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Essential Digital Facilities

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LETTER FROM THE EDITOR

Dear Readers,

The essential facilities doctrine provides a generally recognized basis for imposing antitrust liability for unilateral refusals to deal. Classically, it has been claimed that a monopolist that denies a competitor access to an input considered an “essential facility” violates section 2 of the U.S. Sherman Act or Article 102 TFEU (and its national equivalents) in the EU, though in Europe the concept is termed as a “refusal to deal” or a “refusal to supply.”

The concept finds its origins in caselaw dating back to the “gilded age” of alleged robber barons. In *United States v. Terminal Railroad Association* (1912), the U.S. Supreme Court required Jay Gould and others who maintained control over railroad bridges that crossed the Mississippi River to provide access to any competitors who wished to cross. Over the years, Courts and enforcers have invoked the concept in diverse industries ranging from railroads to recreational skiing, energy, groceries, photocopying, newspaper distribution, telecommunications, and professional sports, to name just a few. The popularity and acceptance of the concept has ebbed and flowed over the years, perhaps finding its nadir in the well-known cases of *Verizon v. Trinko* (2004) in the U.S., and *Oscar Bronner v. Mediaprint* (1999) in the EU, though it enjoyed a brief resurgence in the time of the EU *Microsoft* case.

As the contributors to this Chronicle note, the notion of essential facilities is back in the limelight (particularly in terms of its potential application to the modern “platform economy”). **Thomas B. Nachbar** opens by posing the question of why the essential facilities doctrine has been so popular among recent proponents, while it remains unpopular with courts? He concludes that the doctrine has the unintended effect of shifting attention away from the question of anticompetitive conduct (which ought to be central to any critical analysis). As a result, the author proposes that the concept of essential facilities is better thought of as a “remedy” rather than as a distinct theory of antitrust liability. Taking an equally critical perspective, **John M. Taladay** likens the recent resurgence of interest in the essential facilities doctrine in colorful terms, casting it as an “infection that has devoured the minds of the zombified.”

Nikolas Guggenberger strikes a contrasting tone, noting that some of the critiques of the doctrine in the past (e.g. allegations that monopolies lack incentives to monopolize adjacent markets and concerns about error costs) are potentially misconceived, and best left behind. **Erik Hovenkamp** develops further on these ideas, with a specific focus on large online platforms. To the author, the real economic risk raised by platforms is typically that the defendant could be leveraging its control of a dominant platform to foreclose rivals in an adjacent market. He draws an analogy with tying cases like *Microsoft* rather than classic “refusal to deal” or “essential facilities” cases such as *Trinko*. The piece goes on to suggest that courts should revise the legal standard used to evaluate refusals to deal by platforms to better capture economic realities.

As **Stephen M. Maurer** notes, the essential facilities doctrine began as an attempt to reconcile the benefits of competition with those of commonly owned assets. Most judges, however, have evaluated sharing almost entirely through its impact on competition. This simplification was tenable in the past, when network effects were relatively rare and scale economies bounded. Today, product performance can sometimes depend on sharing even more than competition. As a result, sharing and competition are both valuable, and can present difficult tradeoffs. In the author’s view, requiring judges to consider the benefits of synergy coequally with competition will be an essential first step toward rationalizing essential facilities case law worldwide.

Turning to the matter of user data, **Chris Riley** notes that digital data is both created and used within specific contexts, and its value derives from its use within certain contexts. Looking at personal data through the blunt lens of the essential facilities doctrine risks losing this perspective. The author further notes that meanwhile there have been significant advancements in portability for personal data. As public policy frameworks for data portability continue to develop, the article offers some principles to guide those conversations to reinforce and strengthen the efficacy of data portability.

Finally, **Bilal Sayyed** closes with a timely discussion of the majority staff report of the U.S. House of Representatives’ recent Investigation of Competition in Digital Markets. Notably, the report recommends that Congress consider revitalizing the essential facilities doctrine and override judicial decisions that have treated unfavorably essential facilities and refusal to deal-based theories of harm. Although the jury remains out on how the report’s conclusions will be implemented, if the report indicates anything, it is that discussion of the topic of essential facilities is not going anywhere soon.

As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

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ESSENTIAL FACILITIES AND THE ZOMBIE APOCALYPSE

By John M. Taladay

At its core, the essential facilities doctrine (“EFD”) invariably involves property rights. The idea is that a party that indisputably owns rights to certain property must provide access to that property to another party (that otherwise has no rights to that property and presumably has made no investment in that property) in order to facilitate competition by the other party. But, because we tend to hold the idea of property rights in high regard as a law-abiding society, a doctrine forcing a party to give up its property rights has been, understandably, narrowly construed and applied only in the higher standard of “exceptional circumstances.” This is consistent with the *Colgate* and *McGill* rights to discretion in business affairs in the U.S. and the EU, respectively. Nonetheless, recent developments relating to the overwhelming power of certain very large tech companies to call this orthodoxy into question.

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ESSENTIAL FACILITIES AND THE LAW OF THE HAMMER

By Thomas B. Nachbar

The essential facilities doctrine has received a resurgence of interest recently, especially with regard to platform markets. Many references to the doctrine exaggerate its centrality to antitrust law; it is a “doctrine” in name only. The question is why the essential facilities doctrine has been so popular among recent proponents while it remains unpopular with courts. The answer lies in the doctrine’s ability to simplify inquiries into anticompetitive conduct, which can be complicated in platform markets. The next question, then, is whether that is a good thing. I conclude that it is not. The essential facilities doctrine, appealing as it is for solving a host of competitive problems posed by large Internet platforms, is likely to lead antitrust commentators and courts to ignore more significant – but much harder – questions of what constitutes anticompetitive conduct in the context of those markets. As a theory of liability, the essential facilities doctrine shifts attention away from the question of anticompetitive conduct, which is a question that deserves more attention, not less. Instead, the concept of essential facilities is better thought of as a remedy rather than as a distinct theory of antitrust liability.

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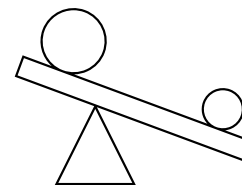


DISPELLING MYTHS: THE ESSENTIAL FACILITIES DOCTRINE IN THE DIGITAL ECONOMY

By Nikolas Guggenberger

The essential facilities doctrine is back. Yet, despite its recent endorsements, the doctrine’s criticisms linger. They range from allegations that monopolies lack incentives to monopolize adjacent markets to doubts about the doctrine’s administrability and fears of error costs. They also include claims of entrenching monopoly power and decry severe limitations of the antitrust remedy. Many of these objections to the essential facilities doctrine are fueled by persistent myths and misconceptions. It is time to move on and leave the debunked myths and disproven misconceptions behind.

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TRINKO MEETS MICROSOFT: LEVERAGE AND FORECLOSURE IN PLATFORM REFUSALS TO DEAL

By Erik Hovenkamp

Large platforms are often accused of refusing to serve (or discriminating against) competing sellers in adjacent product markets. Antitrust law labels such activity a unilateral “refusal to deal” (“RTD”) and evaluates it under a predation-like framework shaped by the two leading RTD cases, *Aspen* and *Trinko*. However, this framework is largely unhelpful in evaluating platform RTDs, because it does not ask the right economic questions. The relevant economic risk raised by platform RTDs is typically that the defendant might be leveraging its control of a dominant platform to foreclose rivals in an adjacent market. Therefore, as an economic matter, they tend to have much more in common with tying cases like *Microsoft* than they do with historical RTD cases like *Aspen* or *Trinko*. This suggests that courts ought to revise the legal standard used to evaluate platform RTDs to better capture economic realities. This would allow for meaningful antitrust oversight of platform conduct without opening the door to the freeriding or administrative concerns often associated with RTD doctrine. It would also likely end the Congressional push for an ill-conceived “self-preferencing” bill that might well do more harm than good.



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THE ESSENTIAL FACILITIES DOCTRINE: FROM LOCOMOTIVES TO SEARCH ENGINES

By Stephen M. Maurer

The Essential Facilities doctrine began as an effort to balance the efficiency of asset-sharing against the need to promote competition. In practice, however, judges have nearly always ignored sharing except to the limited extent that it impacted competition. This bias was not particularly harmful in the Old Economy, where network effects were rare and scale economies limited. But product performance in the Digital Economy often depends on sharing just as much, and sometimes more, than competition. This should remind us to take the frequently subtle tradeoff between sharing and competition seriously. The European Commission's Digital Markets Act (2022) has made the issue still more salient. Requiring judges to consider the benefits of sharing coequally with competition would go a long way toward rationalizing essential facilities case law on both sides of the Atlantic.



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PORTABILITY, NOT DOCTRINE, IS KEY TO UNLOCK USER AGENCY FOR DATA

By Chris Riley

Data is of central importance for users of digital services, and for many years has been the subject of significant attention in the realm of public policy. In the context of the historical common law doctrine of essential facilities, little wonder that many scholars have looked at data. But this is a poor choice of path. Digital data is both created and used within specific contexts, and its value derives from its use within contexts. Looking at personal data through the blunt lens of the essential facilities doctrine risks losing those contexts, and will struggle to reach an effective public policy balance, including taking into proper account privacy considerations. Meanwhile, there have been significant advancements in data portability for personal data, including both greater product offerings and more well-developed public policy principles and understandings. As public policy frameworks for data portability continue to develop, this article will offer some principles to guide those conversations to reinforce and strengthen the efficacy of data portability as a paradigm for governing personal data.



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REVIVAL OF THE ESSENTIAL FACILITY DOCTRINE IS NOT ESSENTIAL; JOINT AGENCY GUIDELINES WILL BETTER STRENGTHEN MONOPOLIZATION LAW

By Bilal Sayyed

The Executive Branch, Congress, and the federal enforcement agencies are focused on the competitive impact of large, allegedly dominant technology platform companies. The House's Competition in Digital Markets majority report recommends major changes to antitrust law, but such changes are unlikely to be adopted. The Federal Trade Commission has adopted an expansive policy statement on the scope of what constitutes unfair methods of competition, but the policy statement appears inconsistent with developments in antitrust law over the past four decades and thus may not be sustainable. As an alternative to legislative change and revival of less credible theories of competitive harm, this article proposes that the antitrust enforcement agencies promulgate Platform Competition Guidelines that articulate a competitive effects analysis within the scope of the burden shifting approach applied in the horizontal merger guidelines.

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The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.



ESSENTIAL FACILITIES AND THE ZOMBIE APOCALYPSE



BY JOHN M. TALADAY¹



¹ John Taladay is a Partner in the Washington office and Chair of the Global Competition Practice of Baker Botts LLP. The author would like to thank Jane Antonio for her contributions and Christine Ryu-Naya for her comments on the article.

I. INTRODUCTION

In most post-apocalyptic zombie movies, the dead bodies slowly rise up, infected by the disease of humanity's past sins, and shamble forward – groaning and lurching – seeking to devour the brains of the living and pass on the infection that has devoured the minds of the zombified . . . just like the essential facilities doctrine.

A growing raft of literature is pushing the idea of using the essential facilities doctrine as a tool to attack perceived competition harms, particularly in digital markets. The argument often goes something like this: “It is put forward that the essential facilities doctrine should be rethought in order to be effectively applied in the [] digital economy, in particular by aligning its application with the underlying economic interests.”² Or like this: “It is high time to revive, renew, and expand the essential facilities doctrine in the digital economy.”³

If we are to apply a competition doctrine to a major sector of our economy, we should choose one that is stable, predictable, adaptable and well-regarded as competition policy. As we shall see, the essential facilities doctrine has none of these attributes. Why would anyone want to exhume this decayed, diseased doctrine and let it devour robust, healthy antitrust minds? Are we, like the movie industry, condemned to merely “reboot” old concepts rather than turning to ideas informed by the economics of today? As explored below, there is not much left to the essential facilities doctrine – if there was ever much there in the first place – and it certainly is not suitable as an organizing principle to solve a new variety of competition concerns.

At its core, the essential facilities doctrine (“EFD”) invariably involves tampering with somebody’s property rights. Historically, as a law-abiding society, we tend to hold the idea of property rights in high regard, ensuring that the property owner is entitled to their peaceful enjoyment of it, and the freedom to determine when they will grant access, with whom they transact business, and on what terms they are willing to do so.⁴ The idea of the EFD is that the property owner, who does not wish to transact with a particular party, must nonetheless provide access to that party (i.e. a party who otherwise has no rights to the property and presumably has made no investment in it) in order to facilitate competition by the other party, normally to compete against the property owner. Not surprisingly, a doctrine forcing a party to give up its property rights has been narrowly construed and applied only in “exceptional circumstances.” And for good reason.

One of those reasons is that forced access is not always consistent with competition. As the U.S. Supreme Court noted, “Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. . . . We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing.”⁵ This view is consistent with the *Colgate* right of a private party to “exercise his own independent discretion as to parties with whom he will deal.”⁶ This tension is also evident in the EU, with the inconsistency between the European Court of Justice cases on EFD and margin squeeze.⁷ But even the ECJ’s EFD decision in *McGill* made clear that the refusal by a party to grant access (in that case a license to intellectual property) cannot constitute an abuse absent exceptional circumstances.⁸

As background, it is interesting to note that while first application of the EFD is often traced back to Supreme Court’s decision in the 1912 *United States v. Terminal Railroad Ass’n*⁹ case, which actually involved a group boycott, the first known use of the phrase “essential facilities doctrine” by the judiciary did not occur until 1977 in *Hecht v. Pro-Football, Inc.*¹⁰ Moreover, the U.S. Supreme Court arguably has never recognized the EFD as a theory of harm. “We have never recognized such a doctrine, and we find no need either to recognize it or to repudiate

2 Inge Graef, *Rethinking the Essential Facilities Doctrine for the EU Digital Economy 2* (TILEC Discussion Paper No. DP2019-028, 2019), <https://ssrn.com/abstract=3371457>.

3 Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237, 238 (2021).

4 Cf., *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

5 *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-408 (2004).

6 *Colgate*, 250 U.S. at 307.

7 See Pablo Ibáñez Colomo, *Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping*, 10 J. COMPETITION L. & PRAC. 532 (2019).

8 Joined Cases C-241/91 P & C-242/91 P, *RTE & ITP v. Comm’n*, 1995 E.C.R. I-743, ¶¶ 49-50.

9 224 U.S. 383 (1912).

10 570 F.2d 982 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978). See Tad Lipsky, *Essential Facilities Doctrine: Access Regulation Disguised as Antitrust Enforcement*, in THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 769, 771, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733729.

it here,” they said in *Trinko*.¹¹ Instead, the doctrine that has become the “essential facilities” concept was really developed by several U.S. Courts of Appeal.

In those cases, courts applied a stringent test before utilizing the EFD to force access to a dominant party’s facilities. The U.S. Courts of Appeal that have adopted the EFD (which does not include all of them) generally apply a four-pronged test: “(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.”¹² Even the first prong of this test, however, is a loaded one. Recall that a *prima facie* showing of monopoly power in the U.S. typically requires market shares in excess of 70 percent, and courts almost never find monopoly power when shares are less than 50 percent.¹³ Also, U.S. courts have been clear that the standard for essentiality is a high one. A dominant firm will almost always possess something its competitors, or potential competitors, want or envy. But courts have been clear that the facility must be more than merely helpful or even highly useful. As the Ninth Circuit noted, a facility is essential “only if control of the facility carries with it the power to eliminate competition in the downstream market.”¹⁴ Thus, even getting past prong one of the assessment is an extremely high hurdle. Competitors also must show that the “duplication of the facility would be economically infeasible” and that denial of a facility would place the competitor at a “severe handicap.”¹⁵

The EU courts also do not go lightly into the ether of the EFD. Under the conditions imposed in the *Bronner* case, in addition to the requirements for dominance, it is necessary that: (1) the refusal is likely to eliminate all competition in the market on the part of the person requesting the service; (2) the refusal be incapable of being objectively justified, and (3) the service in itself be indispensable to carrying out that person’s business, i.e. there is no actual or potential substitute to the requested input.¹⁶ Again, like its U.S. counterpart, there is a lot baked-in to this test, with each factor having its own internal pre-conditions. If anything, the EU courts have been narrowing the EFD doctrine over time. As recently as January 2023 the ECJ refused to apply *Bronner* outside of its narrow facts. Although it had the opportunity to apply the EFD to the intentional destruction of a facility used by a competitor, EFD application was reserved to “in essence, a refusal of access to infrastructure, whereby, ultimately, the dominant undertaking reserves the infrastructure which it has developed for its own use. . . . [and] reserves for itself in pursuit of an immediate benefit.”¹⁷ That was true even where the facilities in question were financed by means of public funds, not by the dominant undertaking itself.¹⁸

Many of the cases that have applied the EFD, both in the U.S. and in Europe, have involved utilities like railroads, ports, telecommunications, and electricity that were constructed either with public funds or through the use of public rights of way.¹⁹ There have been far fewer cases that have applied the EFD to force access to purely private facilities. One prominent example in the U.S. — if you want to call it an essential facilities case — is *Aspen Skiing*,²⁰ a case that sparked considerable controversy and has been declared to be “at or near the outer boundary of [the antitrust laws].”²¹ Thus, one would be wading in very shallow waters by using past experience to further extend the EFD to private facilities like digital platforms.

To contort the rigid, unforgiving framework of the EFD onto the silhouette of modern digital platforms would require some impressive gymnastics. The new raft of papers promoting the EFD as a solution to digital competition problems envisions the mutation of the doctrine, or at least the relaxation of the stringent requirements that courts have imposed. For example, one commentator proposed applying the doctrine and allowing access rights to third parties “[w]here the market provides insufficient alternatives to independent vendors that cannot reasonably

11 *Trinko*, 540 U.S. at 411 (citation omitted).

12 *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

13 See ABA ANTITRUST LAW SECTION, ANTITRUST LAW DEVELOPMENTS 230-31 (9th ed. 2022).

14 *Alaska Airlines v. United Airlines*, 948 F.2d 536, 544-45 (1991).

15 *Twin Labs, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568, 570 (2d Cir. 1990) (citing *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C.Cir.1977)).

16 Case C-7/97 *Bronner*, ECLI:EU:C:1998:569, ¶ 41 (Nov. 26, 1998).

17 Case C-42/21 P, *Lietuvos geležinkeliai v. Comm’n*, ECLI:EU:C:2023:12, ¶ 82 (Jan. 12, 2023).

18 *Id.* at ¶ 87.

19 See, e.g. *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383 (1912) (railroads); Case C-42/21 P, *Lietuvos geležinkeliai v. Comm’n*, ECLI:EU:C:2023:12 (Jan. 12, 2023) (railroads); Case IV/34.689—*Sea Containers v. Stena Sealink*, 1994 O.J. (L 15) 8 (ports); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (wholesale electricity); *MCI Commc’ns v. AT&T*, 708 F.2d 1081 (7th Cir. 1983) (telecommunications).

20 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

21 *Trinko*, 540 U.S. at 409.

replicate the facility themselves. . . .”²² This approach would effectively dispense with any finding of dominance or essentiality, instead requiring only “insufficient alternatives.” Presumably the test to find alternatives to be “insufficient” is a much lower hurdle than to find a facility to be “essential.”

Thus, if there are “insufficient alternatives” to a particular online sales platform, and the platform elects to offer only 52 brands of heavy-duty staplers, then stapler sellers number 53 and up would have an actionable essential facilities claim, irrespective of whether there are in fact other sales channels, other marketing alternatives, or even whether adding that 53rd stapler brand to the mix would have any conceivable competitive benefits.²³ This construction of the law becomes nothing more than a formula for meaningless legal wrangling and vexatious litigation without any promise of improving competition.

Finally, some commentators – perhaps all of them – espouse the use of a modified essential facilities doctrine. They would alter the definition of “essential,” or “refusal,” or “dominant” to make it easier to apply to the “new” economy. This is just saying that we should use the familiar name “essential facilities” but change the legal requirements – in which case all we are doing is creating confusion with the original doctrine. Plus, with a change in the EFD requirements of this magnitude it is not even recognizable as the EFD anymore, but more akin to a barely recognizable spin-off that is given a familiar name, like “Fear The Walking Dead” instead of “The Walking Dead.”

Others would seem to require the passage of new legislation as a mechanism for implementing the EFD to control digital markets, e.g. “regulators and courts must bar discrimination and self-preferencing by platforms and create access rights for third parties.”²⁴ Bear in mind that, to the extent that new regulation is proposed, the adoption of a new regulatory scheme designed to end-run the limits placed on competition law – limits that have been recognized in the law and by the courts applying that law – is the antithesis of competition law. It is giving up on competition law principles and deciding, instead, to dictate an outcome. There are times in our society that it may be necessary to do so, but we should be sure to identify these short-cut solutions for what they are: creatures of governmental market intervention, not tools of competition policy.

I suspect what attracts some commentators to apply the EFD to digital markets is the fact that the EFD, where applicable, grants access to the competitor, and the complaints of some digital market participants often center on access. But the attractiveness of the EFD remedy – i.e. the granting of access – does not imply that the elements of the doctrine are satisfied; that is literally saying that the ends justify the means.

The EFD is not the right cure for digital markets. Let’s not disturb the dead – it never turns out well.

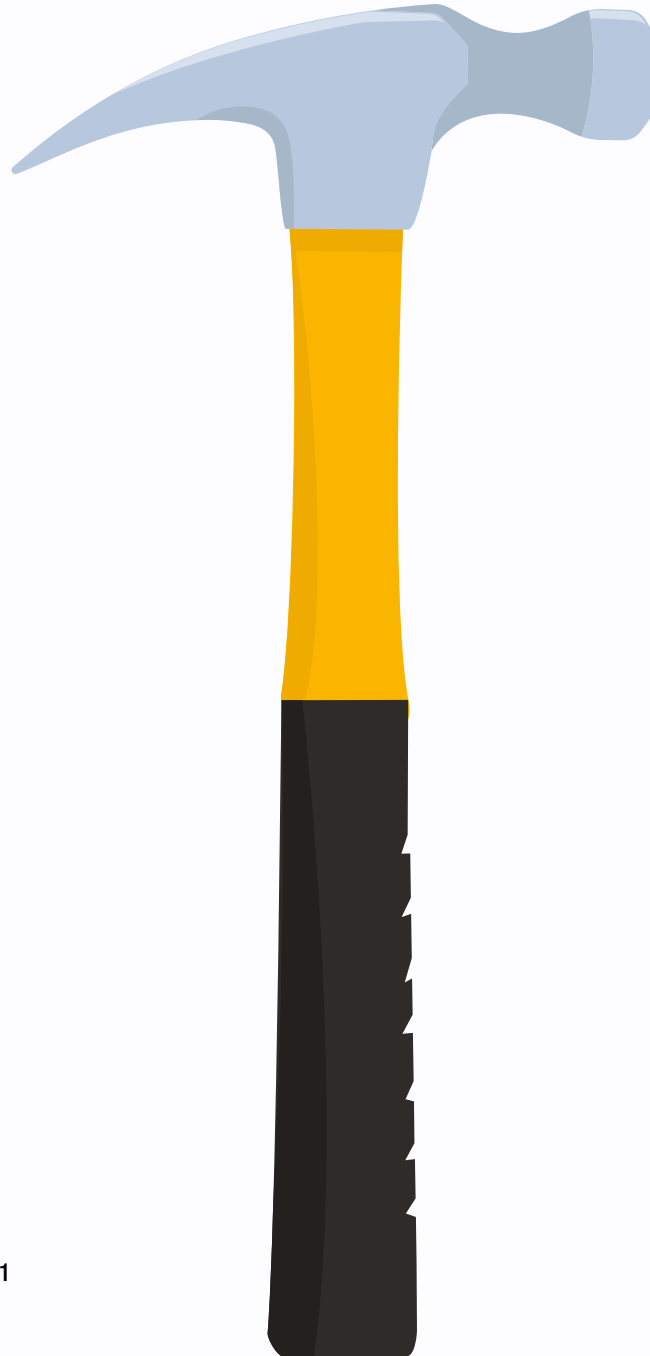
²² Guggenberger, *supra*, note 3, at 317.

²³ In fact, a recent search revealed that the particular online sales platform offers 233 results for “heavy duty staplers.”

²⁴ Guggenberger, *supra*, note 3, at 306.



ESSENTIAL FACILITIES AND THE LAW OF THE HAMMER



BY THOMAS B. NACHBAR¹



¹ F.D.G. Ribble Professor of Law, University of Virginia School of Law.

The essential facilities doctrine has received a resurgence of interest recently. Commentators have been advancing it² for its potential to bring meaningful antitrust regulation to platforms,³ and regulators have similarly suggested either the doctrine itself⁴ or remedies sounding in essential facilities, such as the requirement for monopolists to provide nondiscriminatory access to their platforms,⁵ as ways to tame the commercial power of those platforms. I've described elsewhere why I think the essential facilities doctrine is a poor match for platform regulation.⁶ My larger point here is a more general one about the essential facilities doctrine: that the thing that makes it popular among commentators and regulators is the same thing that suggest that courts and commentators should eschew it. The essential facilities doctrine is too useful to be useful.

Although frequently presented (especially in popular media) in terms such as “a long-standing element of antitrust law,”⁷ the essential facilities doctrine is anything but.⁸ Indeed, given how infrequently it is applied, one hesitates to refer to it as a “doctrine” so much as a “theory” or, because I doubt that it actually serves as a distinct theory of liability at all, maybe just a “concept.”

Essential facilities might be unique among antitrust theories for having its most recognizable references be in the form of criticisms. Phillip Areeda's 1989 article on essential facilities, *Essential Facilities: An Epithet in Need of Limiting Principles*,⁹ arguably remains the definitive work on the doctrine,¹⁰ and the only time the Supreme Court addressed the doctrine by name, it refused to recognize its existence.¹¹ Given the lack of favorable Supreme Court precedent, citations to the doctrine usually point to U.S. Court of Appeals cases like *MCI v. AT&T*, in which the Seventh Circuit laid out the elements of the claim:

- (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.¹²

The doctrine is a creature of lower court decisions, although even there, successful claims are uncommon.¹³

2 E.g. Donald I. Baker & William S. Comanor, *A U.S. Antitrust Agenda for the Dominant Information Platforms*, 35 ANTITRUST 66, 69-70 (2021); Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237 (2021); Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 794-802 (2017); Sandeep Vaheesan, *Reviving an Epithet: A New Way Forward for the Essential Facilities Doctrine*, 2010 UTAH L. REV. 911, 912 (2010).

3 On platforms, see Thomas B. Nachbar, *Platform Effects*, 62 JURIMETRICS J. 1, 8-10 (2021).

4 See Majority Staff of the Subcommittee on Antitrust, Commerce & Administrative Law. of the House Committee on the Judiciary, 116th Cong., *Investigation Of Competition In Digital Markets* 397 (2020); Khan, *supra* note 1, at 794-802. Although a law student when she first suggested the use of essential facilities doctrine for Amazon, Khan currently serves as Chair of the Federal Trade Commission.

5 E.g. American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021).

6 Nachbar, *supra* note 3, at 38-42. The economic characteristics of platforms are such that they have little incentive to deny access solely to leverage themselves vertically into markets that are likely to be more competitive than the platform market. *Id.*

7 Russell Brandom and Adi Robertson, *Apple asks court to rule iOS is not an “essential facility,”* THE VERGE (May 19, 2021), <https://www.theverge.com/2021/5/19/22443616/apple-requests-court-dismiss-epic-essential-facilities-claim-fortnite-trial>.

8 See Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 WISC. L. REV. 359, 360 (describing the doctrine as “charitably speaking, hanging by a thread”).

9 Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989).

10 Of the 1,156 articles in the Westlaw JLR database that mention the essential facilities doctrine as a feature of antitrust law, over 20 percent of them cite Areeda's article on essential facilities.

11 *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004). The Court did acknowledge the existence of a unilateral “duty-to-deal” claim in antitrust law in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438, 455 (2009), although only in the course of rejecting a different (price squeeze) claim. See also IIB Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW ¶ 770 at 199 (5th ed. 2020). (alternatively referring to it as the “essential facility” doctrine and “unilateral refusals to deal”).

12 *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1133-34 (7th Cir. 1983).

13 See generally Phillip E Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 722 at 97-98 (2022 supp.) (collecting cases).

It is, nevertheless, extremely popular among academics. Even though there are arguably *zero* Supreme Court cases applying the doctrine,¹⁴ there are many, many law review articles offering to “revitalize,”¹⁵ “revive,”¹⁶ renew[],¹⁷ or otherwise resurrect the essential facilities doctrine to solve any range of competitive ills, from self-dealing by Internet shopping platforms to social media platform refusals to allow application interfaces. The question is: Given that the doctrine is so rarely applied by courts, why is it so popular among commentators and regulators? And why is a doctrine so popular with the aforementioned commentators and regulators so disfavored by courts?

The answer, I think, lies not in Areeda’s cogent criticism of the essential facilities as a doctrine in need of limiting principles. Areeda himself offered six,¹⁸ which haven’t been as helpful in application as Areeda’s criticism of the doctrine itself. For instance, the first of the six argues that the doctrine should only be applied in “very exceptional” cases while the second concedes the doctrine should be applied when a competitor cannot effectively compete without the facility and cannot practically replicate the facility.¹⁹ Both limitations are hopelessly vague, and the second essentially repeats the requirements of the doctrine as nominally applied, negating the “very exceptional” cautioning of the first. None of the others, I think, have fared much better.²⁰

Many scholars have effectively offered their own limits on the doctrine by focusing on particular subject matter. The doctrine is most frequently invoked with regard to specific industries, or at least industries displaying particular characteristics. It is a staple of commentary on regulation of the Internet,²¹ a field of research closely related to communications law. Perhaps the leading modern proponent of the doctrine, Spencer Weber Waller, has argued (in conjunction with Brett Frischman) that it should be applied more aggressively to “infrastructure,” a set of industries (or resources) defined by economic characteristics that make sharing both easier and particularly beneficial,²² such as roads, communications networks, and electricity grids, but also courts, schools, and basic research.²³ Some of these items (like communication networks and electricity grids) are subject to other regulatory regimes, some (like roads, courts, and public schools) are provided by government and unlikely objects of antitrust regulation, but others (like basic research) open the aperture of antitrust considerably. This is the move underlying Lina Khan’s argument that the essential facilities doctrine should be applied to Amazon. Khan, the current chair of the FTC, relies heavily on arguments like Frischmann and Waller’s to analogize Amazon to a public utility.²⁴ One, of course, could make the same argument for any major Internet platform, such as Facebook,²⁵ or, indeed, for access to any product that exhibits network effects.²⁶

Those subject-matter limits, as much as they might increase one’s comfort with application of the doctrine, come not from the doctrine itself but rather from its proponents; there’s nothing inherent in the essential facilities doctrine that limits its application to firms having those characteristics. Many lower court cases applying the doctrine concern firms that resemble public utilities, such as the MCI case cited above. The Supreme Court actually suggested in *Trinko* that the availability of other forms of regulation (including utility regulation) make those cases *poor* candidates for the essential facilities doctrine,²⁷ but even more significantly, two of the four Supreme Court cases usually cited for the doctrine,

14 Areeda, *supra* note 9, at 847-50; Nachbar, *supra* note 3, at 38.

15 Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1 (2008).

16 See Vaheesan, *Reviving an Epithet*, *supra* note 2.

17 Guggenberger, *supra* note 2, at 314 (describing “inspiration for a renewed essential facilities doctrine”).

18 Areeda, *supra* note 9, at 852-53.

19 *Id.* 852.

20 The sixth, for instance, suggests the doctrine should only be applied when a regulator is available to oversee implementation, *id.*, but the existence of such a regulator, the Court suggested in *Trinko*, was a reason for *not* applying the doctrine. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004).

21 See, e.g. Marina Lao, *Networks, Access, and “Essential Facilities”: From Terminal Railroad to Microsoft*, 62 S.M.U.L. Rev. 557 (2009).

22 According to Frischmann and Waller, Infrastructure resources tend to satisfy the following demand-side criteria:

1. The resource may be consumed non-rivalrously;

2. Social demand for the resource is driven primarily by downstream productive activity that requires the resource as an input; and

3. The resource is used as an input into a wide range of goods and services, including private goods, public goods, and/or non-market goods.

Frischmann and Waller, *supra* note 15, at 12. See also Waller, *supra* note 8, at 361 (arguing that infrastructure theory provides a justification for the theory).

23 *Id.* at 11, 14.

24 Khan, *supra* note 2, at 801-02.

25 Guggenberger, *supra* note 2, at 320-21.

26 See Lao, *supra* note 21, at 559.

27 *Trinko*, 540 U.S. at 412.

Aspen Skiing and Associated Press, involved businesses as about as far from utilities (a ski resort and a newspaper wire service) as imaginable.²⁸

But if the doctrine is poorly specified seemingly unlimited as to its industrial subject matter, it is even less so with regard to the conduct it seeks to police. The trigger for scrutiny under the essential facilities doctrine is a refusal to deal. But a refusal to deal itself tells one very little about the circumstances underlying that refusal. The elements of a Section 2 violation are market power and anticompetitive conduct,²⁹ and consequently, in order for a refusal to deal to be a Section 2 violation, it must be an expression anticompetitive conduct.³⁰ The essential facilities doctrine lumps together refusals to deal that might have very little to do with each other. Both Apple³¹ and Facebook³² have recently been accused of refusing to deal in violation of the antitrust laws, but their business models are completely different and so are the likely reasons (good or bad) for their relative refusals. Any such nuance, though, is lost by labeling either one of them “essential.”

As theories of antitrust become increasingly sophisticated, antitrust needs to pay more attention to anticompetitive conduct, not less, and the essential facilities doctrine, by focusing on whether the facility is essential, shifts the focus of the inquiry away from the reasons for the refusal and toward the refusal itself (or whether the facility is truly essential). There is not, under typical formulations of the doctrine, any distinct requirement that the refusal be anticompetitive.³³ The doctrine is not a method for *analyzing* whether a specific refusal is anticompetitive, it is a *conclusion* that such a refusal is anticompetitive. Areeda correctly noticed this problem in his treatment of essential facilities, suggesting as one of his limits a rule-of-reason inquiry into the refusal, but he provided little guidance on how that would happen,³⁴ for good reason. If one were to conduct a normal Section 2 analysis on the underlying refusal, the essential facilities doctrine would serve no function. The market power inherent in finding that the input is essential combined with an *anticompetitive* refusal would be sufficient for a Section 2 violation,³⁵ obviating the need for the essential facilities doctrine as a distinct theory of liability. That’s why it is so hard to characterize cases like *Aspen Skiing* as essential facilities cases – because the evidence in that case showed conduct (a refusal to sell even at retail and the deviation from a past course of dealing) that could otherwise be characterized as anticompetitive.³⁶ When combined with market power, that refusal would be sufficient to support a claim under Section 2. The essential facilities doctrine only does any work when the plaintiff *cannot* explain how the refusal is otherwise anticompetitive,³⁷ and that itself should be reason for caution.

The potential reach of the essential facilities theory can be demonstrated by reconsidering any number of antitrust cases as essential facilities cases. In *Eastman Kodak v. Image Technical Services v. Eastman Kodak*,³⁸ Kodak had refused to sell (and entered into agreements with suppliers to refuse to sell) Kodak copier parts to independent service organizations (ISOs).³⁹ The parts were essential to the ISOs in order to compete with Kodak in providing service to Kodak copiers, there was no other source for the parts, and Kodak could easily have provided the parts, so that should be enough alone to establish the essential facilities case. But what made the case against Kodak compelling was not the refusal to deal itself but that it was combined with a pattern that otherwise showed that Kodak’s refusal was intended to be, and was, anticompetitive.⁴⁰ *Kodak* could have been an essential facilities case, but if it had been, the underlying conduct the Court found so critical to deciding the case would have been irrelevant.⁴¹

28 Indeed, the application of something resembling utility regulation on a newspaper wire service could potentially raise serious First Amendment concerns. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

29 *United States v. Grinnell Corp.*, 384 U.S. 563, 57071 (1966).

30 *Trinko*, 540 U.S. at 407-09. Areeda and Hovenkamp, *supra* note 8, ¶ 770 at 199 (5th ed. 2020).

31 *EPIC Games, Inc. v. Apple*, 559 F. Supp.3d 989 (N.D. Cal. 2021).

32 *FTC v. Facebook, Inc.*, 560 F. Supp.3d 1, 21-23 (D.D.C. 2021).

33 See *supra* the text accompanying note 12.

34 Areeda, *supra* note 9, at 852.

35 Cf. *Marian HealthCare, LLC v. Southern Illinois Hospital Svcs.*, 41 F.4th 787, 792 (7th Cir. 2022) (Easterbrook, J.) (suggesting that, absent an allegation of market power, it cannot be the case that an input is “essential” for purposes of the doctrine).

36 Whether the refusal was anticompetitive is subject to considerable doubt, and the Court keyed upon features, such as the termination of a prior course of dealing, that made the case very unusual. *Trinko*, 540 U.S. at 409. The case highlights how every refusal to deal is unique and cannot be lumped together under an umbrella doctrine like the essential facilities doctrine.

37 Thus, Areeda and Hovenkamp label such refusals “arbitrary,” an attempt to define actionable refusals to deal negatively. See Areeda and Hovenkamp, *supra* note 9, ¶ 770 at 198.

38 *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 458-62 (1992).

39 *Id.* at 465.

40 *Id.* at 483-85.

41 See Areeda and Hovenkamp, *supra* note 13, ¶772 at 244.

One way to square the essential facilities theory with antitrust doctrine would be to acknowledge the addition of a fifth element in cases like *Aspen Skiing* (or my re-imagined *Kodak*): that the refusal to deal be anticompetitive. That makes sense of the theory, but because a Section 2 violation requires only market power and anticompetitive conduct, the addition of the anticompetitive conduct element essentially transforms the essential nature of the facility into an inquiry into the defendant's market power, as described above.⁴² I actually think the doctrine might be useful for those purposes. The current inquiry into market power, dominated as it is by what Louis Kaplow calls the market share/market power paradigm,⁴³ is both irrational and has led to an anemic understanding of market power.⁴⁴ Using the essentiality of the input as part of the inquiry into market power might be one way the essential facilities concept can contribute to Section 2 analysis.

By shifting the focus away from conduct, the essential facilities doctrine could potentially simplify antitrust cases, except that its other requirements negate any such simplification. Mandating access, and placing a court in charge of monitoring it, places courts in an inherently fraught role.⁴⁵ Managing access is a complicated task on its own. In the late twentieth century, when telephone networks started becoming useful for things other than telephony, the FCC mandated that AT&T provide access for providers of other services to be carried on those networks. But even that comparably simple access mandate gave rise to a years-running set of regulatory proceedings to define and manage those network interfaces.⁴⁶ Access mandates only work if the need for access and the definition of access itself are relatively stable.⁴⁷ In modern Internet platform markets, neither of those things are true. Nor is the business context surrounding access subject to ready and stable definition. The doctrine only applies to refusals to deal with competitors,⁴⁸ but in the modern markets in which proponents would apply the essential facilities doctrine, it is sometimes difficult to identify exactly what the competing products are, much less whether two firms are in competition.

Instead of being a tailored solution to a specific form of anticompetitive conduct, the essential facilities doctrine is a solution in search of a problem – it is a generic, but lightly theorized, form of traditional utility regulation. Like modern information platforms, industrial age monopolies presented a host of problems, from the potential for overcharging to limiting access to both potential customers and competitors. Comprehensive utility regulation could solve *all* of those problems by controlling many aspects of how those firms did business without the need to identify a particular practice. That might be why Lina Khan, after suggesting the essential facilities doctrine as a response to Amazon, later moved on to suggest a different remedy more closely tied to utility regulation – structural separation – to cure Amazon's ills.⁴⁹

And that might be the best lesson for the essential facilities doctrine: that its power is remedial. Mandatory access has been used in previous antitrust cases involving platforms, like the one against Microsoft for its anticompetitive conduct related to Windows and Internet browsers.⁵⁰ Cases like *Otter Tail* and *Aspen Skiing*, and the essential facilities theory itself, might best be considered a category of remedy – access – rather than a distinct theory of antitrust liability.⁵¹ That modification to the essential facilities *literature* would do much to bring it more into line with the Supreme Court's antitrust *doctrine*.

We should be wary of any doctrine with the selectivity of a hammer because it is likely to turn any number of controversial business practices into nails.⁵² The essential facilities doctrine, which has been offered as the solution to so many problems, presents exactly that risk. The doctrine is little more than a direct assault on the notion of anticompetitive conduct, which is an area of antitrust law that requires more attention, not less.

42 See *supra*, the text accompanying note 34.

43 Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 446 (2010).

44 See Thomas B. Nachbar, *Qualitative Market Definition*, 109 VA. L. REV. 373 (2023).

45 See Areeda and Hovenkamp, *supra* note 13, ¶ 774e at 309-13.

46 On the years-long evolution of those requirements, see Glen O. Robinson and Thomas B. Nachbar, COMMUNICATIONS REGULATION 447-60 (2008).

47 Christopher Yoo, *Common Carriage's Domain*, 35 YALE J. REG. 991 (2018).

48 See Thomas B. Nachbar, *The Public Network*, 17 COMMLAW CONSPICUOUS 85 (2008); Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AMER. ECON. REV. 112, 112 (1971).

49 Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019).

50 Daniel L. Rubinfeld, *Access Remedies in High-Technology Antitrust Cases*, in MERGER REMEDIES IN AMERICAN AND EUROPEAN COMPETITION LAW 137, 153-56 (François Lévêque and Howard Shelanski, eds. 2003). See also Herbert Hovenkamp, *Antitrust Interoperability Remedies*, 123 COLUM. L. REV. F. 1, 8 (2023) (comparing the remedy of mandatory interoperability with the application of the essential facilities doctrine in the *MCI* case).

51 See Rubinfeld, *supra* note 50 at 158-59.

52 See Richard W. Brislin, *Cross-Cultural Research Methods: Strategies, Problems, Applications*, in ENVIRONMENT AND CULTURE 47, 73 (Irwin Altman et al. eds. 1980) (describing the law of the hammer).

The question is not whether the essential facilities theory should be its own theory of liability – it clearly should not. Given its moribund status in the courts, the essential facilities concept serves primarily as fodder for conversations among academics, not as a rule of decision in antitrust cases. Because it is being applied so infrequently and unevenly, the real question is whether the concept of essential facilities is *helpful* for understanding antitrust law. Its lack of precision and amenability to being molded to fit virtually any refusal by a dominant firm to deal with its competitors suggests that it is not.



DISPELLING MYTHS: THE ESSENTIAL FACILITIES DOCTRINE IN THE DIGITAL ECONOMY

BY NIKOLAS GUGGENBERGER¹



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The “essential facilities” doctrine is on the cusp of a reawakening in American antitrust law. The doctrine grants competitors the right to access essential facilities of monopolists to the extent that these competitors depend on the facilities and cannot reasonably duplicate them. This approach forced railroad companies and utility providers to share their infrastructure, for example. After a generation of decline, the doctrine is gaining momentum, as it has received prominent endorsements across the political spectrum: The 2020 Democratic House Majority, “Investigation of Competition in Digital Markets,” included the approach in its recommended toolkit to reign in Big Tech, as did its Republican counterpart, the brief report titled “Third Way.” In the same vein, several bills have just been introduced as part of a bipartisan “Anti-Monopoly Agenda for A Stronger Online Economy: Opportunity, Innovation, Choice,” most notably the “American Innovation and Choice Online Act,” sponsored by Rep. David Cicilline (D-RI). Several of the legislative proposals contained elements of access rights as they are core to the original essential facilities doctrine. Even the traditionally antitrust-skeptic business community seems out of lockstep, with smaller enterprises and their interest groups favoring more vigorous enforcement against dominant digital platforms.

This recent shift is remarkable, given skepticism with which U.S. courts have treated the essential facilities doctrine since the early 1990s. In light of the evolving debate about the merits of the essential facilities doctrine, I have [recently addressed](#)² some of the myths that brought about the doctrine’s decline and whose perpetuation still stand in the way of its revival. Among these are the exception-turned-rule one-monopoly rent theorem, the purely theoretical internalizing complementary efficiencies theorem, the overblown concerns about administrability, information aggregation, and error costs, and, finally, the misguided allegation of entrenching monopolies.

Before diving into the persisting myths, however, let me briefly lay out the [case for the essential facilities doctrine in the digital economy](#).³ Economic concentration has increased across industries in the U.S. over the past decades. This development has become especially evident in the digital economy. Just a few platforms dominate the landscape: in e-commerce, there is Amazon; there are two relevant app stores, Apple’s and Google’s; Facebook has a firm grip on social media; and Google has become synonymous with online search. Where the market does not provide reasonable alternatives to essential facilities, goods, or services, access rights can open markets and enable follow-on innovation. This is the logic behind the 1912 Supreme Court ruling in *Terminal Railroad Association*. On the internet, large platforms occupy positions in the economy comparable to the railroads of the late nineteenth and early twentieth century.

For the application of the essential facilities doctrine, let us focus on app stores. Apple would need to be considered a monopolist controlling the app store as an essential facility to fulfill the first prong of the essential facilities doctrine, as originally defined in *MCI Communications*. Many developers do not have sufficient substitutes because users tend to *single home* on one of the OS ecosystems, either Apple’s or Google’s. And these ecosystems are not necessarily interchangeable, because of the different user characteristics. Also consider that certain apps need to have the ability to reach all smartphone users to provide sufficient utility. To fulfill the second prong of the essential facilities doctrine, app developers must be practically or reasonably unable to duplicate the app store’s infrastructure. That inability stands to reason not only because of the incumbents’ size advantages but also because of the connection of the app stores with the operating systems and Apple’s hardware or licensing and tying arrangements in the case of Google.

The third condition for an essential facilities-claim requires that the platform denies a competitor the use of the facility. The distinction between an outright denial of use and inappropriate conditions frequently is impossible to draw. Take Epic’s (ultimately unsuccessful) complaint against Apple, for example. The deplatforming of a developer or their apps, as with Epic and its game Fortnite, can be seen as an outright denial of use. At the same time, Fortnite’s deplatforming is directly tied to Epic’s decision not to comply with the conditions for access that Apple demanded, namely, to refrain from offering alternative direct methods of payment for in-app purchases. Either way, the essential facilities doctrine remains applicable because “[a]greeing to deal on unreasonable terms is merely a type of refusal to deal.”

The fourth and final condition for liability under the essential facilities doctrine opens the assessment to an array of potential justifications, including legitimate business reasons that go beyond the mere profit maximization or desire to exclude rivals. There might be security or privacy concerns as well as objections to the content and features of the applications, for example. Security and privacy concerns may relate to technical deficiencies or business practices. Objections to the content and features of applications may be based on the lack of precautions against hate crimes, incitements of violence, the (mental) health impacts on users, and the protection of children, to name just a few. And in fact, Apple and Google cited Parler’s insufficient content moderation as cause for the app’s delisting in January 2021, following the violent storming of the Capitol building in Washington D.C.

As applied, the essential facilities doctrine does not require incumbents to open their facility free of charge. Also, the operator of the facility may use admission and governance criteria beyond strict technical neutrality. In many instances, strict technical neutrality — even if such

2 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802559.

3 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3703361.

standard were attainable — would diminish the usefulness of the service. Just think of a search engine. Instead, the essential facilities doctrine builds on a normative understanding of non-discrimination, focused on avoiding anticompetitive exclusions.

Finally, the essential facilities doctrine should not be conceptualized as a stand-alone policy response to concentration in the digital economy. In fact, there is often good reason to embrace structural remedies instead of the essential facilities doctrine or alongside the definition of access rights. These structural remedies may focus on horizontal concentration or vertical integration.

I. THE SINGLE MONOPOLY THEOREM

The most prominent critique of the essential facilities doctrine commonly goes by the name single monopoly rent theorem. Incumbent to open their facility free of charge. In fact, the obligation to do so would be counterproductive, as it would undermine the ability of the operator to continue the service. Robert Bork, one of the most prominent figures of the Chicago School movement, argued that a firm could only reap monopoly profits once — hence the name of the theorem. The theorem is intuitive and, stated in the abstract and the simplest setting, true: where there is only a single monopoly rent, it can indeed only be captured once. The relevant question is whether the theorem's assumptions broadly hold in the real world or whether they apply only in limited circumstances.

The hypothesis rests on several assumptions. First, the monopoly power must be absolute; as Johnathan Baker writes, the theorem only holds if a monopolist “has literally no rivals and faces no potential entrants, and if buyers have literally no alternative to the monopolist's products.” Second, complementary products or services in adjacent markets must enter the consumer market in fixed ratios. Third, the adjacent market must be perfectly competitive. Even proponents of restrained approaches to antitrust enforcement acknowledge these assumptions as conditions for the validity of the single monopoly rent theorem. Contention arises over the typicality of conditions that define the boundaries between exceptional circumstances and policy guiding regularity. Newer evidence-based thinking rightly characterizes the theorem's insights as an outlier, applicable in only a small handful of empirical settings. Its qualifying assumptions and exceptions have been shown to be so attenuated that the model represents the exception, not the rule, when describing monopolist incentives to monopolize adjacent markets.

Notably, the digital goods often do not need to be consumed together. To illustrate, consider Amazon. It mainly facilitates the sale of physical and virtual goods. For both types of products, the platform service is not strictly necessary, even if it is deemed essential for the purpose of the essential facilities doctrine. Amazon's (own and third-party) inventory of physical merchandise could also be sold through a variety of traditional brick and mortar stores, from grocery stores to sports outlets and home improvement retailers. And while Amazon sells e-books in its proprietary Kindle format, creating a necessary nexus between the platform and this version of the e-book, the same content can be read in a different format on other e-book readers. Thus, Amazon and similarly situated platforms have an incentive to monopolize secondary markets like those for retail goods and e-book content because they cannot extract full monopoly rents from their market power over the platform services alone.

Revenues from outside sources constitute a further exception. And online, advertising funding is ubiquitous — an argument on which Barbara van Schewick bases her analogue analysis of telecommunication networks. Additionally, the characteristics of data — and specifically data exhaust, generated by observing incidental user behavior — provide an independent basis for the profitability of exclusionary conduct in adjacent markets.

Finally, the single monopoly rent theorem does not account for inevitable agency costs and misaligned incentives within the firm. To be more precise, managers at all levels of the firm face incentives to increase the size of the firm beyond its profit-maximizing scope. Even carefully designed compensation schemes cannot neutralize the appeal of bigness. Social status and power tend to increase with the size of the operation, not only with the operation's profits. Invitations to Davos and Jackson Hole, private audiences with high-ranking government officials, and interview requests are only the most visible perks of bigness and power.

After deducting all the exceptions from the so-called single monopoly theorem, there is not much left — especially in data-driven platform markets. Rather than guidance for default enforcement rules, the theorem describes a theoretical exception with little practical application.

II. THE INTERNALIZING COMPLEMENTARY EFFICIENCIES THEOREM

Opponents of the essential facilities doctrine argue that monopolists benefit from the existence of a functional and competitive adjacent market. Efforts to exclude competitors would be detrimental to their bottom line. This idea is called the internalizing complementary efficiencies theorem.

Indeed, open ecosystems often enable more innovation than closed alternatives, and several successful platforms have chosen open architectures to spur growth in their early stages. Once the market has tipped in favor of one dominant player, the now significant relative size advantage insulates the dominant platform from competition. As a result, the incentive structures change. It can become attractive to close in and push downstream competitors out of the market.

III. ADMINISTRABILITY, INFORMATION AGGREGATION, AND ERROR COSTS

In short, concerns about the administrability of the essential facilities doctrine, about proper information aggregation by courts, and error costs in decision-making are exaggerated and ignore the costs associated with the “market-based” alternatives. To begin with arguments based on the alleged unadministrability, the essential facilities doctrine is an exception — by design. It deviates from the fundamental principle that businesses are free to deal with whomever they please or refrain from doing so. As such, the essential facilities doctrine necessarily will remain limited to discrete cases. The lack of an all-encompassing theory is unavoidable. To increase the level of certainty, the application of the doctrine could be tied to hard(er) criteria or presumptions. More generally, it appears at least curious that concerns about the vagueness of concepts seem to cause little concerns in areas that are arguable more decisive for the future of the country.

Reservations based on courts difficulties in aggregating information and, potentially related, error costs simply lack empirical evidence. Even if one were to accept the allegations of mistakes in individual decisions, these remain anecdotal and fail to account for (potential) false negatives. And again, there are ways and means address these concerns: one might increase sector specific expertise in government agencies and courts, for example. Similarly, if the remedy is perceived to come to slowly, one might accelerate the processes.

IV. ENTRENCHING MONOPOLY POWER AND THE POLITICAL ECONOMY OF REMEDIES

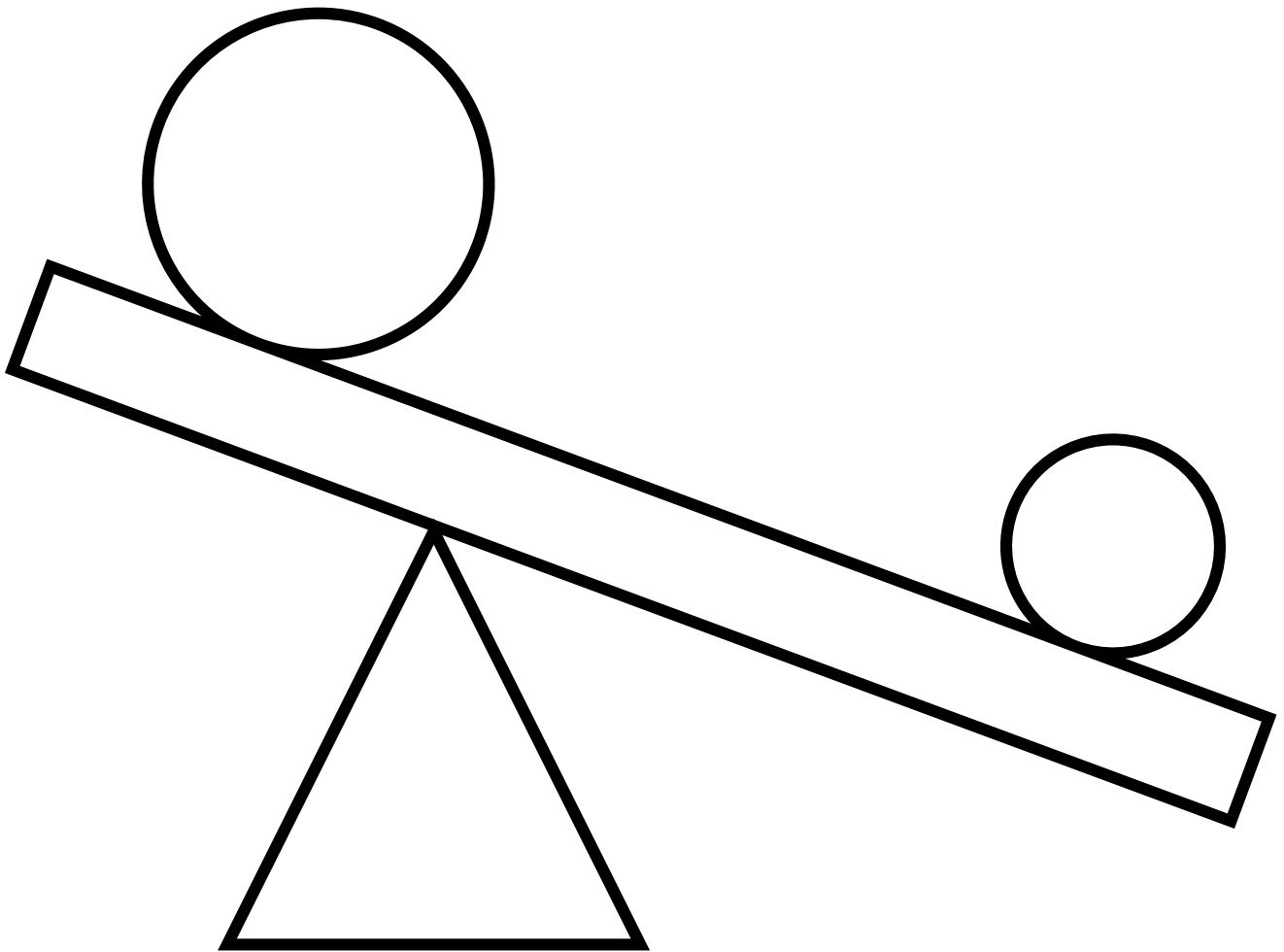
The essential facilities doctrine was originally conceived as a remedy that is less intrusive of property rights than divestitures. While that was undoubtedly true in *Terminal Railroad Association* — the Court effectively gave the defendant a choice between granting access rights and a breakup — it not necessarily always true.

It is undoubtedly true that the essential facilities doctrine does not reestablish competition at the level of the facility. Yet, the remedy does also not entrench monopoly power, as some critics suggest. Other than some regulatory regimes, it does not burden nascent competitors. It only limits the incumbent’s earning and differentiation potential relative to that of competitors.

Overall, much of the essential facilities doctrine’s critique reflects unfounded myths, based on anecdotal evidence that ignores the hypothetical alternatives. It is time to leave outdated theories behind and replace them with evidence-based insights and value-based visions for the digital economy.



***TRINKO* MEETS *MICROSOFT*: LEVERAGE AND FORECLOSURE IN PLATFORM REFUSALS TO DEAL**



BY ERIK HOVENKAMP¹



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I. INTRODUCTION

Can a powerful firm really violate the antitrust laws by merely refusing to do business with a competitor? Officially, the answer has been yes for more than a century.² However, this “refusal-to-deal” (“RTD”) doctrine is highly controversial, and in recent decades the courts have narrowed it almost out of existence.³ But the current debate on antitrust and digital platforms gives us reason to revisit the matter. This is not simply because platform conduct often raises RTD questions, but because it raises different economic issues than most historical cases in this area, and this is helpful in exposing the holes in current law.

Large digital platforms are often vertically integrated into adjacent product markets whose sellers rely on the platform to reach consumers. Such platforms are sometimes accused of refusing to serve (or discriminating against) rivals in adjacent markets. For example, Apple has been accused of removing competitors’ apps from its App Store.⁴ And the FTC recently accused Facebook of analogous behavior.⁵ And many platforms are accused of discriminating against rivals in ways that may impair their ability to make sales over the platform.⁶

Courts evaluate such conduct under the RTD rubric. The most significant RTD precedent is the Supreme Court’s 2004 *Trinko* decision.⁷ Although the decision declined to overturn the Court’s prior decision in *Aspen*, which upheld liability for an RTD,⁸ its overall effect was to narrow RTD doctrine substantially. In justifying this result, the Court emphasized that a widespread “duty to deal” with rivals would create freeriding problems and administrative challenges.

Trinko and its progeny were correct to emphasize the dangers of an overbroad “duty to deal.” And many of the complaints that have historically arisen under this doctrine were indeed poor candidates for antitrust intervention. Nevertheless, the prevailing *Aspen/Trinko* framework is largely unhelpful in evaluating platform RTDs. It developed from historical cases that shed little light on the economic concerns raised by platform RTDs. And, for related reasons, antitrust scrutiny in these cases generally does not create the same freeriding and administrative risks emphasized in *Trinko*.

Instead, the famous *Microsoft* case is a much more helpful model for courts to follow when evaluating platform RTDs.⁹ Microsoft was a vertically integrated firm in a network industry. It controlled both a dominant platform (the Windows operating system) and a popular product in an adjacent market (its Internet Explorer web browser). Microsoft was convicted of an antitrust violation for leveraging its control of the platform to foreclose Netscape and other competitors in the adjacent market.

Of course, *Microsoft* involved a tying arrangement, not an RTD.¹⁰ However, some RTD cases raise essentially the same economic concerns as tying: namely, that a defendant may be exploiting a dominant position in one market to impair competition in another. Indeed, this aligns with most RTD claims involving dominant platforms.

I have recently argued that courts should distinguish RTD cases that raise tying-like concerns of leverage and foreclosure by evaluating them under a revised standard of liability that better captures their economic characteristics.¹¹ In a nutshell, this would treat certain RTDs

2 *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (an RTD may be illegal when it serves a “purpose to create or maintain a monopoly”).

3 In this article, I focus on RTD doctrine and not its sibling, the “essential facilities” doctrine. The two are very similar, and the Supreme Court has refused to acknowledge the latter as an independent doctrine.

4 See, e.g. Sarah Perez, *Apple CEO Tim Cook questioned over App Store’s removal of rival screen time apps in antitrust hearing*, TechCrunch (July 29, 2020) (discussing allegations that Apple removed third-party screen-time monitoring apps shortly after introducing its own screen-time app).

5 This portion of the FTC’s complaint was dismissed, however. Fed. Trade Comm’n v. Facebook, Inc., No. 1:20-cv-03590 (JEB), 2021 WL 2643627 (D.D.C. June 28, 2021).

6 Committee on the Judiciary of the House of Representatives, *Investigation of Competition in Digital Markets, Part I* (117th Congress, 2022), <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

7 *Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

8 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

9 *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

10 Microsoft used a combination of vertical agreements and software design choices to tie its Internet Explorer web browser to its Windows operating system. This was found to exclude competing browsers, such as Netscape. *Id.*

11 Erik Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 Yale L.J. 1483 (2022), <https://papers.ssrn.com/abstract=3889774> [hereinafter Hovenkamp, *Duty to Deal*]; Erik Hovenkamp, *Platform Discrimination Against Rivals: An Economic Framework for Antitrust Enforcement*, J. Corp. L. (forthcoming, 2023), <https://papers.ssrn.com/abstract=4323207> [hereinafter Hovenkamp, *Platform Discrimination*].

(including most of those involving platforms) as similar to tying. By contrast, all other RTDs would continue to be evaluated under a conservative standard verging on *per se* legality. This two-track approach would allow for meaningful antitrust scrutiny in meritorious cases without creating freeriding or administrability problems.¹²

Given that Section 2 of the Sherman Act is usually viewed as less formalistic than other antitrust statutes, one might think that courts would already allow plaintiffs to challenge some RTDs as de-facto vertical restraints. Indeed, courts have taken an analogous approach when evaluating other types of unilateral conduct.¹³ But, to date, courts have consistently rejected such efforts in RTD cases, instead adhering to the *Aspen/Trinko* framework.¹⁴ (The FTC's case against Facebook was a prominent recent example of this.¹⁵) As detailed below, this creates a huge mismatch between the questions courts ask to determine liability and the relevant economic concerns raised by the defendant's conduct.

As this reflects, current law's treatment of RTDs is highly formalistic and mechanical. This prevents it from seriously considering the possibility that some RTDs might raise very different economic questions than historical cases like *Aspen* or *Trinko*. What explains this obstinance? In the decades preceding *Trinko*, RTD doctrine acquired a (largely deserved) reputation for being unprincipled and potentially harmful. Courts worry that any expansion of the doctrine will necessarily reintroduce the freeriding and administrability problems that *Trinko* sought to eliminate. This fear is unwarranted, however. The approach advocated here would expand antitrust scrutiny only in cases that raise essentially the same concerns as tying and related vertical restraints — practices that already receive meaningful scrutiny under Section 2 (at least compared to RTDs¹⁶).

Questions about antitrust reform and platform RTDs are especially timely given that Congress is showing interest in the subject. A bipartisan coalition of lawmakers recently proposed a bill that would target platform RTDs, including relatively mild forms of “self-preferencing.”¹⁷ This project has been lauded by the popular press and progressive political commentators. However, for reasons I have discussed elsewhere, the bill is poorly designed, and could cause significant collateral damage to competition and consumers.¹⁸

In fact, there is no need for complex new legislation to address platform RTDs. The economic and legal foundations needed to evaluate them already exist, at least in broad outline. They predominate in cases like *Microsoft*. An effective policy toward platform RTDs merely requires courts to start building upon those familiar foundations.

The balance of this article begins by discussing why RTD law became so controversial and how the law and has evolved in response. I then discuss how RTDs sometimes emulate the economic effects of tying arrangements (particularly in platform cases); how current law fails to evaluate them in a sensible way; and how courts could do better. The final section offers some thoughts on how courts might be persuaded to adopt this approach before concluding.

II. THE TROUBLED HISTORY OF RTDS

There are good reasons why RTD law became controversial. For a long time, it was highly amorphous and open-ended, lacking concrete rules for courts to apply. Absent sensible limitations on liability, RTD doctrine can be abused as a ticket to freeride. The result is that private plaintiffs sometimes claimed to be the victims of exclusionary conduct merely because a larger competitor declined to grant them unfettered access to its

¹² Hovenkamp, *Duty to Deal*, *supra* note 11.

¹³ See notes 35-37, *infra*, and accompanying text.

¹⁴ Some cases (e.g. *Kodak*) involve *both* an RTD and some tie-like conditional dealing with customers. In these cases, courts are usually willing to treat the conduct as a tie. But absent any such conditional dealing with customers, courts generally apply the standard RTD framework. See *id.* at 1519-1523.

¹⁵ The FTC attempted to portray Facebook's RTD as a kind of “conditional dealing” (an attempted analogy to the famous *Lorain Journal* case). But the court rejected this, instead applying *Aspen/Trinko* and dismissing the RTD claim. *Fed. Trade Comm'n v. Facebook, Inc.*, No. 1:20-cv-03590 (JEB), 2021 WL 2643627 (D.D.C. June 28, 2021). Similar allegations in a revised pleading were again dismissed, although the FTC's merger claim survived. *Fed. Trade Comm'n v. Facebook, Inc.*, 581 F. Supp. 3d 34, 57-60 (D.D.C. 2022).

¹⁶ All exclusion cases (including tying cases) are hard to win. But, as a practical matter, most circuits treat RTDs as essentially legal *per se*. The same cannot be said of Section 2 tying cases, as evidenced by decisions like *Microsoft*.

¹⁷ S.2992 (The American Innovation and Choice Online Act), <https://www.congress.gov/bill/117th-congress/senate-bill/2992/text>.

¹⁸ Erik Hovenkamp, *Proposed Reforms in Big Tech: What Do They Imply for Competition and Innovation?*, CPI Antitrust Chronicle (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4127334.

core technology or other resources.¹⁹ These plaintiffs were usually small firms that were unable to develop a viable competing product on their own. Fortunately, the most egregious freeriding efforts were rarely successful. Nevertheless, jurists and scholars were justifiably frustrated by RTD doctrine's lack of clear, sensible limiting principles, which would have made such cases easier to purge.²⁰

Such freeriding efforts could chill investment in valuable technologies, as a duty to share new technology with one's rivals may substantially reduce the private value of developing it. This is the most important policy concern surrounding RTD doctrine.²¹ The other significant concern surrounds administrability. Courts may not be equipped to determine the price or other terms of compulsory dealing — a task normally assigned to technocratic regulators, not generalist judges.²²

These policy concerns boiled over in *Trinko*, which sharply narrowed RTD doctrine, as noted above. Following *Trinko*, lower courts have defined the scope of liability narrowly around the specific facts of *Aspen*.²³ Under this regime, RTDs are viewed as a form of predation, analogous to predatory pricing. Consequently, in most circuits the primary focus is on whether the defendant's RTD caused it to sacrifice short-run profits, and, if so, whether this indicates an anticompetitive purpose.

Specifically, most circuits now require a showing that: (1) the defendant and its rival had a history of prior voluntary dealing before the defendant refused to continue such dealings; (2) this refusal caused the defendant to sacrifice profits in the short run; and (3) the only conceivable rationale for this sacrifice was to reap monopoly profits in the long run by excluding the rival.²⁴

There are a few things worth noting about this framework. First, the standard is no longer vague and open-ended; it is now quite specific and narrow. Second, it is extremely hard to satisfy; indeed, no plaintiff has won a final judgment since *Trinko*.²⁵ Third, the doctrine focuses largely on the defendant's intent or purpose, with comparatively little focus on actual competitive effects.²⁶ This is in contrast to how most types of conduct are evaluated in antitrust. Typically, antitrust analysis focuses primarily on competitive effects, and there are no special tests required to establish anticompetitive intent.²⁷ Finally, note that this standard bears no resemblance to Section 2 tying analysis. It does not contemplate the existence of separate products or an effort to exploit power in one market to foreclose rivals in another.

III. RTDS THAT RESEMBLE TYING

The following two principles are fundamental in antitrust. First, a firm does not violate the antitrust laws by earning a monopoly through competition on the merits. Second, even if a monopoly is earned on the merits, it is unlawful to exploit that monopoly to foreclose competition in a separate market. The latter is the basic premise of tying claims.

The problematic freeriding cases discussed in the previous section arose because RTD doctrine historically did a poor job of upholding the first principle mentioned above. It left open the possibility that a firm might be required essentially to give away a monopoly it earned on the merits through compulsory sharing of its core technology with rivals.

19 For example, in *Morris*, the defendant PGA Tour had just developed a technology for tracking its golf tournament scores in real time. The plaintiff, a small media company, sued the PGA for refusing to let it publish the scores (for free) before the PGA publicly released them. In effect, the plaintiff sought to be the primary beneficiary of the PGA's own score-tracking technology. Fortunately, the plaintiff's claim was rejected. *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1294 (11th Cir. 2004).

20 See, e.g. Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1990).

21 See, e.g. *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004) ("compelling such firms to share the source of their advantage . . . may lessen the incentive . . . to invest in those economically beneficial facilities.").

22 *Id.* ("Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity and other terms of dealing — a role for which they are ill suited.")

23 For a detailed discussion of post-*Trinko* RTD doctrine, see Hovenkamp, *Duty to Deal*, *supra* note 11, at 1498-1502.

24 See, e.g. *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1074-75 (10th Cir. 2013) (Gorsuch, J.); *FTC v. Qualcomm Inc.*, 969 F.3d 974, 994-95 (9th Cir. 2020).

25 A plaintiff did recently win a final judgment in district court, but it was reversed on appeal. See *id.* at 982.

26 This is because an RTD is not deemed unlawful unless it was undertaken for an anticompetitive purpose, regardless of its actual effects on competition. See, e.g. *Simon & Simon, PC v. Align Tech., Inc.*, No. 1:19-cv-00506-LPS, 2019 WL 5191068, at *5-6 (D. Del. Oct. 15, 2019) (RTD liability requires an "anticompetitive purpose" and this renders it "underinclusive" in the sense that "some refusals . . . evade antitrust scrutiny even when they actually have anticompetitive effects") (citing *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1076 (10th Cir. 2013)).

27 An exception is predatory pricing, which modern RTD doctrine is modeled after.

Contrast this situation with RTDs that resemble tying in terms of their economic effects. In these cases, the defendant has a monopoly over some “primary” product (e.g. a platform), but the plaintiff-rival does not compete with that product. Rather, the rival operates in some adjacent “secondary” product market (e.g. a good sold over the platform). The rival does not seek the defendant’s help to develop a viable product — it has already done so on its own. However, sellers in the secondary market rely on the primary product to some extent to reach consumers.²⁸ The antitrust claim alleges that the defendant is exploiting its control of the primary product to distort competition in the secondary market (e.g. by excluding them from the platform). The desired relief is an injunction requiring the defendant to let rivals access the primary product on the same terms as other customers.²⁹

In such a case, antitrust scrutiny is manifestly consistent with the second principle mentioned above. It also upholds the first principle, because the desired remedy would not take away the defendant’s monopoly over the primary product; it would just prevent the defendant from using that monopoly to foreclose competitors in the secondary market. Finally, this relief would not be difficult to administer, as the court need not come up with the terms of trade on its own.

To underscore the close connection between these RTD cases and tying arrangements, consider a hypo involving a slight change in the facts of *Microsoft*.³⁰ Suppose that Windows came with an app store, and that users had to obtain all third-party software programs through this store. In that case, Microsoft could have excluded competing browsers like Netscape by simply refusing to let them onto its app store. This is an RTD, but it generates the same competitive effects a literal tie of Windows and Internet Explorer.³¹ And the desired remedy in this hypo (an order to let the browsers onto the app store) would act just like an injunction of that tie. Finally, there is no meaningful sense in which Netscape might be called a “freerider” in this hypo. It developed a popular competing browser entirely on its own.

As this demonstrates, an RTD may be largely equivalent to a tying arrangement in terms of its economic effects. However, the formalistic nature of RTD doctrine means that the law treats the two completely differently. This leads to absurd results.

Continuing with the hypo, the operative change in facts means that the case would not turn on whether Microsoft was using its OS monopoly to foreclose rival browsers—the main focus of the actual *Microsoft* case. Instead, the case would turn on the *Aspen*-inspired predation elements discussed in the previous section.

For example, if Microsoft had begun excluding rival browsers from the moment it introduced its app store, then the antitrust claim would necessarily fail. This would negate the “prior voluntary dealing” element of the *Aspen/Trinko* framework. It is hard to overstate how nonsensical this would be. It would suggest that foreclosing rivals in an adjacent market is automatically lawful so long as you initiate it at the earliest opportunity.

Even if the prior dealing element were satisfied, this would merely shift the court’s attention to the profit sacrifice element. This too likely would have resulted in the complaint failing, as there was not strong evidence that Microsoft had sacrificed profits.³² That would be problematic, since antitrust economists have long recognized that profit sacrifice tests are generally unhelpful.³³ Fortunately, the question of whether Microsoft sacrificed profits did not play a major role in the actual *Microsoft* decision.

Ultimately, what matters is the actual competitive effect of the defendant’s conduct, not tenuous proxies for anticompetitive intent. Intent evidence can sometimes be useful when evidence on competitive effects is ambiguous; but it should not be the primary concern. This is consistent with how courts evaluate tying and other contractual restraints. They ought to take the same approach toward RTDs that raise substantially the same competition concerns as tying.

What would this approach look like in practice? The first step would be to verify that the defendant’s conduct does indeed raise the kind of intermarket leverage and foreclosure concerns that underly tying claims.³⁴ As in a typical Section 2 tying case, this requires showing that there

28 For example, they may use the primary product for distribution or marketing services.

29 This assumes that the defendant voluntarily sells the primary product to noncompeting third parties. For administrative reasons, it may be appropriate to limit antitrust scrutiny to such cases. See note 35, *infra*, and accompanying text.

30 This hypo is borrowed from Hovenkamp, Platform Discrimination, *supra* note 11.

31 Both strategies make it difficult or impossible for consumers to use a rival browser on a Windows machine.

32 See, e.g. Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms*, 72 Antitrust L.J. 3, 56-7 (2004); Jonathan M. Jacobson & Scott A. Sher, *No Economic Sense Makes No Sense for Exclusive Dealing*, 73 Antitrust L.J. 779, 794-95 (2006).

33 In particular, most types of exclusionary conduct do not necessarily require a profit sacrifice, nor does a profit sacrifice necessarily indicate anticompetitive animus. See, e.g. Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 Yale L.J. 209, 224 (1986).

34 I discuss this in detail in Hovenkamp, Duty to Deal, *supra* note 11, at 1539-44.

exist separate product markets: a primary one in which the defendant is dominant and an adjacent secondary market in which it competes with the plaintiff-rival. Additionally, for administrative reasons, it may be appropriate to require that the defendant voluntarily offers the primary product to third party customers (i.e. that it is selectively refusing to give rivals the same access).³⁵

This would establish that a tying-like analysis is a good fit, and it would screen out the sort of freeriding cases considered above. To win the case, the plaintiff would have to establish anticompetitive harm. This requires assessing the risk of appreciable foreclosure in the secondary market and considering any relevant defenses. I discuss these and other practical issues in a separate article.³⁶

IV. FINAL THOUGHTS

The baggage surrounding RTD claims is weighty, and calling for the doctrine's expansion is usually a good way to elicit eyerolling within antitrust circles. But the idea that some RTDs should be treated as similar to tying is not only sensible as an economic matter, but it is also consistent with how antitrust already treats other forms of unilateral conduct. For example, cases alleging an exclusionary product design are often treated essentially as tying cases.³⁷ And so-called "conditional refusals" to deal (with *customers*) are often treated as de-facto vertical restraints under Section 2.³⁸ The logic that unifies such examples is that if unilateral conduct behaves like a vertical restraint then it makes sense to treat it as such. That courts do not employ this approach in RTD cases is the exception, not the rule.

The most pressing reason to consider this approach is that it provides a natural way to address the widespread concerns surrounding platform RTDs. The public can see that existing antitrust law does not meaningfully constrain such conduct and wants to see something done about it. That is a perfectly reasonable reform project. But the ham-fisted solution proposed by Congress is not much more appetizing than the *status quo*.

It would be better for the courts to develop a workable framework for addressing platform RTDs. But that is easier said than done. It would require the courts to acknowledge that existing law needs revision, which they rarely do. However, the courts have always been adamant that it should be economic considerations and not legalistic formalities that shape the substantive content of antitrust law. And, for the reasons outlined above, this principle cuts in favor of revision.

However, I suspect that such reform will not occur if plaintiffs (particularly the antitrust agencies) continue to play within the existing rules — to argue for liability within the existing RTD framework (or to argue that an RTD is not actually an RTD, as the FTC recently attempted³⁹). Instead, we need a plaintiff to ask the courts directly to revisit the *Aspen/Trinko* framework as it applies to platform RTDs, and to consider the possibility that decisions like Microsoft might have much more to offer us in these cases.

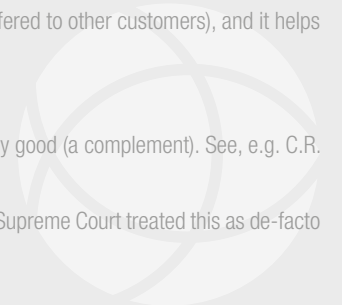
35 This avoids the need for the court to stipulate the price or other terms of compulsory dealing (as the court can just copy the terms offered to other customers), and it helps to prevent difficulties or ambiguities in establishing the "separate markets" requirement. See *id.* at 1530-31, 1542-43.

36 Hovenkamp, Platform Discrimination, *supra* note 11.

37 Typically the defendant is accused of redesigning its primary product to make it incompatible with competing versions of a secondary good (a complement). See, e.g. *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1367 (Fed. Cir. 1998).

38 A famous example is *Lorain Journal*, where a monopolist refused to serve any customers who transacted with its lone competitor. The Supreme Court treated this as de-facto exclusive dealing. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

39 See note 15, *supra*.



THE ESSENTIAL FACILITIES DOCTRINE: FROM LOCOMOTIVES TO SEARCH ENGINES



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Like most areas of law, antitrust constantly raises new and unexpected fact patterns, followed by frantic scrambles as judges and scholars propose doctrines to fill them. Usually these proposals are either discarded or become standard within a few years. Not so the essential facilities doctrine. It has been fifty years since Prof. A.D. Neale first proposed the idea,² while the Supreme Court cases he relied on go back over a century. Yet his suggestion remains in limbo, neither fully recognized nor altogether extinct. The critics are at least superficially right to say that essential facilities overlaps established doctrines like predation and concerted refusals to deal. Yet despite this, its special focus on large assets and returns to scale still speaks to many practitioners. Somehow, they think, antitrust law would be incomplete without it. And so it lingers.

The reason is a freak of history. Congress's decision to construct the Sherman Act around previously undefined concepts like "monopolization" and "restraint of trade" created a gap for judges to fill. But in the common law, gap-filling typically starts with the easiest cases and saves the hard ones for later. Looking back, the problem for essential facilities was that the easiest cases are all digital – and would not exist until the late 20th Century. This forced judges into the messiness of the physical economy first, producing a blizzard of caveats and *ad hoc* reasoning that have confused the subject ever since. It is only in the last decade that the doctrine's underlying simplicity has started to emerge.

The Sherman Act bans illegal "restraints of trade" and Monopolization." But just what, exactly, do those phrases mean? It took twenty years for the Supreme Court to hit upon a solution. *Standard Oil* (1911)³ invoked what we now call classical microeconomics to rationalize the Sherman Act's categories around the concept of "competition," itself justified by the economist's logic of keeping prices near the cost of production. The gloss has been wonderfully durable.

Even so, it took the Court less than a year to find its limits. It was fine to say that competition by small firms could keep prices near their costs of production. But that ignored "increasing returns to scale" or, less formally, "synergies." On the supply side, these usually meant scale economies that let large firms produce goods more cheaply than small ones. In theory, this implied that a monopolist could sometimes sell goods more cheaply and in greater quantity than smaller firms in a fully-competitive market. Meanwhile, on the demand side, the synergies included what we now call "network effects" i.e. the value consumers receive from being able to buy goods and services from a single source. This could leave consumers better off than facing a myriad of small suppliers. The point in both cases was that judges had to pay attention *both* to competition *and* synergies. Conversely, focusing on competition alone could sometimes destroy value.

The saving grace, in the first years of the 20th Century, was that the problem seldom came up. This was nearly always true for scale economies, which usually encountered diminishing returns fast enough for several companies to compete in the same market. Today we know that network effects typically raise bigger issues. But at the time, these were sufficiently rare that courts could usually escape any serious trade-off between competition and synergy.

Still, law has a genius for finding hard cases. Less than a year after *Standard Oil*, *Terminal Railroad* (1912)⁴ forced this awkward gap onto the Court. The issue was railroads. Passengers who needed to change trains did not want to rush cross-town from one company's station to its competitor's. This immediately suggested that unification could generate enormous value – a network effect – for consumers.

The *Terminal Railroad* decision has been paraphrased so often that it is easy to forget just what the Court said. Modern accounts typically claim that defendants controlled the only railroad bridge for westbound trains crossing into St. Louis. In fact, the city was served by two bridges and a ferry, all of which had formerly competed against each other. Defendants, all railroad companies, had joined together to purchase all three assets and were now accused of trying to exclude their competitors. Federal procedure being different in those days, the case had been tried before a four-judge panel that had deadlocked without producing an opinion. On appeal, the parties called on the US Supreme Court to decide whether defendants' conduct violated Sections One and Two and, if so, what could be done about it. Reviewing the record below, the justices were especially moved by an expert witness named Albert Perkins who testified that unification had created enormous value. This persuaded the justices that Congress could not have wanted the Sherman Act to stand in the way of consumers. Their reasoning is worth quoting:

"If, as we have already said, the combination of two or more mere terminal companies into a single system does not violate the prohibition of the statute against contracts and combinations in restraint of interstate commerce, it is because such a combination may be of the greatest public utility. But when, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the act, in that it constitutes a contract or combination

² A.D. Neale, *The Antitrust Laws of the United States of America: A Study of Competition Enforced by Law* (2d ed. 1970).

³ *United States v. Standard Oil Co.*, 221 U.S. 1 (1911)

⁴ *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).

in restraint of commerce among the states and an attempt to monopolize commerce among the states which must pass through the gateway at St. Louis.”

The first sentence plainly says that the Sherman Act does not forbid *all* agreements to merge rail facilities “because” – the word is significant – this offers “the greatest public utility.” Here the Court recognized what was already clear from economic theory, that there were cases where the synergies at stake outweighed any possible damage to competition. The second sentence then goes on to say that some agreements – those that fail to offer access to all competitors – are nevertheless illegal. Finally, the passage is also notable for what it does not say. While the Sherman Act certainly addresses voluntary unification, it does not *compel* sharing unless and until the parties attempt it.

Beyond these general principles, though, it was only natural for the justices to ask if the tradeoff between sharing and competition could be finessed in the case before them. Once again, Perkins came to the rescue. Defendants, he pointed out, had already established a jointly-owned company to operate their facilities. Why not open ownership to any railroad willing to share the costs? This would immediately end discrimination against the new owners. For its part, the Court improved Perkins’ idea by adding two additional stipulations. First, they barred the operating company from paying dividends. This meant that the owners could never get any part of their access fees back, creating a powerful incentive to keep the operating company’s charges as low as possible. This would force the railroads would perform the same cost-containment function that the government normally pays regulators to do. And second, if the defendants objected to Perkins’ scheme, the Court would not force them but instead order divestiture. This immediately removed any danger that the Court’s scheme might turn out to be impractical.

It is hard to exaggerate the scheme’s elegance. All the same, the justices probably thought their new precedent would seldom be used. They knew, of course, that lawyers would invoke the argument to defend mergers among competitors. But railroads were an outlier in the early 20th Century, and the advantages of unification for most industries were vastly smaller. Then too, today we know that the Perkins scheme was flawed. As Prof. Scotchmer has shown, *any* rule that allocates access fees across multiple users automatically leads to some combination of new entry barriers and above-cost pricing.⁵ This did not matter much for *Terminal Railroad* because the network effects were so large. But for close cases competitive effects would often predominate.

The Court did not return to *Terminal Railroad* until William O. Douglas’s familiar concurrence in *Associated Press vs. United States* (1945).⁶ The Associated Press (“AP”) was a newsgathering cooperative owned and funded by hundreds of local newspapers. This created a vast synergy for members, who could never have gathered as much news on their own. But AP also let existing members veto membership applications from competing crosstown newspapers. The Court struck down this practice and ordered AP to repair the injury by admitting applicants who had been previously turned away. Still, the Court was careful to leave open the question of whether AP could freeze all new memberships beyond that. So while ending discrimination was good for competition, the case did nothing for synergies.

Justice Douglas was the only member of the Court to address *Terminal Railroad*. Ignoring his predecessors’ suggestion that synergy might sometimes trump competition, Douglas seems to have assumed that courts could always find some way around the tradeoff. But if that were true, it was enough for judges to worry about competition while deferring synergies, if at all, to the relief stage. And indeed, later cases quickly adopted this pattern. Where *Terminal Railway* had suggested that sharing might sometimes be necessary *despite* damage to competition, cases like *Lorraine Journal* now focused instead on whether access was needed to *promote* it. This turned the inquiry into a discussion about leveraging and predation. Judges would have known, of course, that there were cases where natural monopoly, say, made synergies too big to ignore. Presumably they thought Congress could address these special cases outside the Sherman Act.

Finally, the Court left the biggest question of all unanswered: Could AP freeze its *total* membership at current levels provided it stopped discriminating? Had such a case been brought, the synergies would have been even stronger than in *Terminal Railroad*. After all, a bridge can only accommodate so many railcars, while press reports can be shared with unlimited numbers of newspapers and readers. So the argument from synergy would have been that opening AP’s membership would produce more news at less cost per reader. Against this, the argument for competition would have held that forcing outsiders to create a rival organization would make AP work harder. Yet that would have been a tough sell: Given that AP was already quite efficient, further gains were bound to be limited, and almost certainly dwarfed by

5 For a rigorous analysis of how different sharing arrangements support above-cost pricing and/or deter entry, see Stephen M. Maurer and Suzanne Scotchmer, “The Essential Facilities Doctrine: The Lost Message of Terminal Railroad,” 5 *California Law Review: Circuit* 278 (2014), at pp. 315ff. Available at http://www.californialawreview.org/wp-content/uploads/2014/10/MAURER_278.pdf.

6 *Associated Press v. United States*, 326 U.S. 1 (1945).

the resources that a new competitor would waste trying to duplicate AP's existing coverage. In practice, the one thing we know for certain is that the market vastly preferred synergy to duplication: When AP opened its membership a few months later, the entire industry joined.⁷

That was where matters stood when Prof. Neal came along. His timing was impeccable: By 1970, network effects were proliferating across the economy. The result was a decade of new cases culminating in the Seventh Circuit's decision to embrace Neal's brainchild in *MCI v. American Telephone & Telegraph*.⁸ On the face of things, *MCI* should have been a synergies case: Everything about competitors' need to access AT&T's "Bell Network" screamed "network effects." But Douglas cast a long shadow: Each of the Seventh Circuit's four elements – control of an essential facility, competitors' inability to duplicate it, owners' refusal to share, and feasibility of sharing – focused on "anticompetitive conduct." This left synergies, at best, a subsidiary consideration: Not so much goals in their own right as handmaidens to competition. Yet despite this, litigators continued to sense something special about large facilities that could only be built once. This led later courts to wander off into open-ended policy discussions as if the Seventh Circuit's elements had not settled anything after all. As Prof. Areeda wrote, this made essential facilities more "epithet" than doctrine.⁹ Finally, feasibility continued to pose thorny problems. Perkins' trick worked best for freestanding objects like bridges and ferries. But most firms in the physical economy processed raw materials through a series of highly integrated operations to a final product. Even supposing that one of these steps offered large scale economies, the operations were usually too interconnected to be spun off. One could, of course, ask what each step cost. But that was a task for government regulators, not judges.

These difficulties could only make judges nervous. Even when plaintiffs won, courts were careful to define the doctrine as narrowly as possible. Here the most consequential examples were *Otter Tail* (1973), where the Supreme Court accepted forced sharing because government regulators would review whatever prices were set, and *Aspen Skiing* (1985), where the justices justified sharing because defendants had done it in the past. Small wonder, then, when the Court's *Trinko* (2004) opinion announced that the doctrine had reached its "outer limits" in *Aspen*, and might not exist at all.

And yet, the essential facilities doctrine refused to die. Even as American judges expressed doubts, Europe had begun embracing it in cases like *Commercial Solvents* (1974),¹⁰ *Port of Rødby* (1994),¹¹ and *Bronner* (1998).¹² Like their US counterparts, these early cases focused mostly on physical scale economies and the feasibility of sharing. Soon however, Europe went beyond US examples¹³ by turning to information goods. The fact that the intellectual property in these cases was slender – including, for example, doubtful rights in television listings [*Magill* (1995)¹⁴], the "brick structure" of a commercial database [*IMS Health* (2001)¹⁵], and the arbitrarily-named commands that software developers needed to access an operating system [*Microsoft* (2007)¹⁶] – only underscored the case for sharing.

By now the clear argument for synergy in cases like *Terminal Railroad* and *AP* had bogged down in a host of much more ambiguous fact patterns where the synergies were modest and the trade-offs with competition uncertain. The surprise in the digital economy is that the trend has reversed itself, even if so far the cases are mostly hypothetical. Consider for example, Google. A pathbreaking analysis by Klein et al.¹⁷ recently showed that the company's searches are indeed better than any competitor's, and that this explains the company's outsized ninety-three percent market share.¹⁸ What is striking, though, is that Google's quality advantage does not come from cleverness.

7 Anon., "The Associated Press," Encyclopedia.com, (2018), available at <https://www.encyclopedia.com/social-sciences-and-law/economics-business-and-labor/business-es-and-occupations/associated-press>.

8 *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983).

9 Philip J. Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," *Antitrust LJ* 51: 841 (1989).

10 Joined Cases 6/73 & 7/73, *Istituto Chemioterapico Italiano S.p.A. & Commercial Solvents Corp. v. Comm'n*, 1974 E.C.R. 223.

11 Commission Decision 94/119, 1994 O.J. (L55) 52 (EC).

12 Case C-7/97, *Oscar Bronner GmbH & CO. KG v. Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co.*, 1998 E.C.R. I-779.

13 *But see, Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999).

14 Joined Cases C-241/91 P & C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITP) v. Comm'n*, 1995 E.C.R. I-743.

15 Case T-184/01 R, *IMS Health, Inc. v. Commission*, 2001 E.C.R. II-3198.

16 Case T-201/04, *Microsoft Corp. v. Comm'n*, Commission 2007 E.C.R. II-3619.

17 Tobias J. Klein, Madina Kurmangaliyeva, Jens Prüfer and Patricia Prüfer, "How Important Are User-Generated Data for Search Result Quality? Empirical Evidence." *Social Science Research Network* No. 4229292, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4229292.

18 Statcounter, "Search Engine Market Share Worldwide, Dec 2021 - Dec 2022," available at <https://gs.statcounter.com/search-engine-market-share#:~:text=%20%20%20Search%20Engines%20%20%20Percentage,%201.32%20%25%20%204%20more%20rows%20>.

To the contrary: Other companies' algorithms perform just as well – but only when they have access to the same training data.¹⁹ So yes, Google dominates the industry because its searches are better. But that is only because of the company's market share, itself a legacy of Google's luck in jumping out to an early lead two decades ago. In some ways the situation resembles AP, where incumbents' refusal to share put non-members at a permanent handicap. But the case is also like *Terminal Railroad*, because *every* search engine – including Google's – would perform better if sharing were universal. Finally, digitization has vastly simplified the mechanics of sharing. After all, user statistics, unlike bridges, can be copied and instantly disseminated at no cost. All member companies have to do is share data the moment their own analysts see it. Granted that each company currently formats its data idiosyncratically, participants would soon learn to extract what they needed or adopt more compatible nomenclatures. And if physical storage still turns out to offer scale economies, the parties can always share ownership on the Perkins pattern.

Moreover, Google is far from the only example. Indeed, Twitter's case might be more urgent. Like Google, its value-added consists of search, though in this case figuring out and publicizing the most crowd-pleasing tweets. Opening real time access to this data would almost certainly invite more competitors to enter the fray. But what makes Twitter special is that it is so heavily embroiled in politics. As Prof. Hofstadter long ago pointed out, Congress wrote the Sherman Act less for economic efficiency than to limit the *political* power of private companies.²⁰ This concern is particularly strong for Twitter, whose employees have long used the company's market dominance to squelch speech they dislike.²¹ That, however, was before Elon Musk bought the company. Musk is plainly betting that slashing "content moderation" will simultaneously trim costs and make the site more popular. For now, it is too early to tell. But the fact that he believes such a thing already shows that market forces are good for political discourse. And antitrust can only sharpen these incentives.

The question now is how Europe and America will respond to these developments, and what the essential facilities doctrine can contribute. For a time, some European scholars thought it would be enough to extend the EC's existing case law to confront the big American tech platforms.²² But the European Commission ("EC") rejected this on the ground that existing antitrust law was too complicated and time-consuming to regulate fast-moving markets. So in 2022, it passed a new regulation, the Digital Markets Act ("DMA").²³ Modelled on an earlier German law,²⁴ it imposes twenty-two new obligations on the large "gatekeeper" companies that dominate the Web. These include a duty to share data and also make them available in compatible formats.²⁵

There are several problems here. First, the fact that the DMA limits its sharing obligations to large "gatekeepers" seems misguided. After all, synergies are synergies, no matter who collects the data. Like Justice Douglas, the EC has fallen into trap of reducing antitrust to a problem of competition, and competition alone. Second, the DMA never says which sharing arrangements are best. Instead, it only tells corporations to pick their own methods – and face outsized penalties if they guess wrong. As I write this, Google has already opened the bidding by offering to share on so-called Fair and Reasonable ("FRAND") terms. Still, that sounds like small beer: In the microelectronics industry, at least, FRAND has seldom been more than a promise to negotiate, and too often a curtain-raiser to litigation. The alternative, according to some European scholars, would be to share data through government-run centers.²⁶ Here, most Americans will object that civil servants are certain to cost more and do less work than private employees. Even so, the proposal is not terribly different from the Perkins solution. The main point, of course, is that the facility must never pay dividends to whichever government creates it.

Meanwhile, Americans have a chance to untangle the confusions that have afflicted essential facilities for over a century. Here the most pressing item is whether Congress should follow Europe by forcing on-line platforms to share. Lobbyists will predictably argue that Congress should not confiscate data any more than it should take physical property. This, however, misunderstands the law: The legal basis for protecting data – trade secrets – has nothing to do with property, but reflects contractual agreements between owners and employees.²⁷ The deeper point

19 Klein et al., *supra* note 17.

20 Richard Hofstadter, "What Happened to the Antitrust Movement?" pp. 659-700 in Sean Wilentz (ed.), *Hofstadter* (Library of America: 2022 [1964]).

21 Nicholas Wade, "Cleaning Twitter's Augean Stables," *City Journal* (Dec. 21 2021), available at <https://www.city-journal.org/cleaning-up-twitter>.

22 Jens Prüfer, *8 J Comp. Law & Econ.* 73 (2012).

23 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector.

24 Anon., "Germany Adopts New Competition Rules for Tech Platforms" *Jones Day* (Jan. 2021), available at <https://www.jonesday.com/en/insights/2021/01/germany-adopts-new-competition-rules>.

25 DMA Arts. 6.10 and 6.11.

26 Inge Graef and Jens Prüfer, "Governance of Data Sharing: A Law and Economics Proposal," 50 *Research Policy*: Art No. 1040330. (Nov. 2021).

27 *E.I. DuPont de Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917); see also Mathias F. Correa, "Protection of Business Secrets," 18 *Business Lawyer* 531 (Jan. 1963).

concerns policy: Congress created “intellectual property” rights like patents based on its judgment that they would incentivize innovation. The case is very different for data, where Congress has repeatedly refused to grant any property rights at all.

And if Congress does follow Europe’s lead, it should try to improve it. First, any sharing obligation should extend to small companies, possibly with a chance to opt-out for those that refuse to access the gatekeepers’ data. Second, DMA was written to cover internet platforms. But that is a very broad category, and not every industry will possess large enough synergies to justify forced sharing. Better to announce a presumption of sharing and let companies rebut it in court. Finally, Klein et al.’s findings are narrowly focused on Google. More usually, though, we expect companies that invest more in R&D to offer higher performance, and therefore to attract more users. But in that case the rewards from R&D will include *both* more ad revenue *and* the multiplier effect of more user data that improves quality even more. The catch is that this second reward disappears as soon as the data are shared, so that increased sharing could mean less data overall. Even granting that this might still be the right trade, each case will have to be evaluated on its own merits.

Finally, even if Congress does not act, experience with the digital economy will help clarify existing doctrine. On the one hand, courts should remember *Terminal Railroad*’s core insight that sharing is an integral part of the Sherman Act, and can even reverse the usual rules where outsized synergies are present. On the other, and in keeping with our AP discussion, courts should strike down restrictions when the expected synergies would unambiguously reduce costs and improve quality. While clear IP rights would remain a defense, judges should show a *Magill*-like skepticism toward claims that seem legally doubtful and/or involve investments that defendants would have made anyway as a “spinoff” from normal business operations. The hardest questions, as usual, will involve physical assets. Here the basic principle should be that there is no fundamental difference between shared data and a railroad bridge with more excess capacity than competitors are ever likely to use. It follows that physical assets should only be placed outside the doctrine when congestion is likely. Finally, judges should heed the *Trinko* court’s warning that remedies based on the Perkins mechanism and *Otter Tail*-style regulatory piggy-backing have limited application. When judges cannot invent suitable relief, they should simply say so and move on.

Beyond these broad principles, the digital economy is bound to pose new questions. Suppose, for example, that small search companies voluntarily pool their data to level the playing field against Google. Can Google invoke Section 1 to force its way in? Or suppose that monopolists decide that sharing data will undercut the competition that keeps their R&D budgets high. Should Section 2 block this even if sharing simultaneously increases consumer welfare? Such cases will challenge American scholars and judges to reimagine and, it may be, breathe new life into the essential facilities doctrine. At a minimum, they remind us of *Terminal Railroad*’s long-ago message that antitrust law is about more than competition. Now more than ever, judges who ignore synergies risk vandalizing the economy.



PORTABILITY, NOT DOCTRINE, IS KEY TO UNLOCK USER AGENCY FOR DATA



BY CHRIS RILEY¹



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I. INTRODUCTION

Data is of central importance for users of digital services, and for many years has been the subject of significant attention in the realm of public policy. Some argue that the common law doctrine of essential facilities that has traditionally been applied to physical infrastructure in transportation, energy, and telecommunications, should now be applied to the realm of digital data flows. But this is a poor choice of path, and not only for the known distinction of data as non-rivalrous in nature. Digital data is both created and used within specific contexts, and its value derives from its use within contexts. Looking at personal data in particular through the blunt lens of the essential facilities doctrine risks losing those contexts and will struggle to reach an effective public policy balance, including taking into proper account privacy considerations.

The overarching public policy goal of strengthening the data economy is better served through existing data portability advancements happening all around the world, including both greater product offerings as well as more well-developed public policy principles and understandings. Among other benefits as compared to expanding court doctrine, data portability tools and policies explicitly consider privacy and data protection consideration and develop through consultative and multistakeholder processes that allow broad perspectives to influence output. In contrast, the blunt tool of court interpretation applying common law doctrine to specific instances of fact will inevitably fail to take diverse contexts and perspectives into account.

As public policy frameworks and tools for data portability continue to develop, this article offers three principles to reinforce and strengthen the efficacy of portability as a paradigm for governing personal data: empower users to transfer their data; protect privacy and security of data; and clarify liability for data transfers.

II. DATA CONTEXTS IN THE MODERN INTERNET ECOSYSTEM

Not all data is created equal. The scope of this article is personal data, transferred between businesses putting that data to functional, technical use. This is distinct from data issues arising in the context of researcher access, although that context also involves personal data; similarly, government access requests typically include personal data, but with very different policy tradeoffs. Personal data is defined in the European Union's General Data Protection Regulation (GDPR) Art. 4(1) as "related to an identified or identifiable natural person"; the category includes user communications, activity histories, and other data that can be associated with a person, but does not include data aggregated across many users where that identifiability is inherently and irretrievably lost, and also does not include data with no relation to natural persons such as business logistics data. Commercial exchanges of non-personal data are thus quite distinct.

Within the context of user-driven access to personal data, recent years have given rise to a rich ecosystem of Application Programming Interfaces paired with extensive documentation of digital platform operations, all aimed at developers building complementary tools. Mutually beneficial interconnections add value to the "host" service making data available as well as creating new markets for investment and innovation downstream, implementing the "standing on the shoulders of giants" model of technology development.

While some APIs offer access without requiring user authentication and execution to initiate transfer, such interfaces are limited to non-personal data to avoid violating well-established data protection laws in many jurisdictions, and powerful norms in others where the legal contours are less clear. The balance of data protection and portability has been of critical importance for many years, with the historical Cambridge Analytica incident long serving as a reminder that even user authentication is but a piece of the solution, incomplete by itself.

The modern API landscape is immense, the subject of conferences of developers such as the annual API Specifications Conference.² This richness creates a broad range of contexts in which data is originally contributed by a user to a system, or generated about the user based on activity, contexts which are described in developer documentation prepared alongside the APIs which make that data accessible to other organizations. This description of context is necessary because, as a consequence of continuous innovation, the use of the same data by two organizations is generally alike, but not exactly alike.

These slight variations are features, not bugs, of a technology ecosystem and competitive market. And they tie the value of digital data fundamentally to the contexts of its use. From that perspective, the common law doctrine of essential facilities has a blind spot, as it homogenizes the nature and use of inputs across different firms. Implementation through court systems creates a risk of extending, not remedying, that inherent myopia, by virtue of developing through a case-by-case basis tied to specific fact patterns.

² <https://events.linuxfoundation.org/openapi-asc/>.

In contrast, data portability as a paradigm well handles data in contexts that are not perfectly uniform, whether examined from the lens of privacy or promoting competition. In privacy, giving users agency to control the use of their data does not presume equivalence of uses, and in fact gives users the right to choose to use their data nowhere at all. Data portability gives users the ability to migrate their data to another service, even where the experience is different; that choice remains the user's.

III. ACCESS TO DATA IS CRITICAL; BUT THE AGENCY OF ACCESS MATTERS

The essential facilities doctrine, in a nutshell, holds that if a firm controls certain kinds of indispensable business inputs (facilities) and excludes competitors from access to those inputs, it can be in violation of antitrust under common law. In the United States, this doctrine has emerged as distinct from refusals to deal that arise from customers and supply chains, which do not depend on the input being essential; in the European Union, these, and other theories of illegal exclusionary conduct blur together a bit more, however in practice require a finding that the input is essential. (Graef, 157).³ In lower American courts, one significant precedent also considers whether the input at hand could “practically be duplicated.” (*Id.* 160) Thus, the essential facilities doctrine includes three factors: whether the input at hand is essential to the operation of a competing business, whether it is being denied to competitors, and if both of these are true, whether it is impractical to duplicate the input.

Digital data raises questions as to the applicability of these factors in many different contexts. The contextual necessity, non-duplicability, and accessibility of data are all legitimate subjects of debate in a broad range of scenarios. But this article does not propose to engage with these questions in depth. Rather, it emphasizes a factor entirely missing from the essential facilities framework: the lens of “who's asking.”

There is a world of practical policy difference between a competing firm asking for access to data, and a user asking its service provider for access. These differences hold even if the outcome at the end of both asks is the same – i.e. even if the user subsequently provides the data to that competing firm.

The differences arising from “agency in the asking” begin with principles. Under the General Data Protection Regulation, data portability is a fundamental right in the European Union. That right inheres in individuals, not data controllers. A firm demanding access to personal data does not have any fundamental right to such access; only the data subject does. While the United States lacks a similar fundamental framework of digital rights, free market norms similarly do not extend to competitor rights of access, but do encompass the ability of individuals to “choose with their feet” and switch services within a market; and to make that freedom of choice real, some amount of necessary data may need to move with the user.

Agency also carries practical, strategic consequences as well. Protecting the privacy and security of user data in the context of data portability depends on authenticating the user before providing access and limiting the scope of data made available to that within the user's authorized access. Data transfers between firms, without the inherent limitations that come from individual user action and agency, pose a greater potential for privacy and security harm through the practical difficulties of managing necessary limitations on scope.

Even accepting the (debatable) premise that access to personal data is essential, not able to be duplicated, and not sufficiently accessible, forcing data transfer without centering on individual user agency introduces as much risk as remedy. Furthermore, it's unnecessary, given the rapid evolution of data portability.

IV. DATA PORTABILITY PRODUCTS AND PUBLIC POLICY ARE EVOLVING

A report by CERRE in 2020 expands in detail on the then-current state of public policy and products related to data portability.⁴ It centers around the data portability rights established in the GDPR and the early stages of two products, Solid and the Data Transfer Project, along with the nascent ecosystem of Personal Information Management Systems. In the short time since then, both regulations and technologies have made substantial steps forward.

³ <https://core.ac.uk/download/pdf/34662689.pdf>.

⁴ https://cerre.eu/wp-content/uploads/2020/07/cerre_making_data_portability_more_effective_for_the_digital_economy_june2020.pdf.

Notably, the Data Transfer Project has continued to see growth in its open-source code base, as well as real world deployment.⁵ The model of DTP works by identifying and building code to represent a central “data model” that articulates the core of a user experience to be migrated through portability tools, and then building adapters that translate from individual service APIs to and from that data model. In practice, this means that users can initiate data transfers through DTP that move data directly from one service to another, avoiding the technical challenge and bottleneck of downloading data over a local internet access service and storing it on a personal device, as well as translational issues that could arise between the exporting and importing services. Today, the DTP framework powers direct data transfer features within Google Takeout,⁶ Facebook’s Transfer your Information,⁷ and Apple’s Data and Privacy page,⁸ collectively available to billions of internet users. DTP also includes software libraries that provide connections to over a dozen additional services. (Disclaimer: The author of this article is the inaugural executive director of the Data Transfer Initiative, a nonprofit organization established to invest dedicated resources in data portability, in principal part through supporting the Data Transfer Project.)

The EU has taken the lead again on regulation, with the completion of its Digital Markets Act legislative process. The DMA, which will begin to take legal effect in 2023, includes a new, digital platform directed mandate to provide data portability, distinct from the rights of data subjects under the GDPR. Specifically, Article 6(9) of the DMA imposes the following obligation on designated gatekeepers:

The gatekeeper shall provide end users and third parties authorised by an end user, at their request and free of charge, with effective portability of data provided by the end user or generated through the activity of the end user in the context of the use of the relevant core platform service, including by providing, free of charge, tools to facilitate the effective exercise of such data portability, and including by the provision of continuous and real-time access to such data.

Incorporating data portability with an objective not derived from privacy and data protection goes immediately to address a shortcoming of prior data portability policies, as articulated in (among other sources) a 2021 report by the OECD: “Further, it is clear that the objective of data portability and interoperability measures matters. Portability and interoperability measures implemented with objectives other than competition (such as data protection) may not have procompetitive impacts unless designed with market dynamics in mind.” (OECD 2021, 49).⁹

Substantively, the language of the DMA expands on the GDPR in two fundamental ways. First, it specifies that portability must include data “generated through the activity of the end user” – data about, not from, a user. Second, data portability must include “the provision of continuous and real-time access to such data.” While neither of these concepts has yet been defined, they will undoubtedly expand the horizon for users’ ability to migrate their data to services of their choice.

V. THREE PRINCIPLES CAN SHAPE A USER-CENTRIC FUTURE FOR DATA PORTABILITY

Given this growth, the path ahead for data portability is bright, but remains uncertain. As the OECD’s report made clear, design and implementation of data portability matter. This article thus offers three principles as guidance for policymakers and product builders to realize the benefits of data portability, particularly for technology users: empower users to transfer their data; protect privacy and security of data; and clarify liability for data transfers.

A. Empower Users to Transfer Their Data

The foundation for balancing public policy in data portability is ensuring that users are in control of transfers of their data. This is necessary to comport with both fundamental rights frameworks and free market principles. In practice, providing users with control has several ramifications for product and policy design. Users should be the sole initiator of data transfers, not businesses operating other than at the direct delegation of a user; furthermore, data portability should not become a lever for government access, which should continue to go through separate lawful access frameworks. The scope of data transfers initiated by a user should center around that user’s data and not encompass data beyond that, particularly where broader scope of a transfer would harm another’s privacy. Next, reciprocity should be offered - users risk being worse off if they choose to transfer data to a service, and later are unable to transfer it back, should the destination service not offer portability as effectively

⁵ <https://dtinit.org/>.

⁶ <https://takeout.google.com/takeout/transfer/custom/photos>.

⁷ <https://www.facebook.com/tyi>.

⁸ <https://privacy.apple.com/>.

⁹ <https://www.oecd.org/daf/competition/data-portability-interoperability-and-digital-platform-competition-2021.pdf>.

as the origin. And finally, once data has been transferred at a user's direction to a new service, that new service provider should have the same abilities and permissions for data collection and use as if the user had provided the data through existing means.

B. Protect Privacy and Security of Data

Conversations around public policy and data portability have long tangled with the risks that can arise if data transfers are not subject to sufficiently rigorous privacy and security practices. Yet, no clear framework or guidance exists. Legislation or regulation in one or more relevant jurisdictions could add significant value by setting minimum standards for privacy and security practices before permitting data transfer, as a dual means of ensuring baseline sufficiency and of insulating providers who are behaving responsibly from some legal risk. At the same time, such a standard should be a clear minimum, not a maximum. Providers may set higher standards for privacy and security, reflecting their inherent understanding of the risks associated with transfer of data they control, in contexts they shape. Should these higher standards not be met, providers should not be required to transfer data.

C. Clarify Liability for Data Transfers

The global advancement of data protection regulations poses some implementation complexity for data portability obligations. In particular, data transfer mechanisms offering practical benefits for data portability interfaces cannot be effective unless the recipients of data through these mechanisms can take advantage of the same benefits of legitimacy of data collection and use, conferred to the service provider by the user's intentional decision to transfer the data, building on the foundational principle of empowering users. Legislative and regulatory frameworks for data portability should not hold a service provider responsible either for transmitting or receiving data through a data transfer mechanism lawfully executed by a data user. However, once receiving the data, the recipient service provider should then accept and hold any potential liability associated with holding the data, such as obligations to respond to notice and takedown requests.

VI. CONCLUSION

Conversations of the efficacy of existing competition doctrine for tech are occurring worldwide, and there are contexts and circumstances in which these offer significant potential. However, the essential facilities doctrine is a hammer, and very few problems are nails. Access to personal data is a nuanced challenge, and any remedy must balance the considerations of user centrality, privacy and security, and service provider liability, all of which require a deft intervention. Fortunately, data portability public policy and tools have advanced substantially in recent years and provide a strong foundation for continued development.



REVIVAL OF THE ESSENTIAL FACILITY DOCTRINE IS NOT ESSENTIAL; JOINT AGENCY GUIDELINES WILL BETTER STRENGTHEN MONOPOLIZATION LAW

BY BILAL SAYYED¹



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I. INTRODUCTION

The majority staff report of the House of Representative's recent Investigation of Competition in Digital Markets ("Majority Report") recommends (i) that "Congress consider revitalizing the "essential facilities" doctrine ... [and] overrid[e] judicial decisions that have treated unfavorably essential facilities and refusal to deal-based theories of harm."² The majority report made several other recommendations to "rehabilitate monopolization law" because "over recent decades, courts have significantly heightened the legal standards that plaintiffs must overcome in order to prove monopolization."³

According to the majority, Congress should also consider: (ii) extending the Sherman Act to prohibit abuses of dominance; (iii) creating a statutory presumption that a market share of 30 percent or more constitutes a rebuttable presumption of dominance by a seller, and a market share of 25 percent or more constitutes a rebuttable presumption of dominance by a buyer; (iv) revising the law of monopoly leveraging to not require "actually monopoliz[ing] (or dangerously threaten to monopolize) the secondary market; (v) revising the law to not require recoupment in predatory pricing or predatory buying cases; (vi) clarifying the law of tying, to confirm that "conditioning access to a product or service in which a firm has market power to the purchase or use of a separate product or service is anticompetitive"; and (vii), whether making a design change that excludes competitors or otherwise undermines competition should be a violation of Section 2, regardless of whether the design change can be justified as an improvement for consumers.⁴

In addition, the majority report believes Congress should consider (viii) overriding the Supreme Court case of *Ohio v. American Express*, by clarifying that cases involving platforms do not require plaintiff's to establish harm to both sets of customers; (ix) overriding the district court case of *United States v. Sabre Corp.*, by clarifying that platforms that are two-sided, or serve multiple sets of customers, can compete with firms that are one-sided; (x) clarifying that market definition is not required for proving an antitrust violation, especially in the presence of direct evidence of market power; and (xi) clarifying that false positives (erroneous enforcement) are not more costly than false negatives (erroneous non-enforcement), and that, in relation to conduct or mergers involving dominant firms, false negatives are costlier.⁵

Congress seems unlikely to adopt such an ambitious rewrite of the antitrust laws, and it is at least questionable whether the changes recommended by the Majority Report are likely to be welfare enhancing.

II. THE FTC'S NEW POLICY STATEMENT ON UNFAIR METHODS OF COMPETITION IS NOT SUFFICIENT TO DEVELOP THE LAW ON SINGLE FIRM CONDUCT AS APPLIED TO TECHNOLOGY PLATFORMS

As an alternative (or complement) to a revision of the statutory language of Section 2, the Federal Trade Commission seems poised to attack single firm conduct through a reinterpretation (to others, a reinvigoration) of the scope of its authority to prohibit unfair methods of competition. In November 2022, the Commission issued its interpretation of the scope of conduct prohibited as an unfair method of competition.⁶ Recognizing, as the Supreme Court has, that the prohibition on unfair methods of competition is broader than the Sherman Act, the Policy Statement argues that Section 5 of the Federal Trade Commission Act prohibits conduct that (i) is a method of competition; (ii) may be coercive, exploitative, abusive, deceptive, predatory, involve the use of similar economic power, or is otherwise restrictive or exclusionary (under certain circumstances); and, (iii) tends to negatively affect competitive conditions.⁷

² Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary of the House of Representatives (Oct. 2020), at 336 (hereinafter "Majority Report"). The Majority Report defines the essential facilities doctrine as "the legal requirement that dominant firms provide access to their infrastructural services or facilities on a nondiscriminatory basis." *Id.*

³ *Id.* at 334.

⁴ *Id.* at 334-337.

⁵ *Id.* at 337.

⁶ Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (hereinafter UMC Policy Statement) (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf. Commissioner Wilson issued a dissenting statement. Dissenting Statement of Commissioner Christine S. Wilson Regarding the Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf.

⁷ UMC Policy Statement at 8-9.

According to the statement, the size of the firm engaging in such conduct, its purpose, and its power, are relevant to a determination of the conduct's legality.⁸ Conduct is evaluated for its tendency to "generate negative consequences" including "raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, or reducing the likelihood of potential or nascent competition."⁹ Harm need not be shown by quantifiable evidence.¹⁰ A showing of market power or market definition is not required.¹¹ Section 5, according to the Commission, does not require that conduct be evaluated for its efficiency or justification, and a defense based on such will not generally be available.¹²

The Commission's revised statement on Section 5 adopts, as unfair methods of competition, much of what the Majority Report indicated was appropriate for Congress to reconsider about the Sherman Act. The Commission advocates for finding illegal under a significantly looser set of conditions, conduct that may not violate Section 2 (in part because of efficiencies or cognizable business justifications): examples include (but are not limited to) de facto (and actual) loyalty rebates, tying, bundling, exclusive dealing, parallel conduct that may cause aggregate harm, leveraging of market power (not limited to monopoly power), discriminatory refusals to deal, practices that entrench market power, and conduct that, when considered in its entirety (or cumulatively), undermines competitive conditions.

But the Commission's view of Section 5 may not be enforceable. In the late 1970s and early 1980s, the Commission alleged violations of Section 5 that appellate courts rejected as insufficiently grounded in evidence,¹³ inconsistent with a firm's obligations,¹⁴ and insufficiently defined as unfair and inconsistent with competition.¹⁵

Moreover, the Commission's reading of Section 5 may prohibit efficient conduct. While the Commission believes Section 5 does not require an inquiry into the efficiencies associated with the alleged unfair competition, this view may not be sustained by the courts. The Supreme Court (and the lower courts) are clear that efficient conduct should not be subject to *per se* illegality, and that such efficiencies must be considered in determining the competitive effect of a practice. In *Brunswick Corp.*, the Court found that antitrust injury was absent where a plaintiff alleged that an illegal acquisition threatened to bring a "deep pocket" parent into a market of "pygmies."¹⁶ In *GTE Sylvania*, the Court recognized the efficiency rationale of territorial and location-based restraints on intra-brand competition in support of competition at the inter-brand level and overturned the *per se* ban on certain vertical non-price restraints.¹⁷ In *BMI*, the Court recognized the procompetitive rationale of a "blanket" music license as a reason to forego *per se* treatment of a horizontal agreement among the members of two music societies on license terms.¹⁸ In *Khan*, the Court accepted the efficiency rationale of a vertical maximum price-setting arrangement, and overturned the *per se* ban on vertical, maximum price setting agreements.¹⁹ In *Leegin*, the Supreme Court overturned the *per se* ban on vertical minimum price setting agreements because of the potential efficiencies associated with such agreements.²⁰

8 *Id.*

9 *Id.* at 10.

10 *Id.* at 11.

11 *Id.*

12 *Id.* at 10-11.

13 *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980) (holding that in the absence of evidence of overt agreement to utilize a pricing system to avoid price competition, the Commission must demonstrate that the challenged pricing system has actually had the effect of fixing or stabilizing prices; without such effect, a mere showing of parallel action will not establish a Section 5 violation, and declining to adopt the Commission's suggestion that industry-wide adoption of an artificial method of price-quoting should be deemed a *per se* violation of Section 5).

14 *Official Airline Guides v. FTC*, 630 F.2d 920 (2nd Cir. 1980) (monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains the right to determine who it will deal with).

15 *E.I. DuPont De Nemours & Company v. FTC*, 729 F.2d 128 (2nd Cir. 1984) ("Commission owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability." *Id.* at 139. Commission's "rulings and order appear to represent uncertain guesswork rather than workable rules of law." *Id.*) See also *FTC v. Abbott Laboratories*, 853 F. Supp. 526, 536 (D.D.C. 1994) (Where the Department of Agriculture chose not to contest an improper procurement of infant formula for the special supplemental food program for women, infants and children, Abbott "cannot be faulted and accused of unfair trade practices for failing to sue a U.S. Government territory.")

16 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 487 (1977).

17 *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

18 *Broadcast Music v. CBS*, 441 U.S. 1 (1979).

19 *State Oil v. Khan*, 522 U.S. 3 (1997).

20 *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 2705 (2007).

Because the Commission's interpretation of Section 5 is inconsistent with modern antitrust law, provides limited guidance, and because only the Commission, and neither the Department of Justice nor private plaintiffs can enforce Section 5, any attempt to expand or strengthen laws against anticompetitive unilateral conduct through an expansive interpretation of Section 5 will likely have only limited (if any) effect. An alternative approach to reinvigorating monopolization law should be considered.

III. THE AGENCIES SHOULD ISSUE “PLATFORM GUIDELINES” TO ADVANCE & DEVELOP ANALYSIS OF SINGLE FIRM CONDUCT BY ALLEGEDLY DOMINANT TECHNOLOGY PLATFORM COMPANIES

Developing and promulgating agency enforcement guidelines that provide an analytic framework for the evaluation of conduct by technology platforms would provide valuable guidance and could be a valuable contribution to the development of monopolization law.²¹ Such guidelines are preferred to revisions, including substantial revisions, to the existing statutory framework because they are likely more flexible and avoid per se condemnation of certain conduct. For the same reason, guidelines are preferred to competition rules.²² In this short article, I set out a framework and key elements that Platform Competition Guidelines (“PCGs”) should include.

The PCGs, as applied, should identify conduct that has the actual or potential effect of reducing market-wide output, quality, or innovation, and/or increasing firm or market-wide prices as compared to an alternative in which the conduct did not occur. — The PCGs should not condemn conduct that is pro-competitive or that is competitively neutral.

The Supreme Court has emphasized concerns about over-enforcement of the antitrust laws, without a firm theoretical or empirical basis. The PCGs must balance concerns about overenforcement and underenforcement, and *should strive to minimize the sum of Type 1 errors (overenforcement) and Type 2 errors (underenforcement)*.

IV. OVERVIEW OF TECHNOLOGY PLATFORMS

Technology platforms are software-based businesses that provide services to multiple participants (consumers or other businesses) and often operate in multiple markets. Technology platforms may operate in several related markets. Markets in which technology platforms operate may have several adjacent and often, complementary markets. Technology platforms serve one or more distinct customer (or user) groups and allows for interaction between customers or customer groups. An important function of platforms is to attract both groups of customers in sufficient numbers or in a suitable balance to capture the value of positive (direct or indirect) network effects and to minimize negative network effects. Some—but not all—technology platforms operate “multi-sided transaction platforms” that facilitate transactions or other types of interactions between distinct groups of users. Some multi-sided transaction platforms offer multi-sided “marketplaces.” In some or all of their offerings, technology platforms may compete with non-platform firms. In many cases, firms build their business “on top” of a platform’s software.

Owners of technology platforms may be vertically integrated in input (upstream) and/or output (downstream) markets and provide platform services to itself as well as to others. Thus, a technology platform may also compete directly with its own customers by offering the same or similar products or services on its platform as its customers. The owner of a technology platform that also serves as a multi-sided marketplace may integrate and sometimes also be a “user” — typically a seller or content supplier — on one side of the platform, in addition to operating the platform itself.

Two common features of platforms are relevant to inquiries into a specific platform’s market power. The first is “multi-homing,” which occurs when a platform user connects to multiple platforms simultaneously or in relatively quick succession. For example, a consumer is multi-homing if she uses multiple ride-sharing apps in deciding whether to book a ride. Technology platforms may have an incentive to limit multi-homing, either through conduct that limits the ability of rivals to compete, or through acquisition of competing platforms. Multi-homing can

21 The agencies undertook a similar effort in drafting the 2000 Competitor Collaboration Guidelines. See Remarks of Robert Pitofsky, Chairman, Federal Trade Commission, Joint Venture Guidelines: Views from One of the Drafters (Nov. 11, 1999), available at <https://www.ftc.gov/news-events/news/speeches/joint-venture-guidelines-views-one-drafters>. See also Ernest Gellhorn & William E. Kovacic, Analytical Approaches and Institutional Processes for Implementing Competition Policy Reforms by the Federal Trade Commission (Dec. 12, 1995) (“The lesson of these hearings to us is that the FTC’s most important assignment today is to modernize antitrust rules, to concentrate enforcement where serious systemic blocks to competition may exist, and to lessen the burden as well as improve the transparency of its enforcement efforts.”), https://www.ftc.gov/system/files/documents/public_statements/418071/951212compmpolicy.pdf.

22 This article takes no position on whether the FTC has the authority to issue competition rules.

occur on only one side of a platform or can occur on multiple sides. In the ride-sharing example, if both riders and drivers use multiple platforms, then both sides are multihoming, whereas if drivers tend to use a single platform, then only riders are multi-homing. The second is “switching costs,” which refer to the costs platform users must bear in switching from one platform to another. Switching costs are lower when platforms are interoperable. All else equal, lower switching costs imply that a platform has less ability to exercise market power or obtain (and maintain) monopoly power; firms have an incentive to increase switching costs.

V. POTENTIAL COMPETITIVE HARMS

A technology platform can harm competition in the platform market or the adjacent user markets. It can do so in the same ways that any business can harm competition: by entering into anticompetitive agreements; by monopolizing, attempting to monopolize, or conspiring to monopolize relevant markets (including by acquiring nascent or potential competitors); or by undertaking acquisitions that significantly lessen competition or tend to create a monopoly. The presence of direct²³ and indirect²⁴ network effects may make it difficult for a new entrant offering a competitively superior product to enter, expand, and successfully provide a competitive alternative to an incumbent platform.

As noted earlier, a technology platform that also serves as a multi-sided marketplace may integrate and sometimes be a “user” — typically a seller or content supplier — on one side of the platform, in addition to operating the platform itself. Such integration, on its own, typically does not necessarily harm competition and may be procompetitive, in that the platform offers a competitive alternative to third-party sellers or content providers using the platform.

However, in some circumstances, a technology platform that both operates the platform and competes in an adjacent market may have the incentive and ability to exclude a competitor, in full or in part, sufficient to harm competition.²⁵ Different theories of harm require analysis of the competitive conditions in the various relevant markets. A platform may harm competition in the “core” platform market by engaging in anticompetitive conduct that may either (a) limit the ability of a rival platform to compete, or (b) prevent a firm in an adjacent market from growing or achieving scale, if the firm in the adjacent market is or may in the future become a competitive threat in the core platform market. An investigation of this theory of harm would typically require analyzing current and/or anticipated future competitive conditions in the core platform market.

A technology platform may also harm competition in an adjacent market directly: for example, by engaging in anticompetitive conduct to acquire or maintain market power in that market, or by entering into agreements that restrain competition and harm consumers in the adjacent market. An investigation of this theory of harm would typically require analyzing current and/or future competitive conditions in the adjacent market, which may differ from competitive conditions in the core “platform” market.

If the technology platform is vertically integrated — where the platform acts as a seller or content provider on the platform it operates, a rival may also be a customer of the platform (rather than the operator of a separate, competing platform). In this context, the Agencies should assess whether harm to an unintegrated rival is connected to harm to competition, and therefore whether and how the platform’s conduct affects consumer welfare. This may be shown by evidence that the platform has raised its unintegrated rival’s costs, with the effect that competition in the market in which the unintegrated rival competes is reduced, or through some other coherent economic theory of harm.

VI. POTENTIAL COMPETITIVE BENEFITS

Platforms can create economic benefits by reducing transaction costs, i.e. by facilitating transactions between actual and potential trading partners. In some cases, platforms, by creating a market, enable transactions to occur that otherwise would not have occurred. In other cases, platforms disrupt existing marketplaces by enabling the sale of goods, services, and content at lower prices and/or higher quality. They may also

23 Direct network effects exist when a single user’s desire to use a network is a function of the number or identity of users *from the same set of users* who also use the network.

24 Indirect network effects are a feature of multi-sided platforms. Such effects exist when the demand for the network for a user from one set of users is a function of the number and identity of users *from a different set of users* who also use the network.

25 See, e.g. Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’s Costs to Achieve Power over Price*, 96 Yale Law Journal 209 (1986); Steven C. Salop & David T. Scheffman, *Raising Rivals Costs*, 73 Amer. Econ. Rev. 267 (1983); and Susan Athey and Fiona Scott Morton, *Platform Annexation*, 84 Antitrust Law Journal 677 (2022). See also the theories of harm regarding mergers of firms offering complementary products in the 2020 DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION VERTICAL MERGER GUIDELINES and the Federal Trade Commission’s COMMENTARY ON VERTICAL MERGER ENFORCEMENT (DECEMBER 2020). The FTC has withdrawn from the Vertical Merger Guidelines and rescinded the Commentary on Vertical Merger Enforcement (but not the matters discussed within).

allow customers to find goods, services, and content they would not otherwise have been able to find. The popularity of many large platforms is likely related to these benefits.

Conduct such as vertical integration — which can occur via entry, merger, or contract — may appear to be restrictive, but also can offer procompetitive benefits. Such practices can improve competition, by, for example, reducing transaction costs, eliminating double marginalization, and otherwise aligning companies' incentives in a way that benefits consumers.

Platform operations often involve economies of scale. Such markets may be most efficiently organized with just a few large suppliers. Acquisitions of competing platforms or assets used to create, operate or expand platforms, exclusive contracts with users, or other actions that increase the volume of business flowing through a platform can allow the platform to benefit from scale economies and become a lower cost or otherwise more efficient competitor.

Technology platforms may engage in conduct or enter into various agreements that generate efficiencies and benefit platform users or are otherwise justified. For instance, certain conduct and agreements may enable the platform to better satisfy user preferences (including conduct that benefits one set of users but potentially harms another), to reduce transaction costs between users, to reduce double marginalization, or otherwise to enable firms to offer goods or services that are cheaper, more valuable, or brought to market faster than would otherwise be possible. Accordingly, conduct that produces anticompetitive effects may nevertheless be justified on the ground that it is procompetitive, in that it “is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal.” There are certain types of unilateral conduct in which a technology platform might engage that, without more, will tend not to harm competition and/or will tend to produce efficiencies. These include (1) vertical integration by entry; (2) product design decisions; and (3) above-cost price reductions. These categories of behavior are typically competitive responses and attempts to deliver value to consumers.

Other conduct may plausibly have mixed effects, such as contractual arrangements between a platform and another firm that provides a complementary product or service. Such vertical restraints can yield an anticompetitive effect, but they also have the potential to create cognizable efficiencies, such as allowing firms to streamline production, inventory management, or distribution, or create innovative products in ways that would have been difficult to achieve without a contractual arrangement that includes restrictive terms.

VII. SPECIAL FACTORS IN COMPETITIVE EFFECTS ANALYSIS OF CONDUCT BY TECHNOLOGY PLATFORMS

Each platform business is different, as are the markets in which such businesses compete. Nevertheless, some factors are present in many platform markets, and these factors may be relevant to the competitive impact of the conduct of technology platforms.

A. Data

Although the use of data to make competitive decisions is not unique to technology platforms, firms that operate technology platforms often have access to very large data sets. The competitive significance of data may vary significantly from one case to another in light of the nature or the relevant market or markets; the nature of relevant business models in those markets; and the source, content, nature, breadth, utility, and availability of competitively significant data.

Consistent with the foregoing, the utility and competitive significance of data may vary by market, by time, and by characteristics specific to the data. Different data or data sets may have different and varied characteristics. Some data may be ubiquitous, easily replicable, readily substitutable, or of limited or transitory value. Other data may provide significant and hard-to-replicate competitive advantages for the firms that own or control them. A need for data may impede expansion or entry of an actual or potential competitor, particularly when there are few or no commercially available alternatives to the data, and when access to such data is competitively important in some way.

The analysis of competitive effects of conduct (including acquisitions) should consider whether the relevant data is easily replicable and/or whether rivals or entrants can compete effectively without the data. Data may be competitively significant for one or more reasons, including the nature (e.g. historical, real-time, etc.), breadth and depth (e.g. varied, voluminous, etc.), utility (e.g. basis for better analytics or new products and services, etc.), and availability (e.g. costly, time-intensive, and hard-to-replicate alternatives, etc.) of the data. The process by which a technology platform collects, uses, and shares data may also inform the antitrust analysis.

In markets where data or data-derived products and services is a key differentiator, a technology platform's access to a distinctive or competitively significant dataset (or to large amounts of competitively significant data) may allow it to engage in conduct to protect its position in a market. Evidence that a technology platform selectively denies rivals access to data to prevent smaller rivals from efficient distribution channels or sufficient sales to operate at sufficient scale is relevant to competitive effects analysis. Similarly, agreements that prohibit customers from sharing data are relevant to a competitive effects analysis.

In some cases, particularly cases involving mergers or acquisitions, there may be a relevant market for certain types of data or for access to certain types of data.²⁶ Anticompetitive transactions or other practices that affect such markets may substantially lessen competition or tend to create a monopoly or may constitute anticompetitive conduct.

A platform owner that also operates business units that compete with other users of the platform may, by virtue of owning the platform, obtain competitively sensitive information from these users. The access and use of such information by a platform owner's business units that compete with other users, including any related agreements providing for the transmission of such data by platform users, may result in reduced competition that harms consumers.

B. Network Effects & Multi-Sidedness

The existence, scope and strength of direct and indirect network effects are factual questions relevant to the competitive effects analysis. Network effects exist on a continuum, where at one endpoint on the continuum, any indirect network and feedback effects are strong and at the other endpoint the effects are weak. The strength and degree of direct or indirect network effects may be different on different sides of a firm's technology platform, and the network effects may be positive or negative. The Agencies should be mindful that the degree and nature of network effects can change, sometimes rapidly, in response to a new technology or business model. They should take account of information regarding the presence and strength of network effects in evaluating technology platform conduct. The presence of network effects does not insulate a technology platform from antitrust scrutiny, and the Agencies may determine that a technology platform that benefits from positive (direct or indirect) network effects has engaged in, or is engaging in, conduct in violation of the antitrust laws.

Strong indirect network effects may make it more likely that an incumbent technology platform can profitably and effectively engage in anticompetitive or exclusionary conduct. In these circumstances, a new entrant technology platform must attract sufficient numbers of customers on both sides of the platform to create value, and the indirect network effects operating across customer groups can make entry more challenging than if indirect network effects were not present.

Multi-sided platforms can benefit from "feedback effects." Indirect network effects can sometimes be self-reinforcing. If indirect network effects are positive in multiple directions, then these effects can build upon one another. Using the example of a computer operating system, more consumers leads to more software applications, and more software applications leads to more consumers, yielding a "virtuous cycle" of growth for the platform. Feedback effects can also be negative, in that losing users on either side can lead to a "vicious cycle," whereby the platform's scale decreases quickly.

The nature of competition may be different on each side of a multi-sided technology platform. The Agencies should consider whether competition on one side of the platform makes it less likely that a technology platform can engage in anticompetitive or exclusionary conduct on other sides of the platform. Competition on one side of a technology platform can be insufficient to prevent an unlawful exercise of market power, especially in the face of significant market power on one side. In assessing conduct directed only or primarily at one side of the platform, the Agencies should consider the degree of competition on other sides of the platform, and any other competitive constraints on a technology platform.

²⁶ See, e.g. Complaint, CoStar Group, No. 9398 (Nov. 30, 2020) (relevant market was "internet listing services advertising for large apartment complexes), <https://www.ftc.gov/system/files/documents/cases/d09398complaintpublic.pdf>; Fidelity Nat'l Fin., Inc., No. 9385, 2019 WL 4461620, at *7 (F.T.C. Sept. 5, 2019) (relevant market was "title information services"—the provision of access to title plant information); Corelogic, Inc., No. C-4458, 2014 WL 2331024, at *1 (F.T.C. May 20, 2014) (relevant market was "national assessor and recorder bulk data"); Nielsen Holdings N.V., No. C- 4439, 2014 WL 869523 (F.T.C. Feb. 24, 2014) (national syndicated cross-platform audience measurement services); Dun & Bradstreet Corp., 150 F.T.C. 144, 146 (2010) (relevant market was "kindergarten through twelfth grade educational marketing data"); Reed Elsevier NV, No. C-4257, 2009 WL 1639519, at *2 (F.T.C. June 1, 2009) (relevant market was "electronic public records services for law enforcement customers"); Complaint at 12, FTC v. Hearst Trust, No. 1:01CV00734, 2001 WL 36080059 (D.D.C. Apr. 5, 2001) (relevant market was "integratable drug data files, and/or one or more subsets"); Complaint at 2, Fidelity Nat'l Fin., Inc., No. C-3929 (F.T.C. Feb. 25, 2000) (relevant market was "the provision of title information services"—the provision of selected information contained in a title plant (a collection of records and indices regarding the ownership of and interests in real property), <https://www.ftc.gov/sites/default/files/documents/cases/2000/02/fidelitycmp.pdf>; Automatic Data Processing, Inc., No. 9282, 1996 WL 768219, at *5 (F.T.C. Nov. 13, 1996) (relevant market of, among others, "salvage yard inventory data for estimates").

C. Non-Price Competition

Anticompetitive effects may manifest themselves in price effects, non-price effects, or both. Non-price effects include, among other things, effects on output, quality, variety, and innovation. An enforcement action may be based on actual or anticipated price effects only, actual or anticipated non-price effects only, or both.

In some matters involving platforms, effects on non-price competition may be especially important because price effects may be difficult to detect or to measure. Many platform businesses provide a product or service to one set of users at a nominal price of zero, which does not change over time. In this context, in detecting whether such users have been harmed, it may be appropriate to focus the competitive effects analysis on non-price effects.

Even when a product or service is provided for a nominal price of zero, effects on competition and welfare may manifest, in whole or in part, in changes in output, variety, the rate of innovation, and/or quality (including terms of service to users and businesses, or privacy and data security practices). It may be appropriate to challenge practices or transactions that harm consumers solely through such non-price effects.

With regard to effects on output, a practice may, or be reasonably likely to, harm competition even when market-wide output is increasing over time (or when nominal price is declining or unchanging). The relevant comparison is between the actual or anticipated effects of the challenged conduct and actual or anticipated scenarios where the conduct has not occurred or does not occur. Such actual or anticipated scenarios where the challenged conduct does not occur may also involve market-wide output increasing.

With regard to effects on innovation, the Agencies should consider how a challenged practice or transaction affects or may affect innovation, compared to an alternative in which the practice or transaction did not occur. Markets in which platform businesses compete — when competitively healthy — may be characterized by intense innovation. Accordingly, effects on innovation may be, and in some instances, must be a significant focus in matters involving technology platforms.

Anticompetitive effects on innovation could take the form of a reduced incentive to continue existing product-development efforts or reduced incentives to develop new products. A competitive effects analysis should consider whether the practice or transaction enables or may enable innovation to occur that would otherwise not take place. Both incumbents and entrants, and likewise both large firms and small firms, engage in innovation that increases welfare. As in the analysis of effects on other factors relevant to competition, the focus should be on market-wide effects on innovation, of which effects on individual firms' incentives and abilities to innovate is a part.

The analysis of effects on innovation may include both quantitative and qualitative evidence. Reliable quantitative evidence regarding how a business practice affects innovation may not be available or of limited utility. Quantitative evidence should not be necessary to determine that a firm's conduct has produced harm to innovation.

D. Monetizing Platforms and Business Models

Technology platforms may use different business models and may monetize their products and services in various ways. This may include earning revenue through the sale of advertising, or by charging fees to users on one or more side of the platform for access to the platform. Some platforms may use a mix of strategies to earn revenue, including charging fees to users and selling advertising opportunities.

Platforms can experiment with different approaches to earn revenue. They may change their approaches over time for various reasons, such as responding to new competitive conditions and expanding their product or service offerings. Innovation in business models may be as important and as valuable as innovation in technology, but just as it may benefit consumers, it may also harm them. It may be appropriate for the Agencies to investigate such changes to determine whether the changes reflect or are part of a platform's effort to impair the competitive process. For example, it may be appropriate to investigate whether a platform's change to its approach to earning revenue is a mechanism through which the platform can raise the cost of using a competitor's platform.

VIII. BURDEN SHIFTING APPROACH TO THE ANALYSIS OF COMPETITIVE EFFECTS

The Agencies should follow a structured but flexible analytic framework to identify the competitive effect of conduct (including acquisitions) by technology platforms. The Agencies should challenge only that conduct that has demonstrable anticompetitive harms caused by that conduct that are not outweighed by conduct specific, cognizable, and verifiable procompetitive benefits caused by that conduct. When required to balance

harms and benefits, the Agencies should consider whether the platform could achieve similar benefits through less restrictive or exclusionary alternatives. In evaluating whether any anticompetitive harms outweigh any anticompetitive benefits, the focus must be on the state of competition with, as compared to without, the practice under review.

To avoid determining competitive effects by “characterization” of conduct, the analytic framework should consist of 3-to-5 steps, set forth below.

- First: The **Agency** must identify a plausible basis for alleging the conduct has had or will have an anticompetitive effect. It should identify the significance, magnitude, and likelihood of that effect.
 - Can the Agency demonstrate that the firm has market power or monopoly power? Conduct that may be benign or procompetitive when engaged in by a firm — even a firm operating a technology platform — that does not possess significant market power, may have anticompetitive effect when engaged in by a platform with significant market or monopoly power.²⁷
 - Anticompetitive effects may manifest themselves in price effects, non-price effects, or both. Non-price effects include, among other things, effects on output, quality, variety, and innovation. An enforcement action may be based on actual or anticipated price effects only, actual or anticipated non-price effects only, or both.
 - Harm to rivals must be connected to harm to competition to support an enforcement action.²⁸ Conduct by a platform that harms a rival or a third party (or a group of similarly situated rivals or third parties) is typically insufficient by itself to support a challenge to the practice. Such harms may be part of a body of evidence that supports a challenge to the practice, however, as harm to a rival can be consistent with a viable theory of harm to competition.
- Second: If the Agency makes the requisite showing of harm, the **Respondent** may rebut this showing by establishing that its existing or threatened future market power or monopoly power is not durable because of customer or competitor response.
 - Ease of entry or ease of significant or material expansion will often defeat a claim of future harm associated with existing market or monopoly power.
- Third: Alternatively, the **Respondent may** identify efficiencies or procompetitive benefits linked to the conduct. The Respondent has the burden of showing the significance, magnitude, and likelihood of the procompetitive effect.
 - Whether such a justification for conduct is convincing will depend upon facts specific to the conduct or transaction under review or consideration.
 - The Agencies should evaluate any efficiency claim to determine whether it represents a non-pretexual claim that the conduct is a form of competition on the merits: perhaps it involves or creates, for example, greater efficiency or enhanced consumer appeal, or a lower cost structure. Conduct that is reflective of a “lower cost structure” is typically competition on the merits.²⁹
 - The identification of efficiencies or other procompetitive benefits is not sufficient to rebut the Agencies’ claim (and proof) of exclusionary or predatory conduct, but in the presence of durable monopoly power, cognizable efficiencies are necessary to rebut the Agency’s proof of exclusionary or predatory conduct.
 - If a platform offers procompetitive justifications for its conduct, the claimed benefits must be related to the conduct under review,

²⁷ A firm is generally considered to have market power when it can profitably raise price above what would occur in a competitive market by restricting output below competitive levels (i.e. “supracompetitive” prices). See, e.g. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984) (citing, inter alia, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 & n.46 (1984)). A firm is generally considered to have monopoly power when it can control prices or exclude competition. *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007) (citing *U.S. v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)). Issues that can arise in cases featuring technology platforms that may inform an analysis of relevant markets and market power include: (i) whether, and to what extent, firms that offer goods and/or services for sale through brick-and-mortar outlets compete with firms that offer goods and/or services for sale online; (ii) whether a single platform’s marketplace can constitute a relevant antitrust market; and; (iii) whether platform users face unreasonably high costs to switch to a competing platform, effectively locking them in to use the dominant platform.

²⁸ Harm to a competitor can be associated with harm to competition, particularly in concentrated markets with few rivals. For example, if the conduct at issue effectively raises the rival’s costs, thereby enabling the platform profitably to raise price and/or reduce quality compared to an alternative in which the conduct did not occur, it may be anticompetitive. Harm to rivals also can be the product of competition on the merits. For example, a linear, non-predatory price reduction that has the effect of transferring sales from a rival to the price cutter may harm the rival but is consistent with competition on the merits. Because the antitrust laws protect competition, not competitors (*See Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)), competition on the merits—even when practiced by a firm with market power—can harm rivals without harming the competitive process.

²⁹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993). In *Brooke Group*, the Supreme Court adopted a framework to evaluate predatory pricing claims to avoid chilling competitive price discounting, and in part out of a concern regarding the administrability of such claims. There, the Court required the plaintiff to show that the allegedly unlawful price was below an appropriate measure of cost and that competitive conditions were such that the discounter could recoup its investment in below-cost pricing.

i.e. “conduct-specific,” in addition to being verifiable and cognizable. The general economic benefits the platform has created will typically not be relevant to the determination whether the conduct is anticompetitive. Rather, the platform must explain and show, with evidence, how the specific conduct at issue benefits (or does not harm) competition.

- Fourth, if market power or monopoly power is durable and that there is a plausible basis (and credible evidence) for both the harm alleged and for non-pretexual procompetitive justifications for the conduct, the **Respondent** must show that there is no less restrictive alternative that would allow the relevant efficiencies to be obtained. Such alternatives must be practical, not merely theoretical.
- Fifth, if the **Respondent** makes such a showing, the **Agency** should determine, and be prepared to prove that, on balance – on “net” –the conduct is harmful or beneficial to competition.³⁰
 - The Agencies should compare the likelihood and magnitude of anticompetitive effects with the likelihood and magnitude of efficiencies to determine the likely or actual overall effect. As the expected harm of the conduct or agreement increases, the required offsetting benefits should also increase.
 - In analyzing harms and benefits, it is necessary to consider the scope and strength of the evidence of actual or likely effects. Mere assertions of potential affects or a business justification are insufficient. However, neither the Agency nor Respondent must identify and weigh each anticompetitive and procompetitive effect with specificity and precision. Such analysis may not be possible or efficient in an individual investigation.
- Finally, where remedies are required, they should be designed to: (i) address the competitive harm from the conduct or transaction; (ii) fit the facts of the case and characteristics of the relevant market, which requires a close and logical nexus between the theory of harm and the remedy; (iii) focus on preferred and time-tested approaches, though novel remedies may be appropriate in some contexts; and (iv) preserve efficiencies to the extent such efficiencies are consistent with effective relief. The **party proposing the remedy** has the burden of showing the remedy meets these criteria.
 - Remedies should preserve or restore competition and prevent or correct the exercise of market power that has resulted in harm to competition. To the extent possible, remedies should preserve efficiencies associated with the prohibited conduct, where such remedies are consistent with effective relief. Remedies that may be appropriate include: (i) divestiture or separation; (ii) a prohibition on, or pre-consummation notice of, mergers or acquisitions; (iii) compulsory licensing, including the licensing of data sets or intellectual property; (iv) interoperability requirements; (v) non-discrimination requirements; (vi) corrective actions; and (vii) monetary equitable remedies.

The proposed approach is a competitive effects analysis, not simply a reasonableness test.³¹ While this framework approximates a structured rule-of-reason analysis, much of Section 2 case law is neither a full rule of reason analysis nor a full competitive effects analysis.³² Prior to the modern era, cases (particularly at the Supreme Court) often stopped at Step 1 – the identification, often mere characterization, of conduct as exclusionary or predatory. In the modern era, district courts and appellate courts too often stop at Step 3 – the identification of a competitive justification – and avoid the balancing or analysis of harms and benefits.

IX. KEY PRINCIPLES OF A COMPETITIVE EFFECTS ANALYSIS

Analyzing the competitive effects of conduct by technology platforms (or any firm) is a fact-specific process through which the Agencies, guided by their experience, apply a range of existing tools – analytical tools – to the available evidence. The competitive effects analysis should be

30 See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (identifying approach under Section 1 of the Sherman Act); *United States v. Microsoft*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (*per curiam*) (*en banc*) (identifying approach under Section 2 of the Sherman Act); *United States v. Baker Hughes* 902 F.2d 981, 982-83 (D.C. Cir. 1990) (Thomas, J.) (identifying approach under Section 7 of the Clayton Act).

31 The Department of Justice rejected a competitive effects analysis in its since withdrawn report on Single Firm Conduct. See U.S. Dep't. of Justice, *COMPETITION AND MONOPOLY: SINGLE FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT* (2008) (“Although focusing analysis on the effect of consumer welfare is appropriate, the Department does not believe that using an effects-balancing test as a general standard under Section 2 is likely to maximize consumer welfare. The Department believes that it is better for long-run economic growth and consumer welfare not to incur the costs and errors from attempting to quantify and precisely balance procompetitive and anticompetitive effects as required under this test.” *Id.* at viii.).

32 Compare to the alternatives discussed in the DOJ's Competition and Monopoly Report, including the general standard concepts of no-economic sense, profit sacrifice, equally efficient competitor and disproportionality, as applied to specific categories of potentially exclusionary (or predatory) conduct.

focused on and limited directly on how the conduct (including acquisitions) may affect price, output, quality, and innovation.³³ The analytic focus of this inquiry must be on the actual or reasonably likely effects of the conduct, not its label. While characterizing a platform as an “essential facility” or a platform’s conduct as “an exclusive deal,” a “refusal to deal,” a “product design decision,” or “self-preferencing” may be helpful in identifying relevant prior case law or whether the conduct is engaged in by market participants without market power, such labeling should not be the focus of the inquiry.³⁴

The Agencies should consider effects on each class of platform participants that are proximately affected by the conduct under review, including in markets upstream or downstream, or operating in a complementary relationship to the relevant market, and with respect to both inputs and intermediate and final products (or services). As part of this analysis, the Agencies should consider the nature of the relationship and interaction between the different sides (or different sets of users) of the platform, if a platform is operating a multi-sided business.

The analysis of the potential anti- and procompetitive effects of the conduct at issue should include, where possible, both short-term and long-term effects. A platform’s effort to prevent a nascent technology or nascent competitor from maturing into a viable competitive alternative constitutes a valid theory of harm even if the process of maturation may take some time or is uncertain. Similarly, the fact that any benefits caused by the conduct may not accrue in the near term should not preclude a determination that such benefits are procompetitive. Competitive conditions in a market or industry may change over time. Meaningful competitive constraints may emerge in a market that currently lacks such constraints; and conversely, the existence of meaningful competition today does not necessarily mean that such competition will, or is likely to, persist in the future. Such facts, if available, are germane to the evaluation of the complained of conduct. The evidentiary standard required to show anti- or procompetitive effects should be symmetrical.

The Agencies should not be required to construct a hypothetical alternative marketplace or otherwise show with specificity how competition would have occurred had the firm (the alleged dominant firm or monopolist) not engaged in the putatively anticompetitive conduct, nor to determine whether the conduct is anticompetitive. The focus of the inquiry is only on the connection between the conduct under review and any harms and benefits it may produce, in comparison to competition absent the conduct.

Nascent or potential competition may be important in markets where technology platforms are present, or, more generally, in dynamic markets – markets characterized by rapid change (or the potential for rapid change). Accordingly, the Agencies should be attentive to conduct that has the effect of excluding or harming nascent or potential competitors, including acquisitions that remove a nascent competitive threat.³⁵ However, they must also recognize that antitrust does not condemn competition on the merits even when that competition harms a nascent or potential competitor.

The Agencies should not be required to evaluate or determine whether a new entrant is offering a competitively superior alternative to the incumbent in order to show harm from exclusionary or predatory conduct or in conjunction with a merger; the focus of the analysis should be on whether the platform has engaged in conduct that harms competition, such as by foreclosing the new entrant from key distribution channels or key customers such that the new entrant’s costs are raised and the incumbent faces less disciplining competition to the detriment of consumers.

33 Where the Agencies can identify and administer the analysis of conduct on factors other than price, output and innovation that, based on factual analysis, are important competitive variables, the effect of firm conduct on such factors can be incorporated into the competitive effects analysis. However, the Agencies should proceed cautiously in expanding the relevant factors for competitive effects analysis and should do so on a case-by-case basis.

34 *Caribbean Broadcast Sys. v. Cable & Wireless*, 148 F.3d 1080, 1087 (D.C. Cir. 1998) (“‘Anticompetitive conduct’ can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.”); *U.S. v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001) (“[T]he means of illicit exclusion, like the means of legitimate competition, are myriad.”).

35 See, e.g. Bilal Sayyed, *Actual Potential Entrants, Emerging Competitors, and the Merger Guidelines: Examples from FTC Enforcement 1993-2022* (Dec. 2022), available at <https://techfreedom.org/wp-content/uploads/2022/12/Actual-Potential-Entrants-Nascent-Competitors-and-the-Merger-Guidelines-Examples-from-FTC-Enforcemen.pdf>.

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