Essential facilities doctrine: applicability in certain regulated industries in Venezuela

Bruno Ciuffetelli and José Angel Cobeña
Hogan & Hartson, Caracas
bciuffetelli@hhlaw.com and jacobena@hhlaw.com

Introduction

Oil and gas, electric utilities and telecommunications are highly regulated industries in Latin America, and in some countries such as Venezuela the economic policies tend to control and reserve these industries to the State, instead of following the current trend of privatisation and deregulation. It is not a coincidence that all these industries are capital intensive and critical for the economic development and social welfare of the State.

Even if the infrastructure needed for these industries to flourish and provide reliable services is owned and controlled by the State through a public entity or by private entities through concessions or licences, these industries are protected from the entry of new competitors by either government regulations or natural market conditions. Hence, the natural monopolies created are inclined to maximise profits through vertically integrated structures, which are subject to scrutiny by antitrust agencies.

The few efforts to deregulate and privatise such industries, however, have opened the door for new regulations inspired on the so-called 'essential facilities doctrine'. Access to certain infrastructure that is considered 'essential' is the focus of new regulations by the State over public utilities. In view of the foregoing, this article will analyse the essential facilities doctrine and its application in certain regulated industries in Venezuela. Especially it will review how the legislator or regulator has taken a proactive role in incorporating such doctrine into its laws for mandatory compliance, leaving little room for intervention of the antitrust enforcement agency or the courts to develop such doctrine.

The essential facilities doctrine

The essential facility doctrine basically requires a monopolist to share its essential facility with others that require input in a downstream market from such facility. Therefore, the doctrine must be viewed in the context of a vertically integrated market.[1] Scholars like Frischmann and Weber Waller have stated that the essential facilities doctrine holds that dominant firms may incur antitrust liability if they do not provide access to their unique facilities, even to competitors, on a nondiscriminatory basis where sharing is feasible and the competitors cannot obtain or create the facility on their own.[2]

The modern standard that must be satisfied for the applicability of the essential facilities doctrine has been developed by US case law in *MCI v AT&T*,[3] where it was required to establish the following elements: (i) the monopolist controls access to an essential facility; (ii) the facility cannot be reasonably duplicated by a competitor; (iii) the monopolist denies access to a competitor; and (iv) it was feasible for the monopolist to grant access.

Some other cases like *Aspen Skiing v Aspen Highlands Skiing*,[4] and *Verizon v Law Offices of Curtis V Trinko*[5] have dealt with the essential facilities doctrine, but reaching opposite conclusions. In *Aspen Skiing*, the District Court ruled that a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate §2 of the Shearman Act if valid business reasons exist for that refusal. In *Trinko*, a customer of the incumbent local phone service monopolist brought a private antitrust class action challenging the dominant firm's discrimination against a competitor, which allegedly resulted in overpriced and inadequate phone services.[6] The US Supreme Court ruled that when the access to the essential facility is guaranteed by the Telecommunications Act of 1996, the essential facilities doctrine serves no purpose and may not be invoked.

The ruling in *Trinko* could be interpreted as a recognition by a US court that current regulations in

highly regulated industries, such as telecommunications, have taken the place of antitrust laws for the purpose of creating rules based on the essential facilities doctrine, and that there are certain efficiencies that can be obtained from a vertically integrated industry.

Application of the Essential Facilities Doctrine in Venezuela

The essential facilities doctrine is clearly a creation of the US case law that has influenced many legislators around the world. In Venezuela, however, the Ley para Promover y Proteger el Ejercicio de la Libre Competencia[7] ('Ley de Procompetencia') does not expressly provide for an application of the essential facilities doctrine.

It can be argued, however, that Article 13(3) allows application of the essential facilities doctrine through an interpretation of the refusals to deal provision. Under such Article, a dominant firm must not refuse to satisfy purchase or service orders in an unjustified way.

Rodríguez Pacanins reaches a different conclusion. According to the author, the essential facilities doctrine focuses its analysis on the 'essential' character of the infrastructure being under scrutiny, and not on the dominant position of the concern. In his opinion, the essential facilities doctrine represents an inadequate use of antitrust law, because such use can only be addressed by the regulator. He believes that the disruption of a chain of commerce that has been always integrated must only be subject to scrutiny by a regulation to liberalise the market.[8]

In the specific case of telecommunications carriers, Rodríguez Pacanins considers that it would be very difficult for antitrust law to resolve a case involving a carrier that refuses to provide roaming services to a competitor, because there might be other alternatives and substitutes in the market.[9] Even if the essential facilities doctrine is applicable, the result might be that the allegedly wrongdoer is not in a dominant position in the market of roaming services; thus, the case would be dismissed due to failure to satisfy the standard provided for in Article 13(3) of the Ley de Procompetencia. A regulation of liberalisation, however, would not have such obstacles, concludes the author.

The solution proposed by Rodríguez Pacanins is similar to the conclusions reached by the US Supreme Court in the *Trinko* case, where the access to essential facilities was prescribed by a regulation. Although a regulation of liberalisation may be a suitable solution for these kind of cases, however, it is possible to argue that a claimant in Venezuela may opt for the enforcement of regulations providing for access to essential facilities or an antitrust claim under Article 13(3) of the Ley de Procompetencia if the claimant is able to satisfy such standard.

Following are some examples of how regulations play a decisive role in applying the essential facilities doctrine in Venezuela.

Gas Industry

The gas industry in Venezuela is regulated by the Organic Law of Gaseous Hydrocarbons[10] (the 'Gaseous Hydrocarbons Law'). The two relevant provisions in the Law of Gaseous Hydrocarbons with respect to competition provide for (i) a restrain to vertically integrate in the same region; and (ii) mandatory access to facilities.

Pursuant to Article 9 of the Gaseous Hydrocarbons Law, a competitor shall not simultaneously control or perform two or more activities of production, transportation or distribution of gaseous hydrocarbons in the same region. This provision is a prohibition for vertical integration in the gaseous hydrocarbon market.

The Venezuelan legislator, not only concerned about the harmful effects that vertical integration may have over a market where infrastructure is fundamental, protects its gas sector from the creation of dominant firms that may, at their own discretion, increase or decrease output to the detriment of the Venezuelan consumer. For the Venezuelan government, the gas industry is a matter of national security, which cannot be left to the complicated conditions of markets that naturally tend to vertically integrate. Therefore, the objectives of such provision can be divided in two: (i) eliminate any intent of vertical integration; and (ii) protect consumers from any manipulation of output that may have an impact on prices.

But gas regulations may not be interpreted as an abrogation of antitrust laws. Instead, both systems come into play to help achieve the government objectives. Besides the application of administrative sanctions to a competitor in case of violation of the prohibition to vertically integrate in the gas industry, such as termination or cancellation of any license to produce, transport or distribute gaseous hydrocarbons, an injured competitor may resort to antitrust laws in case that any such vertical integration causes damages to the market.

The main problem that such duality of systems has caused is that, under antitrust law a vertical integration would be subject to scrutiny under the rule of reason, which may allow vertically integrated companies to operate under such structure due to efficiencies that may benefit the market and the consumer; whereas under current Venezuelan gas regulations, the legislator prohibits any vertical integration regardless

of the benefits that such integration may bring to the market and the consumer.

Pursuant to Article 10 of the Gaseous Hydrocarbons Law, storage, transportation and distribution corporations of gaseous hydrocarbons are obliged to allow the use of their facilities to other storage, transportation and distribution corporations, when such facilities have a capacity to do so. The terms and conditions of such use shall be agreed between the parties or, if no agreement is reached, by the regulator.

Article 10 above is a clear development of the essential facilities doctrine done by the legislator. Although it does not focus on the essentiality of the facility, it does provide for access to other competitors in the same market in case that such facility has capacity. Thus, it obliges companies to maximise their capacity and to reach agreements with their competitors in order to have access to exceeding capacity in their facilities.

It can be argued that this provision is based on national security reasons rather than antitrust considerations, because the legislator is not taking into account the dominant factor of the essential facilities doctrine. It does not matter whether the competitor is a dominant firm for granting access to other competitors, because the latter would always obtain access to such facilities. One of the consequences of this provision is that competitors would not be encouraged to invest in infrastructure, because the legislator has guaranteed access to facilities through its regulations.

This gas regulation also promotes free riders. Competitors that are not encouraged to invest in developing new infrastructure may still benefit from other competitor infrastructure by using the latter's facilities. The negative side of this equation is that a competitor that is aware of or would like to avoid free riders, would not maximise the use of its infrastructure for the purpose of alleging that its infrastructure does not have capacity to give access to other competitor.

Therefore, rather than creating benefits to the market by granting access to facilities in the gas market (storage, transportation and distribution), such access may generate distortions in the market if not reconciled with antitrust provisions. Distortions may appear in the form of free riders, or improper use of infrastructure. A reconciliation between antitrust and gas regulations would be possible if access to infrastructure is granted only when the owner of the infrastructure is a dominant firm and it is not feasible for the competitor to replicate such infrastructure. In such case the regulator would have to analyse the benefits to the market of the access to essential facilities in a case-by-case basis (rule of reason), rather than granting access based only on capacity.

Electric Utilities

The electric utilities are regulated in a similar way to the gaseous hydrocarbons industry. Electric utilities are subject to the Organic Law of the Electric Service[11] (the 'Electric Service Law'), which goes farther than the Gaseous Hydrocarbons Law because it expressly grants powers to the government to regulate monopolies that under free competition rules may not be efficient.

Pursuant to Article 3 of the Electric Service Law, the State shall promote competition in such electric service activities that it may deem necessary, regulate monopoly situations in which free competition does not guarantee the performance of efficient services, and encourage private investment in the performance of electric service activities.

The provision of Article 3 provides ample powers to the State, which are exercised through the regulator, to issue and enforce regulations in monopoly situations, including situations where access to essential facilities owned or controlled by a monopolist are at stake.

According to Article 6 of the Electric Service Law, a corporation is prohibited from performing two or more of the following activities: generation, transmission, National Electric System services and distribution. This provision is similar to Article 9 of the Gaseous Hydrocarbons Law, because it prohibits vertical integration regardless of any efficiency that may be created. But do all vertical integration cases pose a risk to the market?

It appears that the Venezuelan legislator did not take into consideration any of the efficiencies that may arise from a vertically integrated electric company, where if antitrust regulations are correctly applied and enforced distortions to the market might be eliminated or mitigated. It is true that infrastructure is fundamental in the electric industry, and that it is not efficient or feasible for competitors to replicate two or more transmission lines for competition to flourish in a given area, but is a per se prohibition of vertical integration the solution to this problem? The conclusion seems to be that the Venezuelan legislator was not relying on the remedies provided for in the antitrust laws, needless to say on the enforcement of such antitrust regulations by the antitrust agency. The legislator took over the role of the antitrust agency, maybe because of the lack of capacity of the antitrust agency to enforce antitrust laws or the establishment of a policy against vertical integration that ignores efficiencies.

It is possible to admit, however, that vertical integration in the electric industry would benefit the Venezuelan electric market; thus, an analysis under the rule of reason would be more convenient for both the market and the consumer. Benefits may come in the

form of optimisation of resources for a better use of infrastructure, and investment in new infrastructure to maximise profits. The regular tendency of a dominant firm that is vertically integrated to increase prices due to lack of competition should be tackled by the antitrust agency, rather than prohibiting all vertical integration regardless of efficiencies and benefits to the market.

In addition, Article 36(5) of the Electric Service Law states that distributors of electric energy are obliged, among other things, to allow free access to their network transportation capacity to other agents in the electric service. Such access shall be regulated by law and the regulations issued by the National Commission of Electric Energy. Administrative sanctions may be applicable in case of violation of such mandate.[12]

Essential facilities doctrine is covered by the Electric Service Law in a way that other competitors are guaranteed access to transportation capacity in the electric utilities market. Although the language used by the legislator does not focus on the essentiality of the facility or the dominant position of the concern, it is clear that the intention of the legislator was to grant access to facilities that are critical in the electric utilities market for competition to increase.

In case that a competitor does not allow access to its distribution capacity to another competitor, administrative sanctions may apply and also the injured competitor may resort on antitrust law to obtain access to the wrongdoer's facilities. But administrative sanctions would be easier to obtain than antitrust remedies, because in the former the agent in the electric service would only have to demonstrate a refusal by distributors of electric energy to grant access to a network for the regulator to intervene and apply sanctions. Antitrust remedies however would only be available if the agent provides sufficient evidence under Article 13(3) of the Ley de Procompetencia that (i) the distributor is a dominant firm in the relevant market; (ii) the dominant firm controls access to an essential facility; (iii) the facility cannot be reasonably duplicated by the agent; (iv) the dominant firm denies access to the agent; and (v) it was feasible for the dominant firm to grant access. It seems like competitors in the electric market would not resort to antitrust regulations, but rather on electric regulations to obtain access to essential facilities. Hence, the role of the antitrust agency in this industry is minimal or almost zero.

Telecommunications Industry:

The telecommunications industry is highly regulated in Venezuela by the Organic Law of Telecommunications[13] (the 'Telecommunications Law'). In this industry access to infrastructure is known as 'interconnection', which in general terms is defined as the physical and logical connection by a carrier to the public network of another carrier.

Telecommunication carriers are obliged to interconnect with other telecommunications public networks. Such interconnection must be performed in non-discriminatory terms.[14] The interconnection obligations are developed in the Interconnection Rules,[15] which in Article 12 provide for a list of resources or infrastructure that is considered essential.

The interconnection agreements must be negotiated and executed between the parties in non-discriminatory terms, among others, which means that the carriers shall not incur in practices regarded as different treatment between carriers of the same nature.[16] In the opinion of Rodríguez Pacanins, this specific regulation seems to limit its protection to the common or classic discriminatory practices.[17] However, it is possible to argue that even if the Interconnection Rules are limited in scope, an injured carrier may rely on the protections given by the Ley de Procompetencia in cases not regulated by the Interconnection Rules.

In fact, pursuant to 58 of the Interconnection Rules, the regulator must decide any claim brought by the parties regarding interconnection matters. In this case, however, the regulator may decide to decline its jurisdiction over to another administrative or judicial authority, such as the Venezuelan antitrust agency. This decision would be based on the nature of the conflict between the parties. Therefore, if the conflict were only related to the access of one carrier to the public network of another carrier, the regulator would have the capacity and powers to take all measures necessary to grant such access and make a decision regarding the controversy. But if the controversy, for example, is related to discriminatory issues that may cause distortions in the relevant market, it is more likely that the regulator would decline its jurisdiction in favour of the Venezuelan antitrust agency, which is more qualified and has better resources to make a decision in such case.

Since the interconnection regulations grant access to any carrier to public networks, which may be considered as an essential facility, there is no need for the antitrust agency to apply the essential facilities doctrine in a case where access to public telecommunications network is denied. In the words of Rodríguez Pacanins, antitrust law is duplicating the specific regulation of interconnection or access to telecommunication networks.[18] Nevertheless, antitrust regulations serve as a complement to the interconnection regulations, and come to play a key role when competitors abuse their powers arising from the possession of infrastructure that is fundamental for other competitors to enter

into the market.

As opposed to the other industries that have been previously analysed, the Venezuelan telecommunications industry does not prohibit vertical integration. Therefore, vertical integration in the telecommunications industry is subject to scrutiny by the Venezuelan antitrust agency under the rule of reason.[19] In this case the agency would have the opportunity to determine whether a given vertical integration is justified by the efficiencies created and the benefits to the market. Thus, it seems like the legislator in the telecommunications industry did take into account the benefits that vertical integration may bring to the market, even in a market where infrastructure cannot be duplicated.

Conclusions

In Venezuela, as well as possibly in the majority of Latin American countries, the tendency is to regulate certain markets that are considered of critical interest for the economic development of the State, such as oil and gas, energy and telecommunications.

The regulations enacted by the legislator and issued by the regulator in Venezuela have incorporated, among others, several antitrust principles that have been developed in the United States of America and the European Union, such as the essential facilities doctrine. The incorporation of such doctrine in regulations gives little space for the antitrust agencies or judges to apply the essential facilities doctrine, which in first instance will be applied by the regulator. As a consequence, regulators would not consider any economic justification by companies refusing to grant access to certain facilities, even if those facilities are not essential under an antitrust analysis. However, there is no restriction for both systems (regulatory and antitrust law) to work together in ensuring access to essential facilities for the purpose of protecting competition.

Although the most efficient and powerful remedies available in Venezuela to enforce the right of a competitor to access essential facilities in regulated markets are encompassed in regulations, a claimant may also rely on the general protection granted by Article 13(3) of the Ley de Procompetencia in order to gain access to essential facilities. Nevertheless, competitors would not be encouraged to initiate an antitrust claim under the Ley de Procompetencia due to a higher burden of proof.

In addition, vertical integration is banned from most of the highly regulated industries in Venezuela. The justifications may be found in national security reasons, protection of the internal market and promotion of competition, but there are other justifications for vertical integration to be permitted that would play an important role in the development of infrastructure that were not taken into consideration.

The Venezuelan legislator, in an effort to simplify market conditions, may have created other problems by prohibiting vertical integration. Optimisation of facilities and investment in infrastructure are some of the efficiencies that were left aside by the legislator, who took over some of the competencies of the antitrust agency.

Notes

1 Areeda, Phillip E and Hovemkamp, Herbert, 'Antitrust Law: An Analysis of Antitrust Principles and Their Application', 2d and 3d editions; 1998–2007 & supp 2008; 771.
2 Frischmann Brett and Weber Waller, Spencer, 'Revitalizing Essential Facilities'; *Antitrust Law Journal*, American Bar Association; Volume 75, Issue 1; 2008; p 6.
3 *MCI Commc'ns Corp v AT&T Co*, 708 F2d 1081, 1132–33 (7th Cir 1983), cited in Frischmann, Brett and Weber Waller, Spencer; *Id.*, p 6.
4 *Aspen Skiing Co v Aspen Highlands Skiing Corp*, 472 US 585, 611 (1985), *aff'g*, 738 F2d 1509 (10th Cir 1984), cited in Frischmann, Brett and Weber Waller, Spencer; *Id.*, p 7.
5 *Verizon Commc'ns Inc v Law Offices of Curtis V Trinko LLP*, 540 US 398 (2004), cited in Frischmann, Brett and Weber Waller, Spencer; *Id.*, p 9.
6 Frischmann, Brett and Weber Waller, Spencer; *Id.*; p 9.
7 Published in the Official Gazette No 34.880 on 13 January 1992.
8 Rodríguez Pacanins, Oscar; La Relación entre el Derecho de la Competencia y las Regulaciones Sectoriales de Telecomunicaciones. El Caso de las Telecomunicaciones en Venezuela; in Jornadas de Derecho sobre la Libre Competencia y Sectores Especiales; Fundación de Estudios de Derecho Administrativo; Caracas, 2007; p. 532–533.
9 *Id.*, p. 535.
10 Published in the Official Gazette No 36.793 on 23 September 1999.
11 Published in the Official Gazette No 5.568 on 31 December 2001.
12 For example, failure to grant access to networks is punished with a fine of up to ten per cent of the gross income of the company in the last 12 months (Article 88).
13 Published in the Official Gazette No 36.970 on 12 June 2000.
14 See Article 130 of the Telecommunications Law and Article 4(4) of the Interconnection Rules.
15 Executive Decree No 1.093 dated 24 November 2000, and published in the Official Gazette No 37.085 on the same date.
16 See Article 4(4) of the Rules of Interconnection.
17 Rodríguez Pacanins, Oscar; *Id.*, p 528.
18 *Ibid*, p 537.
19 See Article 11 of the Ley de Procompetencia.

This article originally appeared in Competition Law International, February 2009, and is reproduced here with kind permission of the International Bar Association, London, UK ©