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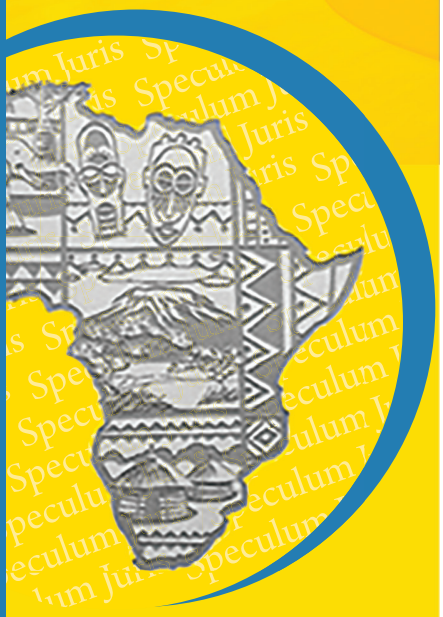

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Speculum Juris

ISSN 2523-2177 • Volume 38, Number 2 (2024)

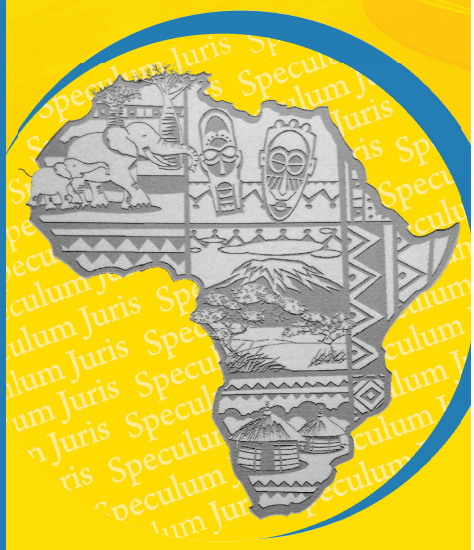
Articles

Notes and Comments

Speculum Juris

Vol 38 No 2 (2024)
Published 31 December 2024

ISSN 2523-2177



Cite as: Moleya and Shumba "The Conceptualisation of an Essential Facility: A Comparative Analysis of the Positions in South Africa and the European Union" 2024 (38) Spec Juris 357–383

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The Conceptualisation of an Essential Facility: A Comparative Analysis of the Positions in South Africa and the European Union

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Abstract

This article analyses the conceptualisation of an essential facility under South African competition law. Although an essential facility is expressly recognised in the South African Competition Act, there is a paucity of case law and academic commentary on the relevant provisions of the Act pertaining to an essential facility. This results in uncertainty on how an essential facility should be conceptualised and enforced under South African competition law. The research undertakes a comparative analysis of the positions in the EU and South Africa regarding the recognition and enforcement of an essential facility, otherwise known as the essential facilities doctrine (EFD) in the EU and other jurisdictions. The comparative analysis is undertaken with a view to distil principles from EU competition law on the EFD that may be applied when developing a distinctly South African EFD under the South African Competition Act. The EU was chosen as a comparative jurisdiction for two reasons. Firstly, the provisions of the South African Competition Act regarding abuse of dominance are largely modelled

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after those of EU competition law and second, the EU is one of the oldest competition law jurisdictions with a well-developed jurisprudence on the EFD. The main conclusion of the research is that although the EFD is expressly recognised in the South African Competition Act, the doctrine remains largely under-developed. There is therefore a need to provide clarity on various aspects of the doctrine as recognised in the Act. The words "resource" and "infrastructure" – which form the backbone of the definition of an essential facility – are not defined in the Act. The authors argue for the two words to be given a wide and liberal meaning that resonates with the broader objectives of the Competition Act of opening the economy and markets for free participation by the majority of South Africans. In this regard, it recommends that South African courts and competition authorities must be guided by the principles developed in the EU when determining which facilities constitute a resource or an infrastructure under the Act. This must be done to open the economy for greater participation. The research further recommends that the interests of dominant firms and the public interest in safeguarding competition must be balanced against the backdrop of the constitutional provisions birthing the contesting rights and interests.

Keywords: essential facilities doctrine; essential facility; abuse of dominance; exclusionary conduct; competition law

1 INTRODUCTION

The doctrine of essential facilities (EFD) is an important principle of competition law designed to safeguard the competition process from anti-competitive unilateral conduct of dominant firms.[1] It entails requiring a dominant firm to give a competitor access to an essential facility or essential input, when it is considered beneficial to the competition process.[2] The enforcement of the doctrine is aimed at protecting competition, not competitors.[3] The doctrine is a species of refusal to deal and is considered to owe its genealogy to the United States antitrust case law,[4] in particular *United States v Terminal Railroad Association of St Louis*.[5] The doctrine constitutes an exception to the general proposition that firms are free to deal with whom they choose.[6] The freedom to deal principle "stems from the principles of freedom of contract and respect for property rights that underpin market economies".[7] The EFD allows competition authorities to override this basic principle by interfering with the freedom of dominant firms in order to protect competition in a market. It has accordingly been argued that the EFD must be interpreted strictly.[8] It is perhaps for this reason that the EFD has been met with "considerable criticism and resistance" and its enforcement remains contentious in competition law.[9]

While the EFD originated from case law in jurisdictions such as the United States (US) and the European Union (EU), the South African counterpart originates directly from the South African Competition Act.[10] It has thus been argued that, instead of transplanting the EFD to South African competition law, the doctrine must be considered in the relevant legislative

1 Klaaren *Competition Law and Economic Regulation: Addressing Market Power in Southern Africa* (2017) 191.

2 Brassey *Competition Law* (2002) 115–116.

3 Dunne *Competition Law and Economic Regulation: Making and Managing Markets* (2015) 133.

4 *Ibid* 129 and 131.

5 *United States v Terminal Railroad Association of St Louis* 224 US 383 (1912). See also Bergh *Comparative Competition Law and Economics* (2017) 307.

6 Haracoglou *Competition Law and Patents: A Follow-on Innovation Perspective in the Biopharmaceutical Industry* (2008) 122–123.

7 Dunne *Competition Law* 129–130. See also Brassey 115–116.

8 Gellhorn and Kovacic *Antitrust Law and Economics in a Nutshell (Nutshells)* (1994) 151.

9 Dunne *Competition Law* 120.

10 Competition Act 89 of 1998 ("South African Competition Act") s 8(1).

and historical context.[11] The EFD must therefore be considered against the backdrop of the overarching purpose of the South African Competition Act, which is to promote and maintain competition.[12] This cardinal purpose of the Act must however be achieved against the backdrop of the several purposes of Act, such as ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the economy, which will promote a greater spread of ownership and employment.[13] The approach underpinning the architecture of the South Africa Competition Act is responsive to the peculiar socio-economic conditions that prevailed at the time of its adoption.[14] These peculiar circumstances birthed conglomerate business structures with vertical linkages and dominant firms that benefitted from previous state sponsorship.[15] Most of the dominant firms in South Africa, are therefore products of either previous state ownership or subsidisation and control certain key infrastructure and resources that give them competitive advantage.[16] It is, therefore, no surprise that the South African Competition Act expressly recognises the refusal to give access to an essential facility as a species of abuse of dominance.[17] In that context, the concept of market dominance and the abuse thereof goes to the heart of the economic reconfiguration process espoused by the remedial stance of the Act.[18] The Act dedicates several provisions to proscribing certain conduct of dominant firms in apparent recognition of the deep and pervasive impact the conduct may have on competition.[19] The abuse of dominance provisions in the South African Competition Act are modelled after European Union competition law.[20] However, unlike South Africa, the European Union have developed principles and guidelines regarding the EFD. By contrast, the South African competition law has lagged on this aspect, as the courts and competition authorities have not yet comprehensively interpreted the scope of an essential facility under the Act.[21] The under-developed state of South African competition law is concerning, given the important role that the EFD plays in protecting competition.[22]

The above prologue is indicative of the fact that South African competition law relating to access to an essential facility is under-developed, which calls for an investigation into how the relevant provisions relating to access to an essential facility must be interpreted under the South African Competition Act. In that context, this research seeks to examine the conceptualisation of an essential facility in the South African Competition Act in view of the paucity of case law and academic scholarship on the topic. This requires a comparative analysis of the Act and the jurisprudence of a mature and developed competition law jurisdiction on the EFD, such as the EU

11 Klaaren *Competition Law* 129.

12 South African Competition Act s 2(1); Brassey *Competition Law* 2 and Moodaliyar "The Relationship Between Public and Private Enforcement in Competition Law – a Comparative Analysis of South African, European Union and Swiss Law" 2010 *SALJ* 141 142.

13 South African Competition Act s 2(1)(c), (e) and (f); Du Plessis "The Role and Nature of the Public Interest in South African Competition Law" 2020 *SAMLJ* 234 235.

14 These circumstances include pronounced state intervention in competition, high concentration levels born out of economic isolation through economic and political sanctions and the exclusion of the black population from participating in the economy and state intervention in competition.

15 Hartzenberg "Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries" 2006 *NJIB* 667 669.

16 Lewis *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table* (2013) 146.

17 South African Competition Act s 8(b).

18 The South African Competition Act defines dominance in relation to market share. See s 7 of the South African Competition Act.

19 South African Competition Act ss 8 and 9.

20 Brassey *Competition Law* 180.

21 *Ibid* 205.

22 Klaaren *Competition Law* 191. One may stress the point that the doctrine is particularly necessary in South Africa given the highly concentrated market created by historical factors peculiar to the country.

because South African competition law is largely modelled from that of the EU.[23] However, the positions of these jurisdictions regarding access to essential facilities are diametrically opposed as, unlike South Africa, the EU position is well developed.[24] This necessitates a comparative analysis of the two positions with a view to extract principles from the jurisprudence of the EU, that may be applied by South African courts and competition authorities to interpret the provisions of the South African Competition Act relating to access to an essential facility.

2 A GENERAL OVERVIEW OF THE ROLE OF THE ESSENTIAL FACILITIES DOCTRINE IN COMPETITION LAW

Modern economies are predominantly underpinned by a free or capitalist market system,[25] of which freedom of trade is at its heart.[26] This market system is characterised by, among others, individual or private freedom, private property rights, and limited government intervention in the functioning of the economy.[27] Thus, private ownership of the factors of production and the absence of government intervention are the main hallmarks of the system. The absence of government intervention is based on the understanding that the market is capable of working itself through what is famously called "an invisible hand".[28] It is equally accepted that although external intervention may be antithetical to the proper functioning of the system, a certain level of government intervention may be necessary in certain circumstances.[29] There is accordingly a perennial debate about what should be left for external regulation, the extent of such regulation, and the circumstances under which such regulation should occur.[30] The invocation of the EFD epitomises this debate. The right of property and the right to choose a trading partner is pertinent in the context of the EFD. Like any other firm, dominant firms have the right to property and freedom of trade.[31] They are entitled to choose their trading partners without interference by the government or regulators. This position obtains in the US, EU and South Africa.[32]

The rules of competition law, however, recognise that the exercise of these rights may sometimes be antithetical to the promotion and maintenance of competition. In this regard, competition law allows the limitation of both the right to choose a trading partner and the right to property of dominant firms. This is done through the enforcement of the EFD, which entitles the courts and competition authorities to intervene in the functioning of the market and limit these rights by compelling dominant firms to share with their competitors, access, or use of certain facilities under their control or ownership. This is, however, done in exceptional circumstances where the refusal to provide a competitor with access to an essential facility is harmful to competition. The objective of enforcing the EFD is the protection of competition in the relevant markets, not

23 Neuhoff *A Practical Guide to the South African Competition Act* (2017) 7.

24 Brassey *Competition Law* 180.

25 Graafland and Verbruggen "Free-market, Perfect Market and Welfare State Perspectives on 'Good' Markets: An Empirical Test" 2022 *ARQL* 1113 1115.

26 McMurtry "The Contradictions of Free Market Doctrine: Is There a Solution?" 1997 *JBE* 645 645.

27 Ditlev-Simonsen *A Guide to Sustainable Corporate Responsibility: From Theory to Action* (2022) 37 45 and 173.

28 Smith *The Wealth of Nations* (1776) 423.

29 Graafland and Verbruggen "Free-market, perfect market and welfare state perspectives on 'good' markets: An empirical test" 2022 *ARQL* 1113.

30 Graafland and Verbruggen *ARQL* 1113 1114.

31 In South Africa, the right to property and freedom of trade are accorded constitutional recognition in ss 22 and 25 of the Constitution, which raises the bar for limiting the rights. See van der Walt and Viljoen "The Constitutional Mandate for Social Welfare–Systematic Difference and Links Between Property, Land Rights and Housing Rights" 2015 *PELJ* 4; Van der Walt *Property and Constitution* (2012) 24.

32 In the US, see *United States v Colgate & Co* 250 US 300 (1919); Kapen "Duty to Cooperate Under Section 2 of the Sherman Act Aspen Skiing's Slippery Slope" 1987 *CLR* 1047.

the sustenance of competitors. The refusal of access to an essential facility must, therefore, have a negative impact on competition, such as foreclosing an effective competitor from the market, reducing output, or raising prices to the detriment of consumers.[33] The lines are, however, arguably blurred in this regard as the initial enquiry is focused on the impact of the refusal on a competitor's ability to compete or render services without the essential facility. The impact of the refusal to access the essential facility on competition seemingly follows as a consequence of the initial inquiry.

The controversies surrounding the enforcement of the EFD do not, however, outweigh the need to sanction and indeed invoke the doctrine in appropriate circumstances.[34] The EFD has arguably become an important component of the competition law toolkit.[35] The doctrine has earned recognition in the competition laws of several jurisdictions.[36] It has also featured in reports of international organisations such as the Global Antitrust Institute (GAI), International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD), in their apparent recognition of the role and place of the EFD in competition law.[37] The relevance or necessity of the doctrine in competition law is thus unquestionable. It has indeed been argued that the relevance of the EFD in the digital economy is heightened as opposed to being attenuated.[38] The enforcement of the EFD, however, continues to pose difficulties considering the growing emphasis on freedom of trade and the right to property. In the EU, the difficulties posed by the need to respect the freedom of trade and property rights of dominant firms have not proved insurmountable.[39] The courts and competition authorities in the EU seemingly attach considerable weight to the need to protect competition and have accordingly permitted the limitation of these rights on several occasions. The approach is aligned with the EU competition policy, which is geared towards liberalising its economy that was once dominated by legal monopolies or state sponsorship.[40] This is similar to South Africa, whose competition policy also emphasises deregulation and opening up of the economy for participation by all South Africans.[41] The EU approach on the enforcement of the EFD may therefore be appealing to South Africa, given its history of government regulation of the market, which created legal monopolies that currently own and control certain strategic facilities in various sectors of the

33 Van Tonder JL "Predatory Pricing: Single-firm Dominance, Exclusionary Abuse and Predatory Prices (Part 1)" 2020 *Obiter* 831 196–7.

34 Lisnic "The Theory of Essential Facilities: The Principle of Access to Invention in Case of Abusive Refusal to License" 2015 *LESIJ* 52 55.

35 Guggenberger "Essential Platforms" 2021 *Stanford Technology Law Review* 237 249 336 343.

36 Waller and Tasch "Harmonizing Essential Facilities" 2010 *ALJ* 741.

37 GAI "The Global Antitrust Institute Report on the Digital Economy" 2020 https://gaidigitalreport.com/wp-content/uploads/2020/11/The-Global-Antitrust-Institute-Report-on-the-Digital-Economy_Final.pdf (accessed 31-12-2022); OECD Competition Committee "Policy Roundtables: Refusals to Deal" 2007 https://www.oecd.org/daf/43644518.pdf (accessed 23-12- December 2022); OECD Competition Committee "Policy Roundtables: The Essential Facilities Concept" 1996 https://www.oecd.org/daf/competition/1920021.pdf (accessed 23-12- 2022); ICN "Report on the analysis of refusal to deal with a rival under unilateral conduct laws" 2010 https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_SR_ReftoDeal.pdf (accessed 29-12-2022).

38 Guggenberger "The Essential Facilities Doctrine in the Digital economy: Dispelling Persistent Myths" 2021 *YJoLT* 301.

39 This will become clear under chapter 5 of this research.

40 Jordi "Deregulation, Integration and Market Structure in European Banking" *EIB Papers*, ISSN 0257-7755, European Investment Bank (EIB) Luxembourg, 34–48 https://www.econstor.eu/bitstream/10419/44775/1/308628098.pdf (accessed 6-12-2022).

41 South African Competition Act preamble and s 2.

economy.[42]

If the EFD is considered an important and relevant competition law toolkit for opening up the economy by proscribing the exclusionary conduct of dominant firms, it is arguable that South Africa's approach to access to essential facilities should favour granting competitors access to essential facilities as opposed to restricting access, as this is more aligned with the proclaimed objectives of the South African Competition Act.[43] Such an approach would facilitate as opposed to inhibiting the realisation of the several goals of the South African Competition Act, particularly opening the economy for participation by all South Africans, reducing levels of concentration in industries, ensuring that small and medium-sized enterprises have equal opportunity to participate in the economy, promoting the spread of ownership by historically disadvantaged persons and addressing market conditions that impede, restrict and distort competition.[44] The realisation of these goals will inevitably collide with the need to respect and protect the constitutionally recognised right to property and the freedom to trade of dominant firms.[45] However, this collision of interests is not insuperable. The constitutional veneer accorded to freedom of trade and the right to property of dominant firms simply means that the limitation or the balancing of these rights with any other competing rights and freedoms must be undertaken against the normative standards of the Constitution.[46] The balance between the rights of the owners of essential facilities and public interest in having access to such facilities must be struck against that backdrop.[47] In such an intersection, the principles emanating from the competition law field would be required to comply with the normative framework of the Constitution as the supreme law.[48] The interests protected by the right to property and freedom of trade would have to be carefully and proportionately balanced with the public interest of promoting and maintaining competition, guided by the requirements of the limitation clause of the Constitution.[49] This provides sufficient bulwark against unwarranted interference with or limitation of the rights of dominant firms.

3 THE CONCEPTUALISATION OF THE ESSENTIAL FACILITIES DOCTRINE IN SOUTH AFRICAN COMPETITION LAW

The South African Competition Act adopts a unique approach towards competition law. Unlike the competition laws of older jurisdictions such as the US that emphasise the efficiency goal, the South African Competition Act seeks to achieve several goals some of which are seemingly

42 Klaaren *Competition Law* 100–101.

43 Guggenberger *Stanford Technology LR* 237 249 336 343.

44 South African Competition Act preamble and s 2.

45 *Ibid* ss 22 and 25. The exercise of these rights is subject to regulation or limitation as provided for in s 36 of the Constitution. See *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) and *South African Diamond Producers Organisation v Minister of Minerals and Energy NO* 2017 6 SA 331 (CC) regarding regulation and limitation of the right to freedom of trade. See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service: First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) in relation to regulation of the right to property.

46 Du Bois "The Appropriate Scope of Property Rights in Patents" 2018 *IPLJ* 73 80; Busch "Promoting Access to Affordable Generics: Reforming South Africa's Patent Law to Prevent Evergreening" 2016 *IPLJ* 101 113.

47 Du Bois 2018 *IPLJ* 80.

48 Munyai "The Interface Between Competition and Constitutional Law: Integrating Constitutional Norms into South African Competition Law Proceedings" 2013 *SA Merc LJ* 323.

49 The Constitution s36; Du Bois 2018 *IPLJ* 80.

competing for valour.[50] Although the Act primarily seeks to promote and maintain competition, this is not the only goal. Among other things, the act also seeks to promote efficiency, create employment, promote a greater spread of ownership and to detect and address undesirable conditions in the market.[51] The Act similarly adopts a unique approach towards the recognition of the EFD. Unlike in other jurisdictions such as the US and EU where the EFD originated from judicial pronouncements, the South African version of the EFD is expressly given recognition by the legislature in the South African Competition Act.[52] The stance is laudable as it eliminates doubt about the role and place of the EFD under South African competition law. The legislature's express inclusion of the EFD in the Act may be attributed to the fact that the Act was enacted in an economy that was characterised by excessive concentrations of ownership and control as well as unjust restrictions on full and free participation in the economy by all South Africans.[53] The enforcement of the EFD is arguably key to the achievement of the objectives of the Act of opening up the economy, detecting and addressing conditions that impede, restrict or distort competition.[54]

Recognising the importance and relevance of the EFD under South African competition law, the South African Competition Act goes as far as defining an essential facility.[55] The Act defines an essential facility as "an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers".[56] This is commendable as it creates certainty about what constitutes or does not constitute an essential facility under the Act. Unfortunately, the terms "infrastructure" and "resource" have not been defined in the Act, albeit their being central to the definition of an essential facility under the Act. This creates uncertainty about what qualifies as an infrastructure or resource for purposes of defining an essential facility under the Act. There has been very little interpretation of what constitutes an essential facility under the South African Competition Act and there is accordingly very little guidance on the meaning of the words "infrastructure" or "resource" as employed in the definition of an essential facility. It is therefore necessary to explore the meaning of these words. It is similarly important to address the other essential elements of section 8(b) of the Act regarding an essential facility, which are considered "extremely difficult to prove".[57]

3 1 Recognition of the EFD Under the South African Competition Act

The South African Competition Act contains detailed provisions relating to the conduct of dominant firms.[58] The Act defines a dominant firm as a firm which has at least 45 per cent of the market, at least 35 per cent of the market but less than 45 per cent of the market, unless it can

50 Ngobese and Chung "The Role of Efficiencies in the South African Merger Control Regime" 2009 *SALJ* 141. See also Mncube and Ratshisusu "Competition Policy and Black Empowerment: South Africa's Path to Inclusion" (2021) https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/researchentities/scis/documents/Competition%20Policy%20and%20Black%20empowerment.pdf (accessed 22-12-2022).

51 South African Competition Act s 2.

52 South African Competition Act s 8(1)(b).

53 *Ibid* preamble.

54 *Ibid* and s 2(g) of the Act.

55 *Ibid* s 1.

56 *Ibid*.

57 Lewis *Enforcing Competition Rules*149.

58 South African Competition Act ss 7, 8 and 9. The concept of market dominance is defined in s 7 of the Competition Act. The section provides that a firm is dominant in a market if it has at least 45 per cent of the market, or if it has at least 35 per cent but less than 45 per cent of the market unless it can show that it does not have market power, or if it has less than 35 per cent of the market but has market power.

show that it does not have market power or if it has less than 35 per cent market share and has market power.[59] The relevant provision in this regard is section 8 of the Act, which prohibits a dominant firm from, among others, charging an excessive price, to the detriment of consumers or customers, refusing to provide a competitor access to an essential facility or engaging in an exclusionary act or certain enumerated exclusionary acts.[60] Of particular relevance is section 8(1)(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".[61] This provision is classified as a *per se* prohibition in the sense that the mere perpetration of the conduct by a dominant firm is outrightly prohibited as such conduct cannot be justified under the Act.[62] The classification of the provision as a *per se* prohibition is, however, contestable since the dominant firm "could offer a defence for not giving access, ie by demonstrating that it is not feasible to do so".[63] It has indeed been rightly stated that while the conduct under section 8(1)(b) of the Act is "prohibited *per se* and admits of no general justification" there is nonetheless "some latitude given by reference to what is economically feasible".[64]

The branding of the section as a *per se* prohibitory provision may have serious consequences for dominant firms as they may not be given an opportunity to justify their conduct. It is, therefore, unsurprising that the classification of section 8(1)(b) as a *per se* prohibition has been criticised.[65] In this regard, it has been argued that the Act "takes a position of unwarranted rigour" in creating the prohibition under section 8(1)(b) because the EFD is a species of refusal to deal and must therefore be "dealt with uniformly as exclusionary acts that may be justified under the balancing test". [66] For this reason, the argument is that there is "no reason or principle that requires essential facilities to be treated as a special case".[67] It has also been argued that the other factor that militates against classifying section 8(1)(b) as imposing a *per se* prohibition is that the cumulative essential elements of the section "rest on the conception of reasonableness".[68] Similarly, it has been contended that "this label is not a particularly useful or accurate" one.[69] It is hard to gainsay the criticisms against labelling the provision as a *per se* prohibition, considering the requirements of section 8(1)(b) of the Act. The definition of an essential facility in the Act makes it clear that a dominant firm is allowed to raise a defence which objectively justifies the refusal to provide access to an essential facility. Furthermore, the reasonableness standard in the provision brings about flexibility and elasticity in the prohibition. The characterisation of section 8(1)(b) as a *per se* prohibition therefore serves no important function in the interpretation of the provision. What is important is dissecting the essential elements of the provision and ascertaining the meaning thereof as opposed to hunkering on the label.

In addition to providing statutory recognition of the EFD, the South African Competition Act adopts a unique approach by also prohibiting a dominant firm from refusing to provide access to

59 South African Competition Act s 7(a), (b) and (c).

60 *Ibid* s 8(1).

61 *Ibid* s 8(1)(b).

62 Competition Tribunal Cases, 205 and 206 https://www.comptrib.co.za/Content/Documents/Info%20Library/Tribunal%20Case%20Law/handbook-version1_25march2020.pdf (accessed 15-12- 2022); *Glaxo* para 51; *Telkom* para 86; Lewis *Enforcing Competition Rules* 142 and 161.

63 Neuhoff *A Practical Guide* 147.

64 Brassey *Competition Law* 203.

65 *Ibid*.

66 *Ibid*.

67 *Ibid*.

68 *Ibid* 204.

69 Sutherland and Kemp *Competition Law of South Africa* (Service Issue 23) 7–52.

"scarce" goods or services.[70] The Act does not however define what constitutes "scarce" goods or services. The requirements of this provision have not been a subject of vigorous interpretation by the courts, competition authorities or academia. Although the meaning of the word "scarce" may seem obvious, it may raise contentions in the context of access to goods or services.[71] What is perhaps uncontestable is that there is a clear and intended distinction between the requirements of section 8(1)(b) and those of section 8(1)(d)(ii) of the Act.[72] The first distinction is apparent from the taxonomical arrangement of the sections and the fact that section 8(1)(b) deals with a *per se* prohibition while section 8(1)(d)(ii) deals with a rule of reason prohibition. Section 8(1)(d)(ii) expressly entitles a dominant firm to demonstrate technological, efficiency or other pro-competitive gains that outweigh the anti-competitive effect of its conduct, apart from showing the economic infeasibility of providing access to its "scarce" goods or services. This is not provided for under section 8(1)(b) although, as indicated, it has inherent flexibilities which allow a dominant firm to raise a defence against allegations of contravention of the provision. The other difference is that section 8(1)(b) deals with the refusal to provide access to an "essential facility" as defined in the Act, while section 8(1)(d)(ii) deals with the refusal to supply "scarce goods or services". The third distinction is that section 8(1)(b) applies where access to an essential facility is required by a competitor of the dominant firm. On the other hand, section 8(1)(d)(ii) applies where access to scarce goods or services is required by either a competitor or a customer of the dominant firm. The requirements of the two provisions are, therefore, arguably different.

The distinction between section 8(1)(b) and section 8(1)(d)(ii) of the Act was recognised by the Competition Appeal Court in *Glaxo*.[73] In that case, the court pointed out that "section 8(b) does not prohibit the conduct of refusing to supply scarce goods to a competitor" since the refusal "'to give a competitor access to an essential facility' does not mean 'refusing to supply scarce goods to a competitor'".[74] The court was correct in distinguishing these two provisions as such a distinction is clearly intended by the legislature. The distinction between the two provisions has also been recognised in academia. In this regard, it has also been argued that section 8(1)(b) "only applies in respect of infrastructure and resources" while the "refusal to supply a competitor with certain goods is covered by section 8(1)(d)(ii)".[75] Furthermore, that the refusal "to supply services seems to be left to the residual prohibition in section 8(1)(c)". On this approach, both goods and services are not covered by section 8(1)(b) as they are covered under section 8(1)(c) and section 8(1)(d)(ii) of the Act.[76] These arguments are seemingly based on a holistic and taxonomical reading of the provisions of the Act and it may be contended that they are cogent, since both services and goods are not expressly provided for in section 8(1)(b) of the Act. However, the counterargument would be that the Act does not expressly exclude goods or services from the ambit of section 8(1)(b) of the Act. These arguments are therefore not beyond contestation, considering the absence of a definition of what constitutes a "resource" or infrastructure" in terms of the Act. The cogency of the arguments becomes questionable, also considering the approach in the EU, which conceptualises both goods and services as essential facilities. It is indeed not inconceivable for a product or service provided by a dominant firm to constitute an essential facility.[77] As it has been argued, "a product that is so superior that it is

70 South African Competition Act s 8(1)(d)(ii).

71 The case in point is *York Timbers Ltd and SA Forestry Company Ltd* (15/IR/Feb01) [2001] ZACT 19, which was brought based on the scarcity argument.

72 The distinction was carefully explained by the CAC in *Glaxo*.

73 See *Glaxo* para 56.

74 *Ibid* para 56.

75 Sutherland and Kemp *Competition Law* 7–59.

76 Neuhoff *A Practical Guide* 151.

77 In *Telkom*, the Competition Tribunal found that a service provided by Telkom constituted an essential facility.

essential for the rivals to compete and that cannot practically be duplicated" may constitute an essential facility.[78] Therefore, while a taxonomical reading of the three provisions may suggest that products and services are excluded from section 8(1)(b) of the Act, this is debatable.

3 2 The Meaning of the Words "Infrastructure" and "Resource" Under the South African Competition Act

The South African Competition Act defines an essential facility as "an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers".[79] The words "infrastructure" and "resource" are key in this definition. They determine what qualifies or does not qualify as an essential facility under the Act. A facility that does not fall within the ambit of the meaning of an "infrastructure" or "resource" would not qualify as an essential facility under section 8(1)(b) of the Act. These two words are unfortunately not defined in the Act, despite their centrality to the meaning of an essential facility in the Act. The courts and competition authorities have similarly not provided useful guidance regarding the meaning of these words within the context of the Act. This then requires an interpretation of the two words, with a view of according them appropriate meaning and not just any meaning, but one that accords with the overall scheme and objectives of the South African Competition Act.[80] Put differently, the words "infrastructure" and "resource" must be interpreted in such a way that they are accorded meaning that is supportive, not destructive of the overall scheme as well as the "policy and object contemplated" in the South African Competition Act.[81] The policy objectives of the South African Competition Act are multi-faceted and embedded in the various parts of the Act.[82] The interpretive exercise requires the text of the Act, in this case, the words "infrastructure" and "resource", to be interpretated objectively within the relevant context of the Act as opposed to adopting a literal or textual approach that seeks to ascertain the subjective intention of the legislature.[83]

The context relevant to the interpretation of a legislation does not, however, "involve guesswork as to the intention of the legislature" as the court arguably did in *Glaxo*.[84] It rather involves considering, among others, the overall scheme and purpose of the Act, the legislative history and mischief addressed by the Act as well as the normative framework of the Constitution.[85] In this regard, it is important to consider the preamble of the Act as well as the interpretation and purpose provisions. Firstly, section 1(2) of the South African Competition Act specifically requires the Act to be interpreted "in a manner that is consistent with the Constitution and gives effect to the purposes set out in section 2".[86] Secondly, the preamble of the Act records that the "apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy" and "restrictions on

78 Czapracka *Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches* (2009) 14.

79 South African Competition Act s 1(1).

80 *Smyth v Investec Bank Limited* 2018 1 SA 494 (SCA) para 28.

81 *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 543.

82 South African Competition Act preamble and s 2.

83 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) para 18; Perumalsamy "The Life and Times of Textualism in South Africa" 2019 *PER / PELJ* 1 15; Wallis "Interpretation Before and After Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)" 2019 *PELJ* 1 13.

84 Wallis 17. See *Glaxo* para 54.

85 *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53.

86 South African Competition Act s 1(2).

full and free participation in the economy by all South Africans".[87] This legislative backdrop is crucial when assessing the conduct of dominant firms since "a dominant firm may have obtained and maintained its position due to special rights or protection that it was accorded, for example through state protection and regulation".[88] In the South African context, it cannot be gainsaid that most of the vertically integrated conglomerates and dominant firms which own and control access to essential facilities are a legacy of this phenomenon.[89] It is therefore unsurprising that the preamble of the Act proclaims the need to, among other goals, open the economy. Lastly, and importantly, section 2 of the Act similarly provides that the Act aims to promote and maintain competition in South Africa by, among others, ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the economy, promoting a greater spread of ownership by historically disadvantaged persons, detecting and addressing conditions in the market that impede, restrict or distort competition.[90] The remedy provided by the legislature through the provisions relating to access to an essential facility is therefore a fundamental form of redress which accords with these objectives of the Act.[91]

This then means that the determination of what qualifies as an essential facility under the South African Competition Act must be done purposively, contextually and consistently with the transformative objectives of the Constitution and remedial aims of the Act.[92] That also entails properly situating the remedy of access to an essential facility as a form of redress to the skewed economic and market structure that the South African Competition Act seeks to address. The meaning of the words "infrastructure" and "resource" as employed in the Act should therefore be ascertained within the relevant context sketched above. Resources have been defined "as tangible or intangible assets that 'are tied semi-permanently to the firm'" and accord the firm "an enduring competitive advantage on a firm to the extent that they are valuable, rare, and hard to imitate or substitute".[93] They have also been defined broadly as including "all assets, capabilities, organizational processes, firm attributes, information, knowledge, etc. controlled by a firm that enable the firm to conceive of and implement strategies that improve its efficiency and effectiveness".[94] Firm resources can be classified into three categories, namely physical capital resources, human capital resources and organisational capital resources. Physical capital resources are germane to the assessment of the EFD and include "physical technology used in a firm, a firm's plant and equipment, its geographical location, and its access to raw materials".[95] Not all of these resources are strategic, and it would appear that physical capital resources accord a firm a nuanced competitive advantage, hence their pronounced relevance to the assessment of the EFD and the particular attention they receive in this discussion. Resources may also be intangible and include "intellectual property rights of patents, trademarks, copyright and registered, networks, scientific works".[96] This explains why resources protected by intellectual property rights are not insulated from application of the EFD. Resources must however be

87 *Ibid* preamble.

88 Neuhoff *A Practical Guide*145.

89 Lewis *Enforcing Competition Rules* 5 and 34.

90 South African Competition Act s 2(d), (d) and (g).

91 *Ibid* s 58(1)(vii). See Piropato "Open Access and the Essential Facilities Doctrine: Promoting Competition and Innovation" 2000 *University of Chicago Legal Forum* 369 385 409 and 410, regarding the role of the doctrine in addressing market concentration.

92 *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 51; *Moroka v Premier of the Free State Province* [2022] ZASCA 34 para 22 and 45.

93 Capron and Chatain "Competitors' Resource-oriented Strategies: Acting on Competitors' Resources Through Interventions in Factor markets and Political Markets" 2008 *AMR* 97.

94 Barney "Firm Resources and Sustained Competitive Advantage" 1991 *JOM* 99 101.

95 *Ibid*.

96 Hall "The Srategic Analysis of Intangible Resources" 1992 *SMJ* 135.

"central to a competitor's viability in the marketplace".[97]

Infrastructure is defined as "the basic systems and services, such as transport and power supplies, that a country or organization uses in order to work effectively".[98] It is also defined as a "system of public works of a country, state, or region" and "resources (such as personnel, buildings, or equipment) required for an activity".[99] Infrastructure assets include roads, bridges, railways, airports, dams, power plants, electricity grids, information networks, water supply and sewage systems.[100] It is these types of infrastructure that are often implicated in the contestations regarding the application of the EFD. There may be an overlap between what constitutes a resource and an infrastructure, particularly in emerging markets with new technologies. A firm's physical resource have indeed been defined as including "infrastructure assets such as buildings, information communication technology, physical networks and other equipment, as well as access to raw materials, energy and other important inputs".[101] It is tempting to conceive of an infrastructure through conventional or traditional lens as limited to physical or tangible facilities. Modern economies are, however, dominated by unconventional forms of infrastructure, particularly in the information technology industries.[102] Whatever form an infrastructure may take, it "should actually serve to reduce barriers to startup in that it facilitates connectivity, interaction and the exchange of knowledge and ideas that potentially could fuel entrepreneurial ventures".[103]

What is clear is that the words "infrastructure" and "resource" are capable of wide meanings. This is because the words are defined with little emphasis on the nature of the object but with much emphasis on the function the object performs.[104] This is particularly so in relation to what constitutes a resource of a firm. The definitions provided clearly demonstrate that a resource must be such that strategically positions a firm in the market so as to confer upon it a competitive advantage over its competitors. Infrastructure should also be considered from that perspective. Otherwise, a facility or infrastructure cannot be considered resourceful to the firm. If goods or services can perform this in relation to a dominant firm, it is difficult to fathom why they cannot be placed within the ambit of a resource or an infrastructure.[105] Their exclusion from the ambit of section 8(1)(b) would be based simply on the fact that they are goods or services and nothing more. The court in *Glaxo* held that a "resource" in the definition of an essential facility "was not meant to be interpreted as products, goods or services" and that such a finding would give the definition a wide meaning not intended by the legislature.[106] It reasoned that such a

97 Soma, Forkner and Jumps "The Essential Facilities Doctrine in the Deregulated Telecommunications Industry" 1998 *BTLJ* 565 582.

98 The Cambridge Dictionary https://dictionary.cambridge.org/dictionary/english/infrastructure (accessed 17-11- 2022).

99 Merriam-Webster Dictionary https://www.merriam-webster.com/dictionary/infrastructure (accessed 17-11-2022).

100 Killeen *A Perfect Storm in the Amazon Wilderness: The Conventional Economy and the Drivers of Change* (2022) 73.

101 Čater and Čater "(In)tangible Resources as Antecedents of a Company's Competitive Advantage and Performance" 2009 *JEEMS* 186 191.

102 See Byrd and Turner "Measuring the Flexibility of Information Technology Infrastructure: Exploratory Analysis of a Construct" 2000 *JMIS* 167 208.

103 Audretsch, Heger and Veith "Infrastructure and Entrepreneurship" 2015 *SBEJ* 219 221.

104 Waller "Areeda, Epithets, and Essential Facilities" 2008 *WLR* 359 372–375.

105 The Competition Tribunal accepts that services can indeed constitute an essential facility, thus a resource or an infrastructure. See the Competition Tribunal's decision in *Telkom*. See also Doherty "Just What Are Essential Facilities?" 2001 *CMLR* 397. The author points out that the EFD means that a "monopolist can be forced to sell a product or service when another person needs it to do business".

106 *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers* (15/CAC/Feb02) [2002] ZACAC para 53.

reading would discourage investment in infrastructure because of free riding concerns.[107] The correctness of this approach is questionable. The court did not point to anything in the Act that suggests that the legislature intended such a narrow reading. It instead appears to have based its conclusions on the literal approach, which seeks to ascertain the subjective intention of the legislature, without paying due regard to the relevant context within which the remedy for access to an essential facility is provided for in the South African Competition Act.[108]

As for the free riding concerns raised by the court in *Glaxo*, it has been argued that firms "may well think twice about investing in a costly input if they may be forced to share it with others on advantageous terms".[109] However, this concern should not be overstated. Firstly, access to an essential facility is not granted to a competitor free of charge, as is seemingly suggested, but against payment of a reasonable fee or royalty that the dominant firm would otherwise charge.[110] Compelling a dominant firm to provide access to an essential facility under such circumstances cannot therefore be legitimately considered free access. Secondly, the right to property and freedom of trade of dominant firms are just like any other rights that can be limited by the government or through contestation with other rights. Pitching them as nearly inviolable or unlimitable rights and freedoms is unrealistic, particularly in the South African context. This is because the Constitution makes it clear that rights, including those in the Bill of Rights such as freedom of trade and the right to property, may be limited in accordance with the limitation clause.[111] There is, in any event, nothing aberrative about including both services and goods within the definition of an essential facility as such an approach is followed in the EU, notwithstanding the free riding concerns raised by the court.[112] This is because access to an essential facility is granted subject to stringent requirements that carefully balance property rights of dominant firms and public interest in promoting and maintaining competition.[113] The cumulative requirements regarding reasonable duplication of the facility and the indispensability of the facility to the competitor add another layer of safeguard and make it unnecessary to adopt a narrow and restrictive approach towards the conceptualisation of an essential facility in South Africa as others have suggested.[114]

It would appear that the suggestion that an essential facility may include goods or services of dominant firms in appropriate circumstances, has been mooted in the South African context. For instance, it has been argued that an essential facility includes "infrastructure, products and services".[115] It has also been stated that an essential facility under the South African Competition Act "is not limited to a major infrastructure" and that a "resource such as an equipment will suffice".[116] It has similarly been argued that an essential facility may include "intangible

107 *Ibid* para 54.

108 *Ibid*.

109 Kelly and Van der Vijver "Less is more: Senwes and the Concept of 'Margin Squeeze' in South African Competition Law" 2009 *SALJ* 247.

110 Seelen "The Essential Facilities Doctrine: What Does it Mean to be Essential?" 1997 *Marquette Law Review* 11117; Fox "A Tale of Two Jurisdictions and an Orphan Case: Antitrust, Intellectual Property, and Refusals to Deal" 2004 *Fordham International Law Journal* 952, 962; Turney "Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: The Primacy of Securing Optimal Innovation" 2005 *Northwestern Journal of Technology and Intellectual Property* 179, 191 and Case 238/87AB *Volvo v Erik Veng (UK) Ltd* [1988] ECR 621 paras 8 and 11.

111 The Constitution s 36.

112 The EU position makes it clear that both goods and services may constitute an essential facility under EU competition law.

113 Dunne 130–131 and Case C-42/21 P *Lietuvos Geležinkeliai AB and European Commission* EU:C:2023:12 para 86.

114 Brassey *Competition Law* 121.

115 Dauds *Competition Law: Substantive Issues* 1 ed (2016) 157.

116 Brassey 204.

infrastructure, such as electronic payment services".[117] This conceptualisation of an essential facility is in line with the Competition Tribunal's approach in *Competition Commission v Telkom SA Ltd* where the services provided by Telkom were found to constitute an essential facility.[118]

It is not entirely clear on what basis the court in *Glaxo* excluded products and services from the definition of an essential facility. Its reasoning should perhaps be understood as an endeavour to distinguish between the prohibitions in section 8(1)(b) and section 8(1)(d)(ii) of the Act, not as an attempt to limit the ambit of section 8(1)(b) of the Act.[119] Limiting the pool of facilities that may qualify as an essential facility under section 8(1)(b) of the Act may be antithetical to the objectives of the Act of transforming the economy and market structures by, among others, opening the economy and markets for participation by all South Africans, in particular those that were previously economically disadvantaged. Such a narrow approach may mean that certain information technologies and resources may be excluded from the ambit of section 8(1)(b) of the Act, notwithstanding the fact that they satisfy all the requirements for accessing an essential facility as defined in the Act, but for the fact that they are classified as products, goods or services.

3 3 The Conditions for Applying the EFD Under South African Competition Law

In *Glaxo*, the court stated that a complainant who alleges a contravention of section 8(1)(b) of the Act must prove the following:

- that the dominant firm concerned refuses to give the complainant access to an infrastructure or a resource;
- that the complainant and the dominant firm are competitors;
- that the infrastructure or resource concerned cannot reasonably be duplicated;
- that the complainant cannot reasonably provide goods or services to its competitors without access to the infrastructure or resource; and
- that it is economically feasible for the dominant firm to provide its competitors with access to the infrastructure or resource.[120]

Therefore, once it is established that a facility concerned falls within the ambit of the definition of an essential facility in the Act, a firm requesting access to the facility must satisfy the essential elements of this provision. A literal reading of the provision would suggest that the firm requesting access is only required to demonstrate that the facility concerned falls within the statutory definition of an essential facility and that once it has done so, the dominant firm in control of the facility would be required to demonstrate that it is not economically feasible to give access.[121] It is clear from the definition of an essential facility in the Act that a firm requesting access to an essential facility is not only required to demonstrate that the facility constitutes an "infrastructure" or a "resource" but also that the facility "cannot reasonably be duplicated" and that the firm requesting access "cannot reasonably provide goods or services"

117 Kelly *et al. Principles of Competition Law in South Africa* (2017) 141.

118 *Competition Commission v Telkom SA Ltd* (11/CR/Feb04) [2012] ZACT 66 ("*Telkom*").

119 The court indeed pointed out in para 56 of the judgment that it was unnecessary for it "to define the ambit of section 8(b)".

120 *Glaxo* para 57.

121 South African Competition Act s 8(1)(b).

to its customers.

The requirements regarding the reasonable duplication of an essential facility and reasonableness of providing goods or services without access to an essential facility have not been explored. In the merger between *DCD Dorbyl (Pty) Ltd and Globe Engineering Works (Pty) Ltd*, the Competition Tribunal found that an A-berth constituted an essential facility as it had the characteristics associated with an essential facility.[122] One of the characteristics was that the A-berth could not "be easily duplicated".[123] The other characteristic was that competitors could not "reasonably provide services to large oil and gas vessels and structures without access to the A-berth".[124] The Competition Tribunal considered the A-berth to be "a 'must have' for rivals".[125] The A-berth was "deemed necessary for all industry participants to operate in a given industry and which is not easily duplicated".[126] In *South African Raisins (Pty) Ltd v SAD Holdings*, the Competition Tribunal left open the question whether wooden crates used for the delivery of farmers' output constituted an essential facility and if so whether the refusal to provide them violated section 8(1)(b) of the Act.[127] The Tribunal could not therefore consider the essential requirements of the provision. In *Glaxo*, the court could not get into these requirements as it found that the pharmaceutical products in question did not constitute an essential facility. In *DW Integrators CC v SAS Institute (Pty) Ltd*, the Tribunal was required to determine whether a software constituted an essential facility and if so, whether the refusal to grant a licence in respect of the software violated section 8(1)(b) of the Act.[128] The claimant argued that it could not provide services effectively without the licence and that the refusal to grant the licence prevented it from participating in the market.[129] The Tribunal could not however determine the issue as the claimant had failed to establish the fact that the respondent occupied a dominant position in the relevant market.[130]

In *Telkom*, the Competition Tribunal was required to decide whether Telkom's refusal to provide independent Value Added Network Services Sector (VANS) providers access to Public Switched Telecommunication Services (PSTS) and facilities services violated section 8(1)(b) of the Act.[131] Telkom accepted that the facilities in question constituted an essential facility.[132] Based on this admission, the Tribunal found that there was "no evidence put up by Telkom" to demonstrate that it was not economically feasible to provide access to the facilities.[133] The Tribunal did not consider the requirements regarding the reasonableness of duplicating the facilities or for the VANS providers providing services without access to PSTS. The Tribunal simply pointed out that once all the "elements of section 8(1)(b) are proved then the anti-competitive harm is presumed".[134] It has therefore been stated that the question of when it is economically feasible for a dominant firm to provide its competitors with access to an essential

122 *DCD Dorbyl (Pty) Ltd v Globe Engineering Works (Pty) Ltd* (108/LM/Oct08) [2009] ZACT 26 para 72.

123 *Ibid*.

124 *Ibid*.

125 *Ibid* para 64.

126 *Ibid* para 74.

127 *South African Raisins (Pty) Ltd v SAD Holdings Ltd* Case Number: 04/IR/Oct/1999 [2000] ZACT 46 paras 11–12.

128 *DW Intergrators CC v SAS Institute (Pty) Ltd* [2000] ZACT 16 ("*DW Integrators*") para 2.

129 *Ibid* para 1.

130 *Ibid* para 31.

131 *Competition Commission v Telkom SA Ltd* (11/CR/Feb04) [2012] ZACT 66 ("*Telkom*").

132 *Telkom* para 87.

133 *Ibid*.

134 *Ibid* para 86.

facility "has not been resolved in South Africa".[135] This view cannot be faulted if one considers that the meaning of the words "infrastructure" and "resource" has not been determined and that the requirements regarding the reasonableness of duplicating the facility or providing goods or services to customers without access to the facility have not been clarified.

It is notable that the Act requires the competing firm requesting access, to demonstrate that the essential facility "cannot reasonably be duplicated". The use of the word "reasonably" in this regard implies that it is not necessary to demonstrate absolute impossibility of duplication. The threshold is therefore lower. The Tribunal and Competition Appeal Court have not offered comprehensive interpretive guidance in respect of this requirement. In *DCD Dorbyl*, the Tribunal simply stated that the facility must be such that "cannot be easily duplicated".[136] Similarly, the Competition Appeal Court in *Glaxo* pointed out that the facility must be such that cannot be "easily duplicated".[137] The duplication of an essential facility may thus be "impossible or extremely difficult, due to physical, geographical, legal or economic constraints".[138] Where such constraints or obstacles exist, it would be impractical and unreasonable to expect the competing firm requesting the dominant firm to give access to an essential facility, to duplicate the essential facility by its own endeavours.[139] The enquiry in this regard is therefore not limited to whether it is "physically possible to replicate" the essential facility since it might be physically possible to duplicate the facility but not economically feasible to do so.[140] It has thus been suggested that the requirement regarding the duplication of an essential facility means that "there must be sufficient barriers to entry that duplication is not economically possible".[141]

The assessment of this requirement is however not limited to the physical or literal duplication of an essential facility. It also entails consideration of whether there are other realistic or viable alternatives or equivalents of the essential facility.[142] If there are, the claim for access to an essential facility falls away. The enquiry in this regard considers whether there are any substitutes for the essential facility or whether the firm requesting access lacks the ability to duplicate the facility because of these constraints.[143] The assessment regarding the capability of the firm to duplicate the essential facility must, however, be objective not subjective. Thus, the inability of a firm requesting access to an essential facility to duplicate the essential facility through its own endeavours must not be based on subjective conditions peculiar to the firm, such as its limited resources.[144] In other words, a firm requesting access to an essential facility owned or controlled by a dominant firm cannot argue that "because of its smallness, it should be entitled to have access to its larger competitor's infrastructure".[145] This sentiment is particularly important in the South African context as section 8(1)(b) of the Act might be wrongly considered as a tool

135 Neuhoff *A Practical Guide* 153.

136 *DCD Dorbyl* para 72.

137 *Glaxo* para 43.

138 Glossary of terms used in EU competition policy: Antitrust and control of concentrations at 18 https://www.concurrences.com/IMG/pdf/european_commission_glossary_of_terms_used_in_eu_competition_policy__antitrust_and_control_of_concentrations.pdf?40143/c3774ee64935572d46552d77051b73fee53aeda168348c3575d30d9dabcc7a34 (accessed 23-12-2022).

139 An example of regulatory contracts was in respect of Public Switched Telecommunication Services (PSTS) licence, which only Telkom was allowed to provide in terms of legislation.

140 Church "The Lamentable Rise of an Expanded Essential Facilities Doctrine in Canada: The Troubling Economic Foundations of the Toronto Real Estate Board Decision" 2018 *CCLR* 122 141.

141 Church 2018 *CCLR* 141.

142 *Oscar Bronner* para 45.

143 Massadeh "The Essential Facilities Doctrine Under Scrutiny: EU and US Perspective" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1738326 (accessed 23-12-2022).

144 Doherty "Just What Are Essential Facilities?" 2001 *CMLR* 397 423.

145 Wish and Bailey *Competition Law* 7 ed (Oxford University Press 2012) 694.

for aiding small and medium-sized firms to access essential facilities owned and controlled by dominant firms even where the other requirements of the provisions are not satisfied. It would seem that the public interest considerations in the Act favour a protection of not only competition, but also certain players in the market.[146] However, inasmuch as it may be tempting to utilise section 8(1)(b) of the Act for that purpose, such an approach would be inappropriate as it seeks to protect firms as opposed to the competition process.[147]

4 THE ESSENTIAL FACILITIES DOCTRINE IN EU COMPETITION LAW

The EFD is well developed in EU competition law. However, unlike in South Africa where the remedy for access to an essential facility is expressly provided in competition legislation, the EFD in EU competition law originates from case law.[148] The case law is based on the interpretation of Article 102 of the Treaty on the Functioning of the European Union (TFEU), which deals with the conduct of dominant undertakings.[149] The Article prohibits abuse of dominance by dominant undertakings within the internal market of the EU.[150] In the EU, the concept of dominance relates to the economic strength or position of an undertaking "to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".[151]

Article 102 is therefore utilised to address the conduct of dominant undertakings that impedes and distorts competition in the internal market.[152] Article 102 is thus regarded as imposing a special responsibility on dominant firms to not allow their conduct to distort meritorious competition in the internal market.[153] Its enforcement is inspired by fairness considerations with regard to competition but not competitors as such.[154] It is important to note that, just like section 8 of the South African Competition Act, Article 102 does not prohibit mere occupation of a dominant position, but its abuse.[155] In this regard, Article 102 expressly provides for certain types of abusive conduct that is prohibited, although the list is not exhaustive.[156] It is generally accepted that the refusal to give access to an essential facility by a dominant undertaking is prohibited under Article 102. It is for this reason that the evolution of the EFD under EU

146 See for instance *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5 regarding the conduct of a dominant of engaging in price discrimination which is likely to impede on the ability of small and medium business or firms controlled or owned by historically disadvantage persons to participate effectively.

147 South African Competition Act s 2(e).

148 Goddard "The 'Essential Facilities' Doctrine in EC Competition Law" 1999 *The Cambridge Law Journal* 490.

149 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01 (TFEU).

150 TFEU art 102 (formerly ar 82 of Treaty Establishing the European Community (TEC)). It provides that "[a] ny abuse by one or more undertaking 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".

151 Case 27/76 *United Brands v Commission* [1978] ECR 207, para 65.

152 Van Tonder *Obiter* 831 833 and Case C-52/09 P *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527 ("*Konkurrensverket*") paras 20–21.

153 Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR 3461 ("*Michelin*") para 56.

154 Bergh *Comparative Competition Law* 302. Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 para 38 and Guidance Communication on the Commission's enforcement priorities in applying ar 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJC45/02 ("the Guidance Paper") para 6.

155 Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports v Commission of the European Communities* [2000] ECR I-1365 para 37.

156 TFEU art 102 (a), (b), (c) and (d).

competition law is considered to originate from case law and that jurisprudence revolves around the interpretation of Article 102.

4 1 The Types of Facilities Covered by the EFD Under EU Competition Law

Article 102 does not expressly prohibit dominant undertakings from refusing to provide competitors access to an essential facility and accordingly provides no guidance on the types of facilities in respect of which the EFD applies. It has been the task of the Commission and the courts to determine the types of facilities covered by the EFD. In this regard, the EU has applied the EFD to a variety of facilities, including physical infrastructure such as railways and ports, products and services, intangible facilities consisting of basic information and technical information protected by intellectual property rights.[157]

In *Sealink/B & I Holyhead*, the EFD was applied to a port facility.[158] The Commission found that the refusal to grant other undertakings access to the port facility constituted an abuse of dominance by the undertaking in control of the facility. The EFD was later applied to physical products (aminobutanol) of a dominant undertaking in *Istituto Chemioterapico Italiano Spa and Commercial Solvents Corporation v Commission*.[159] In that case, Istituto had cut off the supply of aminobutanol to Laboratorio Chimico Farmaceutico Giorgio Zoja to which it had previously supplied large quantities of the substance as raw material for the manufacture of ethambutol. The court found that Istituto's conduct constituted an abuse of a dominant position.[160] It reasoned that a dominant undertaking, which controls access to a raw material required for the production of derivative products by other undertakings cannot simply stop supplying the raw material on the basis that it has started to manufacture its own derivative products.[161] The stoppage of the supply of aminobutanol would eliminate Zoja from the market as it depended on the supply from Istituto.[162] The court accordingly found that such conduct risked elimination of competition in the market. It is notable that the case of *Commercial Solvents* is generally considered as a refusal to deal case, although it is often considered when discussing the EFD.[163]

In *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities*, the EFD was, for the first time, applied to copyrighted information (weekly programmes listings) required for the publication of a comprehensive listing guide or magazine.[164] In this case, the appellants had control and "a de facto monopoly" over the information.[165] The court observed that the appellants were "the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a

157 EC Commission Decision 11 June 1992 relating to a proceeding under ar 86 of the EEC Treaty (IV/34.174 – *B&I Line PLC v Sealink Harbours Ltd. & Sealink Stena Ltd*), [1992] 5 CMLR 255; EC Commission Decision 94/19/EC of 21 December 1993 relating to a proceeding pursuant to art 86 of the EC Treaty (IV/34.689 – *Sea Containers v Stena Sealink – Interim Measures*), [1994] OJ, L 15/8; EC Commission Decision 94/119/EC of 21 December 1993 concerning a refusal to grant access to the facilities of the port of Rødby [Denmark], [1994] OJ, L 55/52; EC Commission Decision 94/894/EC of 13 December 1994 relating to a proceeding under ar 85 of the EC Treaty and ar 53 of the EEA Agreement (IV/32.490 – Eurotunnel) [1994] OJ, L 354/66.

158 *Sealink/B&I Holyhead (interim measures)*, [1992] 5 CMLR 255. Treaty Establishing the European Community as amended by subsequent Treaties Rome, 25 March 1957.

159 *Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp. v Commission* Cases 6 and 7/73, [1974] ECR 223 ("*Commercial Solvents*").

160 *Commercial Solvents* para 232.

161 *Ibid* para 25.

162 *Ibid* paras 233 and 237.

163 OECD Competition Committee "The essential facilities concept, roundtables on competition policy" 1996 at 43 https://www.oecd.org/daf/43644518.pdf (accessed 21-12-2022).

164 C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities joined cases* [1995] ECR I-743 ("*Magill"*).

165 *Magill* para 45.

weekly television guide".[166] The court found that the refusal to provide access to the information constituted an abuse of dominance for several reasons. First, the refusal prevented the appearance of a new product not offered by the appellants and for which there was a potential consumer demand.[167] Second, there was no justification for such refusal.[168] Lastly, the appellants "reserved to themselves the secondary market of weekly television guides by excluding all competition on the market" as they effectively "denied access to basic information which is the raw material indispensable for the compilation of such a guide".[169] The court accordingly concluded that the appellants' refusal to licence the information constituted abuse of their dominant position.[170]

In *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs-und Zeitschriftenverlag*, the EFD was applied to a home-delivery service for distributing newspapers to households.[171] Oscar Bronner sought an order to compel Mediaprint to include its own newspaper in the home-delivery service system on the basis that failure to do so constituted an abuse of dominance. The application was however dismissed on the basis that the other requirements of the EFD were not satisfied.

In *Tiercé Ladbroke SA v Commission of the European Communities*, the EFD was applied on pictures of French races.[172] In that case, the principal French *sociétés de courses* (horse-racing associations) had refused to grant Ladbroke a licence to transmit sound and pictures of French races for purposes of betting.[173] Ladbroke argued that the refusal was arbitrary and objectively unjustifiable since *sociétés* had granted similar licences to other parties.[174] The court dismissed these arguments. Firstly, it found that there was no discrimination as *sociétés* had not granted any undertaking the rights to exploit their IPRs.[175] Secondly, the court found that Ladbroke's reliance on *Magill* was misplaced. In this regard, it found that while the refusal in *Magill* prevented a competitor from entering the market for comprehensive television guides, Ladbroke was already in the market for betting and held the largest share of the market.[176]

In *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG*, the EFD was applied to a set of pharmaceuticals sales data called the 1860 brick structure.[177] The brick structure was protected by copyright and had become a normal industry standard to which business owners adapted their information and distribution systems.[178] NDC sought a licence to use the brick structure on the basis that refusal to grant access constituted an abuse of dominance.[179] IMS declined the request on the basis that the brick structure was protected by copyright.[180] The court

166 *Ibid* para 53.

167 *Ibid* para 54.

168 *Ibid* para 55

169 *Ibid* para 56.

170 *Ibid paras* 54 and 57.

171 Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs* [1998] ECR I-7791 ("*Oscar Bronner*").

172 *Tierce Ladbroke SA v Commission of the European Communities*, Case T-504/93, 1997 ECR II-923 ("*Ladbroke*").

173 *Ibid* para 112.

174 *Ibid* para 113.

175 *Ibid* para 124.

176 *Ibid* para 130.

177 Case C-418/01 *IMS Health GmbH & Co OHG. NDC Health GmbH & Co KG*, [2004] E.C.R. 1-5039 ("*IMS Health*").

178 *IMS Health* para 6.

179 *Ibid* para 11.

180 *Ibid* para 10.

reiterated the view that copyright protection does not preclude the application of the EFD.[181] In *Microsoft Corporation v Commission*, the EFD was applied to protocol specifications relating to Microsoft's workgroup server operating systems (SOS) also referred to as interoperability information.[182] Recently, in *Slovak Telekom AS v European Commission*, the EFD was applied to a "local loop", which means the physical twisted metallic pair circuit connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network.[183] In that case, Telekom was found to have contravened Article 102 in that it, among others, withheld from alternative operators the network information necessary for the unbundling of local loops.[184] It is clear from these cases that the EFD in EU competition law is applied to a range of facilities, including products and services owned and controlled by dominant firms if access to such facilities is required to promote and maintain competition in the relevant market. Access to these facilities is, however, not there for the asking, as the EU has developed stringent requirements for invoking the EFD.

4 2 The Requirements for Invoking the EFD Under EU Competition Law

The requirements for invoking the EFD under EU competition law are crystallised in case law.[185] Whether a facility is essential has much to do with whether it satisfies the requirements enunciated in case law and little to do with the nature of the facility. In *Sealink/B & I Holyhead*, the Commission stated that a facility is essential if "competitors cannot provide services to their customers" without access to it and if the refusal to provide access to the facility is without an objective justification.[186] It found, however, that the EFD was only applicable if the "competitor seeking access to the essential facilities is a new entrant into the relevant market".[187]

In *Commercial Solvents*, the court found that aminobutanol constituted a raw material which was "essential" for the production and sale of ethambutol by Zoja.[188] Put differently, Zoja could not compete in the market for ethambutol without access to the raw material (aminobutanol) required for the production of its products (ethambutol).[189] It is notable that although Zoja was not a competitor of Istituto, but a customer, Istituto's conduct was motivated by the need to enter the market for derivative products and compete with Zoja. Aminobutanol was therefore considered an essential facility in the sense that Zoja could not carry out its productions without access to the aminobutanol provided by Istituto.

In *Magill*, the information was found to constitute an essential facility for several reasons. First, the appellants had a *de facto* monopoly over the information, which was an indispensable raw material for compiling a weekly television guide.[190] Second, the refusal of access to the information prevented the introduction of a new product, namely a weekly guide to television programmes, for which there was a potential consumer demand that the appellants did not offer.[191] Third, there was no justification for the refusal to provide access to the information.[192]

181 This had already been stated in *Magill* and Case 238/87AB *Volvo v Erik Veng (UK) Ltd* [1988] ECR 621 para 9.

182 *Microsoft Corporation v Commission* Case T- 201/04, [2007] ECR II- 3601 ("*Microsoft*").

183 Case C-165/19 P *Slovak Telekom A.S v European Commission* ("*Slovak*").

184 *Slovak* para 16.

185 Wish and Bailey *Competition Law* 7 ed (2012) 699.

186 *Sealink* paras 66–67.

187 *Sealink/B & I Holyhead* para 67.

188 *Commercial Solvents* para 25.

189 *Ibid*.

190 *Magill* para 53.

191 *Ibid* para 54.

192 *Ibid* para 55.

Lastly, the appellants sought to reserve to themselves the secondary market for weekly television guides by excluding all competition in that market.[193]

The requirements enunciated in *Magill* crystallised in *Oscar Bronner*. In that case, Oscar Bronner sought to have access to a home-delivery service of a competitor on the basis that other alternatives such as postal delivery "did not represent an equivalent alternative to home-delivery".[194] Furthermore, that it was "entirely unprofitable for it to organize its own home-delivery system".[195] Mediaprint disputed that Oscar Bronner was entitled to utilise its home-delivery service and contended that the "establishment of its home-delivery service required great administrative and financial investment, and that making the service available to all Austrian newspaper publishers would exceed the natural capacity of its system".[196] Oscar Bronner argued that Mediaprint was obliged to provide access to its home-delivery system.[197] It argued that a dominant undertaking abused its position if it reserved a market for itself without any objective necessity.[198] Mediaprint contended that it was entitled to decide to whom it wished to allow access to its own facilities and that such freedom could only be limited in exceptional circumstances where its conduct was likely to eliminate all competition in a downstream market.[199] However, the court was not swayed by the arguments advanced by Oscar Bronner. It found that a refusal to provide access to raw materials that were "indispensable to carrying on the rival's business" only constitutes abuse of dominance "to the extent that the conduct in question was likely to eliminate all competition on the part of that undertaking".[200] The court found that Oscar Bronner was required to demonstrate that Mediaprint's home delivery service was "indispensable to carrying on" its business and that there was "no actual or potential substitute in existence for that home-delivery scheme".[201] Furthermore, that Mediaprint's refusal to provide access to the home-delivery service was "incapable of being objectively justified" and was "likely to eliminate all competition in the daily newspaper market" presented by Oscar Bronner.[202] The court found that Oscar Bronner had failed to satisfy these requirements for several reasons. Firstly, it found that there were other methods of distributing daily newspapers even though they were less advantageous.[203] Second, that there were no "technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult" for publishers to establish their own home-delivery service either individually or in concert.[204] The court emphasised that one cannot demonstrate that creating one's own home-delivery system "is not a realistic potential alternative and that access to an existing system" is indispensable by arguing that "it is not economically viable by reason of the small circulation of the daily newspaper or newspapers" to create one.[205] The court held that Mediaprint's refusal to grant

193 *Ibid* para 56.

194 *Oscar Bronner* para 8.

195 *Ibid* 8.

196 *Ibid* para 9.

197 *Ibid* paras 24 and 25. Reliance was placed on *Commercial Solvents* and *Magill*.

198 *Ibid* para 25, referring to Case 311/84 *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECR 3261 ("*CBEM*") para 26.

199 *Oscar Bronner* paras 26–7.

200 *Ibid* para 38.

201 *Ibid* para 41.

202 *Ibid*.

203 *Ibid* para 43.

204 *Ibid* para 44.

205 *Ibid* para 45.

Oscar Bronner access to its home-delivery service did not constitute an abuse of dominance.[206]

The principles enunciated in *Oscar Bronner* were restated in *IMS Health*. In that case, the court pointed out that in order to determine whether a product or service is indispensable, it is necessary to determine whether there are others that "constitute alternative solutions, even if they are less advantageous".[207] Second, that one must consider whether there exist any technical, legal or economic hurdles that make it impossible or unreasonably difficult for a competitor to operate in the market.[208] Similarly, in *Ladbroke*, the court stated that a product or service was essential if there was "no real or potential substitute" and if the refusal to provide access to the product or service prevented the emergence of a new product for which there was a constant and regular potential demand.[209] In that case, the information — in the form of sound and pictures of horse races — was found not to be "indispensable for the exercise of bookmarkers' main activity, namely the taking of bets".[210] This was based on the fact that Ladbroke was operating in the market without the information and the transmission of sound and pictures of the races, which appeared only after bets had been placed.[211]

The requirements for establishing the need to access an essential facility were consolidated in *Microsoft*. In summarising the position in case law, the court in that case observed that a refusal by a dominant undertaking to licence a third-party use of a product covered by an intellectual property right cannot in itself constitute an abuse of dominance unless exceptional circumstances that may give rise to abuse, exist.[212] It considered that abuse would occur if three exceptional circumstances exist First, the refusal must relate to a product or service indispensable to the exercise of a particular activity on a neighbouring market. Second, the refusal must be such that excludes effective competition on a neighbouring market. In this regard, the court stated that it suffices if the "refusal at issue is liable to, or likely to, eliminate all effective competition on the market" and not that "all competition on the market would be eliminated".[213]

Lastly, the court in *Microsoft* stated that the refusal must prevent the appearance of a new product for which there is a potential consumer demand.[214] The court pointed out that a dominant undertaking bears the onus to demonstrate an objective justification for the refusal once these exceptional circumstances have been established.[215] The court emphasised that the circumstance, requirement or condition relating to the prevention of the appearance of a new product for which there is a consumer demand is only found in respect of cases dealing with facilities covered by intellectual property rights.[216] As indicated, the court in *Microsoft* concluded that these exceptional circumstances had been established and that Microsoft's refusal to provide competitors access to the information constituted an abuse of dominance.[217]

206 *Ibid* para 47.

207 *IMS Health* para 28.

208 *Ibid*.

209 *Ladbroke* para 131. The court referred to *Magill* in this regard.

210 *Ibid* para 132.

211 *Ibid*.

212 *Microsoft* para 331.

213 *Ibid* para 563.

214 *Ibid* para 332.

215 *Ibid* para 333.

216 *Ibid* para 334.

217 *Ibid* paras 620, 665, 810 and 813.

5 A COMPARATIVE ANALYSIS OF THE EU AND SOUTH AFRICAN COMPETITION LAW ON THE TYPES OF FACILITIES AND REQUIREMENTS OF INVOKING THE EFD

The survey of EU case law on the EFD makes it clear that the doctrine is applied to a variety of facilities. Although the EFD was initially applied to physical infrastructure such as ports and railways, the trajectory shifted in cases such as *Magill*, *IMS*, *Oscar Bronner,* and *Microsoft*. Similarly, cases such as *Magill*, *IMS*, *Oscar Bronner*, *Ladbroke* and *Microsoft* further confirm that the EFD applies to services and products of a dominant firm, notwithstanding the fact that the services or products may be protected by intellectual property rights.[218] Considered holistically, these cases simply demonstrate that whether a facility is essential for purposes of the EFD has little to do with its nature or character. An essential facility may therefore be in the form of an infrastructure, resource, information, a product or service as demonstrated in these cases. The South African approach enunciated by the Competition Appeal Court in *Glaxo* follows a different path from that followed under EU competition law. Firstly, the court appears to have conceived an essential facility in traditional sense, as a physical infrastructure that cannot be duplicated. This can be inferred from the court's reference to cases which involved physical infrastructure such as a railway terminal, a building, a power grid, a football stadium and a port.[219] However, the court's reference to *Oscar Bronner* and *La Poste/SWIFT + GUF* ought to have alerted it to the argument that an essential facility need not be a physical infrastructure.[220] Second, the court's finding that a "resource" within the meaning of section 8(1)(b) of the South African Competition Act should not be interpreted as including products, goods or services, is arguably myopic if one considers the progressive approach adopted in EU case law regarding the types of facilities covered by the EFD.[221]

As indicated, the EU case law makes it clear that products, services, and goods may qualify as an essential facility if all the other requirements for enforcing the EFD are satisfied. This approach is progressive and properly anticipates the fast-paced developments in the information and technology industries, where certain technologies have become industry standards as was the case in *IMS*. On such a forward-looking approach, pharmaceutical products cannot be insulated from the application of the EFD simply because they were created through the investment of the dominant firms, as found by the court in *Glaxo.*[222] There is arguably nothing in the South African Competition Act which suggests that the legislature intended for the narrow and restrictive approach towards the interpretation of section 8(1)(b) of the Act. As indicated, such an approach — if haphazardly adopted — may be antithetical to the objective of the Act of opening up the economy for participation by all South Africans. The liberal approach followed in the EU is supportive of this objective as it discourages restrictive and exclusionary behaviour of dominant firms that do not promote competition. This is not to suggest that the differing legislative frameworks of the EU and South Africa highlighted in *Glaxo* must be ignored. The taxonomical differences between the two regimes are arguably not sufficient to warrant a different approach that seeks to exclude products, goods and services from the ambit of an essential facility as defined in the South African Competition Act.

Insofar as the requirements of invoking the EFD are concerned, it is clear that the requirements under EU competition law are well established in case law. These requirements apply to all

218 This was first stated in Case 238/87*AB Volvo v Erik Veng (UK) Ltd* [1988] ECR 621 para 9.

219 See *Glaxo* paras 42–47.

220 *La Poste/SWIFT + GUF* case IV/36.120 (Official Journal C335, 1997/11/06).

221 *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others* (15/CAC/Feb02) [2002] ZACAC para 53.

222 *Glaxo* para 53–4.

facilities regardless of their nature or character.[223] A firm that seeks to invoke the EFD is required to satisfy all the requirements and only then will the burden shift to the dominant firm to advance an objective justification for refusing access to an essential facility.[224] The dominant firm should then demonstrate that the facility is not shareable.[225] Of all the requirements, the indispensability requirement is key.[226] In terms of this requirement, the facility must be "truly fundamental for rival firms".[227] This means that competitors cannot operate in the market without access to the facility. The indispensability requirement serves an important function of limiting "the scope of Article 102".[228] Put differently, it "limits the application of Article 82 to cases involving essential inputs".[229] It "functions as a filter" so that if an "input is not indispensable, no competition concern arises under Article 102".[230] This is precisely what occurred in *Ladbroke*. When applied in a classical situation of two markets as was the case in *Ladbroke*, the requirement constitutes "a conscious attempt to link findings of abuse to anticompetitive foreclosure from downstream markets to the detriment of consumers".[231]

The duplicability requirement comes second in order of importance. In terms of this requirement, the facility concerned must "be impossible to duplicate".[232] This does not, however, connote physical impossibility. It simply means that there should be no suitable substitute or alternatives for the facility or that there are physical, economic, technical or legal impediments to creating one.[233] This much is clear from *Oscar Bronner* which underscores the need to make a "rigorous assessment concerning the technical, legal, and economic obstacles that rivals face in developing alternative facilities".[234] These requirements pitch the EU threshold on EFD high and it has been pointed out that "EU law requires a higher intervention threshold for refusal to supply".[235] The threshold is even higher in cases involving intellectual property rights as it is necessary to demonstrate that the dominant firm's refusal to provide a competitor access to an essential facility leads to the prevention of the emergence or appearance of new products with potential customer demand.[236] The approach in the EU therefore seeks to strike an appropriate balance between the public interest in protecting competition and the need to respect the freedom and proprietary rights of dominant firms.[237]

The position under South African competition law regarding the requirements for requesting access to an essential facility remains unclear. Although the South African Competition Act sets out the requirements for requesting access to an essential facility, these have not been judicially interpreted.[238] The Act provides that an essential facility must be such that it "cannot reasonably

223 The point here is that is that does not matter whether the facility is in the form of a product, service or a physical infrastructure.

224 Martin "The Exceptional Circumstances Test: Implications for Frand Commitments From the Essential Facilities Doctrine Under Article 102 TFEU" 2014 *ECJ* 37.

225 Bergh *Comparative Competition Law* 305.

226 Wish 700 and 702–3 and Bergh *Comparative Competition Law* 311.

227 Bergh *Comparative Competition Law* 305.

228 Wish 700 and 701.

229 Czapracka *Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches* (2009) 18.

230 Nazzini 262.

231 Wish 700 and 701.

232 Bergh 305.

233 *Ibid*.

234 *Ibid* 311.

235 Nazzini 262.

236 *Microsoft* para 334.

237 Case C-165/19 P *Slovak Telekom A.S. v European Commission* ("*Slovak*") para 51.

238 Section 1(1)(xi) of the South African Competition Act.

be duplicated and without access to which competitors cannot reasonably provide goods or services to their customers". A firm requesting access to an essential facility must therefore satisfy these two requirements. Concerning the reasonableness of duplicating the facility, the EU approach is instructive. As indicated, the approach does not require the impossibility of physical duplication but simply enquires whether technical, legal, or economic obstacles exist that make it impossible or even unreasonably difficult to duplicate the facility.[239] This approach is aligned with the reasonableness standard in the South African Competition Act in respect of access to an essential facility. The duplication of the facility can only be considered if there are no viable alternatives.

The South African Competition Act appears to pitch a lower threshold with respect to the second requirement regarding the reasonableness of providing goods or services without access to the facility. While the EU requires the facility to be "indispensable to carrying on" the business operations of the competitor, the South African Competition Act requires that the facility must be "without access to which competitors cannot reasonably provide goods and services to their customers".[240] The implication is that while it is necessary to demonstrate the impossibility of operating without access to an essential facility under EU case law, the same is not required under the South African Competition Act. In terms of the South African Competition Act, a competitor is simply required to demonstrate that it is not reasonable, as opposed to being impossible, for the competitor to provide goods or services without access to an essential facility owned or controlled by a dominant firm. This arguably demonstrates that the legislature intended a permissive and liberal interpretation of the provisions relating to access to an essential facility as opposed to the narrow and restrictive approach espoused by the Competition Appeal Court in *Glaxo*. The other indication of this is that the South African Competition Act does not require a demonstration of the effects of the refusal to provide access to an essential facility as is the case in the EU. The anti-competitive effect of the refusal to provide access to an essential facility is readily assumed in circumstances where the essential facility cannot reasonably be duplicated, and competitors cannot reasonably provide goods and services to their customers. This is unlike in the EU where competitors are required to demonstrate the effects of the refusal to provide access to an essential facility on competition.

A comparative analysis of the EU and South African competition law regimes on access to essential facilities, therefore, demonstrates that there are several lessons that South Africa can learn from the EU to aid the interpretation of section 8(1)(b) of the South African Competition Act. The first is that essential facilities are not limited to physical infrastructure and may include intangible facilities or resources. This is particularly befitting in the digital economy as it is characterised by rapid disruptive innovation with new technologies becoming industry standards of new markets.[241] The second is that the application of the EFD in the EU is not necessarily limited to a competitor of the dominant firm in the same market. The EFD can be raised by a firm in another market which proves dependance on the essential facility controlled by a dominant firm, as was the case in *Commercial Solvents*. The approach is commendable as it is hard to fathom why it matters who invokes the doctrine if the objective is to promote or safeguard competition. It would be strange for a competition policy to accept cooperation or sharing of resources between competitors if such promotes competition but reject same between non-competing firms or a dominant firm and its customers even if such cooperation is necessary to safeguard and promote competition. There is therefore merit in the argument that

239 *Oscar Bronner* para 44.

240 *Ibid* para 41.

241 Ghidini *Intellectual Property and Competition Law: The Innovation Nexus* (2006) 39.

the application of the EFD should not be limited to competitors.

The third is that both goods and services owned and controlled by dominant firms may constitute essential facilities in appropriate circumstances. South African competition law would do well if it were to follow the approach adopted under EU competition law in this regard. This means applying the provisions of section 8(1)(b) of the South African Act to both products and services in circumstances where the requirements of invoking the provision are satisfied. This would entail jettisoning the approach adopted by the Competition Appeal Court in *Glaxo*, which limits the application of section 8(1)(b) to facilities other than goods, products and services.[242] This was indeed the case in *Telkom*, where the Tribunal applied section 8(1)(b) on the Public Switched Telecommunication Services (PSTS) rendered by Telkom but which were required by independent VANS to provide their own services to their customers.[243] Adopting the EU approach would also entail that, unlike *Glaxo* wherein patented pharmaceutical products were found to be incapable of constituting an essential facility, both products and services protected by intellectual property rights would not be insulated from the application of section 8(1)(b) of the Act. The case of *Hazel Tau & Others v GlaxoSmithKline* demonstrates the devastating effects of unjustifiable refusal to provide access to an essential facility, based on intellectual property rights.[244] The refusal to licence a patented anti-retroviral drug, in that case, resulted in numerous deaths that could have been avoided by timely licensing of the drug.[245]

6 CONCLUSION AND RECOMMENDATIONS

The article has demonstrated that the relevance of the EFD in competition law is unquestionable. The doctrine is as relevant in the current digital economy as it was before.[246] The refusal of access to an essential facility may constitute a barrier to entry into newly established markets in the digital economy as it creates and reinforces the market power of dominant firms and may thwart innovation.[247] Withholding access to essential facilities by dominant firms may also have a negative impact on competition, such as market concentration by preventing entrance into markets and foreclosing competitors.[248] The effect of this is that "competition would be slow to emerge" where essential facilities are owned and controlled by vertically integrated dominant undertakings.[249] It may also lead to the reduction of production output, limitation of product choices, and raising of prices to the detriment of consumers. In the South African context, the consequences of withholding access to an essential facility by a dominant firm therefore go against the several goals of the South African Competition Act.[250] The importance and relevance of the EFD is particularly heightened in deregulated or transitioning economies such as South Africa and the EU, where deconcentration of the markets underpins competition

242 *Glaxo* para 53.

243 *Telkom* para 87.

244 *Hazel Tau v GlaxoSmithKline, Boehringer Ingelheim* 2002 (South African Competition Commission, Competition Commission Case 2002Sep226). A summary of the decision see: https://unctad.org/ippcaselaw/hazel-tau-others-v-glaxosmithkline-boehringer-ingelheim-others-2002-south-african-competition (accessed 29-12- 2022).

245 See Ncube "The Politics of National Intellectual Property Policy Design and the Provision of Health Services in South Africa" *IPLJ* 15 17 for a general comment on the case.

246 Guggenberger *Stanford Technology Law Review* 237, 249, 336, 343.

247 Klaaren *Competition Law* 173.

248 Bergh *Comparative Competition Law* 312.

249 Wish 706.

250 South African Competition Act preamble and s 2.

policy.[251] This makes the EFD a very crucial tool for governing the conduct of dominant firms and it is not surprising that the South African competition law expressly provides for access to an essential facility in section 8(1)(b) of the South African Competition Act.

South Africa has therefore taken the right direction in providing for the remedy of access to an essential facility in the South African Competition Act.[252] The approach obviates the need to grapple with questions about the role and relevance of the EFD under South African competition law. Regrettably, South Africa has lagged insofar as the development and enforcement of the EFD are concerned. This is unlike the EU, which has developed progressive jurisprudence on the EFD in anticipation of modern exigencies that may affect the maintenance and promotion of competition law in the ever-evolving digital world. In South Africa, there is a paucity of guidance on access to an essential facility under the South African Competition Act and South African competition authorities and courts have not engaged on an extensive interpretation of section 8(1)(b) of the Act. To the small extent that the provision has been interpreted, the interpretation is arguably narrow and misaligned with the purpose and objectives of the Act. In view of the progressive developments in EU competition law regarding the enforcement of the EFD, the following recommendations are made regarding the conceptualisation of an essential facility under the South African Competition Act:

- Section 8(1)(b) of the South African Competition Act should be interpretated liberally, contextually, and purposefully, bearing in mind the remedial nature of the South African Competition Act, as proclaimed in the preamble as well as the purposes of the Act. This entails discarding the literal or textual approach that seeks to ascertain the subjective intention of the legislature as was seemingly done by the Competition Court of Appeal in *Glaxo*.[253] This also entails interpreting section 8(1)(b) of the Act against the relevant context, bearing in mind the mischief that the Act seeks to redress from an economic and public interest perspective.

- The words "infrastructure" and "resource" in the South African Competition Act should be interpreted expansively and flexibly to include different types of facilities including products, goods and services as is the case under EU competition law.[254] Such an expansive or liberal approach is aligned with the objectives and goals of the Act regarding the need to open the economy for participation by all South Africans through, among others, the removal of barriers to entry and promoting the greater spread of ownership.[255]

- Section 8(1)(b) of the South African Competition Act should also be applicable to products, goods and services protected by intellectual property rights. In this regard, it is arguably not necessary for the South African Competition Act to adopt the exceptional circumstances approach similar to that of the EU, which requires denial of access to an essential facility to prevent the appearance or emergence of new products for which there is a potential consumer demand. This is because section 8(1)(b) is not effects-based and building in such a requirement through interpretation may dilute the purpose and effect of the provision.

251 Wish 706. The process of deconcentration is defined as the policy of breaking up and divesting operations of large firms to reduce the degree of concentration in an industry. See Khemani and Shapiro "Glossary of Industrial Organisation Economics and Competition Law" https://stats.oecd.org/glossary/detail.asp?ID=3188 (accessed 29-12- 2022).

252 South African Competition Act s 58(1)(vii).

253 *Glaxo* para 54.

254 Meadows "The Essential Facilities Doctrine in Information Economies: Illustrating Why the Antitrust Duty to Deal is Still Necessary in the New Economy" 2015 *Fordham IPLJ* 795.

255 Bourassaforcier and Stirner "Twelve Years After Canada's Access to Medicines Regime: Should South Africa Follow the Path? 2015 *SALJ* 313 315 and Intellectual Property Policy of the Republic of South Africa Phase I, *Government Gazette* GN 518 nu 41870 (31 August 2018) 30 https://www.gov.za/sites/default/files/gcis_document/201808/ippolicy2018-phasei.pdf (accessed 28-11-2022)

This will also ensure that intellectual property rights are not used to stifle competition.[256]

- The requirement regarding whether a facility cannot reasonably be duplicated should be interpreted in a manner that is similar to that adopted under EU competition law. This does not only entail enquiring whether the facility can be physically reproduced, but also whether there are any legal, regulatory or economic obstacles that make it unreasonable for the competitor to duplicate the facility. This includes enquiring whether there are other viable alternatives. The reasonableness element in the requirement should be emphasised to ensure the flexibility inherently intended by the definition of an essential facility in the South African Competition Act.

- The requirement regarding whether a competitor cannot reasonably provide goods or services to their customers without access to an essential facility should be approached objectively, albeit with the required sensitivity regarding the need to build an inclusive economy. In this regard, South Africa should eschew adopting a stringent threshold of indispensability, as applied under EU competition law. This does not seem to be the intention of the South African Competition Act, by virtue of the reasonableness element present in this component of the definition of an essential facility.

256 Turney "Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: The Primacy of Securing Optimal Innovation" 2005 *NJTIP* 179–201.