & T* 708 F 2d 1081 (1983) ("*MCI Communications*") laid down the four requirements under US law in order to found antitrust liability under the doctrine. These four factors are:[36]

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

This test has been applied in nearly every decision on essential facilities in the US.[37]

According to Pitofsky,[38] liability rarely results under this doctrine, 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".[39]

Furthermore, as stated in *Alaska Airlines*:

> "[a] facility controlled by a single firm will be considered "essential" only if control of the facility carries with it the power to eliminate competition".

punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

[35] *Kramer* at 257.

[36] Pitofsky (note 32) at 449.

[37] Ibid at 448.

[38] Ibid at 449.

[39] Ibid.

However, it should be noted that this does not mean that a party is required to prove that it went out of business as a result of the effects of the restriction (see *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 ("*Aspen*")).[40]

The fourth factor, the feasibility of providing access to competitors, acts as a safeguard which ensures 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 (see *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) ("*Hecht*")).[41]

It is also important to note that courts have emphasised that the analysis of the doctrine is highly fact-specific (see *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999) ("*Intergraph*")).[42] The courts in the US also imply that where anticompetitive *animus* (intention) is present, liability on the basis of the doctrine is particularly suitable (see *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) ("*Otter Tail*").[43]

In terms of intellectual property, such as copyrighted databases and software, the courts have applied the doctrine equally. In other words, the existence of intellectual property rights does not act as a protection against liability under the doctrine.[44] The doctrine has also been applied to other intangible assets in the US (see *SunshineCellular v. Vanguard Cellular Sys., Inc.*, 810 F. Supp. 486 (S.D.N.Y. 1992) ("*SunshineCellular*").[45]

Data General Corp. v. GrummanSys. Support Corp., 761 F. Supp. 185, 191-92 (D. Mass. 1991) ("*Data General*") [46] dealt with the right of a service provider to exclude competitors from access to diagnostic software in which it held copyrights. The claimant alleged

[40] *Aspen* at 594-95.

[41] *Hecht* at 992-93.

[42] *Intergraph* at 1356, 1357.

[43] *Otter Tail* at 377-79; Pitofsky (note 32) at 451.

[44] Pitofsky (note 32 at 454.

[45] *SunshineCellular* at 497.

[46] *Data General* at 191–92.

that the software was an essential facility and, furthermore, that Data General's unilateral refusal to deal amounted to monopolisation. The claim failed as a result of the inability to show that the facility was in fact *essential*. It is important to note that this does not mean that the doctrine is not applicable in the case of software.[47] The denial of the essential facility claim was not pursued on appeal, but the more general claim of monopolisation was. The court of appeals held that:

> "while exclusionary conduct can include a monopolist's refusal to license a copyright, an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers".[48]

Pitofsky points out that while the court did show some deference to intellectual property rights, there was an unwillingness to immunise holders thereof in cases where they refused to deal where it could be said that anticompetitive intent was present.[49]

The European Union (EU)

The EU and the US have diverged considerably in their applications of the doctrine.[50] The doctrine is governed by Article 102 of the Treaty on the Functioning of the European Union[51] in the EU.

---

[47] Pitofsky (note 32) at 455.

[48] *Data General* 46 at 37.

[49] Pitofsky (note 32) at 459.

[50] Ali A Massadeh, 'The Essential Facilities Doctrine Under Scrutiny: EU and US Perspective' (2011) UEA Law Working Paper No. 2011-AM-1. [Available at SSRN: http://ssrn.com/abstract=1738326] at 3 ("Massadeh").

[51] Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In the case of *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] E.C.R. I-5039 ("*IMS Health*"), the European Court of Justice ("ECJ") laid down a three-fold test in order to determine whether the doctrine applies. In this case, IMS owned intellectual property rights in respect of a database[52] 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.[53]

Massadeh[54] suggests that this test makes it clear that the EU approach requires either the prevention of the emergence of a new product or the removal of competition in a secondary market; neither consideration is discussed in US case law. However, this test was developed in the context of the specific facts of the case. Reference was made to the tests developed in *Oscar Bronner GmbH & Co v Mediaprint Zeitungs* [1998] C-7/97, [1999] 4 CMLR 112 ("*Bronner*") [55] and *Magill* C-241/91 P & C-242/91 P *Radio Telefis Eireann (RTE) v Commission of the European Communities* [1995] E.C.R. I-743 ("*Magill*").

The test in *Bronner* laid down the following as relevant considerations:

- the refusal would have to be likely to eliminate all competition in the downstream

[52] IMS Health had built a structure in 1860 geographical zones to format its reports on sales of 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).

[53] *IMS Health* at [38] and [52]; Massadeh (note 50) at 7.

[54] Massadeh (note 5050) at 7.

[55] *Bronner* at 112.

market from the person requesting access;

- the refusal must be incapable of objective justification;
- the access must be indispensable to carrying on the other person's business; and
- there must be no actual or potential substitute for the product in question.[56]

In the EU, establishing liability under the doctrine 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* [1974] ECR 223, [1974] 1 CMLR ("*Commercial Solvents*"), the complainant sought access to raw materials (upstream market) that were essential in the production of a certain drug (downstream market).[57] This was described as "vertical foreclosure". As market definition plays a decisive role, a precise definition of the markets involved is critical.[58] The courts, as shown in *IMS Health*,[59] are insistent on the existence of two markets in order for liability to be imposed.[60]

Comparison of the US and EU positions

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.[61] Instead, the US focus is on the underlying intention. Where the intention

[56] Massadeh (note 5050) at 8.

[57] Massadeh (note 50) at 8.

[58] Ibid.

[59] *IMS Health*.

[60] Masadeh (not 50) at 8.

[61] *Otter Tail*.

is to limit competition, the complainant should be granted right of use.[62] The application of the doctrine is not barred by the absence of two markets.[63]

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 a market is defined more narrowly than in the US. The narrower definition increases the possibility of finding dominance in a market, but the overall assessment remains more rigid than in the US.[64]

The EU takes a more political, social and market-based approach, whilst the US is more consumer-welfare orientated.[65] 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, Seelen[66] 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".[67]

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

- the needs of the competitor;
- the preference of the consumer; and
- the analysis of the market.[68]

---

[62] Massadeh (note 50) at 9.

[63] Ibid.

[64] Massadeh (note 50) at 9.

[65] Ibid at 19.

[66] Christopher M. Seelen, 'The essential facilities doctrine: what does it mean to be essential' (1997) 80, *Marquette Law Review*, 1117 ("Seelen").

[67] Massadeh (note 50) at 10.

[68] Ibid.

In the EU, as shown in *Magill*, the word 'indispensible' is used when assessing the question of whether or not a facility is essential. Doherty[69] looked at what needs to be shown in order for a service to be considered 'indispensible' and concluded that:

> "there should be no actual or potential substitute for the facility, meaning that it is not only difficult but impossible for the plaintiff seeking access to duplicate the product (facility)".[70]

Furthermore:

> "The inability to duplicate the facility in question should not be because of the limited resources of the plaintiff; the facility could be described as impossible or unreasonably difficult to duplicate if this is for technical, legal or, in some instances, for economic reasons."[71]

With regard to what the definition of "economically feasible" is, the courts in the US have held that even if there may be anti-competitive effects, the controller of an essential facility need not compromise or impair its own business to accommodate others. If the owner of an essential facility is using it to full capacity to supply a product for which it has a ready market, the controller of the essential facility has no duty to provide access to a competitor (see *State of Illinois ex rel Burris v Panhandle Eastern Pipe Line Co* p35 F 2d 1469 (7^{th} Cir 1991)). Acceptable justifications for not allowing competitors access to the facility may include physical or geographical reasons.[72]

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 Africa derives its force from the Constitution, 1996. All legislation must therefore be interpreted through the prism of the Constitution. This means that although the

[69] Barry Doherty, 'Just what are essential facilities?' (2001) 38, *Common Market Law Review*, 397, 423.

[70] Massadeh (note 50) at 11.

[71] Ibid at 11.

[72] Massadeh (note 50) at 11.

law of foreign jurisdictions can be taken into account, the overall assessment of the courts must be based on a balancing of the various rights enshrined in the Constitution.

South African courts, in order to provide flexibility for this balancing act, should take a fact-specific approach to essential facilities cases. While general set guidelines should be formulated and followed, it is advisable that each case's facts determine its outcome. South Africa should follow the approach of the US courts in this regard. The nature of these cases demands such an approach. For example, the analysis should not be so rigid as to confine it to major infrastructure; leeway should be given to allow for the incorporation of equipment and intangible assets.

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, 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 African 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 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 behaviour 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 section 8*(b)* of the Act.

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. These considerations fall broadly under the umbrella of practicality.

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 would be detrimental to the dominant firm, then that firm should not be obliged to grant competitors access to the facility. In other words, dominant firms should not be required to compromise their own businesses in order for competitors to have access to the facility in question.

The length of time that a firm is required to grant 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. This enquiry will disincentivise 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 sections 1(viii) and 8*(b)* 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.

Cases

Any questions or comment on the content of this *Sibergramme* may be directed to Robert Legh at rlegh@bowman.co.za.

Siber **Ink**