
EVALUATING THE REFUSAL TO SUPPLY/ ESSENTIAL FACILITY LAW IN INDIA VIS-A-VIS THE EU POSITION FROM THE OSCAR BRONNER AND SHAMSHER KATARIA CASES

Shiwangi Kumar, BA LLB, O.P Jindal Global University

Introduction

The Essential Facilities doctrine is used to address the anticompetitive behaviour of a dominant undertaking that owns or controls such a facility (an essential facility) and refuses, without an objective justification, to make it available to competitors or new entrants. And even if they makes it available, it is on discriminatory terms by abusing its position of dominance.

A significant EU case concerning ‘essential facilities’ is the Oscar Bronner case¹. In this case, the respondent Mediaprint published two newspapers which made up almost 50% of the newspaper market share in Austria and also had a well-established system for nationwide newspaper distribution service. Mediaprint via this unique system delivered its own newspapers as well as newspapers by a third party publisher to subscribers’ homes early in the morning. Oscar Bronner, the petitioner, also a publisher of a newspaper made up only 4% of the newspaper market share in Austria. Oscar Bronner argued that Mediaprint’s refusal to distribute its newspapers was an abuse of dominance as Oscar Bronner was incapable of establishing a similar competing distribution system and that the distribution system should be regarded as an essential facility.

The ECJ relied on four factors to determine whether the refusal in this case is abuse of dominance. Firstly, the refusal of the service is likely to eliminate all competition in the downstream market on the part of the person requesting the service. Secondly, the refusal must be incapable of objective justification. Thirdly, the service in itself must be indispensable to

¹ C-7/97 Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG 1998 ECR I-7791, [1999] 4 CMLR 112.

carrying on that person's business. And lastly, there should be no actual or potential substitute for the facility in question. In this case, the court held that Mediaprint's home delivery service was not indispensable as there were other modes available to distribute daily newspaper. Therefore, the last two factors were not fulfilled in this case. Hence, the court held that the behaviour of Mediaprint did not amount to an abuse of dominance and stressed on the fact that access must be indispensable and not desirable or convenient. The court clarified that it would only be indispensable if it was not economically viable to create a substitute for the existing facility. However, it is also important to highlight the fact that the court mentioned that in certain cases like airports or railway networks, it is physically infeasible to duplicate such facilities.

The Essential Facilities doctrine might not be expressly mentioned in the Indian legislation, however it can be broadly construed from within the Indian Competition Act, 2002. Section 4 (2) (b) and section 4(2) (c) prohibits dominant firms from engaging in any behaviour that results in the denial of market access in any manner. These provision can accommodate enough to cover the denial of access to facilities which are critical for competing in the given market. Additionally, Section 4 (2) (e) prevents an undertaking from using its dominance in one market to establish a footing or to protect its position in another market. Another provision into which the essential facilities doctrine can be read is Section 3 (4) (d) of the Act which prohibits the refusal to deal by dominant undertakings when it can create an appreciable adverse effect on competition.

The Essential Facilities doctrine came up for consideration in the recent Shamsher Kataria case². The issue in this case was whether the refusal by 14 car manufacturers to provide access to their spare parts and diagnostic tools to independent repairers constituted as an abuse of dominance. The commission held that spare parts and diagnostic tools constituted as essential facilities without which the independent repairers could not perform their functions efficiently and that it was pertinent to provide independent repairers access to these essential facilities so as to create a more conducive competitive system. Therefore, the CCI imposed a fine of INR 2544 crores on the 14 car manufacturers for abuse of dominance and their anti-competitive behaviour.

² Shri. Shamsher Kataria v. Honda Sael Cars India Ltd., Case No. 03/2011.

A plain reading of Article 82(b) EC and Section 4(2)(b) of the Competition Act 2002 (both provisions relating to refusal to deal), brings to light the evident similarities in the language of the provisions. A basic objective of Article 82 EC is to ensure fairness and protect small and medium-sized firms. Their position is that dominant firms are commercially free to compete on the merits. But small and medium-sized enterprises are important to consumer welfare and should receive some protection. Such an objective is consistent with the Indian policies. Therefore, there are stark similarities in India's position with regards to the essential facilities doctrine with EU's position³. The Oscar Bronner case does not reflect a shift in courts' priorities from its objective. It only restricts the scope of the doctrine by limiting its usage in situations where owner has a dominant position but also imposes a forward looking test, thereby ascertaining whether refusal to deal will lead to monopolization in downstream market.

Even though in the *Shamsher Kataria* case the essential facilities doctrine was not explicitly invoked, there were multiple similarities with the principle in the *Oscar Bronner* case. The commission went into the question of whether the access to the spare parts and diagnostic tools is indispensable to carrying of business by independent repairers, and in its investigation it was found that it is in fact indispensable. The commission also considered the aspect of objective justifications. The commission did not find the reasons of justification by the car manufacturers in the lines of reputation and IPR to fulfil the conditions of this criteria as the car manufactures could not provide relevant documentary evidence to successfully establish the grant of the applicable IPRs, in India, with respect to the various spare parts and could not show how their restrictions protected their interests. There were no substitutes present as well as there were unwritten agreements and written agreements to restrict free access of spare parts in the aftermarket and from international suppliers. And it was found that the refusal of access to spare parts and diagnostic tools did lead to elimination of all competition for these OEMs as independent repairers could not carry out their functions efficiently without these facilities. Therefore, it can be observed that the essence of the four factor test from the *Oscar Bronner* case is found in the analysis of the *Shamsher Kataria* case, although the outcome in both the cases were different.

³ Goyal Y., Ramanujam P., Patel A. (2018) Towards a Transaction Cost Approach to the Essential Facilities Doctrine. In: Bharadwaj A., Devaiah V., Gupta I. (eds) *Multi-dimensional Approaches Towards New Technology*. Springer, Singapore. https://doi.org/10.1007/978-981-13-1232-8_14

India in developing this doctrine further should rely on the position of EU with regard to the Essential Facilities Doctrine as its objective and policies in line with Indian policies. Also, EU in its position, has a more conciliatory role as opposed to over regulation. Over regulation can hamper competition, which is why the EU approach is a more sustainable model for India to follow with regards to the Essential Facilities doctrine.