

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)

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

Verizon Commc’ns Inc. v. L. Offs. Of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004)

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

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

[Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237 \(2021\)](#)

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

Donna Patterson, Robert Pitofsky & Jonathan Hooks, *The Essential Facilities Doctrine Under United States Antitrust Law*, 70 Antitrust L.J. 443 §II (2002)

Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 Wis. L. Rev. 359, 359–60 (2008)