

Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US Supreme Court Ruling in the *Trinko* Case

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A year ago, the United States (hereafter, the “US”) Supreme Court delivered one of its most significant antitrust ruling in the last decades.¹ In the *Curtis v. Trinko* case (hereafter, “*Trinko*”), the Supreme Court radically circumscribed the substantive and institutional scope for antitrust intervention in network industries. In short, the 1996 Telecommunications Act (hereafter, the “1996 Act”) requires incumbent local exchange carrier (hereafter, “ILEC”) to provide access to their operations support systems (hereafter, “OSS”) i.e. a set of systems used for providing services to customers without which rival local exchange carriers (hereafter, “LECs”) cannot enter and operate on the market. The *Trinko* case concerned Verizon’s (the ILEC in New York State) ordering system. Competitive LECs usually sent orders for services through an electronic interface with Verizon’s ordering system. Verizon completed certain steps in fulfilling the order and subsequently confirmed these orders through the same interface. Effective access to Verizon’s OSS was thus necessary for competitive LECs to provide services to customers. In 1999, Verizon’s competitors complained to regulators that a substantial number of customers’ orders were going unfulfilled, in violation of Verizon’s obligations to provide access to OSS. A settlement was reached whereby Verizon accepted to implement a series of regulatory remedies for ensuring effective access to its OSS. A complainant nonetheless filed a class action lawsuit before a federal court claiming that Verizon’s reluctance to provide effective access to OSS amounted to a violation of Section 2 of the Sherman Act. The case was eventually brought before the US Supreme Court.

The *Trinko* case led the Supreme Court to give interesting guidance on two cornerstones of antitrust law. A first issue - of a substantive nature - was to determine whether antitrust rules should be used for validating new entrants’ access demands on the basis of (i) the case law relating to refusals to deal by monopolists and (ii) the “essential facilities” doctrine. A second issue - of a jurisdictional nature - was to determine whether antitrust rules should be enforced in sectors that are already subject to sector specific legislation. These issues have arisen in similar terms in the European Community (hereafter, the “EC”). The answers of the US Supreme Court to these two important questions mark a radical departure from previous case law and, more importantly for the present paper, from the approach taken by the EC courts and the European Commission (hereafter, the “Commission”). As will be seen, where the Supreme Court tends to circumscribe the scope of application of competition law, European authorities tend to expand it.

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¹ See *Verizon Communications, Inc. v. Law Offices of Curtis Trinko, LLP*, 13 January 2004, 540 U.S.

The purpose of the present article is to cast light on these divergences and to address the question of whether a similar approach to that of the US Supreme Court should be promoted in the EC legal order. The discussion is organised as follows. First, the issue of access to an essential facility is analysed (I). Second, the issue of the scope of applicability of antitrust rules to sectors subject to specific legislation is examined (II). Third, some concluding remarks are given (III).

I. Refusals to deal and the “Essential Facilities” Doctrine

The US ruling in *Trinko* considerably narrows the applicability of Section 2 of the Sherman Act to refusals to deal and “essential facilities” claims (1). The EC position and in particular the Commission’s one is at odds (2). Several elements suggest that the Commission could gain from bringing its decision-making practice more in line with *Trinko* (3).

1. The US Supreme Court Ruling in *Trinko*

In *Trinko*, the complainant argued that Verizon had infringed Section 2 of the Sherman Act by wilfully refusing access to some of its network elements in order to prevent competitors from providing services at competitive conditions to customers.² In the complainant’s view (i) Verizon’s conduct amounted to an illegal refusal to deal within the meaning of *Aspen Skiing* (ii) the “essential facilities” doctrine as developed by lower courts should apply to Verizon’s behaviour.

The first of these claims concerned the question whether a monopolist can legitimately refuse to deal with its competitors. This question has been a thorny issue in US antitrust law for the past decades. The US courts have tackled this issue by adumbrating the principle that antitrust law does not impinge on firms’ freedom to decide whether they should deal with their competitors or not.³ However, this freedom has not been left unlimited. In *Aspen Skiing*, the US Supreme Court held that when a firm intentionally refuses to deal in order to achieve or attempt monopolization of a market, a restriction of this firm’s freedom may be ordered through compelling it to grant access to its inputs under Section 2 of the Sherman Act.⁴

This issue lies at the heart of the present *Trinko* ruling where the US Supreme Court takes a restrictive approach to the interpretation of *Aspen Skiing*. The Court recalls that the exception to lawful refusals to deal in *Aspen Skiing* only applies in a narrow set of circumstances which were not present *in casu* for two reasons. First, the refusal to deal must be “unambiguously” motivated by the willingness to achieve an anticompetitive end in the long run.⁵ In *Trinko*, nothing in Verizon’s conduct could lead to the inference of a wilful intent to monopolize. Also, in *Aspen Skiing* the

² The complainant was not a competitor but a customer. Its *locus standi* was justified because the incumbent’s conduct allegedly prevented new entrants from operating efficiently on the market or from entering the market. Thus it discouraged customers from remaining with competitors and/or subscribing to competitors’ offers. The concurring opinion by Justice Stevens (joined by Justice Souter and Justice Thomas) denied standing to the customer holding that only competitors could have advanced a claim on the basis of Section 2.

³ *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

⁴ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985).

⁵ Indeed, the monopolist had terminated a profitable commercial relationship and had thus no other rational explanation for its behaviour than the goal of eliminating its competitor.

defendant refused to sell even if compensated at its own retail price while no similar conclusion could be drawn from Verizon's reluctance to interconnect at the cost provided for by the 1996 Act. Second, in *Aspen Skiing*, the defendant refused to provide its competitor with a product which it already sold on the retail market to other customers. In *Trinko*, the services at stake were not otherwise marketed or available to the public.

The second claim raised by the complainant concerned the so called "essential facilities" doctrine. This doctrine embodies a derogation comparable to the *Aspen Skiing* exception in fields where, for various reasons, a firm holds control over an asset to which a competitor must have access in order to operate on a given market. This concept was created by inferior US courts in order to compel infrastructure owners to grant access to their facilities provided four conditions are met: (i) the firm controlling the facility must be a monopolist, (ii) competitors must not be practically or reasonably able to duplicate the essential facility, (iii) competitors must be denied the use of the facility, (iv) provision of access to the facility must be feasible.⁶ Typical examples of "essential facilities" have been prevalent in, for instance, utilities such as railway bridges,⁷ electricity power plants,⁸ telecommunications network⁹ etc.

The *Trinko* case constitutes a major reduction in significance of the "essential facilities" doctrine. The Supreme Court indeed challenges the validity of a doctrine that was "crafted by some lower courts" that it had never recognised in previous cases. In addition to this, the Court notes that in any event, if such a doctrine were recognized, it could only apply where access is unavailable. This is unlikely in sectors where sharing requirements are or can be imposed through regulation. The latter finding is of utmost importance in utilities sectors where access is often guaranteed through regulation because competitors seeking access to incumbents' infrastructures may no longer be entitled to rely on the "essential facilities" doctrine.

2. The EC approach to Refusals to Deal and Essential Facilities

In the EC, the question of exclusionary refusals to deal by dominant undertakings was first analysed by the ECJ in *Commercial Solvents*.¹⁰ The Court held that the refusal to supply raw material to a competitor could amount to an abuse of a dominant position under Article 82 EC provided it led to the exclusion of its competitors from the market. Against this background, the Commission developed an "essential facilities" doctrine whereby it initiated a number of Article 82 EC actions against refusals of

⁶ This is, of course, in addition to the "wilful" intent to eliminate competition. See *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983). As a consequence of these strict conditions, there were only a few successful access demands. However, the "essential facility" doctrine was expanded over the borders of utilities sectors. Controversially, the doctrine was applied to Intellectual Property (hereafter "IP") rights. Holders of intellectual property rights were required to grant licences of their IP rights to competitors. These developments led to acrimonious criticisms from the industry. In particular, patent and copyright holders were concerned that the limitations to exclusivity flowing from IP right would not enable them to reap sufficient reward for their inventive effort and would disrupt the fundamental incentive for innovation which lies at the heart of IP protection. See *Bellsouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, 719 F. Supp. 1551, 1566 (S.D. Fla. 1988).

⁷ *United States v. Terminal Railroad Ass'n*, 224 US 383 (1912).

⁸ *Otter Tail Power Co. v. United States*, 410 US 366 (1973).

⁹ *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983).

¹⁰ ECJ, 6 March 1974, *Commercial Solvents v. Commission*, Case 6-7/73, ECR [1974]-223.

access to facilities such as ports,¹¹ computer reservations services,¹² landing and take-off slots,¹³ pipelines,¹⁴ financial payment systems,¹⁵ etc.

Rather than relying on the “essential facilities” lexical, the Court of First Instance (hereafter, the “CFI”) and the European Court of Justice (hereafter, the “ECJ”) introduced in *Magill* the concept of “exceptional circumstances” in which the owner of a non duplicable asset may be forced to grant access to it to competitors pursuant to Article 82 EC.¹⁶ This concept was clarified by the ECJ in *Bronner* where three conditions were laid down for forcing facilities owners to grant access: (i) the refusal of access to a facility must be likely to prevent any competition at all on the applicant’s market, (ii) the access must be indispensable or essential for carrying out the applicant’s business and (iii) the access must be denied without any objective justification.¹⁷

Although *Bronner* might at first sight have been interpreted as a case reducing the possibility to pursue the enforcement of “essential facilities” policies, the Commission nonetheless continued to extensively use the concept in the field of network industries.¹⁸ An example of this can be found in the Commission’s decision in the *Georg Verkehrsorganisation GmbH* (hereafter, “GVG”) case.¹⁹ GVG, a German railway undertaking intended to provide an international passenger service from Germany to Milan and back. In order to do so, GVG needed to enter into a number of arrangements with an Italian railway undertaking. First, pursuant to EC legislation, access to the Italian rail passenger transport market required the conclusion of an

¹¹ See Commission Decision of 21 December 1993, Port of Rodby, OJ L 55 of 26 February 1994 at p.52; Commission Decision of 21 December 1993, Sea Containers/Stena Sealink, OJ L 15 of 18 January 1994 at p.8; Commission Decision of 11 June 1992, Sealink/B&I-Holyhead, interim measures, not published.

¹² See Commission Decision of 4 November 1988, London European/Sabena, 1988 OJ L 317 of 24 November 1988 at p.47.

¹³ See Commission Decision of 20 July 1995, Swissair/Sabena, OJ C 200 of 4 August 1995 at p.10.

¹⁴ See XXIII Report on Competition Policy, (1994) at §.80 and §§.223-224 where the Commission cites the *Disma* case.

¹⁵ See XXVII Report on Competition Policy, (1997) at §.68 where the Commission mentions cites the *La Poste/Swift* proceedings.

¹⁶ See ECJ, 6 April 1995, Radio Telefis Eireann and Independent Television Publications Ltd v. Commission, C-241/91 and C-242/91, ECR [1995]-743. *Magill* represented a significant furthering of the abovementioned doctrine whereby the Commission applied the concept in the sphere of IP. Without explicitly referring to the “essential facilities” concept, both courts upheld the Commission’s decision. The transposition of “essential facilities”-like principles in the field of IP led to much controversy. In the recent *IMS Health* case, the Court, refined the *Bronner* conditions by holding that “for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market”. See ECJ, 29 April 2004, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, C-418/01, not yet published at §.38. See also Commission Decision of 3 July 2001, *NDC Health/IMS Health: Interim Measures*, OJ L 49 of 28 February 2002 at p.18.

¹⁷ See ECJ, 26 November 1998, *Oscar Bronner v. Mediaprint*, C-7/97, [1998] ECR I-7791.

¹⁸ In these sectors, the second *Bronner* condition is generally met and the remaining conditions have been broadly construed by the competition authorities.

¹⁹ See Commission Decision of 27 August 2003, *GVG/FS*, OJ L 11 of 16 January 2004 at p.17. For a comment, see Olivier Stehmann, “Applying ‘Essential Facility’ Reasoning to Passenger Rail Services in the EU – the Commission Decision in the case GVG”, (2004) 7 *European Competition Law Review*, 390.

“international grouping arrangement” with an Italian railway undertaking. Second, GVG needed to be provided with infrastructure capacity on the Italian market (time slots as well as a series of information on availability of train paths, prices, signalling etc.). Third, GVG needed to obtain traction to move the train on the Italian network (locomotive and qualified staff for piloting the train). GVG thus asked Ferrovie dello Stato SpA (hereafter “FS”), the Italian incumbent railway carrier to enter into a series of access arrangements. Most of these demands were left unanswered by FS and, where the latter did reply, it reluctantly provided the information needed. GVG thus lodged a complaint before the Commission on the basis of Article 82 EC considering that the various refusals (i.e. to enter into an international grouping arrangement, to provide the necessary information on the Italian railway infrastructure and to provide effective traction) by FS constituted abuses of a dominant position.

Applying in substance a *Bronner*-like test, the Commission came to the conclusion that (i) GVG had no alternative means of obtaining the services in question than by addressing to FS, (ii) the refusals by FS were not justified by any objective reasons and (iii) the refusals by FS bore the risk of substantially eliminating competition on the various relevant markets identified *in casu*.²⁰ It is of note that the Commission only referred to the existence of an “essential facility” concerning the railway infrastructure. Yet, the Commission applied, in substance, a similar test to the other assets at stake (e.g. trains, staff, drivers etc.). A striking feature of the decision thus lies in the fact that the Commission stretches the “essential facilities” concept beyond the purely non duplicable infrastructure.²¹

3. Relevance of *Trinko* for the EC

The *Trinko* case sheds light on two issues which are often being superficially addressed in the EC. First, it underlines the importance of safeguarding investment incentives for market players (3.1). Second, it recalls that a too generous approach to access demands may promote collusive outcomes on downstream markets (3.2).

3.1 Safeguarding Investment Incentives for Market Players

The *Trinko* case constitutes a new illustration of a classic dilemma for antitrust policy: the trade off between the promotion of short term (or static) consumer welfare and the promotion of long run (or dynamic) consumer welfare.²² Under the first concept, a competition authority will typically intervene to ensure that access be granted to competitors so that the consumer faces alternative sources of supply in the short run (access based policies). Under the second concept, a competition authority will allow an infrastructure owner to enjoy a temporary monopoly position and will tolerate the charging of supra competitive prices to competitors if these wish to obtain access to the infrastructure (infrastructure based policies). This preserves the incentives for infrastructure owners to invest in their facilities, improve them and innovate.²³ It also

²⁰ The Commission, however, did not impose fines because of the novelty of the case and following the submission of a number of commitments by FS for terminating the infringements.

²¹ See, in particular, Commission Decision, *supra* note 19 at §§.93-109.

²² See Simon Bishop and Mike Walker, *The Economics of EC Competition Law*, 2nd Ed. Sweet and Maxwell, London, (2002) at §.2.26.

²³ See Office of Fair Trading, Innovation and Competition Policy, Part I – Conceptual Issues, Economic Discussion Paper 3, March 2002, at p.17.

stimulates other operators to invest in their own facilities, leading to the existence of alternative sources of supply in the long run.²⁴

In *Trinko*, the US Supreme Court delivered a “Schumpeterian” ruling by underlining the dangers of the first approach and explicitly endorsing the second. The possibility to exercise monopoly power is an important vector of competition, innovation, investment and economic growth. Therefore, it must not be condemned on a *per se* basis and can only be held unlawful if there is evidence of additional wilful anticompetitive conduct. Policies based on infrastructure sharing of unique facilities are 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”.²⁵

In contrast, the European Commission is much less concerned with the second approach. Besides the controversial *IMS Health* case in the field of IP, it can be argued that the essential facilities decisions adopted by the Commission in utilities sectors do not sufficiently give importance to investment-related issues. In *GVG*, for instance, while issues of access to the railway infrastructure could arguably be brought under the essential facilities umbrella, doubts can be raised where the Commission pushed the concept so far that it was considered unfeasible for the company demanding access to set up and train its own pool of drivers.²⁶ The extremely generous and mechanical approach of the Commission towards some aspects of access demands is unfortunate.²⁷ It may have a disincentive effect on potential competitors’ innovations and investments because they can free-ride on others’ commercial advantages by arguing that the latter is an essential facility.²⁸ A more dynamic approach re-centred on long run consumer welfare should thus be promoted in the EC.

3.2 The Promotion of Collusive Outcomes on Downstream Markets

A second interesting feature of *Trinko* lies in the explicit statement that promoting the conclusion of all sorts of access arrangements between operators bears a risk of

²⁴ See Roger Van den Berg and Peter Camesasca, *European Competition Law and Economics - A Comparative Perspective*, Intersentia, (2001) at p.36.

²⁵ See US Supreme Court ruling, *supra* note 1 at p.8.

²⁶ See Commission Decision, *supra* note 19 at §.95.

²⁷ This approach is criticized by a number of authors. The Commission seems to move towards the recognition of a “convenient facilities” doctrine. See Derek Ridyard, “Compulsory Access under EC Competition Law – A New Doctrine of ‘Convenient Facilities’ and the Case for Price Regulation”, (2004) 11 *European Competition Law Review*, 269. Quite controversially, Simon Bishop evoked the risk that competitors could obtain access to any asset by proving that it would “make their life easier”. See presentation delivered at the Fourth Lunch Talk of the GCLC, available at www.gclc.coleurop.be.

²⁸ See Opinion of AG Jacobs in *Bronner* at §.57: “The justification in terms of competition policy for interfering with a dominant undertaking’s freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it.”. See ECR [1998] I-7791.

facilitating “the supreme evil of antitrust: collusion”. Here again, the Supreme Court’s reasoning can be contrasted with the EC approach where the relationship between the “essential facilities” doctrine and collusion has for the most been ignored by the Commission (and is often overseen by practitioners and scholars).

EC competition law would, arguably, benefit from taking into account the risks of collusive outcomes when applying the “essential facilities” concept. In industries where, for a number of reasons (e.g. high sunk costs, increasing scales returns, natural capacity constraints), the market structure has oligopolistic features, the extensive enforcement of the “essential facilities” doctrine may lead to collusive outcomes.²⁹ This is so for a number of reasons. First, in addition to the duty to grant access to competitors, EC law has established a duty for infrastructure holders not to discriminate between their competitors and their subsidiary.³⁰ The combination of these legal requirements may, to a certain extent, lead to harmonized access conditions for operators on the downstream markets. This is problematic because on oligopolistic market structures, the symmetry of costs between operators is often cited as a critical factor for the likelihood of a collusive outcome.³¹ Of course, the risk that harmonized access conditions limit the scope for price competition on downstream markets depends on the portion of access costs within average total costs.³² From an abstract perspective, it is impossible to determine whether the risk is high or low. Yet, it should be noted that the more extensive the interpretation of the essential facilities doctrine (as for instance, in the *GVG* decision), the more important the common costs incurred by operators will be.³³

Second, the conclusion of access agreements offers a convenient device for monitoring adherence to a collusive scheme (explicit or tacit) on the downstream market. Any deviation downstream can easily be detected by the incumbent through a close surveillance of the evolution of network traffic (and especially of the traffic generated by its competitors). In addition, the deviating operator will normally face an increase in consumer demand. He may thus ask the incumbent to grant him larger volumes/access, thereby signalling that he is deviating from a collusive line of action downstream.

Finally, the conclusion of access agreements enhances the possibility of retaliation in response to a deviation from a collusive scheme.³⁴ Access givers could easily increase access price, undercut retail prices or downgrade access quality in order to “punish” the “cheating” operator. Of course, these parameters are often placed under regulatory

²⁹ This is relevant in utilities sectors where markets are often structured along oligopolistic lines.

³⁰ This results from case law and sector specific legislation. See, e.g., CFI, 15 September 1998, *European Night Services*, T-374-375/94, T-384/94 and T-388/94, ECR [1998] II-3141. See also Commission Notice on the Application of Competition Rules to Access Agreements in the Telecommunications Sector, OJ C 265 of 22 August 1998.

³¹ See Commission’s Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, at §.48.

³² This is likely to be a minimal concern where access costs are a limited share of the average total costs.

³³ In *GVG*, for instance, not only the access costs, but also traction costs, training costs etc.

³⁴ See, for a formulation of this idea, Patrick Rey, “Collective Dominance and the Telecommunications Industry”, 7 September 2002, mimeo.

control. But recent cases show that such predatory strategies (e.g. margin squeezes) are extremely difficult to remedy.³⁵

The Commission should thus strive to ensure that the elimination of alleged abuses of single dominance does not end up in the promotion of collective dominance outcomes.³⁶

II. The Interface between Antitrust Rules and Sector Specific Legislation

The second interest of *Trinko* lies in the radical solution given by the US Supreme court to the question of the interface between competition rules and sector specific legislation (1). In the EC, the recent *Deutsche Telekom* decision portrays slight divergences with the US approach (2). It is, however, not sure whether *Trinko* should be transposed as such in the EC (3).

1. The US Supreme Court Approach in *Trinko*

The question at stake in *Trinko* was to determine whether the enforcement of antitrust rules should be admitted in situations where sector specific remedies can also be enforced.³⁷ The US Supreme Court takes a negative stance on this. The court's reasoning is based on a costs/benefits rationale whereby when a regulatory structure has been set up to reduce and remedy the risks of a competitive harm, the additional benefits from antitrust enforcement are likely to be limited. The Court finds three reasons in support of this view. First, in the field of telecommunications, the US authorization requirements and the other sector specific provisions applicable to Verizon are very intrusive. Operators are placed under the detailed scrutiny of the Federal Communications Commission which enjoys significant powers to prevent the likelihood of competitive harm.

Second, the US Supreme Court stresses the costs of an expansion of Section 2 liability through the existence of "false positives" (i.e. false condemnations where purely legitimate actions by an undertaking are held to be an infringement of the antitrust rules).³⁸ In the field of network industries, practices which have an exclusionary effect may often have nothing to do with the intent to eliminate competitors and it would thus be inappropriate to bring these conducts under the umbrella of Section 2 of the Sherman Act.

³⁵ See, for an excellent discussion of margin squeeze practices, Damien Geradin and Robert O'Donoghue, "The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector", Paper presented at the BT-GCLC Conference, 10 December 2004, available at http://www.gclc.coleurop.be/conferences_workshops.htm

³⁶ The promotion of collective dominance outcomes would be problematic because EC competition law is ill-equipped to deal with abuses of joint dominance (and especially to devise an appropriate remedy against anticompetitive parallel behaviour). This is probably why the Commission has been very cautious with using Article 82 EC against tacit collusion in oligopolistic markets. For a good discussion of this, see Richard Whish, *Competition Law*, 4th Ed., (2001) Butterworths, at p.479

³⁷ In the US, the telecommunications sector specific legislation explicitly mentions that it does not prevent the application of the antitrust rules. The following question is then to determine whether antitrust rules intrinsically embrace situations where sector specific legislation can be applied.

³⁸ See US Supreme Court ruling, *supra* note 1 at p.14.

Third, the US Supreme Court points out the fact that courts of law are ill equipped to deal with the day to day enforcement of the remedies they could impose on the basis of antitrust rules because this would require “continuing supervision of a highly detailed decree”.³⁹ Hence, the US Supreme Court comes to the conclusion that in fields where sector specific remedies can be applied, it is preferable to refrain from enforcing antitrust rules.

The *Trinko* ruling marks the recognition of a “pre-emption” or “exhaustion” principle in the field of antitrust. Private claims on the basis of antitrust rules should be, to a certain extent, exhausted where a sector specific remedy exists. The ruling of the US Supreme Court suggests that the scope of antitrust law in regulated sectors is a subsidiary one, in situations where no sector specific remedies are available.⁴⁰

2. The EC Approach

Similarly to the US, the question of the interface between sector specific legislation and competition rules has arisen in the EC. The first generation directives (i.e. the first sets of directives that were adopted at the beginning of the liberalisation process in a number of network industries) already provided that the regulatory frameworks are “without prejudice to the application of competition rules”.⁴¹ These directives, however, did not indicate whether and to which extent, competition authorities would broaden the scope of application of competition rules to sectors where sector specific legislation applies. The Commission’s decision in the *Deutsche Telekom* case clarified this issue.⁴²

This case concerned the prices charged by Deutsche Telekom (hereafter, “DT”) to its competitors and consumers for access to the local loop between the end of 1998 and 2002. The local loop is the physical circuit between the consumer’s premises and the telecommunications operator’s local switch. This infrastructure is generally controlled by the incumbent operator and new entrants need access on fair and non discriminatory terms to the loop in order to offer retail services to consumers and compete with the incumbent. In March 1999, several of DT’s competitors had lodged complaints before the Commission arguing that DT’s prices for access to the local loop were incompatible with Article 82 EC. The prices charged by DT for competitors’ access on the wholesale local loop market were higher than the prices it

³⁹ See US Supreme Court ruling, *supra* note 1 at p.14.

⁴⁰ It is now discussed in the US whether *Trinko* shall apply to all sectors where a regulatory structure exist.

⁴¹ See Recital 26 of Directive 97/33 of the European Parliament and of the Council of 30 June 1997 on Interconnection in Telecommunications with regard to ensuring Universal Service and Interoperability through the Application of the Principles of Open Network Provision (ONP), OJ L 199 of 26 July 1997, pp.32-52; See Recital 3 of Directive 96/92 of the European Parliament and of the Council of 19 December 1996 concerning Common Rules for the Internal Market in Electricity, OJ L 27 of 30 January 1997, pp.20-29; See Recital 6 of Directive 98/30 of the European Parliament and of the Council of 22 June 1998 concerning Common Rules for the Internal Market in Natural Gas, OJ L 245 of 4 September 1998, pp.1-12; See Recital 41 of See Directive 97/67, of the European Parliament and the Council of 15 December 1997 on Common Rules for the Development of the Internal Market of Community Postal Services and the Improvement of Quality of Service, OJ L 15 of 21 January 1998, pp.14-25.

⁴² See Commission Decision of 21 May 2003, *Deutsche Telekom AG*, OJ L 263 of 14 October 2003, p.9. See also, Robert Klotz and Jérôme Fehrenbach, “Two Commission Decisions on Price Abuse in the Telecommunication Sector” (2003) 3 *Competition Policy Newsletter*, 8.

charged to its own subscribers on the retail market. DT thus prevented new entrants from competing in the retail local loop market and deterred entrance on the market.⁴³

DT argued that its conduct could not be held as an infringement of Article 82 EC in that its tariffs had previously been approved by the German telecommunications regulator.⁴⁴ DT considered (i) that the Commission was not entitled to proceed against alleged infractions which have been the subject of regulatory decisions at the national level, and (ii) that if there was a violation of EC law, the appropriate course of action was the initiation of Article 226 EC infringement proceedings against Germany in spite of a direct procedure against the undertakings' whose conduct had been approved by the regulator. These arguments were rebutted by the Commission:

“the competition rules may apply where the sector specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distort competition”.⁴⁵

In fact, the Commission observed that the charges for wholesale and retail access to the loop were regulated but that DT was still left with a commercial discretion which allowed it to restructure its tariffs in order to put an end to the margin squeeze.⁴⁶ DT could have avoided the price squeeze by increasing the retail charges, which DT actually did but in insufficient volumes. In addition, even when it enjoyed limited commercial discretion, DT could have raised the prices of other non regulated charges. Thus, the Commission considered that DT's behaviour was the main source of the restriction of competition and that Article 82 EC was the appropriate course of action. DT was condemned to a € 12.6 million fine. The prior application of a regulatory remedy was not regarded as a justification for its behaviour. It was merely taken into account as a mitigating factor for the calculation of the fine.⁴⁷

The DT case provides a good example of a situation where (i) a sector specific regulatory structure exists and has been enforced by a regulator and (ii) a complaint on a similar matter is subsequently dealt with by a competition authority under competition rules. The approach taken by the Commission there can be criticized for two main reasons. First, on the jurisdictional ground, it opens alternative remedial routes for complainants without coordinating them through a rule of case allocation. Thus, there is no theoretical obstacle for a complainant to bring a similar action before several institutions, i.e. the National Regulatory Authorities (hereafter, the “NRAs”) on the one hand and the various institutions competent to apply competitions rules (namely the National Competition Authorities, the Commission and national courts) on the other hand. Also, there is a possibility that distinct complainants each bring

⁴³ This practice is called a “margin squeeze” because even if competitors are as efficient as the infrastructure owner, they have to bear the costs of access.

⁴⁴ The conformity of prices for access to the local loop with German telecommunications law is under the scrutiny of the German regulator.

⁴⁵ See Commission Decision, *supra* note 42 at §.54.

⁴⁶ See Commission Decision, *supra* note 42 at §.57. This solution is in line with the ECJ case law on the restrictions of competition induced by State interventions. In short, competition rules can be enforced against undertakings as long as they keep some discretion. However, it shall be discussed whether these principles should be transposed in the field of regulation. See XXII Report on Competition Policy, (1992) at §.193; See also Michel Waelbroeck and Aldo Frignani, *Commentaire J. Megret, Le droit de la CE, Vol. 4 Concurrence*, 2nd Ed. (1997), at p.149.

⁴⁷ See Commission Decision, *supra* note 42 at §.212.

closely related cases (e.g. several interconnection conventions with a same incumbent operator) before distinct authorities or courts. The risk of duplication of proceedings that may result is unsatisfactory because it may in turn generate delays, higher transaction costs and increased legal uncertainty for operators. From a public policy standpoint, it is also costly because it creates a risk of duplication of investigative resources.

Second, on the substantive ground, there is a possibility that the decisions adopted under each body of rules differ in the medium run and lead to regulatory inconsistencies. Indeed, the approach under sector specific regulation is often different from the approach under competition rules. In the field of conditions for access to a network, for instance, sector specific frameworks often take into account the investments incurred by the owner of the infrastructure, the existence of intellectual property rights or the necessity to preserve competition in the long run.⁴⁸ In contrast, competition rules are less concerned with these objectives. The “essential facilities” doctrine does not mention the conditions under which access should be given. Since competition authorities are primarily concerned with the elimination of actual restrictions of competition, they generally give little importance to the necessity that access conditions ensure sufficient rates of return on investments and do not undercut incentives for innovation etc. Therefore, sector specific regulators may legitimate access conditions that a competition authority would on the contrary consider as incompatible with Article 82 EC.⁴⁹

3. Relevance of *Trinko* for EC Competition Action in Specific Sectors

On face value, the US and EC approach to the interface between sector specific legislation and antitrust rules seem to be at odds. However, a number of elements suggest that the Commission’s approach can be partly reconciled with the Supreme Court’s approach in *Trinko*. There are indeed some indications that the Commission is unlikely to initiate proceedings where sector specific remedies can be applied. In the *O2/T-Mobile* decision, a notified agreement on infrastructure sharing entailed a risk of foreclosure on sites used for installing antennas, masts and other network elements.⁵⁰ However, the Commission voiced no concern in light of the fact, *inter alia*, that a sector specific remedy was provided for by Article 12 of the Framework Directive on electronic communications and could be used by NRAs if a restriction of competition

⁴⁸ See, e.g., Article 12(2) of Directive 2002/19 of the European Parliament and the Council on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities of 7 mars 2002 OJ L 108 of 24 April 2002, pp.7-20.

⁴⁹ Some consider that the risk of outright decisional conflict is limited because the rules laid down in sector specific frameworks go further than competition rules and lead to the imposition of more stringent conditions on incumbents. See Alexandre de Stree, Robert Queck and Philippe Vernet, “Le nouveau cadre réglementaire européen des réseaux et services de communications électroniques” (2002) 3-4 *Cahiers de Droit Européen*, 243 at p.294. While this is generally true, NRAs and competition authorities follow different approaches which could, in the long run, lead to substantial divergences.

⁵⁰ See Commission Decision, O2 UK Ltd./T-Mobile UK Ltd. of 30 April 2003, OJ L 200 of 7 August 2003, p.59. The agreement could have been used as a blocking tactic against competitors to slow down the pace of rolling out their networks. For an analysis of this decision see Nicolas Petit, “The Commission’s Contribution to the Emergence of 3G Mobile Communications: an Analysis of some Decisions in the Field of Competition Law”, (2004) 7 *European Competition Law Review*, 429.

was observed.⁵¹ In other utilities sectors, the Commission also seems to give preference to intervention by sector specific regulators on the basis of specific provisions. In the field of energy, for instance, the Commission decided, in the *HFC Bank plc/British Gas Trading Ltd* to refrain from action in light of the fact that UK gas regulator had concluded that the risk of anticompetitive effect was unlikely.⁵² These cases provide a clear illustration that the Commission gives priority to the specialized authority and stays proceedings when a NRA is already investigating a case on the basis of sector specific legislation. The Commission's line of action in those cases neutralizes the shortcomings that have just been mentioned.

The remaining difference between the US and the EC approaches is the following. In the US, the application of antitrust rules to regulated sectors is very clearly rejected through the adoption of the principle that the scope of antitrust rules should not be extended where an appropriate regulatory structure exists. In contrast, in the EC, the enforcement of competition rules in addition to sector specific rules always remains a reserved possibility, which is left to the discretion of the competition authority.

It is debatable whether the US Supreme Court approach should be roughly transposed in the EC. The Supreme Court's approach was probably motivated by the fact that US telecommunications regulation is extremely intrusive and that antitrust action in this sector is thus of little benefit. It was also possibly encouraged by the fact that an expansion of antitrust liability to regulated sectors may trigger a flood of litigation through the initiation of numerous class action procedures combined with substantial treble damages claims.⁵³

In the EC, these attributes do not exist. Sector specific legislation is in general not as intrusive as US telecommunications regulation. EC sector specific legislation indeed leaves important discretion on NRAs to decide whether to initiate action. There might thus be situations where NRAs fails to enforce sector specific remedies. In these cases, the possibility to act on the basis of competition rules could prove extremely useful. The Commission would start the procedure (by, for instance, launching a sector inquiry) in order to bring the failing NRAs' attention to a particular problem. The Commission would subsequently defer the case to the regulator and the problem would be handled through the application of sector specific remedies. The competition rules are thus only enforced as an "ignition" device. This approach has already been followed in the telecommunications sector with regards to the *pricing of leased lines* inquiry and the *mobile termination charges* inquiry.⁵⁴ In the latter case,

⁵¹ A similar approach was taken in *BT/MCI I*, where in case of a strategic alliance, the Commission concluded that no conditions or obligations were needed, in view of the national regulatory frameworks to which both parties were submitted. The Commission nonetheless reserved the application of competition rules, if regulatory action proved unsatisfactory. See Commission Decision of 27 July 1994, *BT-MCI*, OJ L 223 of 27 August 1994, pp.36-55 at §57. See on this, Pierre Larouche, *Competition Law and Regulation in European Telecommunications*, Hart Publishing, (2000) at p.312. This suggests, to a certain extent, that the *Deutsche Telekom* case should be read on its facts and arguably, the Commission will only follow this line of action in a narrow set of exceptional circumstances.

⁵² See European Commission, XXVII Report on Competition Policy, (1997) at p.108.

⁵³ That may, indeed, slow down the pace of regulatory reforms, reduce the efficiency of regulatory schemes, increase legal uncertainty and affect investments in the sector.

⁵⁴ See Commission Press Release IP/02/1852 of 11 December 2002, "Prices decrease of up to 40% lead Commission to close telecom leased lines inquiry".

the Commission launched a sector inquiry on the pricing of interconnection charges but subsequently decided to stay proceedings and shift the investigation to the relevant NRAs because the sector specific framework provided a remedy for tackling the identified problem.⁵⁵

In sum, it seems that a bold transposition of *Trinko* could lead the EC authorities to deprive themselves of a useful “ignition” device. However, the lack of clarity in the Commission's approach to these issues is not satisfactory. In addition, the costs of the cumulative application of sector specific regulation and competition rules cannot be ignored. This is why, the Commission could fruitfully draw some lessons from *Trinko* by holding that it will only engage into cumulative intervention under exceptional circumstances.

III. Concluding Remarks

The US and EC approaches diverge substantially. The question whether the EC shall promote a *Trinko*-based approach is to be answered in a differentiated manner. First, as far as the essential facilities doctrine is concerned, the short overview above shows that the EC Commission would probably gain by bringing its decision making practice closer to *Trinko*.⁵⁶

Second, as far as the interface between sector specific legislation and competition law is concerned, the benefits from a bold transposition of *Trinko* in the EC are not obvious. This is, however, not to say that no improvements can be made in the EC. On the contrary, the signals given by the Commission in recent times are contradictory.⁵⁷ Given the potential jurisdictional and substantive drawbacks of the cumulative approach, it is suggested that the Commission should promptly clarify its position. It could be recommended, for instance, that the Commission adopt “best practices” standards whereby it would explain when competition rules shall be enforced in regulated industries.⁵⁸

⁵⁵ See Commission Press Release IP/98/707 of 27 July 1998, “Commission concentrates on nine cases of mobile telephony prices”. The inquiry led to the finding that several PSTN operators charged mobile operators more than fixed operators for call termination.

⁵⁶ The recent ECJ ruling in *IMS Health* reiterates the *Bronner* conditions and thus seems to imply that the concept of exceptional circumstances shall not be pushed too far. See ECJ, *IMS Health* supra note 16, especially at §§.48-49.

⁵⁷ The *GVG* decision raises doubt as to whether the existence of access under sector specific legislation is seriously taken into account by the Commission. Indeed, the Commission took the view that Article 10(1) of Directive 91/440 could have been used for granting access to a number of necessary technical and commercial information but nonetheless held that the refusal to provide information amounted to a breach of Article 82 EC. See §126. See Council Directive 91/440 of 29 July 1991 on the development of the Community's railways, OJ L 237 of 24 August 1991, pp.25-28.

⁵⁸ This has been done in the telecommunications sector with the “Access Notice”. See Commission Notice on the Application of Competition Rules to Access Agreements in the Telecommunications Sector OJ C 265 of 22 August 1998. A prompt clarification is required, given that the enforcement of EC competition rules will increasingly be carried out at the national level.