Essential Facilities and Refusals to Deal

Sometimes a company controls a resource that other companies also need in order to access a market and create effective competition. The incumbent could have created the resource through its investments, have purchased it, or have control over it by historical accident. Antitrust law has struggled to create clear rules around when companies have a “duty to deal,” or share access or resources, with rivals. In principle the law aims to protect the incentive to invest in a business while still ensuring that markets remain competitive. In practice, in the U.S., courts have shied away from imposing on companies a duty to deal with each other (Colgate), especially following Trinko. European competition law is more willing to entertain essential facilities arguments because, under EU law, dominant firms have an affirmative duty to enable competition. See IMS Health. Today, some tech platforms have monopolies on data and are important gatekeepers to information. Should this cause American courts to rethink the doctrine?

Reading

Required Reading

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


AREEDA AND HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 770–774.

Recommended Reading

*Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)

Case C-418/01 IMS Health [2004] 4 CMLR 28

Background Reading


