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Essential Facilities Doctrine in Stem Cell Market

ESSENTIAL FACILITIES DOCTRINE IN STEM CELL MARKET

by
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ABSTRACT

The doctrine of Essential Facility imposes a duty to share a monopoly facility which is essential, on non-discriminatory terms to all those who require that facility. An essential facility may be defined as "the need of the public at large, the need of the individual competitor, the market power possessed by the facility's owner, and the preferences of the consumers." The object of this paper is to focus on the need for the applicability of this doctrine to the new and vital facilities developed by the technological innovation keeping in view the limitations of the doctrine. Now a day, the public depend on the stem-cells market. This doctrine is discussed in this paper from the point of view of the competitor, the public, the consumer and the market power in order to determine the essentiality of the facility.

Keywords: Stem-cell, The Clayton Act, the Competition Act, Mediaprint

I. INTRODUCTION

The importance of the doctrine of an 'essential facilities' is increasing in a number of decisions delivered by competition authorities throughout the world due to: "The liberalization of utility markets which feature a number of possible essential facilities; and the desire of governments to establish new infrastructure funded by private investment."[1] This doctrine originated in U.S. under their anti-trust law. The essential conditions to be complied with for invoking the doctrine of Essential Facility are: control of an essential facility by a monopolist; a competitor's inability practically or reasonably to duplicate the facility[2]. Aside from these two the other ingredients to be fulfilled with as enumerated in *Oscar Bronner GmbH & Co. KG* v. *Mediaprint Zeitungs- und Zeitschriftenverlag. GmbH & Co. KG*[3] are as follows: The refusal to access to a facility must be likely to eliminate all competition in the applicant's market, the access must be indispensable or essential for carrying out the applicant's business, the denial to access lacks any Objective Justification[4]. Nevertheless, there is no precise definition for the word "essential". Similarly, what makes the "facility" as essential is not clear. Essential facility may be defined as "the need of the public at large, the need of the individual competitor, the market power possessed by the facility's owner, and the preferences of the consumers."[5]

The range of facilities to which the doctrine has been applied by the Judiciary all over the globe are "railways (track, stations); airports (slot allocation; ground handling services) and airline computer reservation systems; ports; utility distribution networks e.g. electricity wires and gas pipelines; bus stations and some intellectual property rights"[6]. The objective of this paper is to focus on the necessity of the applicability of this doctrine to the new and the vital facilities developed by the technological innovation keeping in view the limitations of the doctrine.

India has been ranked 71 by the Global Competitiveness Report 2014-2015 published by the world Economic Forum in its Global Competitiveness Index. The competitiveness of 144 global economies is estimated keeping in view 12 pillars which encompass inter-alia infrastructure, health, goods

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market efficiency, market size, business sophistication, innovation. India is at the lowest position amongst the BRICS countries. This Report has defined the word competitiveness as the "set of institutions, policies, and factors that determine the level of productivity of a country."[7] The freedom of trade is guaranteed by our Constitution in Article 19(1)(g). This Article endeavours to explain the new dimension which has taken place in the form of the application of the Doctrine of Essential Facilities to tying arrangements in medical field.

Section 3(1) of the Competition Act, 2002 prohibits an enterprise or an association of enterprises or a person or an association of person from entering into any agreements in connection with production, supply, distribution, storage, acquisitions or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition[8] within India. Such an agreement becomes void under sub-section (2) of S. 3. If any agreement between a person or association of persons or an enterprise or an association of persons relating to the above stated activities is made exclusive it may bring about the denial of an essential facility to the competitors. Even if no provision for the application of the Essential Facility Doctrine is explicitly made in the Competition Act, 2002 it is an implied letter used in the Act.

S. 3(3) of the Competition Act enumerates certain kinds of agreements entered into between enterprises[9] or association of enterprises, persons or

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association of persons or between any person and enterprise, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

Such agreements are per se void[10]. S. 3(3) does not apply to an agreement in the nature of Joint Venture if such agreement increases efficiency in production, supply, distribution, storage, acquisition, or control of goods or provisional services.

S. 3(3) enunciates that markets, technical development, investment or provision of services, sharing of source of production are essential facilities either for entering into the market or for surviving in the market

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Sub-section (4) of Section 3, specifically provides for certain conditions, which if interpreted properly may lead to the denial of the essential facilities for the other manufacturers in the market[11]. It specifically focuses on tie in arrangement, exclusive supply arrangement and exclusive distribution agreement. A tie-in agreement is an agreement whereby a seller sells or lease out one product or service on the condition that the purchaser purchases a second product or service[12]. The essential requisites for anti-competitive tying agreement in India are that there must be two separate products or services that can be tied together. A sale or an agreement to sell one product or service must be subject to a condition that the buyer shall buy another product or service (or the buyer signifies consent not to buy the product or service from another supplier).The second requirement is that the free competition in the market for the tied product must get impaired owing to the enough economic power of the seller in the market for the tying product. The third requirement is that a substantial portion of the market should be hindered by reason of the tying arrangement[13]. Hence, tying agreements may harm the buyers and the competitors, who lose the opportunity to sell the tied product.

The Competition Commission of India has applied the essential facilities doctrine to tying agreement entered into in medical field in the following case, namely, *Ramakant Kini* v. *L.H. Hiranandani Hospital*.[14] The OP hospital was a frontline provider of Comprehensive healthcare services in Mumbai. The patient was availing the maternity healthcare services of the OP. With a view to preserve the stem cell of her expected baby, patient entered into an agreement with M/s Life Cell India Pvt. Ltd. To avail its services for banking of stem cells. The informant submitted that the OP hospital not only denied the patient to avail services of Life Cell India, but

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also directed the latter not to enroll any of its patient for stem cell banking services as M/s Cryobanks was their cord stem cell Banker with whom OP had an exclusive tie-up agreement. The informant alleged that OP was indulged in anti-competitive practices and abused its dominant position in the market for maternity services causing an appreciable adverse effect on competition in violation of sections 3(4) and S. 4. It was held that Agreement between OP hospital and Cyrobank was an anti-competitive agreement under section 3(1) of the Competition Act, 2002.

Keeping in view the welfare-enhancing goals of the Competition Act, 2002 which aims to preserve and promote competition, freedom of trade and the bedrock principle of antitrust policy i.e. consumer's interest the Competition Commission of India concluded that the agreement between the OP Hospital and the Cryobank was in violation of Section 3(1) of the Competition Act, 2002 for the following reasons:

1. OP Hospital chose the Cryobank as its cord stem cell banker based on monitory considerations as the Cryobank was the highest offeror of the enrolment fee out of all those who submitted offers but not on the merit of technology.
2. Life Cell and Cryobank, the two major players in the market shared collectively i.e. 67% of the stem cell market which was the relevant market[15] in this case wherein it would have adverse effect on

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competition since the expecting mothers shall get an access to the stem cells/cord

blood market through the maternity service providers.

The plea of the OP Hospital was that OP Hospital and Cryobank were not operating at different stages or levels of some production chain as the affairs of OP Hospital and Cryobank were neither vertically nor horizontally connected. Therefore, the allegations of the anti-competitive agreement under Section 3(4) cannot be examined lest a vertical agreement[16] in the same production chain was not entered into by the parties. However, it was held by the Competition Commission that such an exclusive tie up agreement hampers the development of the stem cell market and creates entry barriers for competitors which ensue lower quality, hike in price of service and also restrain the choice of the consumers in the selection of the service provider. The latter part fiddles the market mechanism altogether. It is not established that the above stated agreement result in "any improvements in production or distribution of goods or provision of services or resulting in the promotion of technical scientific and economic development by means of production or distribution of goods or provision of services"[17] The tie in agreement mentioned supra led to an adverse effect on stem cell bankers, free trade and choice as well as money to be paid by the patients. No evidence was adduced showing that the OP Hospital was dominant in the relevant market of 'provision of maternity services by super-specialty/high-end hospitals within a distance of 0-12 km. from the Hiranandani Hospital of Municipal Corporation of Greater Mumbai.

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On the other hand, as per the dissenting view delivered by M.L. Tayal, the agreement between OP Hospital and the Cryobank was not a vertical arrangement as the OP Hospital was providing maternity services while Cryobank was providing stem cell banking services. Therefore, no manufacturer and the retailer relationship could be found between them. Thus, the agreement cannot be analyzed as anti-competitive agreement within the breadth of Section (4) of the Competition Act, 2002.

The dissenting view necessitates the doctrine of essential facilities to be explicitly mentioned in the Indian Competition Act, 2002 in order to avoid the dichotomy between the majority and minority view about the application of Section 3(4) on the touchstone of vertical agreements. Although the Indian Competition Act, 2002 doesn't precisely refer the term 'vertical' agreement, the agreements consulted in section 3(3) can be termed as 'horizontal'[18] agreements and the agreements mentioned in section 3(4) can constitute 'vertical' agreements.

Having regard to the growing importance of the deposit of stem cells for the good health of a mankind as a right to health is a fundamental right as declared by the Supreme Court by means of interpretation of Article 21 of the Constitution of India. The majority judgment delivered by the Competition Commission of India in the instant case is laudable as a new entrant is equally pertinent as an incumbent in utility should not be driven out of the market. The tying agreement is judged under the rule of reason.[19]

The facility denied in this case is for the future consumers who are a vitally important asset to the stem cells market which has risen to the level of societal necessity[20] for which no adequate substitutes in the locality.

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Nowadays the public depend on the stem-cells market. The essential facilities doctrine has featured implicitly in the *Hiranandani case*. Judgments about the means to regulate the restraints on competition need to be pronounced to incentivize initiation and investment by enterprises.

Section 4 of the Competition Act, 2002 provides: (1) No enterprise or group shall abuse its dominant position. (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation.—The discriminatory conditions or prices adopted in order to meet the competition shall be excluded from the purview of S.4 (2) (a) (i) and (ii); or

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access [in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) Uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.—for the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—(i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.

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Under S. 3, the Competition Commission of India is required to establish an appreciable adverse effect on competition whereas under S. 4 an abuse of dominant position is required to be examined, when the dominance is established, under S. 4 of the Competition Act, 2002[21]. A strategy that generate efficiency gains does not amount to an abusive strategy[22]. The doctrine of Essential Facilities can be brought jointly within the orbit of Ss. 3 & 4 of the Competition Act, 2002 since this doctrine refers to an anti-competitive behaviour of an enterprise or an association of enterprises and a claim of an abuse of dominant position.[23]

II. ORDERS BY COMMISSION AFTER INQUIRY INTO AGGRESSION OR ABUSE OF DOMINANT POSITION

S. 27. Where after inquiry into agreements finds that any agreements referred to in section 3 or action of enterprise in a dominant position, is in a dominant position, is in contravention of S. 3 or S. 4, as the case may be, it may pass all or any of the following orders, namely:—

"(a) direct any enterprise or association of enterprises or person or association of

persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to reenter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turn over for the last three

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preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

Provided that in case any agreement referred to in S. 3 has been entered unto by a cartel, the Commission may impose upon such producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement whichever is higher;

(d) direct that the agreement shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(g) pass such other order [or issue such directions]"[24] as it may deem it:

Provided that if an enterprise in contravention of S. 3 or S. 4 of the Act is a member of a group as defined in clause (b) of the Explanation to S. 5 of the Act, and the other members of group are also responsible for, or have contributed to, such a contravention, then, the Commission may pass orders against the other members of the group under this section.

In *Shamsher Kataria* v. *Honda Siel Cars India Ltd.*[25], the issue was whether the Original Equipment Manufacturers (OEM's) of product can refuse to provide access to spare parts and other associated technological information related to the same (over which they hold IP rights) and which happen to be essential inputs for entering a derivative market. In this case, a complaint was filed against 3 Original Equipment Manufacturers (OEMs)/Car companies for having violated Sections 3 and section 4 by entering into anti-competitive vertical agreements with original equipment suppliers (OES) and authorized dealers in order to restrict free availability of auto spare parts in the market, imposing unfair prices and prohibiting independent repairers from accessing spare parts and selling them to car users in the open market.

Independent repairers were also not being provided technological information, diagnostic tools and software programs which would enable them to continue providing maintenance & repair services. As a result, only authorized workshops were able to sell spare parts or provide maintenance services at higher (or even monopolistic) prices.

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The OEM's contended that the restriction imposed by them on OESs and authorized dealers were for the safety of consumers and to enhance the service to the car owners. Further, the restriction under agreements with OESs from sale in open market without the consent of OEM was a reasonable condition imposed to protect their IPRs, and

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such agreements were protected from scrutiny of the Commission by section 3(5) of the Competition Act.

However, the Commission did not accept their contentions stating that in case of a refusal to deal or a case of denial of market access to customers in the relevant market leading to a violation of s 4, there being no equivalent to s. 3(5) under s. 4, there was available no IP defence against an alleged abuse of a dominant position.

The Commission held that as regards Vertical agreements between OEMs and OESs restraining OESs from supplying spare parts in the independent after market without the permission of the OEM's, the Act only recognized protection to the IPRs mentioned in section 3(5). OEMs failed to establish their claim over any particular type of IPR. Hence, OEMs plea was rejected by the Commission.

Further, the Commission said that only reasonable and necessary restriction related to IPRs are protected and the restrictions imposed by OEMs were not reasonable and necessary.

The Commission's holding the IP holders to have abused their dominant positions leads to the unmistakable inference of the Commission having accepted the "*Essential Facilities*" doctrine. Though the Commission nowhere expressly states so its reliance on the same can clearly be inferred from the mentioned decisions in *Istituto Chemioterapico Italiano SpA* v. *Commission of the European Communities*[26] and *United Brands Co.* v. *Commission of the European Communities*[27] which had held an abuse if dominant enterprises refused to deal in essential inputs in order to exclude competition in a derivative market.

Moreover even for the applicability of Sec 3(5) IP defence the Commission has observed that it would be necessary for the IP rights to be registered under the Indian Statutes mentioned in the Act and the party claiming it would have to adduce documentary evidence to claim the same under s 3(5).

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III. US: THE RELEVANT LAW PERTAINING TO THE APPLICATION OF ESSENTIAL FACILITIES DOCTRINE TO TYING ARRANGEMENTS

To grant an access under this doctrine an underlying antitrust violation must be established. Sections 1 & 2 of the Sherman Act, 1890 deal with tying agreements.

Sub-sections (1) and (2) of Section 3 of the Competition Act, 2002 are similar to Section 1 of the Sherman Act, 1890 of the US. Section 1 Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be 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". Section 2 of the Sherman Act provides for the essential facilities doctrine implicitly in the following words: "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 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

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court."[28]

Sherman Act distinguished concerted activity from unilateral activity. Concerted activity is outlawed under Section 1 if it merely restrains trade. Unilateral activity is punished under Section 2 if it either actually monopolizes or attempts to monopolize.[29]

Section 2 provides relief for two traditional grounds, i.e. monopolization and attempted monopolization. The elements for monopolization are: "'(1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen,

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or historic accident.' "The elements for attempted monopolization are: (1) a specific intent to monopolize a relevant market; (2) predatory or anticompetitive conduct; (3) a dangerous probability of success."[30]

To what extent the monopolist is bound to provide, an access to its facility which is essential to its competitors, under the essential facilities doctrine is specified in the following case, namely, *United States of America* v. *Terminal Railroad Assn. of St. Louis*,[31]. The roots of the doctrine of essential facilities are stemmed from this case under Section 1 of the Sherman Act.

Various railroad companies formed the Terminal Railroad Ass'n in St. Louis which had acquired and controlled the two bridges and ferry, which were the only facilities for transporting railroad trains across the Mississippi river. It was not feasible for any other railroad company to pass through without having an access to the said facilities and to build up and maintain their own bridges, It was alleged by the United States that this would violate the Sherman Act.

The court held that it amounted to an illegal restraint of trade and an attempt to monopolise. The US Supreme Court ordered the Terminal Rail Road Association which jointly controlled access and terminal facilities permitting traffic across the Mississippi River, to open membership to all other railroads or to grant an access to the facility to the non-members in a non-discriminatory manner as the facilities were "public utility" and the denial of access to it would adversely impact trade and commerce. This order laid down the foundation stone to the essential facilities doctrine.

> "Critics of the essential facilities doctrine have worked hard to distinguish Terminal Railroad on the ground that the Court would have reached the same result following an ordinary horizontal monopolies analysis and/or as a novel alternative to divestiture relief. However, the Court's emphasis on synergies requires a different analysis"[32]

The Supreme Court case dealing with facilities controlled by single firms is *Otter Tail Power Co.* v. *United States*,[33] the defendant, Otter Tail Power Co. held a regulated monopoly for electric power transmission service within a multistate area in the upper Midwest. The defendant also generated power for distribution over this grid and held local monopoly franchises for distribution of electricity to customers within the municipalities in its

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service area. As these local franchises expired, several municipalities individually attempted to establish independent retail distribution systems. The defendant refused

to sell the new systems energy at wholesale rates or to "wheel" power--i.e., to transmit power from independent generators to municipalities within its service area over its own grid even though it had the ability to do so, solely to prevent municipal power from eroding its monopolistic position. The duplication of wholesale electrical services of the Otter Tail Power was not feasible.

The Court held that Otter Tail used its monopoly position as the exclusive regional supplier of wholesale power to "foreclose competition or gain a competitive advantage, or to destroy a competitor" in the retail power market, which are all in violation of Section 2 of the Sherman Act.

It can be inferred from this case that the doctrine can be applied to impose a duty to share a facility which is vital to the public.

If a monopolist alters an established course of dealing to exclude rivals without any business justification, it will violate Section 2 of the Sherman Act.

Aspen Skiing Co. v. *Aspen Highlands Skiing Corpn.*[34]

The Supreme Court affirmed a jury verdict for the plaintiff, holding that the defendant Ski Co. was "not motivated by efficiency concerns and. .. was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival."[35] The Court was of the opinion that the defendant "did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years."[36] The Court emphasized that "we squarely held that this right [to refuse to deal] was not unqualified."[37]

Alaska Airlines Inc. v. *United Airlines Inc.*[38]

Alaska Airlines, Muse Air Corporation, Midway Airlines, Inc., and Northwest Airlines, Inc. filed a suit against their competitors, United Airlines and American Airlines under Section 2 of the Sherman Act in operating computerized reservations systems (CRS) in an abusive manner.

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The function of CRS was to furnish to the participating travel agents with schedule, fare, and seat availability information for every airline and to send and receive airline booking data, book space on flights, and automatically prepare tickets and advance boarding passes.

The airlines pass on flight information to the CRSs, and through the CRSs the travel agents obtain the information. The travel agents then serve the information to consumers. Nominal fee or no fee need to be paid to the CRSs by travel agents. However, the airlines paid a huge amount for these services to the travel agents. American Airlines started its own CRS named as SABRE, similarly, United Airlines started its own CRS named as Apollo. American SABRE was the largest CRS followed by United's Apollo. The plaintiffs, previous subscribers to Apollo and SABRE, instituted a suit under the Sherman Act on the ground that United and American Airlines denied plaintiffs a reasonable access to their CRS services which were essential facilities. Thus, they could individually be brought within the orbit of Section 2 of the Sherman Act.

The court held that a successful "essential facilities" claim need to prove that the denial of access has either caused the plaintiff "severe handicap" which indicate more than inconvenience or economic loss since an alternative to the essential facility is not

possible.

The essential facilities doctrine is applied only to "natural monopo[lies] facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus, could not practically be built privately".[39]

United States v. *Colgate & Co.*[40]

In this case, freedom of market participant to deal with parties of its choice is recognised. Colgate & Co. had a policy of refusing to deal with distributors who sold below prescribed lowest retail price. It has determined a lowest selling price for its products and had instructed the distributors and retailers not to sell its product below that price. An abuse of dominant position in contravention of the Sherman Act was alleged.

The Court held that there was no violation of the Act by Colgate & Co. Putting lowest price for its products and not dealing with the distributors who didn't comply with lowest price instruction was not an abuse of monopoly.

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The objective of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade.

In the absence of any purpose to create or maintain a monopoly, the Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal"[41]; and, he may proclaim in advance under what circumstances he will refuse to sell. 'The trader or manufacturer who carries on an entirely private business can sell to whom he pleases.' Same principle was pleaded in the following case, namely,

Verizon Communications Inc. v. *Law Offices of Curtis V. Trinko Llp*[42]

The issue in this case was whether the 'Essential Facilities Doctrine' is applicable when a government facility has the power to create or grant access. An action was brought by a lead plaintiff, a customer of AT&T, a long distance carrier which was competing with the ILECs in the market for local phone service as per the provisions of the Telecommunications Act, 1996 which sought to uproot the incumbent ILECs' monopoly and to introduce competition in its place. The Act of 1996 imposed obligations on the ILECs by forcing them to share their local telecommunications network with their competitors. Verizon was the Incumbent Local Exchange Carrier) in New York. Before 1996 Act, Verizon and other incumbent LECs enjoyed an exclusive franchise within its local service area. The plaintiffs argued that certain Verizon-owned networking equipment constituted an essential facility for the market to the competitive local telephone services. Verizon had been fined a $3 million by FCC on the footing that it had not discharged statuary obligations under the 1996 Act. Trinko filed a suit for antitrust damages. AT&T claimed that Verizon failed to provide an adequate access. Trinko, AT&T customer instituted a class action against Verizon under the Sherman Act, claiming that he had been injured when Verizon denied the essential facility to the competitors.

It was held that the essential facility doctrine should not be applied "where a state or federal agency has effective power to compel sharing and

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to regulate its scope and terms."[43] The conclusion drawn by the court is not inconsonance with previous judgments wherein the doctrine of essential facility has been applied in the same set of facts.

Tying agreements can be brought within the scope of Section 3 Clayton Act. Section 3 Clayton Act states: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce". This section embraces only sale of goods but not of services.

The US Supreme Court has applied this doctrine to tying agreement in medical field in a case, namely, *Jefferson Parish Hospital* v. *G. Hyde*[44], the petitioner (the hospital) entered into a contract with a firm of anesthesiologists providing that all anesthesiological services required by them. The respondent, a board certified anesthesiologist launched an action for an injunction ordering the petitioners to appoint him to the above exclusive contract which was unlawful since it violated Article 1 of the Sherman Act.

It was held by the Court of Appeal that the case concerned with a 'tying arrangement' because the users of the hospital operating rooms (the tying product) were compelled to purchase the hospital's chosen anesthesiological services (the tied product). The hospital did have a 'sufficient market power in the tying market to coerce the purchasers of the product.' The purchase of the tied product constituted a "not insubstantial amount of interstate commerce, "hence, the tying arrangement was illegal "per se".

On the other hand the Supreme Court of the United States held that the exclusive contract in the instant case doesn't violate Article 1 of the Sherman Act and observed inter alia that when the seller exploits its

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"market power" over the tying product to force a purchaser to buy a tied product that would not otherwise be bought or else might have purchased in a competitive market on different terms, the competition on the merits in the market for the tied item is impaired, therefore, the tying arrangement becomes un lawful under Section 1 of the Sherman Act, anchored to 'Quasi-per se' rule because this per se rule is applied in the light of the probability of the anti-competitive consequences. If this threshold in surmounted, an unreasonable restraint on competition must be established in order to bring the tying arrangement within the width of antitrust violation. Thus, the tying arrangement encompasses two distinguishable product markets i.e., a market therein a competition has been foreclosed and the market for the tying item.

In order to determine the validity of the tying arrangement market or markets wherein the two products are sold, for i.e. where the anti-competitive forcing has its impact must be taken into consideration. "For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately without also purchasing the tying product. When the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire no additional market power by selling the products together"[45] Therefore, in the instant case, anesthesia and surgical services cannot be treated as distinct products for tying purposes. Moreover no evidence as to the actual adverse effect on competition in price, or quality, or supply, or demand for either the 'tying product' or the 'tied product' due to the tying arrangement was adduced, hence, no case could be made out under the antitrust laws. This case was referred to in *Eastman Kodak Co.* v. *Image Technical Services Inc.*[46]. The issue in this case was whether a firm or trader had an absolute right to freely exercise its own independent discretion as to the parties with whom it will deal/refuse to deal?

The facts of this case were as follows: the Respondent Independent Service Organizations (ISOs) were entered into the business of servicing copying and providing micrographic equipment manufactured by petitioner Eastman Kodak. Kodak espoused policies restricting the availability to ISOs of the replacement parts for its equipment and not enable ISOs to compete with it in servicing such equipment. Kodak obtained agreements from its contracted original equipment manufacturers for not to sell parts to ISOs.

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The Respondents (ISO's) instituted an action, on the footing that Kodak had unlawfully tied the sale of service for its machines to the sale of parts, which was contrary to § 1 of the Sherman Act, and had unlawfully monopolized and attempted to monopolize the sale of service and parts for such machines, which was contrary to § 2 of that Act.

The District Court granted summary judgment for Kodak, but the Court of Appeals reversed. The respondents adduced before the Appellate Court a sufficient evidence to raise a genuine issue as to the Kodak's market power in the service and parts markets, and the Appellate Court denied the Kodak's argument that the lack of market power in service and parts must be assumed when such power is absent in the equipment market.

It was held that a tying arrangement is an agreement by a party to sell one product on the condition that the buyer also purchases a different (tied) product, or agrees not to purchase that product from any other supplier and is applicable only if the seller has appreciable economic power in the tying product market. The court held that the markets for service and the parts were two separate and distinct markets and that since there was an evidence indicating that Kodak had agreed to sell parts to third parties only if they agreed not to buy service from ISO's it amounted to a tying arrangement and the economic power enjoyed by Kodak in the tying market was visible from the analysis undertaken by the court.

Kodak had contended that it lacked market power in the parts or services markets as it did not have market power in the primary equipment market itself and it's raising the cost of parts or services would lead to a fall in the primary equipment sales. The Court, however, rebutted it by saying that the existence of significant information and switching costs would create a less responsive connection between aftermarket prices

and equipment sales as once the customers got locked-in, the high information costs, and discriminatory pricing would have eliminated any long-term loss to Kodak.

On the issue of Kodak's attempt at monopolization of the market the court held on the basis of the evidence that Kodak held near about complete monopoly in the services and the parts markets. The exclusionary action by Kodak of restricting supply of parts to ISO's amounted to an anticompetitive unilateral refusal to deal as none of its asserted business justifications—a commitment to quality service, a need to control inventory costs, and a desire to prevent ISOs from free-riding on its capital investment could be taken into consideration as sufficient to prove its behavior as not having anti-competitive effects[47].

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In Eastman Kodak the Supreme Court addressed another refusal to continue dealing with a rival where both Kodak and independent service operators (ISOs) traditionally serviced Kodak copying equipment. ISOs sued after Kodak began limiting their ability to obtain replacement. While discussing Kodak's policies the Court observed that although it was true that as a general matter a firm could refuse to deal with its competitors, but that right was not absolute and it existed only if the firm had legitimate competitive reasons for the refusal.

IV. ACCOMMODATION OF THE DOCTRINE IN EC LAW

The doctrine of Essential Facilities has been developed under Article 82 of the EC Treaty. EC Law — Article 82 of the EC Treaty, 1958 states as follows: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States."[48] An undertaking that owns or manages and uses itself an essential facility, i.e. a facility or infrastructure to which if no access is granted to its competitors, who, as a result, cannot offer their services to customers will fall within Article 82.[49] A refusal to deal may constitute an abuse of dominant position.

> "…The owner of an essential facility which uses its power in one market in order to strengthen its position on another related market, in particular, by granting its competitor access to that related market on less favourable terms than those of its own services, infringes Article [82] where a competitive disadvantage is imposed upon its competitor without objective justification"[50]

The law relating to tying is incorporated in Article 101(1) of which includes, as agreements "…shall be prohibited as incompatible with the common market: all agreements…which:…make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature are according to commercial usage, have no connection with the subjects of such contracts". Thus, tying arrangements can be brought within the ambit of Articles 101(1) and 102 of TFEU *Oscar Bronner GmbH* v. *MediaPrint Zeitungs.*[51]

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Whether the refusal to supply raw materials or services which were indispensable to

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carry on the rival's business would be held as abusive.

Mediaprint was the publisher of two newspapers NeueKronenZeitung and Kurier which together accounted for 46.8 percent of the Austrian daily newspaper market in terms of circulation and 42 percent in terms of advertising revenues. As per the Mediaprint's nationwide delivery scheme, its newspapers could be distributed in the early hours of the morning. Oscar Bronner was the publisher of a competing newspaper, which accounted for 3.6 percent of the Austrian daily newspaper market in terms of circulation and 6 percent in terms of revenues. Bronner's newspaper was enjoying spectacular growth in new subscriptions and in advertisement revenues. Mediaprint refused to grant Bronner an access to its delivery scheme. As a result Bronner launched a complaint in its national court seeking for an order requiring Mediaprint to grant the access to its system in consideration of an appropriate remuneration. It was argued by the Mediaprint that granting of the access to its system to the Austrian newspaper publishers would exceed its natural calamity. The national court stayed the proceedings and referred preliminary questions to the Court of Justice. It gave rise to an issue whether Mediaprint's refusal constituted an abuse of dominant position under Article 102 TFEU

The court held that if the national court was of the opinion that the relevant market was nationwide home-delivery schemes, Mediaprint would be deemed to have a dominant position in that market.

> "It was further held that there could be an abuse of dominant position if (i) the refusal was likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service; (ii) that such refusal was incapable of being objectively justified; and (iii) that the service in itself was indispensable to carry on that person's business, inasmuch as there was no actual or potential substitute in existence for the home-delivery scheme".[52] In the instant case these ingredients were not complied with because the other, though less advantageous, methods of distributing daily newspapers existed and were used by the publishers of daily newspapers. Apart from it, there were no technical, legal, or economic obstacles for establishing another nationwide delivery scheme. Therefore, the refusal to furnish the access to the facility by the dominant entity did not amount to an abuse of dominant power within the meaning of Article 102 TFEU.

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The Court of Justice first dealt with a refusal to deal in *Istituto Chemioterapico Italiano SpA* v. *Commission of the European Communities*[53] was referred to in this case. Commercial Solvents was the only supplier of aminobutanal, a raw material for the manufacture of ethambutal, in the EEC. It had supplied the same to Zoza, a manufacturer of ethambutal from 1966 to 1970. In 1970 the Commercial solvents had decided to produce drugs based onaminobutanal itself and informed Zoza that it would no longer be supplying aminobutanal to it. The court of justice affirmed the Commission's finding that the commercial solvents had abused its dominant's position. The court found that "an undertaking which has a dominant position in the market in raw materials and with the object of reserving such raw materials for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article (102) …"[54]

In the instant case, it seemed that Commercial Solvents had had enough capacity to supply aminobutanal to Zoza.[55] The Court stated that the Commission was entitled to conclude that "in the present conditions of economic competition it is not possible to have recourse on an industrial scale to methods of manufacture of ethambutol based on the use of different raw materials"[56]

V. CONCLUSION

S. 3 of the Competition Act, 2002 goes to show the antitrust concern of the Indian legislature with the tying arrangement by applying the "Rule of Reason" that appears to be appropriate since, even if the plaintiff is unable to establish a sufficient market power of the seller for the tying product to enforce the tie in he may still be able to prove a tying violation under the "Rule of Reason".

The Doctrine of essential facilities applies to horizontal and vertical agreements as well.[57] The Competition Commission of India is empowered to estimate any agreement which complies with the essential elements of Section 3(1) of the Competition Act, 2002 without any requirement of the relevant market. However, if it cannot be assessed that does the agreement

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have any 'object' of impeding competition, a detailed study of market is invariably required in order to analyze and determine the 'effect' of the agreement on competition. Thus, either the term 'facility' or the term 'relevant market' is required to be explicitly coached in section 3 in order to effectuate the objectives of the Competition Act, 2002. Apart from it, the essential ingredients of the doctrine are required to be embodied explicitly in S.4 of the Competition Act, 2002 since the 'abuse of the dominant position'[58] must be established before mandating of an access to the facility.

If the denial of access to the essential facility to the competitor without legitimate business justification can be proved, this doctrine can be applied without the necessity of establishing two distinguishable product markets for two separate products. A legitimate business justification is critical solely to that particular business.[59]

If the essential facilities doctrine is explicitly embedded in S. 3 and S. 4 of the Competition Act, 2002 the substantive law will have an effective substance in it so as to enable the enforcement mechanism to curb potholes i.e. anti-competitive agreements by applying it when the necessity arises as the regulatory structure has to be in sync with the economic conditions of a country.

This doctrine can be applied to both traditional and non-traditional infrastructures. New facilities in terms of services may be developed due to the technological innovation by the companies as their focus is generally on the customer orientation and the buyer sophistication which are required for goods market efficiency which is one of the 12 pillars for the assessment of Global Competitiveness for the year 2014-2015.

Investment in the stem cells market is critical as the stem cells market is in the nascent stage in India, entry barriers for new entrepreneurs will have an affect on the economy. Hence, a proper balance of an incentive and a protection is necessary for the innovation, otherwise, there may be a chilling affect on the entrepreneurial activity in this pertinent facility which will enhance the standard of living in the years to come.

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Competition Commission officials are empowered to adjudicate the matters and determine the boundaries of this doctrine in order to enhance the spirit of the Competition Act, 2002, to avoid dissuasion to the entrepreneurs from investing in new goods or services lest they may not earn adequate return.[60] It has to communicate the same to the commercial world. If a safe harbour is introduced to determine the dominance of an enterprise in the relevant market by fixing up a definite per cent for the market share below which dominance is impossible, the smaller undertakings will be able to invoke the essential facilities doctrine widely against their larger competitors to obtain an access to the desired facility where the ingredients of the doctrine are complied with. Consequently, the policy of the Competition Act, 2002 i.e. an efficient allocation of resources can be made. Nevertheless, the level of marker share or potential impact on less efficient competitors can be disregarded in case; consumers derive benefit from the pro-competitive efficiencies developed by the undertakings[61]

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[1] OECD Policy Round Tables, The Essential Facilities Concept 1996, p.71.

[2] *MCI Communications Corpn.* v. *American Telephone and Telegraph Co.*, 708 F 2d 1081, 1132-3 (7th Cir 1983).

[3] 1998 ECR I 7791 : (1999) 4 CMLR 112. This case has put forward an idea that the smaller undertakings may take a shelter under this doctrine in order to obtain an access to the desired infrastructure or services.

[4] *MCI Communications Corpn.* v. *American Telephone and Telegraph Co.*, 708 F 2d 1081, 1132-3 (7th Cir 1983).

[5] Christopher M. Seelen, "The Essential Facilities Doctrine: What Does it Mean to be Essential"?, 80 Marq. L. Rev. 1117 (1997).

[6] OECD Policy Round Tables, The Essential Facilities Concept 1996, p.71.

[7] http://reports.weforum.org/global-competitiveness-report-2014-2015/methodology/.

[8] What Constitutes appreciable adverse effect on Competition has been provided in S. 19(3) of the Act

S. 19. Inquiry into certain agreements and dominant position of enterprise:

(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under S. 3, have due regard to all or any of the following factors, namely—

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services; and

(f) Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

[9] *Vedant Bio Sciences* v. *Chemists and Druggists Assn*, 2012 SCC OnLine CCI 59. In this case the informant was the Baroda based distributor of few pharmaceutical formulations of the companies through promotion and distribution. He filed a complaint against a chemist and druggists association (CDAB) alleging that it imposed unfair conditions in the sale of pharmaceutical products of different companies. It's guidelines for its members required any person including a member to obtain permission/NOC before which he could become a stockiest of a

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particular company. CDAB forced the additional/new stockiest not to sell the products of a pharmaceutical company unless NOC was obtained from the existing stockiest of that pharmaceutical company operating in that area. CDAB compelled pharmaceutical companies to get NOC before launching new products or appointing new stockiest. As per the circular of CDAB, NOC was mandatory to do business. CDAB took part in fixing margins for pharmaceutical companies.

It was held that CDAB was an enterprise as its constituent members are stockiests and retailers of pharmaceutical companies engaged in the supply of pharma products to consumers. S. 3(3) of the Competition Act embraces agreements between enterprises or association of enterprises and the practice carried on or decisions taken by any association of enterprises engaged in identical or similar trade of goods or provision of services. Thus, the practices carried on or decisions taken by CDAB as to distribution and supply of pharmaceutical products as an association of enterprises are brought within the ambit of S. 3(3) of the Competition Act, 2002.

CDAB is not only a person under S. 2(1) but also it is an enterprise since its activity has an effect on carrying on the business of medicines in the State of Baroda. By limiting the number of stockiests not only competition but also the availability of medicines would be reduced. Further, the denial of market access to persons to sell medicines amounts to an infringement of the freedom of trade.

It was further held that... "The consumers are depending on the decisions of the association and the dominant position has been acquired due to the collective bargaining power which the association is acquired for forming the association. Therefore, under cl. (g) of S. 19(4) the dominance has been acquired under the item 'otherwise'. No relative advantage acquired in terms of economic development by informing the association or by regulating the trade of medicines in the State of Baroda. But as medicines are important for human life, social obligations and social costs are necessary. Therefore, cls. (f) (g) (h) and (l) of S. 19(4) are applicable to the facts of this case": 2012 SCC OnLine CCI 59. The abuse of dominance was established in this case.

The Competition Commission of India passed an order under S. 27 of the Competition Act, 2002 directing the CDAB and its members to cease and desist from indulging in and following practices which have been found to be anti-competitive in violation of S. 3 of the Competition Act, 2002 and also imposed a penalty on CDAB.

[10]

[11] "Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services."

[12] "Tying agreement (also known as tie-ins or sales on condition) involve a seller who agrees to sell a highly desirable product or service (the tying product) only on the condition that the buyer also purchase a less desirable second product or service (the tied product), whether the buyer wants the second product or not": Douglas Broder, "U.S. Antitrust Law and Enforcement : A Practice Introduction" 2010 (Oxford University Press) p. 50.

[13] *Sonam Sharma* v. *Apple Inc. USA*, 2013 SCC OnLine CCI 25 : (2013) 114 CLA 255 at 278. In this case, a tying arrangement spurred an innovation which led the explosion of new mobile devices and continued growth of the mobile communication industry, therefore, did not cause an appreciable adverse effect on competition. In order to constitute the anti-competitiveness of an agreement in vertical chain it should be established that "the intention of such an agreement was foreclosure in both the relevant markets resulting in considerable consumer harm". In *Mathrubhumi Printing & Publishing Co Ltd., In re*, 1977 Tax LR 2290, it was observed that market control of the tying device is an essential requisite to justify a tying arrangement vis-á-vis the tied product.

[14] 2014 SCC OnLine CCI 151 : (2014) 126 SCL 210 : (2014) 44 taxmann.com 177; *Blue Cross & Blue Shield United of Wisconsin* v. *Marshfield Clinic*, 65 F 3d 1406 (7th Cir 1995), cert. denied, 134 L Ed 2d 232 : 116 S Ct 1288 : 516 US 1184 (1996).

[15] S. 2 of Competition Act, 2002 says ?

S. 2(r) "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

S. 2(s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

S. 2(t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

In *Sajjan Khaitan* v. *Eastern India Motion Picture Assn.*, 2012 SCC OnLine CCI 52 : (2012) 115 SCL 383 :

(2012) 25 taxmann.com 275, a producer of the TV serial "Mahabharata" conferred sole and exclusive rights to Magnum TV serials to dub the Hindi version of the said serials in Bengali language and for exploiting its satellite, pay TV, DTH, IPTV, video, cable TV and internet rights. The serial was dubbed by the informant as a sub-assigner of Magnam TV serials. The informant entered into an agreement with two channels for the telecast of aforesaid dubbed serial. The Eastern India Motion Picture Association which was operating in the State of West Bengal (OP 1) and the coordination committee was the joint platform of federation of Cine Technicians and Workers of Eastern India (OP 2) sent letters to the two TV channels to stop telecast of the dubbed serial and channel 2 will have to face non-cooperation if it does not stop telecast. The two channels were threatened by boycott, strike, etc. and one day strike was called by OP 2. The allegation by the informant was that the conduct of OP 1 and OP 2 was contrary to the provisions of the Competition Act 2002. It was held that the relevant market in this case is broadcasting of TV serials. The pressure exerted by OP 1and OP 2. It was not an economic pressure but was a kind of a trade union pressure. It was not an agreement among the enterprises active in the same relevant market whereby the informant was stopped from telecasting dubbed serial. This kind of threat or action cannot be brought under S. 3., *Ravi Bhushan Sharma* v. *Toyota Kirloskar Motor (P) Ltd.*, 2016 SCC Online CCI 75. Sports Utility Vehicle (SUV) has been purchased by the informant from an authorised dealer of Toyota Kirloskar Motor Pvt. Ltd., namely, Budha Toyota. SUV cannot be considered as substitutable with other passenger cars/vehicles. Hence, the relevant product market is 'the market of Sports Utility Vehicles' and the relevant geographic market is India since the conditions of competition in SUV market are homogenous through India.

[16] Vertical agreements refer to agreements between non-competing enterprises or undertakings at different levels of production and distribution change in a market. Vertical agreements may have the character of distorting or preventing competition which includes restriction on intra-brand competition, market foreclosure, etc. therefore, vertical agreements are subject to the rule of reason: The position is same in US also as held in *State Oil Co.* v. *Khan*, 1997 SCC OnLine US SC 88 : 139 L Ed 2d 199 : 522 US 3 (1997) that vertical maximum price maintenance should be subject to the rule of reason.

However, for the evaluation of all the vertical agreements same standard cannot be applied. The vertical agreement may have a pro-competitive effect which include economic efficiency gains i.e. reduction in the transaction and distribution costs of the participating undertakings and optimization of their sales and investment levels. As a result, consumers derive benefit.

[17] *Ramakant Kini* v. *L.H. Hiranandani Hospital*, 2014 SCC OnLine CCI 151 : (2014) 126 SCL 210 : (2014) 44 taxmann.com 177 at 213 (CCI).

[18] Horizontal agreements are between competitors' which aim at restricting competition and thus leading to customers paying not the competitive but higher prices, by means of price fixation or making desired quantities non-available or reducing choices: D.P. Mittal, Competition Law & Practice 3rd edn. (Taxmann) p.174.

In the case of horizontal agreements, the burden of proof would lie with the entities who are parties to the agreements, to prove that there is no appreciable adverse effect on completion in India. On the other hand, in the case of vertical agreements, the CCI would have to prove that there is an appreciable adverse effect on competition in India since there is no such presumption.

[19] "The rule of reason requires that the plaintiff (whether government or private) do more to prove the unreasonableness of the alleged practice than where the allegations involve per se illegality. The plaintiff must demonstrate that the challenged practice actually harms competition in a 'relevant market'.

If the plaintiff discharges that burden, the defendant may still come forward and demonstrate that the practice is justified from a competitive standpoint i.e. that its pro-competitive aspects outweigh any possible harm to competition": Douglas Broder, U.S. Antitrust Law and Enforcement: A Practice Introduction 2010 (Oxford University Press) p. 51.

[20] The "societal necessity" of an asset means that it is "essential" for the welfare of the society as a whole: Armando A. Ortiz, "Old Lessons Die Hard: Why the Essential Facilities Doctrine Provides Courts the Ability to Effectuate Competitive Balance in High Technology Markets", 13 J. High. Tech. L. 170 (2012) p. 207 at p. 209.

[21] *R. Prasad (dissenting) in Vedant Bio Sciences* v. *Chemists and Druggists Assn.*, 2012 SCC OnLine CCI 59 : (2012) 115 SCL 757 : (2012) 25 taxmann.com 184 at 787 (CCI).

[22] Federico Etro, Competition, Innovation, and Antitrust: A Theory of Market Leaders and its Policy Implications, 2007 (Springer) p. 196.

[23] The Competition Commission of India found the conduct of All India Chess Federation (AICF) is in violation of S. 4 of the Competition Act, 2002. AICF is an enterprise as it is engaged in chess tournaments/events and also undertakes incidental/related activities for the purpose of getting income. AICF enjoys a dominant position in the market for organization of professional chess tournaments and market for services of chess players. Having regard to its regulatory powers, the only national level chess federation in India affiliated to FIDE, which is the

sole and supreme international body governing the game of, the restraints on competition on chess players without any plausible justification CCI was of the opinion that the AICF abused its dominant position. It was observed by CCI that "In any case of alleged abuse of dominant position, delineation of relevant market is important as it sets out the boundaries of competition analysis. Proper delineation of relevant market is necessary to identify in a systematic manner, the competing alternatives available to the consumers and accordingly the competitive constraints available to the consumers and accordingly the competitive constraints faced by the enterprise under scrutiny. The process of defining the relevant market is in essence a process of determining the substitutable goods or services as also to delineate the geographic scope within which such goods or services compete. It is within the defined product and geographical boundaries that the competitive effects of a particular business conduct are to be assessed": *Hemant Sharma* v. *All India Chess Federation*, 2018 SCC OnLine CCI 53, para 32.

[24] S. 27 of the Competition Act, 2002.

[25] 2015 SCC OnLine CCI 114.

[26] 1974 ECR 223.

[27] 1978 ECR 207.

[28] ...the essential facilities doctrine tends to prevent monopolization, i.e. the emergence of market power ex ante, in the sense of Section 2 of the Sherman Act: Associate Jones Day Brussels, "Essential Facilities in the European Union: Bronner and Beyond" 2004 Columbia Journal of European Law, vol.10 p.1 at 33.

[29] *Copperweld Corpn.* v. *Independence Tube Corpn.*, 1984 SCC OnLine US SC 147 :: 81 L Ed 2d 628 : 104 S Ct 2731 : 467 US 752 (1984); *Alaska Airlines Inc.* v. *United Airlines Inc.*, 948 F 2d 536 at 541 (9th Cir 1991).

[30] *Alaska Airlines Inc.* v. *United Airlines, Inc.*, 948 F 2d 536 at 541-542 (9th Cir 1991).

[31] 1912 SCC OnLine US SC 114 : 56 L Ed 810 : 224 US 383 (1912); Sealink/B&I Holyhead, European Commission Decision of 11 June 1992.

[32] Stephen M. Maurer* and Suzanne Scotchmer, "The Essential Facilities Doctrine: The Lost Message of Terminal Railroad", 5 Calif. L. Rev. Circuit 287, pp. 4371 at 4375.

[33] 1973 SCC OnLine US SC 38 : 35 L Ed 2d 359 : 93 S Ct 1022 : 410 US 366 (1973).

[34] 1985 SCC OnLine US SC 168 : 86 L Ed 2d 467 : 472 US 585 (1985).

[35] 1985 SCC OnLine US SC 168 : 86 L Ed 2d 467 : 472 US 585 (1985) at 610-11.

[36] 1985 SCC OnLine US SC 168 : 86 L Ed 2d 467 : 472 US 585 (1985) at 603.

[37] 1985 SCC OnLine US SC 168 : 86 L Ed 2d 467 : 472 US 585 (1985) at 601-02.

[38] 948 F 2d 536 (9th Cir 1991).

[39] 948 F 2d 536 at 569.

[40] 1919 SCC OnLine US SC 177 : 63 L Ed 992 : 250 US 300 (1919).

[41] 1919 SCC OnLine US SC 177 : 63 L Ed 992 : 250 US 300, 307 (1919).

[42] 2004 SCC OnLine US SC 2 : 157 L Ed 2d 823 : 540 US 398 (2004), it was held by the US Supreme Court that there is no general duty on the part of firms to co-operate with their competitors under US antitrust law.

[43] Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* Second Edition, 2011 (oxford) P. 442.

[44] 1984 SCC OnLine US SC 66 : 80 L Ed 2d 2 : 466 US 2 (1984). In this case the term leveraging has been defined "as a supplier's ability to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that product:" 1984 SCC OnLine US SC 66 : 80 L Ed 2d 2 : 466 US 2 (1984) at 14.

[45] Einer Elhauge and Damien Geradin, *Global Competition Law and Economics*, Second Edition 2011 Hart publishing, Oxford and Portland, Oregon p. 584.

[46] 1992 SCC OnLine US SC 64 : 119 L Ed 2d 265 : 504 US 451 (1992); "[to] demonstrate market power by circumstantial evidence, plaintiff must (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing

competitors lack the capacity to increase their output in the short run": *Image Technical Services Inc.* v. *Eastman Kodak Co.*, 125 F 3d 1195 at 1202-03 (9th Cir 1997).

[47] Mere possession of monopoly power does not attract Section 2 of the Sherman Act as it does not prohibit "natural" monopolies that result due to a superior product, good business decisions, historic accident: *United States* v. *Grinnell Corpn*, 1966 SCC OnLine US SC 114 : 16 L Ed 2d 778 : 384 US 563, 570-71 (1966).

[48] *Istituto Chemioterapico Italiano SpA* v. *Commission of the European Communities*, (6 & 7/73), 1974 ECR 223.

[49] Port of Rødby, (1994) 5 CMLR 457.

[50] Richard Whish, *Competition Law*, Sixth Edition (Oxford) p. 696.

[51] (1994) 4 CMLR 112.

[52] *Bronner* v. *Mediaprint*, 1998 ECR 1-779 at para 41.

[53] 1974 ECR 223.

[54] *Istituto Chemioterapico Italiano SpA* v. *Commission of the European Communities*, 1974 ECR 223 at para 25.

[55] *Istituto Chemioterapico Italiano SpA* v. *Commission of the European Communities*, 1974 ECR 223 at para 28.

[56] *Istituto Chemioterapico Italiano SpA* v. *Commission of the European Communities*, 1974 ECR 223 at para 16.

[57] *For instance, Standard Oil Co.* v. *United States*, 1911 SCC OnLine US SC 123 : 56 L Ed 65 : 222 US 1 (1911).

[58] Competition Commission of India C. Nos. 1000 of 2013, 49 of 2014 & 89 of 2014: in this case allegations had been made under Ss. 3, 4 of the Competition Act, 2002 about the anti-competitive conduct of Indian railways along with IRCTC. The court held that Indian Railway and IRCTC abused their dominant position in levying higher price for the service of providing e-ticket which costs them less.

[59] *The Ninth Circuit in Eastman Kodak Co.* v. *Image Technical Services Inc.*, 1992 SCC OnLine US SC 64 : 119 L Ed 2d 265 : 504 US 451 (1992) held that intellectual property rights like patents, copyrights constitute a presumptively legitimate business justification for refusing to deal with rivals; in *Music Broadcast (P) Ltd.* v. *Phonographic Performance Ltd.*, 2002 SCC OnLine CB 3, the Indian Copyright Board held that music is an essential ingredient for the survival of the radio industry.

[60] Some of the exceptions to the doctrine are:

(1) if the granting of an access to the competitors exceeds its natural capacity unless the owner of the facility operates it inefficiently to create entry barriers to the new entrants: *Oscar Bronner GmbH* v. *Mediaprint Zeitungs*, (1994) 4 CMLR 112. It gives rise to a question that whether the owner of an essential facility is bound to increase capacity in order to grant an access to the person seeking for it. No positive answer appears to be given by the Commission or Community courts: Richard Whish, *Competition Law*, Sixth Edition (Oxford) p. 697.

(2) If the owner operates the facility with an efficient strategy which is pro-competitive. (The objective of antitrust laws is the protection of the competition but not the competitors: *Brook Group Ltd.* v. *Brown & Williamson Tobacco Corpn.*, 1993 SCC OnLine US SC 94 : 125 L Ed 2d 168 : 509 US 209 (1993).

(3) If the undertaking claiming an access to the facility is not creditworthy or that it is incompetent to use the facility as required: Richard Whish, *Competition Law*, Sixth Edition (Oxford) p. 697.

[61] Federico Etro, Competition, Innovation, and Antitrust: A Theory of Market Leaders and its Policy Implications, 2007 (Springer) p. 197,

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