

**Joint Comments of the American Bar Association's
Section of Antitrust Law, Section of Intellectual Property Law and
Section of International Law and Practice
on the Report of the Study Group on the Antimonopoly Act of Japan**

The Section of Antitrust Law, the Section of Intellectual Property Law, and the Section of International Law and Practice of the American Bar Association (collectively, the "Sections") take this opportunity to submit comments on the October 2003 Report of the Study Group on the Antimonopoly Act of Japan (the "Report").¹ The views expressed herein are presented jointly on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

Our comments relate specifically to the Report's recommendations as to the essential facilities doctrine. The Report recommends that the Japan Fair Trade Commission ("JFTC") propose measures for "prompt and effective action against conduct to prevent market entry when essential facilities exist."² The Report defines the following conduct to prevent market entry as unlawful when conducted without reasonable cause: (1) "rejection of, discrimination in, or restrictions or obligations concerning the use of the facilities," (2) "conduct to prevent the shift of customers to competitors (long-term agreements accompanied by large-sum penalties for breach of contract, etc.)," and (3) "conduct in parallel to prevent market entry by two or more entrepreneurs, which have been exclusively allocated usage rights for essential facilities by an institution such as the central government." The Report recommends the "certification" of essential facilities, and it proposes remedies that include injunctions and other measures to restore competition.³

¹ Our comments are based on the Tentative Translation as of 21 November 2003 that was posted on the website of the Japan Fair Trade Commission, at <http://www2.jftc.go.jp/e-page/report/survey/index.html>. We are aware of the Outlines of the amendment of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (Antimonopoly Act) (the "Outlines") that were issued by the JFTC on December 24, 2003 and posted on the JFTC website at <http://www2.jftc.go.jp/e-page/press/2003/december/031224Outlines.pdf>. The Outlines are more succinct than the Report and do not identify the remedies that shall be employed, but are consistent with the Report. Accordingly, while our comments address specifically only the Report, we intend that these comments will also address the Outlines.

² The Report's definition of the elements of an "essential facility" are discussed at *infra* note 11 and accompanying text.

³ The Outlines state that "Current regulations concerning measures against monopolistic situations...shall be revised into those for eliminating promptly and effectively conduct by 'Specific Entrepreneurs' preventing business activities of new entrants on the occasion of their using 'Essential Facilities,'" where "'Specific Entrepreneurs' shall mean the entrepreneurs who have large and dominant market share and own 'Essential Facility' (including the specific technology) in an important market (a market whose scale is significantly large)." They further state that "Denial of access to 'Essential Facilities' and discrimination against competitors by the 'Specific Entrepreneurs' shall be prohibited where they are without proper justification." Finally, the Outlines indicate that "The JFTC will designate each 'Essential Facility' where...(a) It shall be essential to provide goods or services in the important market in which the 'Specific Entrepreneur' carries its business. (b) It shall be almost impossible for other entrepreneurs to establish a similar facility competitive against the existing facility."

For reasons set forth below, the Sections have substantial concerns about the effects that the recommendations, if adopted, would have on incentives for investment, innovation, and competition; on the role of the courts; and on the relationship between competitors. We hope that the JFTC, as it considers and refines the Study Group proposal, will be sensitive to the potential harm that the recommendations could cause across national boundaries in a globalized economy.

The Sections' Interest in the Essential Facilities Doctrine

These comments are based on our members' experience as United States practitioners. They are grounded in the historical development of United States antitrust law and practice regarding similar issues and in our comparative knowledge of competition law regimes abroad. The Sections hope and intend that these comments will assist in the development of the enforcement program of the JFTC and in the drafting of any proposed legislation it may submit to the Diet.

The Sections' Membership. The membership of the Sections includes over 47,000 lawyers. Most of the members are based in the United States of America, but a substantial number have lived and worked abroad, and some do so currently. Members of the Sections have substantial expertise with competition law in the United States and around the world. Our membership includes lawyers in the law departments of businesses and the faculties of law schools, as well as in private practice and in government. In addition, many non-U.S. attorneys are active as Associate Members in the Sections, and have contributed their expertise and insights to the Sections' work. Given the increasingly global nature of business and the long history of competition law in the United States, members of the Sections have substantial familiarity with legal and economic analyses of the potential competitive effects of the full range of economic activity. These comments offer a perspective based upon the experience in the United States in the fields of antitrust, intellectual property and international business law.

Need for Review of Competition Policies. The Sections support the JFTC's efforts to undertake a review of its enforcement policies. Twenty-five years have passed since amendments to broadly strengthen the Antimonopoly Act were enacted by the Japanese Diet in 1977. As the Study Group noted in its Report, the Japanese and world economies have undergone dramatic changes since that time, especially in high-technology and network industries. Economic and antitrust theory have also advanced a great deal, often due to increased collaboration and cooperation among governments in formulating and implementing competition laws and policies.

Extraterritorial Effects of Competition Enforcement. In today's globalized economy, the enforcement of Japan's Antimonopoly Act by the JFTC has effects far beyond Japan's borders. Multinational corporations based in Japan and elsewhere conduct business under a multitude of legal regimes. It has therefore become increasingly important for countries to consider the policies of other jurisdictions when developing new competition laws and policies. These concerns are especially salient in respect of enforcement policies that affect intellectual property rights and intangible goods and services that by their very nature cannot be contained within national borders, because such policies may have profound extraterritorial effects.

Accordingly, the Sections offer their comments on the Report in the hope that they may assist the JFTC in formulating an enforcement policy that is well-balanced and, to the extent practicable, consistent with other nations' rules and policies.

Essential Facilities as the Focus of these Comments. The Study Group undertook a comprehensive review of the JFTC's enforcement policies and provided comments on a wide range of competition law and policy issues. However, the Sections' comments herein are focused on the Report's discussion of essential facilities, because we question whether the treatment of essential facilities proposed in the Report is justified, in light of the U.S. experience. We have focused on the essential facilities discussion in the Report because it is a subject that can have far-reaching implications for the worldwide business and competition law community, with respect to the application of the doctrine to intellectual property rights and other issues as well.

Policies Underlying the U.S. Essential Facilities Doctrine. Some U.S. antitrust practitioners and commentators maintain that the essential facilities doctrine has little or no utility.⁴ Others believe the principle may usefully be applied in "those rare and exceptional circumstances where a facility is truly essential to competition, the anticompetitive effects of denial of access are severe, and there is no business justification" for the owner's denying access.⁵ United States law recognizes, however, that overbroad application of the essential facilities doctrine can reduce incentives to innovate and compete, thus hindering long-term competition and economic growth.⁶

The United States Supreme Court has made clear that it has never recognized the essential facilities doctrine, and it recently declined the opportunity to endorse or repudiate the doctrine.⁷ In discussing the policy considerations surrounding possible application of the doctrine, though, the Court noted that requiring owners of an essential facility to "share their advantage" with rivals "may lessen the incentive for the monopolist, rival, or both to invest in those economically beneficial facilities," compels the courts to "act as central planners," and compels "negotiation between competitors [that] may facilitate ... collusion."⁸

To the extent that lower courts in the United States have ordered access on the basis of the doctrine, they have done so only where the following circumstances are present:

- a competitor is demanding access to something that qualifies as a "facility" within the meaning of the doctrine,
- the facility is owned by a monopolist (or is jointly owned by competitors whose denial of access prevents others from effectively competing),

⁴ A leading U.S. treatise takes this view. IIIA Philip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW* ¶ 771c (2d ed. 2002) ("the essential facility doctrine is both harmful and unnecessary and should be abandoned").

⁵ Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine under U.S. Antitrust Law*, 70 *ANTITRUST L.J.* 443, 461 (2002).

⁶ *Id.* at 443; see also William Blumenthal, *Compulsory Access under the Antitrust Laws* at 2-3, in ABA, *ADVANCED ANTITRUST COUNSELING WORKSHOP* (1998).

⁷ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, ("Trinko") slip op. at 11, 540 U.S. ___ (2004).

⁸ *Id.*, slip op. at 7-8, 540 U.S. ___ (2004).

- others cannot effectively compete without access to the facility – as distinguished from a situation where access would merely be useful or helpful to a competitor,
- as a practical matter the competitor cannot duplicate the facility on its own – as distinguished from a case where duplication of the facility would merely cost money which the complaining party would rather not spend,
- the owner has refused to allow access to the facility on commercially reasonable terms,⁹
- there is a way in which access may be granted without undue interference in the owner’s right to use its own property, and
- as a practical matter, a court may decide the financial and other terms of access without undue ongoing regulatory oversight – a role U.S. courts properly deem inappropriate for themselves.¹⁰

The overwhelming majority of cases in which an essential facilities claim is asserted fail one or more of these tests – which thus serve to limit the application of the doctrine to rare and exceptional circumstances, as advocated even by proponents of the doctrine.

The Essential Facilities Doctrine: Basic Policy Considerations

In light of the United States’ experience with the essential facilities doctrine, we believe that the following questions merit careful consideration by the JFTC.

1. What Is a “Facility” and When Is It “Essential?”

The Report’s Definition. Based on our review of the English translation of the Report, we understand that the Study Group sets forth three “fundamental prerequisites” of essential facilities:

- 1) assets having natural monopoly characteristics (declining cost on the supply side, substantial investment requirement) or network externalities, or assets such as facilities, rights and information deliverables that are scarce resources for which the usage rights are exclusively allocated by the central government or other public institutions;
- 2) assets whose use is necessary and indispensable when supplying goods or services;

⁹ *Id.* (“indispensable requirement” for invoking the essential facilities is the unavailability of access – where access is required by statute an essential facilities claim cannot lie).

¹⁰ On the elements of an essential facilities claim see ABA Antitrust Section, ANTITRUST LAW DEVELOPMENTS 278-86 (5th ed. 2002) (hereinafter “ALD”); see also *id.* at 451-54 (addressing restraints on access imposed by joint venture parents).

- 3) facilities and other assets in question, and facilities that enable firms to effectively compete, which entities conducting or thinking of conducting business activities in certain business sectors for goods and services (referred to below as “competitors”) find markedly difficult to construct on their own because of economic, technical, legal or other reasons.¹¹

In addition to the above basic requirements, the Report suggests that the JFTC take into consideration “[i] the influence on competition at a long-term, dynamic level such as technology development or capital investment,...and [(ii)] the size of the use market.”

U.S. Definition of Essential Facilities. The general test for the essential facilities doctrine was first articulated by the Seventh Circuit Court of Appeals in the *MCI* case: “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors.”¹² The United States Supreme Court has not expressly adopted the *MCI* standard, although the essential facilities doctrine arguably is derived from a 1912 Supreme Court decision.¹³ Since that time, numerous U.S. courts have applied the principles of the essential facilities doctrine, or expressly applied the doctrine itself, to a variety of factual scenarios.

However, the doctrine has not been applied uniformly, and there has been some inconsistency among the U.S. judicial circuits on the precise requirements and application of the doctrine. The Antitrust Division of the Justice Department and the Federal Trade Commission recently argued before the Supreme Court that the *MCI* criteria, while relevant to a claim of monopolization based on denial of access to an essential facility, are not sufficient to establish liability. In addition, according to the two agencies, it must be shown that the refusal of access “involves a sacrifice of profits or business advantage that makes economic sense only because it eliminates or lessens competition.”¹⁴ The Supreme Court did not address these arguments in its recent decision.

What Is a “Facility”? The threshold consideration in the essential facilities doctrine is to determine what qualifies as a “facility.” Under U.S. law, the doctrine has been applied to a variety of physical assets such as rail networks, oil and natural gas pipelines and storage facilities, regional electricity distribution networks, airport terminals, sports stadiums, and local telephone networks. A key issue is the application of the doctrine to intellectual property; this is further discussed below.

Regulated Industries and Natural Monopolies. The Report gives some general guidance as to which assets could be treated as essential facilities: “assets having natural monopoly characteristics (declining cost on the supply side, substantial investment requirement)

¹¹ Report, at 62 (English translation). We are not entirely clear as to whether the three criteria in the definition quoted in the text are intended to be conjunctive or disjunctive.

¹² *MCI Communications v. AT&T Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

¹³ *United States v. Terminal Railroad Ass’n*, 224 U.S. 383 (1912).

¹⁴ Brief of *Amici Curiae* United States and Federal Trade Comm’n at 16, *Verizon Communications Inc. v. Trinko* (U.S. No. 02-682), available at <http://www.usdoj.gov/atr/cases/f201000/201048.pdf>; see also *id.* at 20-25 (criticizing the Second Circuit for what the agencies viewed as an overbroad application of the *MCI* doctrine).

or network externalities, or assets such as facilities, rights and information deliverables that are scarce resources for which the usage rights are exclusively allocated by the central government or other public institutions.”¹⁵ This definition, coupled with the Report’s discussion of essential facilities in the context of deregulation, indicates that the Study Group’s focus is on traditional regulated industries.

Essential or Merely Useful? The Report’s second “fundamental prerequisite” appears to articulate the standard for “essentiality”: “assets whose use is necessary and indispensable when supplying goods or services.” We are not entirely clear whether this proposed language is intended as a test that must be met in all essential facilities cases, or whether it is meant as only one of three alternative tests for an essential facility. The Sections strongly urge the former approach, *i.e.*, that a facility never be deemed subject to the essential facilities doctrine unless, among other things, it is indispensable in the downstream market in which the owner of the essential facility and others compete, not merely helpful to the owner’s competitors.

In the United States a facility cannot be “essential” unless it “is vital to competitive viability because competitors cannot effectively compete in the relevant market without access to it.”¹⁶ An asset is generally not deemed to be essential merely because it confers some “cost advantage” or other competitive benefit upon its owner. This strict and narrow test of essentiality is very important in helping courts to avoid overbroad application of the doctrine – which, in many cases, could substantially reduce incentives to invest, create legal uncertainty, and burden the legal system severely. We urge the JFTC to take a similar approach.

Hard to Duplicate or Impractical to Duplicate? The third “fundamental prerequisite” states that the asset is one that potential market entrants would find markedly difficult to construct on their own because of economic, technical, legal or other reasons.¹⁷ By contrast, in the U.S. jurisprudence, the facility must be such that a competitor cannot practically or reasonably duplicate it.

The Sections are unsure what is intended by the Report’s “markedly difficult” standard. This may be a question that cannot be answered by abstract discussion, but only by observing how the rule is applied in practice. For present purposes it is enough to say that the Sections recommend a narrow approach to the difficulty of duplication issue, for the same reasons we recommend a narrow approach to the competitive viability question, as applied to the essential facilities doctrine.

Advance Identification of Essential Facilities? The Study Group suggests that the JFTC should (a) clarify specifically, for a specified period of time, which essential facilities will be subject to regulation; and (b) continuously update the items from the list subject to regulation at the point in time when such items are believed to no longer correspond to essential facilities.

We are unclear exactly how this suggestion would work in practice, particularly in highly fluid markets with short product lives such as high-technology markets. Strict as the U.S. definition of essential facilities is, in view of the myriad complex markets in a modern economy, it hardly seems feasible for any agency to identify in advance all facilities that might fit within

¹⁵ Report, at 62 (English translation).

¹⁶ ALD at 280.

¹⁷ *See id.* at 282.

the doctrine. On the other hand, if the suggestion is that the doctrine should apply only to facilities specifically identified as a result of an advance regulatory procedures – and not to other facilities, even though they might seem to come within a general definition of essential facilities – then the proposal could serve as a means to promote legal certainty and guard against overbroad application if a careful process with appropriate review rights is used to determine inclusion in any such list.¹⁸ There is, however, the danger that in a fluid industry, even with a carefully determined list, an identified facility could continue to be deemed “essential” even if the facts supporting such identification change – for example, after alternative facilities have become available to competitors.

2. Should Intellectual Property Ever Be Considered an Essential Facility?

A vital policy consideration is the need to balance short and long term competition. In the context of essential facilities, there is a risk that trying to encourage short term competition, by mandating access to a facility, may, in the long run, reduce competition and adversely affect the dynamic efficiency of resource allocation by reducing the incentive to develop assets that, if successful, may eventually be deemed “essential.” Absent this incentive, it may be the case that no asset is created, maintained, and upgraded, which would be less optimal for consumer welfare than if the asset is created but confers monopoly power on its owner. The U.S. Supreme Court recently recognized that allowing firms to charge monopoly prices “is an important element of the free-market system,” for it “attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”¹⁹ Therefore, broad application of the essential facilities doctrine could discourage innovation and may instead provide a windfall for those who failed to innovate.

The application of the essential facilities doctrine to intellectual property is the most compelling example of these policy risks, and has been the subject of significant discussion among U.S. commentators and practitioners. In fact, the prevailing view among intellectual property lawyers is that the essential facilities doctrine should not apply to intellectual property. U.S. antitrust enforcement agencies and others have expressed the view that intellectual property is like other property, and has the potential to be used for anticompetitive purposes in the same manner as a physical asset. Thus, the U.S. antitrust enforcement agencies have noted that, while an intellectual property right does not necessarily confer market power in a relevant market, “[a]s

¹⁸ In formulating its policies, the JFTC may wish to consider several other, less significant points that have arisen in U.S. jurisprudence. First, some U.S. case law suggests that the intent of the essential facility owner is relevant to whether the owner is liable under the U.S. antitrust laws. See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973) (“Otter Tail’s refusals to sell ... were solely to prevent municipal power systems from eroding its monopolistic position”); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520-22 (10th Cir. 1984) (finding that the intent to monopolize by putting a competitor ski resort out of business was refusal to an essential facility). This must be construed narrowly, however, as the intent to maintain or improve one’s own market position always entails the intent to beat out rivals.

Second, U.S. courts generally permit denial of access to an essential facility to certain competitors if a reasonable business justification exists for doing so and the effect of the restraint on consumers is nonexistent or positive. See *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1209 (9th Cir. 1997); *Data General Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1187 (1st Cir. 1994); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1381 (9th Cir. 1992).

¹⁹ *Trinko*, slip op. at 7, 540 U.S. ___ (2004).

in other antitrust contexts, however, market power could be illegally acquired or maintained, or, even if lawfully acquired or maintained, would be relevant to the ability of an intellectual property owner to harm competition through unreasonable conduct in connection with such property.”²⁰ In considering antitrust “refusal to deal” claims (of which an essential facility claim is a particular type), some U.S. courts have stated that antitrust liability may arise, under certain circumstances, from an intellectual property holder’s refusal to license.²¹

Other U.S. courts and commentators have expressed serious concern about the application of the essential facilities doctrine in the intellectual property context.²² The intellectual property laws give incentives to market participants to innovate and thereby develop better products, more efficient processes, and original works of expression. Unlike physical property, in general, intellectual property cannot be used unless it is disclosed. Once it is disclosed, it can be easily misappropriated, causing its market value to be easily destroyed. Absent the right to exclude others from utilizing the fruits of an investment in innovation, economic actors may be less inclined to invest time and money in developing patented or copyrightable assets. While enforcement of intellectual property rights may seemingly reduce competition in the short term, this effect is often likely to be surpassed by the long-term procompetitive benefits of sound intellectual property laws and enforcement. Depending on the circumstances, forcing a patent holder to license its patent deprives the patentee of its rights, and can chill desirable activities such as research, development, and commercialization of desirable inventions. These considerations have led some to conclude that the application of the essential facilities doctrine is antithetical to the policies of intellectual property rights. Commentators have also noted that, while the essential facilities doctrine has been pled in several cases in the context of intellectual property, no U.S. court has held that a unilateral refusal to license a patent, alone, served as actionable exclusionary conduct.²³

We therefore agree with the Report’s finding that “it will be necessary to consider whether an intention to undertake new research and development or new investment is being obstructed and whether competition at a long-term, dynamic level such as technology development or capital investment will be distorted.” The Sections encourage the JFTC to seriously consider the potential effects of its policies in the essential facilities area not only in global industries but in particular in the fields of technology, innovation, and intellectual

²⁰ U.S. Dep’t of Justice & Federal Trade Comm’n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 2.2 (1995).

²¹ The rationale for this view has been expressed as follows: “[P]ower gained through some natural or legal advantage such as a patent, copyright or business acumen can give rise to liability if ‘a seller exploits his dominant position in one market to expand his empire into the next.’” *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 479 (1992). For a discussion of the complexities of leveraging as treated in U.S. antitrust law, see Lawrence A. Sullivan & Warren S. Grimes, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 106 *et seq.* (2000).

²² Paul D. Marquart & Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson, and Hooks*, 70 *ANTITRUST L.J.* 847 (2003); Abbott B. Lipsky, Jr. & Gregory Sidak, *Essential Facilities*, 51 *STAN. L. REV.* 1187 (1999).

²³ Some U.S. courts hold that a unilateral refusal to license intellectual property can never be the basis for an antitrust claim, while others have ruled that a unilateral refusal to license is presumptively lawful, but the presumption may be overcome in limited circumstances. See ALD at 1076-79 (collecting cases).

property.²⁴ In light of the global nature of these markets and the significant cross-border activity in this area, it is important that any policies fashioned on this subject take into account the consequences on the world economy generally.

3. How Should the Size of the Market Affect the Essential Facilities Doctrine?

While recognizing the need to balance long-term incentives to invest as against the desirability of promoting market entry in the short run, the Study Group asserts that the size of the use market ought to be a relevant factor in drawing that balance. The Sections are unclear as to what the Study Group means. We would disagree with any general claim that the bigger the market, the stronger is the case for the doctrine's application, other things being equal. The Report offers no basis for such a claim, and we are aware of none. The Sections instead would suggest that the bigger the market, and the more consumers affected, the more important it is to promote *both* short-run competition and long-run incentives to invest. U.S. antitrust law does not take mere size of market into account in drawing the balance, and we would urge the JFTC to take the same approach.

4. Should Unilateral Versus Concerted Action Be a Factor?

Another consideration in applying the essential facilities doctrine is whether the relevant asset was created or obtained through single-firm conduct, or by concerted action. The Report does not appear to make a distinction in this regard. As a general matter, under U.S. law, there is greater antitrust scrutiny of joint conduct, as compared to the activities of a single economic actor. U.S. law generally condemns "contracts, combinations, or conspiracies" between multiple parties that unreasonably restrain trade, or business combinations that "may substantially lessen competition" in a relevant market. However, the standard for finding anticompetitive conduct by a single firm is more stringent, and there are many examples of business conduct that are lawful when done by a single company, but which are illegal when agreed to between competitors.

The offense of "monopoly" under U.S. law requires not only a showing of market power, but also of "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."²⁵ Furthermore, there is a general policy, as articulated by the Supreme Court in *United States v. Colgate*,²⁶ that a firm has a general right to choose with whom it conducts business, even if such a refusal to do business perpetuates monopoly power for the refusing firm. This general policy drives innovation, lower prices, better quality, and higher output by not punishing a monopolist merely because it has enjoyed great success. We suggest that the JFTC consider whether it may be appropriate to make a distinction between single-firm conduct and concerted action when weighing its enforcement policies in this area of law.

²⁴ The Report mentions "information deliverables" as a possible "facility," but it is not clear whether this refers to intellectual property or simply information generally (further clarification on this specific language would be helpful).

²⁵ *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

²⁶ 250 U.S. 300 (1919).

5. Must the Complaining Party Be a Competitor of the Facility's Owner?

It is not clear from a reading of the Report as to whether the Study Group makes any distinction between purely vertical relationships (*e.g.*, where the essential facilities owner is in an input market only, and the entity seeking access to the facility is a downstream purchaser), and horizontal relationships (where the essential facilities owner also competes with the entity seeking access). U.S. courts have generally held that a plaintiff seeking to invoke the essential facilities doctrine must be in competition with the facility owner in a downstream market to which the alleged essential facility is a necessary input.²⁷ Such a requirement protects the important principle that even a monopolist is generally privileged to choose with whom it deals. For example, a would-be distributor with whom a monopolistic supplier refuses to deal in order to achieve an efficient distribution structure should not be in a position to force the supplier to deal, by invoking the essential facilities doctrine. The JFTC may wish to consider whether to limit the application of the essential facilities doctrine to scenarios where the facility owner competes in a downstream market with those that seek access to the facility as a necessary input to the downstream market.

6. What Remedies Are Appropriate?

A key consideration is the appropriate scope of remedies to be applied in the essential facilities doctrine context. The Report implies that essential facilities may be subject to “regulation,” but it is not clear whether this means that the JFTC would assume regulation of access to these facilities, or whether other arms of the Japanese government would assume such responsibility. As with remedies in other areas of antitrust law, the Sections recommend that remedies be narrowly-drawn to address the anticompetitive effects. We also recommend that there be a degree of predictability in fashioning such remedies, thus affording greater certainty among market participants.

U.S. courts have been mindful of the costs and burdens that would be placed on the tribunal if it is going to be required to do detailed, ongoing regulation of the parties relationship as distinguished from a more manageable one-time decision about granting access and on what terms.²⁸ For example, will owners of essential facilities be required to charge “reasonable” rates for access? It may also be the case that only a certain number of entities may practicably share an essential facility, and therefore the JFTC may wish to consider how access will be allocated under these circumstances. We would suggest that the JFTC provide some clarity as to what types of remedies will be applied, and under what circumstances.

²⁷ See *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1357 (Fed. Cir. 1999) (“[T]here must be a market in which plaintiff and defendant compete, such that a monopolist extends its monopoly to the downstream market by refusing access to the facility it controls.”); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991) (“A facility that is controlled by a single firm will be considered ‘essential’ only if control of the facility carries with it the power to eliminate competition in the downstream market.”).

²⁸ *Trinko*, slip op. at 15, 540 U.S. ___ (2004) (in the context of the breach of a regulatory sharing requirement).

Conclusion

The Sections support the thorough and careful review of the Antimonopoly Act that the JFTC is undertaking after 25 years of experience under the current law. We question whether the special focus on essential facilities is warranted, however, in light of the experience in the United States. As our Supreme Court recently noted, mandating that owners of an essential facility “share their advantage” with rivals “may lessen the incentive for the monopolist, rival, or both to invest in those economically beneficial facilities,” compels the courts to “act as central planners,” and compels “negotiation between competitors [that] may facilitate ... collusion.”²⁹ Unless narrowly and carefully applied, the essential facilities doctrine will reduce incentives to innovate and compete, thus hindering long-term competition and economic growth.³⁰ In a globalized economy, the harm from overbroad application of the doctrine, particularly as to intellectual property, will spill across national boundaries. As the JFTC considers and refines the Study Group proposal, we hope it will be sensitive to these concerns.

We appreciate the opportunity to comment and would be pleased to respond to any questions the Commission may have regarding these comments, or to provide any additional comments or information that may be of assistance to the Commission.

January 30, 2004

²⁹ See *supra* note 8 and accompanying text.

³⁰ See *supra* note 6 and accompanying text.