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THE DIVERGING APPROACH TO PRICE SQUEEZES IN THE UNITED STATES AND EUROPE

*George A. Hay** & *Kathryn McMahon*†

ABSTRACT

Notwithstanding assertions of greater harmonization and convergence between U.S. and EU competition law, recent case law has identified significant differences in those jurisdictions' approaches to the regulation of a price or margin squeeze. In the United States after *linkLine*, the likelihood of a successful claim has been significantly diminished, particularly if there has been no prior course of voluntary dealing and no downstream predatory pricing. In contrast, in a series of decisions in liberalized telecommunications markets, the EU courts, in applying an "as efficient competitor test," have focused on the preservation of competitive rivalry as "equality of opportunity." This significantly broadens the potential liability for a margin squeeze in the European Union and reconstitutes EU competition law as a form of *de facto* regulation in liberalized markets. Faced with the uncertainty of this standard, the dominant firm has an incentive to avoid liability by raising its retail prices to the detriment of consumers. This article evaluates this divergence in the approach to the regulation of a price or margin squeeze in the United States and the European Union and traces these approaches to differing conceptions of dominant firm regulation, which in turn have informed different understandings of the regulation of a refusal to supply and the intersection of competition law with sector-specific regulation.

JEL: K21; L12; L41; L43

I. INTRODUCTION

Substantial progress has been made toward greater harmonization of competition law,¹ from both a procedural and a substantive perspective, among the more than 150 national or supra-national jurisdictions around the world that

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¹ As a result, in part, of the efforts of the International Competition Network (ICN) (*at* <http://www.internationalcompetitionnetwork.org/>) and the Organization for Economic Cooperation and Development (OECD) (*at* http://www.oecd.org/department/0,3355,en_2649_34685_1_1_1_1_1,00.html).

maintain some kind of competition law regime, including most notably the United States and the European Union. On the procedural side, there are numerous examples of cooperation agreements; on the substantive side, a widespread consensus has emerged that a very aggressive prosecution of cartels, especially of the international variety, is an economically and politically appropriate attitude.²

One area that has been slower to advance toward harmonization has been the law and policy regarding dominant firms. The U.S. courts have almost completely abandoned the notion that antitrust law exists in part to protect competitors against aggressive competition from their larger and often more efficient rivals, towards a consumer-welfare model that punishes such competition only if it threatens to lead to higher prices for consumers. Even then, it bends over backwards to avoid “false positives” that might act to deter large firms from engaging in aggressive but legitimate competition out of fear of being caught in a government enforcement web and private treble damage actions.³ Yet many have perceived a historical reluctance of the European Union to give up the notion that competition law can and should be used to protect smaller firms from aggressive competition from larger rivals, even when there is little likelihood of long-term harm to consumers.⁴

Recently, however, the European Commission has signaled a desire to move towards a “more economic,” “effects based,” and “consumer welfare” assessment of exclusionary abuses by dominant undertakings under Article 102 of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 82 of the EC Treaty).⁵ Many have viewed this as evidencing

² A representative collection of writings on U.S. and EU competition law cooperation and cartel enforcement is found in issue 1 of 10 COMPETITION POL’Y INT’L (2011), available at <http://www.competitionpolicyinternational.com/oct-11/>.

³ This is reflected in a string of Supreme Court (and lower court opinions): *Brooke Group v. Brown & Williamson Tobacco*, 509 U.S. 209 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Verizon Commc’ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *Pac. Bell Tel. Co. v. linkLine Commc’ns Inc.*, 555 U.S. 438 (2009). Christine Varney, recent head of the Antitrust Division, has suggested that concerns about “false positives” or excessive deterrence are overblown. Christine Varney, *Vigorous Antitrust Enforcement In This Challenging Era*, Remarks as Prepared for the Center for American Progress (May 11, 2009), available at <http://www.justice.gov/atr/public/speeches/245711.htm>.

⁴ See Case C-95/04 P, *British Airways plc v. Comm’n*, 2007 E.C.R. I-2331; Case C-202/07 P, *France Télécom SA v. Comm’n*, 2009 E.C.R. I-2369; Judgment of the Court (Second Chamber) of 14 October 2010—*Deutsche Telekom AG v. European Commission, Vodafone D2 GmbH, formerly Vodafone AG & Co. KG, formerly Arcor AG & Co. KG and Others* (Case C-280/08 P), 2010 O.J. (C 346) 4 [hereinafter *Deutsche Telekom* 2010]; Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 ECJ EUR-Lex LEXIS 42 (Feb. 17, 2011).

⁵ In announcing the review of Article 102 TFEU, Philip Lowe, then EC Director General of Competition, stated “[a] credible policy on abusive conduct must be compatible with mainstream economics.” Philip Lowe, *Speech by the Director-General of DG Competition*, Fordham Corporate Law Institute 30th Annual Conference on Int’l Antitrust Law & Pol’y 2

an increasing convergence with the approach to monopolization in the United States under section 2 of the Sherman Act. The European courts, however, have maintained a distinctly different interpretation to that developed in the United States.⁶ The U.S. Supreme Court decision in *Pacific Bell Telephone v. linkLine Communications*⁷ and the European Court of Justice's decisions in *Deutsche Telekom AG v. European Commission*⁸ and *Konkurrensverket v. TeliaSonera Sverige*⁹ offer clear illustrations of these differing approaches in the context of the regulation of a "price squeeze," or "margin squeeze."¹⁰ In the United States after *linkLine*, the likelihood of a successful price squeeze suit has been significantly diminished. Price squeezes have traditionally been treated as a variant of a "constructive refusal to deal," but the viability of refusal to deal cases, except possibly in very limited circumstances, has been cast into doubt by the Supreme Court decisions in *Verizon Communications v. Law Offices of Curtis V Trinko*¹¹ and now *linkLine*. In contrast, in a series of decisions in liberalized telecommunications markets, the EU courts have separated the margin squeeze inquiry from a "constructive refusal to supply." This significantly broadens the scope of potential liability for a margin squeeze in the European Union, particularly in non-regulated industries, increasing the likelihood of false positives and the distortion of investment incentives.

This divergence has most commonly been traced to differing conceptions of the purposes of dominant firm regulation, which in turn have informed different approaches to the regulation of a "refusal to supply" and the intersection of antitrust with sector-specific regulation. The EU seems attracted to the notion of preserving "equality of opportunity" for smaller firms to

(Oct. 23, 2003). See also Economic Advisory Group on Competition Policy (EAGCP), *An Economic Approach to Article 82* (July 2005), available at http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf; Eur. Comm'n, Guidance on the Commission's Enforcement Priorities in Applying Article 82 [Article 102] of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45) 7, 9 ¶ 19 (EC) [hereinafter Guidance on Article 102].

⁶ In her opinion in the *British Airways* appeal, Advocate General Kokott pointed out: "[a]ny reorientation in the application of Article 82 EC can be of relevance only for the future, not for the legal assessment of a decision already taken." Opinion of A-G Kokott, Case C-95/04 P, *British Airways plc v. Comm'n*, 2007 E.C.R. I-2331, ¶ 28. See also Ariel Ezrachi, *The Commissions' Guidance on Article 82 EC and the Effects Based Approach—Legal and Practical Challenges*, in *ARTICLE 82 EC: REFLECTIONS ON ITS RECENT EVOLUTION* (Ariel Ezrachi ed., Hart Publ'g 2009).

⁷ *linkLine*, 555 U.S. 438.

⁸ *Deutsche Telekom* 2010, *supra* note 4.

⁹ *TeliaSonera*, 2011 ECJ EUR-Lex LEXIS 42.

¹⁰ "Price squeeze" is the term more commonly used by courts and commentators in the United States, and "margin squeeze" is more common in the European Union. The terms have identical meanings, and reference will be made to both throughout this article.

¹¹ *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko*, 540 U.S. 398 (2004).

compete against their dominant rivals. A problem with this focus, however, is that “equality of opportunity” translates neither into an exclusionary purpose nor into consumer detriment.

As a group of U.S. antitrust professors and scholars, headed by Robert Bork and Gregory Sidak, stated in their *amicus curiae* brief to the U.S. Supreme Court in the *linkLine* appeal from the Ninth Circuit Court of Appeals (“*Amicus Brief*”):

The alternative to consumer-welfare maximization is the view that antitrust law is simply one more tool of industrial policy, and thus its application may permissibly compromise consumer welfare to advance the welfare of competitors. Other nations evidently consider this normative proposition to be appropriate, if recent developments in the European Union are a valid indication. More than ever before, the United States and Europe appear to be at a fork in the road over whether the law of monopolization exists to protect consumers or to ensure that a specified number of firms will profitably populate a market.¹²

For such eminent U.S. antitrust academics to highlight these differences in an *amicus* brief is, in itself, quite remarkable and is clear evidence of the importance they attach to this issue.

This article examines the regulation of a price or margin squeeze in the United States and the European Union and argues that there is some basis for the claim in the *Amicus Brief* of the “consumer welfare” versus the “welfare of competitors” characterization of the differences in approach.

II. A PRICE SQUEEZE AS A “CONSTRUCTIVE REFUSAL TO SUPPLY” UNDER SECTION 2 OF THE SHERMAN ACT

A price squeeze typically arises in an industry where a vertically integrated dominant supplier prices wholesale access to a network or an input vital to the sale or manufacture of a downstream product or service at such a level that the downstream competitor of the dominant firm cannot purchase the input at that price and compete with the downstream retail arm of the vertically integrated firm. This pricing of the input has the effect of raising rivals’ costs and forcing competitors out of the downstream market.¹³

¹² Brief of Amici Curiae Professors and Scholars in Law and Economics in support of the Petitioners at 5, *Pac. Bell Tel. Co. v. linkLine Commc’ns*, 555 U.S. 438 (2009) (No. 07-512), 2007 WL 4132899 [hereinafter *Amicus Brief*]. See also J. Gregory Sidak, *Abolishing the Price Squeeze as a Theory of Antitrust Liability*, 4 J. COMPETITION L. & ECON. 279, 295 (2008); Declaración de Economistas y Especialistas en Legislación Antimonopólica en Representación de Radiomóvil Dipsa, S.A. de C.V. (Telcel) [Declaration of Economists and Antitrust Scholars on Behalf of Radiomóvil Dipsa S.A. de C.V. (Telcel)], *Recurso de Reconsideración*, RA-007-2011, Expediente del asunto n.º DE-37-2006 (filed Oct. 14, 2011) [hereinafter *Telcel Declaration of Economists*].

¹³ See Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986); Steven C. Salop, *Refusal to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist*, 76 ANTITRUST L.J. 709

In the United States, a price squeeze was regarded as a “constructive refusal to deal” and developed against the background of the law on “refusals to deal” under section 2 of the Sherman Act.¹⁴ The classic duty to deal doctrine was established in *United States v. Colgate & Company*,¹⁵ where the Supreme Court stated that, in the “absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”¹⁶ The Court suggested that, where such a purpose exists, there may exist a duty to deal, although the opinion is silent on the terms of such a duty.¹⁷

Subsequent Supreme Court decisions in *Aspen Skiing Co. v. Aspen Highlands Ski Corporation*¹⁸ and *Trinko*¹⁹ have significantly reduced the circumstances where a duty to deal will be established under section 2, particularly in regulated industries and/or where there has been no previous course of dealing. These decisions were then relied on by the Court in *linkLine* to reject the price squeeze (constructive refusal to supply) claim.

In *Aspen*, the Supreme Court found that it was possible for a jury to infer that the dominant ski company’s refusal to continue a joint venture with a rival was anticompetitive. The change in pattern of behavior or withdrawal from the scheme was seen as arguably contrary to the profit-maximizing interests of the monopolist.²⁰ The Court approved a jury instruction that the

(2010); Dennis W. Carlton, *Should “Price Squeeze” Be a Recognised Form of Anticompetitive Conduct?*, 4 J. COMPETITION L. & ECON. 271 (2008).

¹⁴ The test to be applied for monopolization under section 2 was established by the Supreme Court in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). That is, the possession of monopoly power in the relevant market and “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *Id.* at 570-71.

¹⁵ 250 U.S. 300 (1919).

¹⁶ *Id.* at 307.

¹⁷ Later in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the Court specifically referred to the above-quoted passage in *Colgate* and found the refusal to accept local advertising (presumably at the paper’s standard rates) from parties that also used a competitor for local advertising was unlawful as an attempt to monopolize. In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the defendant’s refusal to sell power at wholesale rates (set by a federal regulator) was unlawful because it represented a use of the defendant’s dominance to foreclose potential competition with itself at the retail level.

¹⁸ 472 U.S. 585 (1985).

¹⁹ 540 U.S. 398 (2004).

²⁰ The United States Supreme Court stated:

In any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns that do develop and persist we may call the optimal patterns. By disturbing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs.

refusal to deal would not be a violation if a valid business reason existed for that refusal. In the view of the Court, the defendant's conduct seemed to be without any valid business reason, but the Court did not elaborate on what would count as a valid business reason and did not provide any detail as to the terms on which the defendant would be required to deal, possibly permitting the inference that the defendant had to continue to deal on the same terms it had dealt with the plaintiff in the past. Therefore, the Court left open the question of the existence and terms of any duty to deal had there been no prior course of dealing.

In *Trinko*, it was claimed that Verizon, the incumbent local exchange carrier (LEC), provided insufficient assistance in the provision of telecommunication services to rivals in a market regulated by a federal and state statutory access regime. The Supreme Court described *Aspen* as:

at or near the outer boundary of [section] 2 liability. The Court there found significance in the defendant's decision to cease participation in a cooperative venture. The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.²¹

The termination of the agreement in *Aspen* therefore formed a plausible basis for the jury's inference that the defendant had no legitimate business reason for continuing the cooperation: "[s]imilarly, the [*Aspen*] defendant's unwillingness to renew the ticket prices *even if compensated at retail* price revealed a distinctly anticompetitive bent."²²

The Supreme Court placed a great deal of emphasis on the absence of a prior supply agreement. Since the defendant (Verizon) in *Trinko* had never previously sold to the entity seeking cooperation (AT&T),²³ there would be no basis such as that in *Aspen* for any inference that the refusal was not motivated by legitimate business reasons. The Court notes that the complaint failed to allege that

Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal—upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice.²⁴

472 U.S. at 604 (1985) (citing ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 156 (Basic Books 1978)).

²¹ *Trinko*, 540 U.S. at 409.

²² *Id.* (emphasis in original).

²³ At the time of the *Trinko* decision, AT&T, on account of its divestiture in 1984, was primarily involved in the long distance telephone market and did not operate as an ILEC. By the time of the *linkLine* decision, it had been acquired by SBC (in 2005), an ILEC (and former "Baby Bell," Southwestern Bell Corporation). The merged entity adopted the AT&T name.

²⁴ *Trinko*, 540 U.S. at 409.

Moreover, Verizon was not free to set the terms of any cooperation, because the terms of dealing were effectively dictated by regulation. This undermined another basis for any assertion that cooperation would have been profitable for Verizon (and therefore that the refusal to cooperate could not have been for a legitimate business reason).

The question remains: does this reflect simply a failure in the pleadings that future plaintiffs could easily remedy, or is the Court setting up a “safe harbor” for defendants that have never sold at arms’ length, in that “the services allegedly withheld are not otherwise marketed or available to the public,”²⁵ or otherwise cooperated with competitors?²⁶ It is significant that the Court indicated that the charging of monopoly prices is not *per se* unlawful, seemingly undermining any basis for a claim that, when a duty to deal exists, the dealing must be at “reasonable” (that is, competitive) prices.²⁷

A. The Classic U.S. Price Squeeze Decisions

Although the terminology “price squeeze” does not appear in the judgment, the first price squeeze scenario under section 2 of the Sherman Act was in *Eastman Kodak Company of New York v. Southern Photo Materials Company*.²⁸ The defendant, allegedly seeking to control the retail market as well as the wholesale market, discontinued selling to the plaintiff at the dealers’ discount and would sell only at retail prices, making it impossible for the plaintiff to compete with the defendant for retail sales. The Supreme Court held that the defendant’s refusal to continue to sell to the plaintiff at the dealers’ discount could be an actionable wrong if it is in furtherance of a purpose to monopolize.

The classic formulation of liability for a price squeeze is that put forward by Judge Learned Hand in *United States v. Aluminum Co. of America*.²⁹ Alcoa was charged with using its monopoly power in the upstream aluminum ingot market to squeeze the profits of rivals in downstream aluminum sheet manufacturing. The Court generally endorsed the plaintiff’s theory that Alcoa

consistently sold ingot at so high a price that the “sheet rollers,” who were forced to buy from it, could not pay the expenses of “rolling” the “sheet” and make a living profit out of the price at which “Alcoa” itself sold “sheet” That it was unlawful to set the price

²⁵ *Id.* at 410.

²⁶ *Id.* at 409. In *In re Elevator Antitrust Litigation*, 502 F.3d 47 (2d Cir. 2007), the Court of Appeals adopted the view that *Trinko* created a safe harbor for firms with no prior course of dealing or cooperating with rivals.

²⁷ The Court did not discuss the potential evidentiary burden in trying to decide whether a proffered price is a genuine profit-maximizing monopoly price or something more, intended to function as a “constructive refusal to deal.”

²⁸ 273 U.S. 359 (1927).

²⁹ 148 F.2d 416 (2d Cir. 1945).

of “sheet” so low and hold the price of ingot so high, seems to us unquestionable, provided, as we have held, that on this record the price of ingot must be regarded as higher than a “fair price.”³⁰

While the Court’s concern was whether Alcoa’s competitors could survive given that they had to buy from Alcoa in the upstream market and sell against Alcoa in the downstream market, the actual test suggested by Judge Learned Hand used Alcoa’s costs as the benchmark, asking, in effect, whether Alcoa’s downstream fabricating division could make a profit at the current price if it had to buy ingot at arm’s length—that is, at Alcoa’s upstream price.

Later in *Town of Concord, Massachusetts v. Boston Edison Company*, Judge Breyer (as he then was) referred, generally favorably, to Learned Hand’s conclusion that, at least in an unregulated context, a price squeeze can violate section 2, and he cited a number of district and appellate court decisions condemning such price squeezes.³¹ He also essentially adopted the conceptual test advocated by Learned Hand: whether the integrated firm could make a profit in the downstream market if it had to buy its input in an arms’ length transaction at the monopolist’s upstream price and sell at the prevailing downstream price.³² Judge Breyer went on to raise some questions about the theory of a price squeeze and in particular why the upstream monopolist would feel the need to gain a monopoly in the downstream market as well, given the “single monopoly profit” theorem.³³ He suggested circumstances where the squeeze might actually benefit consumers, for example, when it eliminates a less efficient competitor in the downstream market or when it eliminates a separate monopolist in the downstream market, thereby avoiding “double marginalization.”³⁴

He also raised questions about the ability of a court to determine when the gap between the upstream price and the downstream price is too narrow to allow a competitor to survive, although in doing so he moved away from Learned Hand’s focus on Alcoa’s costs (could Alcoa make a profit in the downstream market if it had to buy ingot at Alcoa’s upstream price?) to

³⁰ *Id.* at 437-38.

³¹ 915 F.2d 17, 18 (1st Cir. 1990).

³² *Id.*

³³ The argument is based on the view that there is only one monopoly profit to be made in a chain of production. The firm in a monopoly position cannot increase its profits by extending or leveraging that monopoly into a vertically adjacent market. *See generally* BORK, *supra* note 20, at 141; RICHARD A. POSNER, *ANTITRUST LAW* 199-200 (2d ed., Univ. of Chicago Press 2001); Ward S. Bowman, *Tying Arrangements and the Leverage Problem*, 67 *YALE L.J.* 19 (1957). More recent literature suggests that the theorem is riddled with exceptions. *See, e.g.*, Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 *HARV. L. REV.* 397 (2009).

³⁴ The exercise of market power downstream can increase the price of the end product beyond the price that results from just one firm’s extraction of monopoly profit. *See Town of Concord*, 915 F.2d at 24-25.

focus on whether a competitor could do so, which raises the issue of whether the doctrine can ever be used to protect a less efficient competitor in the downstream market. In the end, Judge Breyer regarded all this as simply an aside, because he then rejected the application of the price squeeze theory to firms whose upstream and downstream prices are subject to regulation, on the grounds that regulation significantly reduces the risk of harm to consumers from a squeeze.

B. The Decision in *Pacific Bell Telephone v. linkLine Communications*

In *linkLine*,³⁵ it was alleged that AT&T, the vertically integrated owner of the fixed telecommunications network, set a high price for wholesale local loop access and a low price for its retail broadband internet services (DSL), which squeezed the profit margins of the plaintiffs, who were involved in the provision of retail broadband internet services, and “exclude[d] and unreasonably impede[d] competition,”³⁶ thus allowing AT&T to “preserve and maintain its monopoly control of DSL access to the Internet.”³⁷ At the time of the complaint, AT&T was required by regulation to supply the wholesale service at a reasonable and nondiscriminatory rate. The regulation ceased when it was deemed that sufficient competition had been introduced downstream.

The district court and the Court of Appeals for the Ninth Circuit³⁸ ruled that the plaintiffs had a potentially valid claim under section 2 of the Sherman Act. On appeal, the Supreme Court, rather than looking at the price squeeze as a single concept, broke it into its component parts, finding that the “[p]laintiffs’ price-squeeze claim, looking to the relation between retail and wholesale prices, is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level.”³⁹

The plaintiffs’ claim that the retail price was too low failed because the plaintiffs’ did not satisfy the *Brooke Group*⁴⁰ requirements for predatory pricing—that is, that the defendant’s retail prices are below a relevant measure of costs for the vertically integrated entity and there is a “dangerous probability” that they will recoup any lost profits from the period of predation.⁴¹ The claim that the wholesale prices were too high failed because,

³⁵ *Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 555 U.S. 438 (2009).

³⁶ *Id.* at 443–44.

³⁷ *Id.*

³⁸ *linkLine Commc’ns, Inc. v. SBC Cal., Inc.*, 503 F.3d 876 (2007).

³⁹ *linkLine*, 555 U.S. at 452.

⁴⁰ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

⁴¹ *linkLine*, 555 U.S. at 451.

since the defendant had no duty to deal at all (in accordance with *Trinko*), it clearly did not have a duty to sell at reasonable prices.⁴²

Presumably in *linkLine*, the reason that the defendant (AT&T) did not have a duty to deal is that, like the defendant in *Trinko*, it had never voluntarily engaged in selling at the wholesale level. The Supreme Court stated:

The nub of the complaint in both *Trinko* and this case is identical—the plaintiffs alleged that the defendants (upstream monopolists) abused their power in the wholesale market to prevent rival firms from competing effectively in the retail market. *Trinko* holds that such claims are not cognizable under the Sherman Act in the absence of an antitrust duty to deal.⁴³

The Supreme Court cited the price squeeze discussion in *Alcoa*, and did not explicitly reject it, but it surely does so implicitly by holding that in those cases where the upstream monopolist had not previously (voluntarily) sold at arm's length, according to *Trinko*, no duty to deal exists. Referring to *Alcoa*, the Court states: “Given developments in economic theory and antitrust jurisprudence since *Alcoa*, we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us.”⁴⁴

Therefore, at least in circumstances where there is no duty to deal at the upstream level, the Court has apparently foreclosed an argument that the downstream division of the vertically integrated entity is selling at a loss—that is, the difference between the retail price and the defendant's upstream price is not enough to cover the relevant costs of the downstream operation.⁴⁵ It is difficult therefore to see whether any liability remains for a price squeeze, since high prices are not considered objectionable because “[t]he opportunity to charge monopoly prices . . . is what attracts ‘business acumen’ in the first place.”⁴⁶

On the refusal to deal claim, the Court seemed to go even further than *Trinko* in limiting liability. In particular, the Court described its conclusion in *Trinko* to be that the defendant had no antitrust duty to deal at all with the applicant. The Court did not say, however, that “we had found that the plaintiff (in *Trinko*) did not meet its burden to show that the refusal to deal was not based on a legitimate business reason,” which is what the original decision seemed to be about. The Court continued to refuse to disavow

⁴² *Id.* at 450–51.

⁴³ *Id.*

⁴⁴ *Id.* at 452 n.3.

⁴⁵ Because the defendant has no duty to reduce the price of the upstream product, the logical remedy (should such an argument be accepted) would be for the defendant to raise the downstream price to a level that provided an adequate margin for its downstream competitors—in effect, serving to orchestrate pricing in the downstream market to eliminate any significant competition. See, e.g., *Sidak*, *supra* note 12, at 297.

⁴⁶ *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko*, 540 U.S. 398, 407 (2004).

Aspen: “[t]here are also limited circumstances in which a firm’s unilateral refusal to deal with its rivals can give rise to antitrust liability,”⁴⁷ but failed to make clear how, without disavowing *Aspen*, it could hold that Verizon had no duty to deal at all with rivals unless, as suggested above, the Court intended to create a safe harbor for firms that have never before sold at a wholesale level or otherwise cooperated with rivals.

III. THE REGULATION OF A MARGIN SQUEEZE IN THE EUROPEAN UNION UNDER ARTICLE 102 OF THE TFEU

There have been a number of European Commission and European Court decisions on the abuse of a margin squeeze under Article 102 of the TFEU.⁴⁸ The earliest decision, in 1975, was the Commission’s adoption of interim measures in the *National Carbonising* case.⁴⁹ In *Napier Brown-British Sugar*,⁵⁰ British Sugar, which was dominant in both the wholesale market for the supply of raw sugar and the downstream retail sugar product market, was found by the Commission to have imposed prices for the two products where the margin was “insufficient to reflect that dominant company’s own costs of transformation . . . with the result that competition in the derived product is restricted.”⁵¹ In *Industrie des Poudres Sphériques*,⁵² the General Court recognized the concept of a margin squeeze but upheld the Commission’s rejection of the complaint because it was based on the applicant’s desire to set its retail prices to cover its higher processing costs.

Three important recent margin squeeze decisions concerned the provision of broadband services by former state-owned monopolies in the liberalized European telecommunications market. In *Telefónica*, the Commission imposed a fine of almost €152 million on the Spanish telecommunications operator Telefónica for a margin squeeze in the Spanish broadband market

⁴⁷ *linkLine*, 555 U.S. at 448 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608–11 (1985)).

⁴⁸ See generally Damian Geradin & Robert O’Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector*, 1 J. COMPETITION L. & ECON. 355 (2005); Robbie Downing & Alison Jones, *Margin Squeezes in Telecommunications Markets*, in INTELLECTUAL PROPERTY: NEW FRONTIERS ch. 10 (Steven Anderman & Ariel Ezrachi eds., Oxford Univ. Press 2011); RICHARD WHISH, *COMPETITION LAW* 744–48 (6th ed., Oxford Univ. Press 2008); ROBERT O’DONOGHUE & A. JORGE PADILLA, *THE LAW AND ECONOMICS OF ARTICLE 82* 303–50 (Hart Publ’g 2006).

⁴⁹ Commission Decision of 29 October 1975 Adopting Interim Measures Concerning the National Coal Board, National Smokeless Fuels Limited and the National Carbonising Company Limited, 1976 O.J. (L 35) 6.

⁵⁰ Commission Decision of 18 July 1988 Relating to a Proceeding under Article 86 of the EEC Treaty (Case No IV/30.178 *Napier Brown–British Sugar*), 1988 O.J. (L 284) 41 [hereinafter *Napier Brown/British Sugar*].

⁵¹ *Id.* ¶ 66.

⁵² Case T-5/97, *Industrie des Poudres Sphériques SA v. Comm’n*, 2000 E.C.R. II-3755.

from 2001 to 2006.⁵³ The case is currently on appeal to the General Court.⁵⁴ In *Deutsche Telekom*, the European Commission fined Deutsche Telekom AG €12.6 million for a margin squeeze.⁵⁵ The Commission's decision was upheld on appeal to the General Court⁵⁶ and the European Court of Justice (ECJ).⁵⁷ In *TeliaSonera Sverige AB*,⁵⁸ the ECJ was requested by the Stockholm District Court to provide a preliminary ruling on the application of Article 102 in a margin squeeze case. The Swedish Competition Authority (*Konkurrensverket*) had fined TeliaSonera the equivalent of €15.1 million for a margin squeeze in breach of Article 102 and its national law equivalent.

These three cases involved industry structures similar to that in *Trinko*, with a competition law claim essentially identical to that in *linkLine*. The wholesale and retail telecommunications services in *Deutsche Telekom* and *Telefónica* were subject to some form of sector-specific regulation (as in *Trinko*), while the provider in *TeliaSonera*, like the one in *linkLine*, had previously been subject to regulation.

These cases demonstrate marked differences between the U.S. and EU treatment of a margin squeeze and its relationship to a refusal to deal and the role of antitrust in liberalized telecommunications markets.

A. The Decision in *Deutsche Telekom*

Deutsche Telekom is the vertically integrated telecommunications operator in Germany. It owns and operates the fixed telephone network and sells a range of retail services including analogue and broadband internet access and telephone call services. It enjoyed a monopoly in the wholesale and retail provision of fixed-line telecommunications services until the German telecommunications market was liberalized on August 1, 1996, by force of the *Telekommunikationsgesetz* (German Law on Telecommunications, or "TKG"). Its first competitor entered the retail market in 1998.

Following liberalization, Deutsche Telekom was required to offer entrants in the German telecommunications market fully unbundled wholesale access to the local loop. Its wholesale charges and retail rates for analogue

⁵³ Summary of Commission Decision of 4 July 2007 Relating to a Proceeding under Article 82 of the EC Treaty (Case COMP/38.784–*Wanadoo España v. Telefónica*), 2008 O.J. (C 83) 6 [hereinafter *Wanadoo España*].

⁵⁴ Action Brought on 10 September 2007–*Telefónica and Telefónica de España v. Commission* (Case T-336/07), 2007 O.J. (C 269) 55.

⁵⁵ Commission Decisions of 21 May 2003 Relating to a Proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579–*Deutsche Telekom AG*), 2003 O.J. (L 263) 9 [hereinafter *Deutsche Telekom 2003*].

⁵⁶ Case T-271/03, *Deutsche Telekom v. Comm'n*, 2008 E.C.R. II-477.

⁵⁷ *Deutsche Telekom 2010*, *supra* note 4.

⁵⁸ Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 ECJ EUR-Lex LEXIS 42 (Feb. 17, 2011).

and broadband were subject to some form of regulation by the German telecommunications authority (Reg TP). Some competitors, such as Vodafone, claimed that the wholesale prices charged by Deutsche Telekom constituted a margin squeeze—that Deutsche Telekom had pitched its wholesale price at such a level that they were unable to obtain wholesale access and profitably sell retail access services in competition with Deutsche Telekom’s own retail access services.⁵⁹

1. The “As Efficient Competitor” Test

The Commission established (and this was subsequently approved on appeal by the General Court and ECJ), that an abusive margin squeeze involves the imposition of “unfair prices,” contrary to Article 102(a) of the TFEU, when

the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market.⁶⁰

The Commission applied the “as efficient competitor” test,⁶¹ whereby the difference in prices did not need to be negative but merely “insufficient to enable an equally efficient operator to cover its product-specific costs of supplying retail access services. A potential competitor which is just as efficient as the applicant would not be able to enter the retail access services market without suffering losses.”⁶²

The relevant costs applied by the Commission were Deutsche Telekom’s own costs and not the costs of the competing undertaking.⁶³ The “as efficient competitor” test therefore seems to reject the broader reading of *Alcoa* (though Learned Head actually applied *Alcoa*’s own costs) that the dominant firm’s pricing must be such as to permit a rival, regardless of its

⁵⁹ Deutsche Telekom did not contest the finding that it had a dominant position in the wholesale market in local loop access services and in the retail market in end-user access services.

⁶⁰ *Deutsche Telekom* 2003, *supra* note 55, ¶ 107; *cf. Deutsche Telekom*, 2008 E.C.R. II-477, ¶ 166.

⁶¹ The test is also applied by the European Commission in its Guidance on Article 102, *supra* note 5, ¶ 80. For an application of the test in a margin squeeze case in the U.K. water sector, see *Albion Water Ltd. v. Dwr Cymru Cyfyngedig* [Water Services Regulation Authority], [2008] All E.R. 314, [2008] EWCA Civ. 536 (Court of Appeal); *Albion Water Ltd. v. Water Services Regulation Authority*, [2006] CAT 26 (Competition Appeals Tribunal).

⁶² *Deutsche Telekom*, 2008 E.C.R. II-477, ¶ 237. The dominant undertaking “would have been unable to offer its own retail services without incurring a loss if...it had had to pay the wholesale access price as an internal transfer price for its own retail operations.” *Deutsche Telekom* 2003, *supra* note 55, ¶ 140.

⁶³ *Deutsche Telekom*, 2008 E.C.R. II-477, ¶ 192; *cf. TèliaSonera*, 2011 ECJ EUR-Lex LEXIS 42, ¶ 41.

efficiency, to earn a normal or “living” profit.⁶⁴ The test in *Deutsche Telekom* also rejects the “reasonably efficient competitor test,” which examines the costs of a hypothetical reasonably efficient rival.⁶⁵ As the General Court pointed out, a focus on the rival’s costs (whether actual or hypothetical) can be contrary to legal certainty.⁶⁶ It also raises potential collusion and price-fixing problems, as it can promote discussions between rivals concerning costs and prices.⁶⁷ The test can also lead to the protection of less efficient rivals. While some may view this as appropriate to promote competition in newly liberalized markets where entrants with a higher cost structure may not be able to achieve the economies of scale and efficiencies of the dominant firm,⁶⁸ this would seem to be a regulatory rather than an antitrust issue.⁶⁹

2. *The Imputation of Costs and Rejection of Predatory Pricing as a Necessary Component*

The “as efficient competitor” test, like the “fair price” for the wholesale product in *Alcoa*, however, raises problematic issues concerning what

⁶⁴ Cf. Case T-5/97, *Industrie des Poudres Sphériques SA v. Comm’n*, 2000 E.C.R. II-3755.

⁶⁵ The “reasonably efficient competitor” test is presented as an alternative test to the “as efficient competitor” test in the EU regulatory framework for electronic communications. Eur. Comm’n, Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector—Framework, Relevant Markets and Principles, 1998 O.J. (C 265) 2, ¶ 118, cf. ¶ 117. In *National Carbonising*, the Commission stated that the dominant firm’s pricing must “allow a reasonably efficient manufacturer of the derivative a margin sufficient to enable it to survive in the long-term,” but ultimately applied the dominant firm’s own costs. Commission Decision of 29 October 1975 Adopting Interim Measures Concerning the National Coal Board, National Smokeless Fuels Limited and the National Carbonizing Company Limited, 1976 O.J. (L 35) 6, 7. In rejecting the complaint, the General Court in *British Sugar* stated that the test was that of an “equally efficient competitor.” *Napier Brown/British Sugar*, *supra* note 50, ¶¶ 66, 180–82. In *Telefónica*, the Commission stated that both the “equally efficient competitor” test and the “reasonably efficient competitor” test applied but ultimately applied the “equally efficient competitor” test. Eur. Comm’n, Commission Decision of 4 July 2007 Relating to a Proceeding under Article 82 of the EC Treaty (Case COMP/38.784—*Wanadoo España vs. Telefónica*) ¶¶ 311–12, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38784/38784_311_10.pdf [hereinafter *Telefónica*]. In its Guidance on Article 102, the Commission states that it will generally use the benchmark of the LRAIC of the downstream division of the integrated dominant undertaking in margin squeeze cases but may rely on the LRAIC of a nonintegrated downstream competitor when it is not possible to clearly allocate the dominant undertaking’s cost to downstream and upstream operations. Guidance on Article 102, *supra* note 5, ¶ 79 n.55.

⁶⁶ *Deutsche Telekom*, 2008 E.C.R. II-477, ¶ 192; cf. *TeliaSonera*, 2011 ECJ EUR-Lex LEXIS 42, ¶ 41.

⁶⁷ Gianluca Faella & Roberto Pardolesi, *Squeezing Price Squeeze under EC Antitrust Law*, 6 EUR. COMPETITION J. 255, 277 (2010); Sidak, *supra* note 12, at 297.

⁶⁸ Bernard Amory & Alexandre Verheyden, *Comments on the CFI’s Ruling in Deutsche Telekom v. European Commission*, GCP MAGAZINE at 9, 11, 2008. For criticism of this as the sole test, see Geradin & O’Donoghue, *supra* note 48, at 392–93.

⁶⁹ Faella & Pardolesi, *supra* note 67, at 276.

constitutes an “insufficient price” to enable an equally efficient operator to cover its product-specific costs of supplying retail access.⁷⁰ The positive element, where the price is merely “insufficient to cover the vertically integrated firm’s cost of providing its own services,” is particularly problematic, and the Commission gave no real indication of how this would be determined in practice.⁷¹

It is difficult to impute costs in vertically integrated telecommunications firms where markets are subject to network effects and where end-user access services, call services, and other telecommunications services are mostly offered in a bundle. Requiring the dominant firm to be mindful of such specificity in pricing decisions, in order to avoid liability, imposes potentially unreasonable transaction costs, which can result in higher prices, the protection of inefficient competitors, and obstacles to growth and innovation.⁷² This was especially the case when the Commission, the General Court, and ECJ in *Deutsche Telekom* rejected a safe harbor for non-predatory retail prices. Because the abusive nature of the conduct was connected not with the level of the wholesale or retail price but with the “unfairness of the spread,”⁷³ there was no need to demonstrate that the wholesale and retail prices in themselves were abusive “on account of their excessive or predatory nature.”⁷⁴ This is so, notwithstanding the apparent inconsistency that, in order to avoid the margin squeeze, *Deutsche Telekom* would have to increase its retail prices, inviting a possible abuse claim for excessive pricing.⁷⁵ It also poses the same possible risk of collusion between rivals that arises from the application of the “reasonably efficient competitor” test, as it invites the dominant firm to hypothesize about its rivals’ costs in order to ensure they have a sufficient margin to avoid liability. As Robert Bork and other antitrust scholars

⁷⁰ One method that is used by regulators to determine a “fair price” at the wholesale level is the efficient component pricing rule (ECPR). This method generally allows the incumbent to maintain all or a substantial part of the downstream profits it would have earned in the absence of supply (the opportunity cost), thereby reducing the incentives for exclusion. See generally Geradin & O’Donoghue, *supra* note 48, at 374–75; Cf. *Telecom Corp. of New Zealand Ltd. v. Clear Commc’ns Ltd.*, [1995] 1 NZLR 385. The incumbent may also elect to incur rather than avoid costs by selling to the downstream competitor. *Sidak*, *supra* note 12, at 302.

⁷¹ It is important that mere profit-sacrifice, for example, is not confused with a claim that pricing does not cover imputed costs. In regulated industries, this may be a consequence of the regulator setting a wholesale price too high. *Sidak*, *supra* note 12, at 287. *Deutsche Telekom* had, in fact, argued that its retail price did cover its product-specific costs.

⁷² The higher wholesale price may also reflect higher transaction costs in supplying the input to rivals as opposed to the cost savings brought about by vertically integrated provider. Faella & Pardolesi, *supra* note 67, at 279–80.

⁷³ *Deutsche Telekom* 2003, *supra* note 55, ¶ 107; Case T-271/03, *Deutsche Telekom v. Comm’n*, 2008 E.C.R. II-477, ¶ 167; Case C-280/08 P, *Deutsche Telekom AG v. Comm’n*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 159 (Oct. 14, 2010).

⁷⁴ *Deutsche Telekom*, 2010 ECJ Eur-Lex LEXIS 882, ¶ 183; cf. Eur. Comm’n, *Margin Squeeze: Working Paper No. 2 on Competition and Regulation* 32 ¶ 4 (DAF/COMP/WP2/WD, 2009).

⁷⁵ *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶¶ 179–181.

have pointed out, faced with this uncertainty, the dominant firm will likely “default to a strategy of refraining from pricing ‘competitively’ . . . a dominant firm’s safe strategy is to raise its retail price to the level at which the least-efficient retailer does not complain . . . [and] act as the price leader and intentionally cede market share to the benefit of its rivals.”⁷⁶

The determination of a “fair” or “adequate” margin between the wholesale and retail price lacks clarity as a standard of abuse. As the U.S. Supreme Court stated in *linkLine*, the finding of a margin squeeze requires the courts to regulate wholesale and retail prices, and “courts would be aiming at a moving target, since it is the *interaction* between these two prices that may result in a squeeze.”⁷⁷ This supervisory function would also expect to continue as costs change over time.⁷⁸

Such a test leads to the very criticism that the U.S. courts in *Trinko* and *linkLine* ascribed to the determination of a duty to supply, which 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.”⁷⁹ The *Amicus Brief* in *linkLine* noted, “price-squeeze theory is a regulatory undertaking, not an antitrust cause of action.”⁸⁰ The pricing of bottleneck inputs for vertically integrated monopolists is a common regulatory task,⁸¹ and such complicated specialist determinations may be best left to a sector-specific regulator such as the German regulator in *Deutsche Telekom*.

In determining liability, the Commission applied the regulatory principle of tariff rebalancing, separating the costs for the provision of retail access services from call charges.⁸² It was assumed that “as efficient competitors” were obliged to offset losses incurred in relation to local network access by higher call charges and that this would distort competition not only in the (end-user) access market but also in the telephone calls market.⁸³

⁷⁶ Telcel Declaration of Economists, *supra* note 12, at 3–4; Sidak, *supra* note 12, at 297. Carlton points out that these higher retail prices “would in essence impose a tax on consumers of [the downstream product].” Carlton, *supra* note 13, at 275.

⁷⁷ Pac. Bell Tel. Co. v. *linkLine Commc’ns, Inc.*, 555 U.S. 438, 453 (2009). Sidak, *supra* note 12, at 296.

⁷⁸ Telcel Declaration of Economists, *supra* note 12, at 9.

⁷⁹ Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004).

⁸⁰ Amicus Brief, *supra* note 12, at 14; Sidak, *supra* note 12, at 296.

⁸¹ Amicus Brief, *supra* note 12, at 6; Sidak, *supra* note 12, at 282, 296; William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 YALE J. ON REG. 171 (1994).

⁸² Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 ECJ EUR-Lex LEXIS 42, 2003, *supra* note 58, ¶ 120; Case T-271/03, *Deutsche Telekom v. Comm’n*, 2008 E.C.R. II-477, ¶¶ 196–97. Tariff rebalancing seeks to increase access prices and reduce prices for services to ensure that the underlying cost of providing that service is reflected. As Deutsche Telekom argued, tariff rebalancing is primarily used by regulators to avoid cross-subsidizations as a result of universal service provision and not for determining liability for abuse of dominance in an antitrust case. Case C-280/08 P, *Deutsche Telekom AG v. Comm’n*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 211 (Oct. 14, 2010).

⁸³ See *Deutsche Telekom*, 2008 E.C.R. II-477, ¶ 199.

Is it appropriate, however, to separate access services from telephone calls for the purposes of this analysis?⁸⁴ It might be more in keeping with commercial practice and economic efficiency in these markets if the court considered the profitability of a cluster of services offered by the competitors, including telephony services, where they could acquire additional revenue and efficiency savings rather than access services alone.⁸⁵ If services are usually bundled, cross-subsidies and price discrimination may not always be detrimental. Clearly, the ECJ was also of the view that counter-strategies were unavailable to rival firms, stating that a “dominant undertaking cannot drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.”⁸⁶

Damian Geradin and Robert O’Donoghue have argued that, where products are bundled in telecommunications markets, the cost structures of rivals should be considered, because they can make cost savings: “In markets where there is no simple, linear chain of production a margin squeeze test based only on the cost structure of the dominant firm may therefore give a misleading picture of rivals’ costs and competitive constraints.”⁸⁷ Because ascertaining a rival’s costs introduces uncertainties, it may therefore serve competition and avoid false positives in these particular markets to defer to the reasonable pricing decisions of the dominant firm. This was largely the response of the German regulator in *Deutsche Telekom*, which rejected a margin squeeze claim because rival operators could offer their end users competitive prices by resorting to cross-subsidized charges for access services and call charges.⁸⁸

3. *The Distortion of Competition as an Absence of “Equality of Opportunity”*

The ECJ stated that it was not necessary to demonstrate that the pricing had a concrete effect on the markets concerned but it was enough for the Commission to demonstrate that the conduct was capable of an exclusionary effect, even if the result hoped for may not be achieved.⁸⁹ It

⁸⁴ The ECJ found that the retail market for end-user access services constitutes a separate market and “those other telecommunications services fall within markets that are distinct from the latter market.” *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 236.

⁸⁵ *Deutsche Telekom*, 2008 E.C.R. II-477, ¶ 194.

⁸⁶ *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 199 (citing Case C-62/86, *AKZO v. Comm’n*, 1991 E.C.R. I-3359, ¶ 72); cf. Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 ECJ EUR-Lex LEXIS 42, ¶ 40 (Feb. 17, 2011). See generally Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

⁸⁷ Geradin & O’Donoghue, *supra* note 48, at 394.

⁸⁸ *Deutsche Telekom*, 2008 E.C.R. II-477, ¶ 116; see *infra* below.

⁸⁹ *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶¶ 183, 253-54 (“However, in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue cannot be classified as exclusionary if it does not make their market penetration

was claimed that undistorted competition between Deutsche Telekom and its competitors could only be guaranteed if “equality of opportunity” was secured between the various economic operators.⁹⁰ However, is the concept of “equality of opportunity” a useful antitrust standard? Its application, particularly in circumstances where markets are highly regulated and costs are not easily isolated, may have the propensity to create false positives and further distort competition. Equality of opportunity also lacks meaning when one firm is a vertically integrated owner of the fixed network and the other an entrant in the downstream market.⁹¹ As the Supreme Court noted in *linkLine*, citing Philip Areeda and Herbert Hovenkamp, “it is difficult to see any competitive significance [of a price squeeze] apart from the consequences of vertical integration itself.”⁹²

The concept of “equality of opportunity” is also difficult to apply in circumstances where the dominant firm, unlike its competitors, is subject to obligations derived from sector-specific regulation regarding unbundling, nondiscriminatory access, universal services, and tariff rebalancing and the requirement to offer its customers operator (pre)selection, or “call-by-call,” selection.⁹³ Any attempt to incorporate these differences within a calculus to determine “equality of opportunity” is ultimately ineffectual and raises similar analytical difficulties as the “reasonably efficient competitor” test and

any more difficult.”); cf. *TeliaSonera*, 2011 ECJ EUR-Lex LEXIS 42, ¶¶ 61-64; cf. Case T-219/99, *British Airways v. Comm’n*, 2003 E.C.R. II-5917, ¶ 293. In *Deutsche Telekom*, the Commission stated that once a margin squeeze was established, it was not necessary to examine any effects on competition, but it went on to examine those effects. *Deutsche Telekom* 2003, *supra* note 55, ¶¶ 179-83.

⁹⁰ *Deutsche Telekom* 2003, *supra* note 55, ¶ 198; *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶¶ 230, 233.

⁹¹ Inequality as the General Court defines it is inevitable because the owner of the vertically integrated network does not need to rely on wholesale (local loop access) services in order to be able to offer (end-user) access services. *Deutsche Telekom* 2003, *supra* note 55, ¶ 238.

⁹² *Pac. Bell Tel. Co. v. linkLine Commc’ns Inc.*, 555 U.S. 438, 455 (2009) (citing PHILIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 126 (2nd ed., Aspen Publishers 2002)).

⁹³ *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶¶ 190, 203. The concept has been applied in this manner by the ECJ to entrants in telecommunications markets in the context of freedom to provide services:

It may become apparent that operators which have or have had exclusive or special rights were able to enjoy, before other operators, a position allowing them to redeem their costs of establishing networks. The fact that operators entering the market are subject to public service obligations, including those concerning territorial cover, is likely to put them, in terms of controlling their costs, in an unfavourable position by comparison with traditional operators.

Joined Cases C-544/03 & C-545/03, *Mobistar SA v. Commune de Fléron & Belgacom Mobile SA v. Commune de Schaerbeek*, 2005 E.C.R. I-7723, ¶ 49.

the “living profit” requirement in *Alcoa*, which, as we have seen, have largely been rejected by the EU courts.

These concepts demonstrate the vast distinction between the EU and U.S. approaches to abuse of monopoly and provide the basis for the claim made in the *Amicus Brief* that EU law protects competitors, while U.S. law protects consumer welfare: “It becomes necessary to hypothesize what an efficient competitor would be and then determine whether the defendant’s wholesale and retail prices permit the efficient competitor to earn some level of profit deemed to be sufficient.”⁹⁴

The EU model of competition law, as embedded in Articles 101 and 102 of the TFEU, has been traditionally associated with rules to safeguard the totality of the competitive process rather than the U.S. embrace of efficient outcomes and “total welfare.” As the ECJ in *Deutsche Telekom* points out, Article 102 “refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition[.]”⁹⁵ and it aims “to protect consumers by means of undistorted competition.”⁹⁶ Unlike in the United States, where, under section 2 of the Sherman Act, “there is no duty to aid competitors,”⁹⁷ a dominant undertaking under Article 102 has a special responsibility “not to allow its conduct to impair genuine undistorted competition on the common market”⁹⁸ through recourse to methods different from those governing normal competition in products or services.⁹⁹

The EU focus on preserving rivalry, preventing foreclosure, and ensuring “competition on the merits” is derived from an institutional and political history that prioritizes market integration and sets out a system ensuring that competition in the internal market is not distorted.¹⁰⁰ It favors the

⁹⁴ *Amicus Brief*, *supra* note 12, at 7.

⁹⁵ *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 176 (citing Case C-202/07 P, France Télécom SA v. Comm’n, 2009 E.C.R. I-2369, ¶ 105 and the case-law cited therein).

⁹⁶ *Id.* ¶ 180 (citing Joined Cases C-468/06 to C-478/06, *Sot. Lélous kai Sia and Others*, 2008 E.C.R. I-7139, ¶ 68); *cf.* Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 ECJ EUR-Lex LEXIS 42, ¶ 24 (Feb. 17, 2011).

⁹⁷ *Verizon Commc’ns Inc. v. Law Offices of Curtis v. Trinko*, 540 U.S. 398, 411 (2004). The Court also states: “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.” *Id.* at 407-08.

⁹⁸ *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 176.

⁹⁹ *Id.* ¶ 174 (citing Case 85/76, *Hoffman-La Roche v. Comm’n*, 1979 E.C.R. 461, ¶ 91; Case 322/81, *Nederlandsche Banden-Industrie-Michelin v. Comm’n*, 1983 E.C.R. 3461, ¶ 70; *AKZO*, 1991 E.C.R. I-3359, ¶ 69; Case C-95/04 P, *British Airways v. Comm’n*, 2007 E.C.R. I-2331, ¶ 66; Case C-202/07 P, *France Télécom SA v. Comm’n*, 2009 E.C.R. I-2369, ¶ 104).

¹⁰⁰ Formally found in Article 3(1)(g) of the EC Treaty. Article 3(3) of the Treaty on the EU (TEU) states that the European Union is to establish an internal market, which, in accordance with Protocol (No 27) on the Internal Market and Competition, annexed to the Treaty of Lisbon, 2008 O.J. (C 115) 309, 309, is to include a system ensuring that

fostering of short-term competitive rivalry as the best way to ensure long-term investment incentives,¹⁰¹ rather than the U.S. goal of encouraging outcomes that are economically efficient as a way of promoting consumer welfare.

The question must be asked, however, whether consumer detriment always flows from distortion of competition and a reduction in equality of opportunity. In *Deutsche Telekom*, the distortion brought about by the margin squeeze resulted in “limitation of the choices available to them [consumers] and, therefore, of the prospect of a longer-term reduction of retail prices as a result of competition.”¹⁰² The General Court stated that this anticompetitive effect related to the “possible barriers to entry which the applicant’s pricing practices could have created for the growth of competition in that market.”¹⁰³ The ECJ considered that pricing practices can be abusive when access for competitors is “made more difficult”¹⁰⁴ and “the practice tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.”¹⁰⁵

It is difficult to see how non-predatory pricing practices can create barriers to entry in these circumstances. The General Court found that

the small market shares acquired by the applicant’s competitors in the retail access market since the market was liberalized...are evidence of the restrictions which the applicant’s pricing practices have imposed on the growth of competition in those markets.¹⁰⁶

competition is not distorted. Articles 101 and 102 form part of the competition rules referred to in Article 3(1)(b) TFEU. See *TeliaSonera*, 2011 ECJ EUR-Lex LEXIS 42, ¶¶ 20-22. EU competition law has its theoretical foundations in the political and economic ideas of “ordoliberalism,” which originated in the 1930s in Germany, particularly in the University of Freiburg. See DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE, PROTECTING PROMETHEUS* ch. 7 (Oxford Univ. Press 1998). Under this view, “there is neither unconstrained private power nor discretionary governmental intervention in the economy...competition is a value in itself and not just a means by which purely economic objectives—such as efficiency—are to be achieved.” ALISON JONES & BRENDA SUFRIN, *EU COMPETITION LAW* 35 (4th ed., Oxford Univ. Press 2010).

¹⁰¹ See, e.g., Case T-201/04, *Microsoft Corp. v. Comm’n*, 2007 E.C.R. II-3601, ¶ 783; David Howarth & Kathryn McMahon, “*Windows Has Performed an Illegal Operation*”: *The Court of First Instance’s Judgment in Microsoft v. Commission*, 29 EUR. COMPETITION L. REV. 117 (2008).

¹⁰² *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 182.

¹⁰³ Case T-271/03, *Deutsche Telekom v. Comm’n*, 2008 E.C.R. II-477, ¶ 235.

¹⁰⁴ *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 178.

¹⁰⁵ *Id.* ¶ 175 (citing Case 322/81, *Nederlandsche Banden-Industrie-Michelin v. Comm’n*, 1983 E.C.R. 3461, ¶ 73; Case C-95/04 P, *British Airways plc v. Comm’n*, 2007 E.C.R. I-2331, ¶ 67).

¹⁰⁶ *Deutsche Telekom*, 2008 E.C.R. II-477, ¶ 239 (cited by *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 257).

These small market shares could be explained by other factors, however, especially when new entrants in other liberalized markets within the EU member states also experienced limited growth. In *Town of Concord*, Justice Breyer acknowledged that a margin squeeze can harm the competitive process by obstructing “the achievement of competition’s basic goals—lower prices, better products, and more efficient production methods[.]”¹⁰⁷ but this cannot be equated with a finding derived from mere “equality of opportunity.”

4. The Establishment of an “Exclusionary Purpose”

The key difficulty with the concept of “equality of opportunity” is that it does not correspond either to an exclusionary purpose or to a finding of consumer detriment. As Justice Breyer points out in his separate concurring judgment in *linkLine*,¹⁰⁸ a price squeeze can be exclusionary conduct, in the sense recognized by *Trinko* and *Aspen*, where conduct, even if profitable, indicates a “willingness to forsake short-term profits to achieve an anticompetitive end.”¹⁰⁹ As Justice Breyer notes:

As a matter of logic, it may be that a particular price squeeze can only be exclusionary if the refusal by the monopolists to sell to the “squeezed customer” would also be exclusionary. But a court, faced with a price squeeze rather than a refusal to deal, is unlikely to find the latter (hypothetical) question any easier to answer than the former.¹¹⁰

Justice Breyer seems to suggest that the retail price need not amount to predatory pricing, but whether it is exclusionary for antitrust purposes “depends upon a host of factors, including, for example, the market position of the defendant, the nature of the market, and the nature of the defendant’s conduct.”¹¹¹

The European Commission, in its *Guidance on the Commission’s Enforcement Priorities in Applying Article [102] (Guidance on Article 102)*, states that it regards a margin squeeze as a form of “constructive refusal to supply” and requires the establishment of the elements of a duty to deal under Article 102.¹¹² The EU courts, unlike those in the United States, which, as we have seen, have considerably diminished the circumstances when a duty to deal will be found, have imposed such a duty under Article

¹⁰⁷ *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990).

¹⁰⁸ Justice Stevens, Justice Souter, and Justice Ginsburg joined with Justice Breyer’s opinion.

¹⁰⁹ *Pac. Bell Tel. Co. v. linkLine Commc’ns Inc.*, 555 U.S. 438, 458 (2009) (Breyer, J.) (citing *Verizon Commc’ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 409 (2004); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985)).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Guidance on Article 102*, *supra* note 5, ¶ 79. These elements are: the refusal relates to a product or service that is objectively necessary to be able to compete effectively in a downstream market; the refusal is likely to lead to the elimination of effective competition on the downstream market; and the refusal is likely to lead to consumer harm. *Id.* ¶ 81.

102 in a number of decisions.¹¹³ In *Oscar Bronner*, the applicant newspaper publisher sought access to the existing newspaper distribution network of the dominant publisher (Mediaprint) rather than develop its own distribution scheme. For a refusal to supply under Article 102, the ECJ required that the refusal must be likely to eliminate all competition (or effective competition)¹¹⁴ in the relevant market, the service in itself must be indispensable to carrying on that person's business (inasmuch as there is no actual or potential substitute), and the refusal must be incapable of being objectively justified.¹¹⁵ In determining the issue of "indispensability," the ECJ stated that other methods of distributing daily newspapers existed, even though they may be less advantageous.¹¹⁶

Moreover, it does not appear that there are any technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme and use it to distribute its own daily newspapers.¹¹⁷

The ECJ declared that it was "not enough to argue that it is not economically viable by reason of the small circulation."¹¹⁸ It inquired instead whether it was economically viable to create a second nation-wide home-delivery network for a newspaper with a comparable circulation to allow it to compete on equal terms with the incumbent.¹¹⁹

5. "Indispensability" in a Regulated Context

The question then arises, in cases such as those under consideration here, whether the *Bronner* principles must be established, or does a regulated duty to supply equate with the determination of "indispensability" of the input, meaning that there "is no actual or potential substitute"?¹²⁰ This issue was

¹¹³ Cases 6 & 7/73, *Istituto Chemioterapico Italiano Spa & Commercial Solvents Corp. v. Comm'n*, 1974 E.C.R. 223, [1974] 1 C.M.L.R. 309; Cases C-241-242/91 P, *Radio Telefis Eireann (RTE) & Independent Television Publ'ns Ltd (ITP) v. Comm'n*, 1995 E.C.R. I-743, [1995] 4 C.M.L.R. 718; Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint*, 1998 E.C.R. I-7791, [1999] 4 C.M.L.R. 112; Case C-418/01, *IMS Health v. NDC Health*, 2004 E.C.R. I-5039, [2004] 4 C.M.L.R. 28; Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3601.

¹¹⁴ As it has been subsequently defined.

¹¹⁵ *Oscar Bronner*, 1998 E.C.R. I-7791, ¶ 41.

¹¹⁶ *Id.* ¶ 43.

¹¹⁷ *Id.* ¶ 44.

¹¹⁸ *Id.* ¶ 45.

¹¹⁹ *Id.* ¶ 68. The ECJ referred to the opinion of the Advocate General. *Id.* ¶ 46.

¹²⁰ The EU regulatory framework provides that *ex ante* regulation is generally required in circumstances of market failure where there is insufficient competition in alternative inputs such as satellite, wireless, and cable, and where national and Community competition law remedies are not sufficient to address the problem. *Cf.* Directive 2002/21/EC (Framework Directive), 2002 O.J. (L 180) 33, ¶ 27.

considered by the Commission in *Telefónica* and by the ECJ in *TeliaSonera*. Telefónica argued that the appropriate test for a margin squeeze was that of *Bronner* and a “constructive refusal to supply.”¹²¹ It argued further that (as in *Trinko*) it did not have a duty to supply its wholesale products absent the requirement under Spanish Telecommunications law.¹²²

The Commission, in its *Guidance on Article 102* and in *Telefónica*, and the ECJ, in *TeliaSonera*, have stated that if there is a regulated duty to supply, there is no need to consider a margin squeeze within the elements of a refusal to supply as determined by *Bronner*, because the relevant questions about balancing of the *ex ante* investment decisions and the promotion of competition in the downstream market have already been undertaken by the regulatory authority. The Commission in *Telefónica* stated:

It is clear from the considerations underlying both the EC and Spanish law and regulation that Telefónica’s duty to supply the relevant upstream products results from a balancing by the public authorities of the incentives of Telefónica and its competitors to invest and innovate. This is because the need to promote downstream competition in the long term by imposing access to Telefónica’s upstream inputs exceeds the need to preserve Telefónica’s *ex ante* incentives to invest in and exploit the upstream infrastructure in question for its own benefit.¹²³

But the question of indispensability of the input under *Bronner* is a broader investigation than the question of whether imposing a duty to supply will be detrimental to the incumbent’s *ex ante* investment incentives.¹²⁴ *Bronner* examines the *ex post* investment incentives in the market. A duty to deal will not be imposed in circumstances where investment is economically viable,

¹²¹ *Telefónica*, *supra* note 65, ¶¶ 271-72, 300-01. The Commission in *Telefónica* interprets *Bronner* as requiring an assessment of whether an undertaking with an efficiency level comparable to that of the infrastructure owner is able to replicate the input. *Id.* ¶ 300.

¹²² Applying the requirements in *Bronner*, Telefónica argued that (1) there were real and/or potential alternatives to its wholesale access services (ULL and wholesale access to cable networks), (2) the regional and national wholesale access services of Telefónica could be replicated, and (3) the alleged conduct is not likely to eliminate all competition in the downstream market. *Id.* ¶ 301.

¹²³ *Id.* ¶ 303. The Commission sets out this approach in its *Guidance on Article 102*, *supra* note 5, ¶ 82. The Commission found in any event that Telefónica was dominant in both the upstream market (for wholesale broadband at regional and national levels) and the downstream retail market (for all standard broadband products through ADSL or any other technology). It also found that it was uneconomic to duplicate the local access network. These factors, as Geradin argues, would most probably result in a finding of indispensability in any event, “as there did not seem to be a serious alternative to Telefónica’s DSL network.” Damian Geradin, *Refusal to Supply and Margin Squeeze: A Discussion of Why the ‘Telefónica Exceptions’ Are Wrong 4* (Tilburg Law & Econ. Center, Discussion Paper No. 2011-009, 2011), available at <http://SSRN.com/abstract=1750226>. Similarly, the Commission in *Deutsche Telekom* found that there were insufficient alternatives to the wholesale local loop access services: *Deutsche Telekom*, 2003 O.J. (L 263) 9, ¶ 83; Case T-271/03, *Deutsche Telekom v. Comm’n*, 2008 E.C.R. II-477, ¶ 236-37.

¹²⁴ Geradin expresses a similar view. Geradin, *supra* note 123, at 8. See also Faella & Pardolesi, *supra* note 67, at 271.

by the applicant alone or with others, in infrastructure of the size or scope of the incumbents. This is a broader inquiry than a purely regulatory one that aims to foster new entry or greater competition in a newly liberalized market. Regulators must also take into account objectives that differ from those applicable under competition law.¹²⁵ Applying competition law in these circumstances does not merely supplement regulation *ex post* to prevent abuses of market power but reconstitutes competition law as a form of *de facto* regulation in liberalized markets.¹²⁶

Even if a regulated duty to supply is deemed sufficient for indispensability, the remaining elements of the *Bronner* test, such as the requirements of the likelihood of the elimination of effective competition and objective justification, should still be considered. As we have pointed out, the assessment of the likelihood of anticompetitive effect was equated to mere “equality of opportunity” in *Deutsche Telekom*.¹²⁷ An examination under *Bronner* would move the focus from the access service market to the cluster of retail services and require the consideration of other potential sources of competition in the downstream market (including cable, mobile, wireless, and satellite services). If a rival firm is found to have market power in this market, a margin squeeze could be procompetitive because it may prevent the possibility of “double marginalization.”

B. The Decision of the ECJ in *TeliaSonera*

The question remains, in the absence of a regulated duty to supply, is it a requirement for a margin squeeze in the European Union to establish the elements of a refusal to supply, or is a finding of “insufficient spread” enough?¹²⁸ This issue was considered by the ECJ in a preliminary ruling on

¹²⁵ Geradin argues that the Commission’s approach is fundamentally flawed, as the decision by the regulator under the liberalization framework centers on a more narrow determination of “substantial market power” that brings into place automatic access obligations that are made at a different time and in different market conditions to the issue that arises under Article 102. Geradin, *supra* note 123, at 9.

¹²⁶ See Faella & Pardolesi, *supra* note 67, 272; Giorgio Monti, *Managing the Intersection of Utilities Regulation and EC Competition Law*, 4 COMPETITION L. REV. 123 (2008).

¹²⁷ The Commission in *Telefónica*, *supra* note 65, ¶¶ 543–44, did examine the effect on competition, finding that the margin squeeze was a profitable rational strategy for Telefónica and that Spanish retail prices were excessive and well above the EU average. It found that “by reducing the competitive constraints at the retail level, Telefónica is able to sustain a high level of retail prices. . . . The profits extracted from a high level of retail prices surpass by far the forsaken profits related to the forsaken wholesale sales as a result of high wholesale prices (relative to the retail prices).” *Id.* ¶ 611. In the context of *linkLine*, Sidak questions the probability of recovering lost profits from mass market sales to large numbers of customers when wholesale prices are raised to niche market ISP players: Sidak, *supra* note 12, at 288. This finding would require a complex factual analysis in any event, which was not undertaken here. The Commission’s assessment also ignores that in order to avoid price squeeze liability, Telefónica would need to raise retail prices in any event to the detriment of consumers.

the application of Article 102 in *Konkurrensverket v. TeliaSonera Sverige AB*.¹²⁹ TeliaSonera was charged with pricing its wholesale access services to competitors and its broadband ADSL internet services to end users at prices that were insufficient to cover the incremental cost that it had to incur in providing end user services. The wholesale and retail services, unlike those in *Deutsche Telekom* and *Telefónica*, were not subject to sector-specific regulation.

The ECJ confirmed that the test for a margin squeeze was that of the “as efficient competitor”¹³⁰ and that there was no need for the wholesale or retail prices to be abusive in themselves¹³¹ or that any losses be capable of recoupment.¹³² TeliaSonera argued that, in the absence of a regulated duty to supply, the test for a margin squeeze had to go beyond the mere finding of an insufficient price spread and be considered under the general principles of a refusal to supply as set out in *Bronner*.¹³³ In reply, the ECJ stated that a margin squeeze can “constitute an independent form of abuse distinct from that of refusal to supply”¹³⁴ and that there was no need to apply the elements as set out in *Bronner* in the absence of a regulated duty to supply. The test for a margin squeeze in the European Union is therefore one solely focused on the spread (whether positive or negative) between the wholesale and retail prices.

This approach is, as we have seen, contrary to that proposed by the Commission in its *Guidance on Article 102* and to the Opinion of Advocate General Mazák in *TeliaSonera*, where he stated:

charging a price (margin squeeze) which prevents an as-efficient competitor from competing downstream operates in effect as a refusal to deal and implies that the same framework of analysis and the general concerns about the incentives of dominant undertakings to invest should apply . . . the NCA claims that there is an abusive margin squeeze merely on the basis of the insufficient spread between wholesale and retail prices, irrespective of the indispensability of the input. I consider that this approach is incorrect and insufficient.¹³⁵

¹²⁸ In margin squeeze cases in non-regulated markets, such as *Napier Brown*, this question did not necessarily arise because the input was arguably indispensable. *Napier Brown/British Sugar*, *supra* note 50, ¶ 66. In *Telefónica*, however, the Commission disputes this interpretation, stating that a finding of indispensability of the input has not been a requirement for a finding of a margin squeeze abuse in previous decisions, even in non-regulated markets. It explains the *Napier Brown* finding as related to the question of dominance not indispensability. *Telefónica*, *supra* note 65, ¶ 734.

¹²⁹ Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 ECJ EUR-Lex LEXIS 42 (Feb. 17, 2011).

¹³⁰ *Id.* ¶¶ 32, 42.

¹³¹ *Id.* ¶ 34.

¹³² *Id.* ¶ 99. On recoupment in predatory pricing in the EU, see Case C-202/07 P, *France Télécom SA v. Comm'n*, 2009 E.C.R. I-2369.

¹³³ *TeliaSonera*, 2011 ECJ EUR-Lex LEXIS 42, ¶ 54.

¹³⁴ *Id.* ¶ 56.

¹³⁵ Opinion of Advocate General Mazák in *TeliaSonera* (E.C.J.), ¶ 16 (citing Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint*, 1998 E.C.R. I-7791) [hereinafter *Comments of Mazák*].

While not going as far as the U.S. courts in providing a safe harbor if there has been no previous course of dealing, Mazák argued that if a dominant undertaking could lawfully have refused to provide the products, then it “should not be reproached for providing those products at conditions which its competitors may consider not advantageous. Indeed, it is difficult to see how in such a case the alleged insufficient margin could be anti-competitive.”¹³⁶

The ECJ likened a margin squeeze where access had been given voluntarily to a situation of the law regulating terms of a contract, similar to the abuse of tying under Article 102. The ECJ stated that the *Bronner* elements were inapplicable when the facts involve “supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser”¹³⁷ and that these “constitute an independent form of abuse distinct from that of a refusal to supply”¹³⁸ because not all aspects of the terms of trade by a dominant undertaking need to be considered under a refusal to supply.¹³⁹ The ECJ noted that in *Bronner*, Mediaprint was also alleged to have abused its position by refusing Oscar Bronner access to its home delivery service unless it was also willing to purchase a package of services including printing and marketing through other sales points such as kiosks.¹⁴⁰

But a margin squeeze differs in a fundamental way from a “conditional sale” contract, which is characteristic of tying and exclusive dealing.¹⁴¹ The EU case law in these areas can also be criticized as being excessively formulaic and not always mindful of the economic consequences of these agreements.¹⁴² In fact, these cases, in as far as they deal with the issues of leverage and raising rivals’ costs, would also be better dealt with under the *Bronner* principles.

The ECJ did add, however, that in the assessment of whether the conduct was capable of an exclusionary effect, a finding of indispensability was a relevant, though not a necessary, element.¹⁴³

the possibility cannot be ruled out that, by reason simply of the fact that the wholesale product is not indispensable for the supply of the retail product, a pricing practice which

¹³⁶ *Id.* ¶ 21.

¹³⁷ *TeliaSonera*, 2011 ECJ EUR-Lex LEXIS 42, ¶ 55.

¹³⁸ *Id.* ¶ 56.

¹³⁹ *Id.* ¶ 58.

¹⁴⁰ Oscar Bronner had argued that Mediaprint had discriminated against it, contrary to Article 102, in making their delivery service available to another rival newspaper, *Wirtschaftsblatt*, which had purchased these services as part of a package. *Oscar Bronner*, 1998 E.C.R. I-7791, ¶ 8. Given the Court’s ruling on the refusal to supply issue, it was not necessary to answer this question. *Id.* ¶¶ 48, 49.

¹⁴¹ See, e.g., the decisions on tying or exclusive purchasing: Case T-65/98, *Van den Bergh Foods Ltd. v. Comm’n*, 2003 E.C.R. II-4653; Case C-552/03 P, *Unilever Bestfoods v. Comm’n*, 2006 E.C.R. I-9091; Case T-201/04, *Microsoft Corp. v. Comm’n*, 2007 E.C.R. II-3601; cf. Comments of Mazák, *supra* note 135, ¶ 22-23.

¹⁴² See, e.g., *Microsoft*, 2007 E.C.R. II-3601.

¹⁴³ *TeliaSonera*, 2011 ECJ EUR-Lex LEXIS 42, ¶¶ 64-69.

causes margin squeeze may not be able to produce any anti-competitive effect, even potentially.¹⁴⁴

Even so, the notion of indispensability here is more narrowly construed than in *Bronner*. It is defined as the “functional relationship of the wholesale products to the retail products[.]”¹⁴⁵ where the “supply of the wholesale product is indispensable for the sale of the retail product.”¹⁴⁶ It is dependent on how the retail market is defined. For example, if the retail product market is narrowly defined as the ADSL broadband market, then TeliaSonera’s wholesale product would be an indispensable input to this downstream “secondary” market. Indispensability of the input under *Bronner* is a broader question than merely being requested or required by a downstream retail competitor to supply.¹⁴⁷ As noted in the Opinion by Advocate General Mazák, a number of alternative technologies were apparently available to provide end users with broadband services, and TeliaSonera’s network could have been replicated by its competitors (jointly or severally) or third parties.¹⁴⁸

In assessing whether the margin squeeze was capable of having an anti-competitive effect on the market,¹⁴⁹ the ECJ in *TeliaSonera* did not apply the *Bronner* requirement of the likelihood of the elimination of all competition on the downstream market but rather found it sufficient if the conduct creates barriers or hinders growth, “making it more difficult” to penetrate the market.¹⁵⁰ Even in the more problematic circumstances where the pricing margin is positive, the ECJ considered that it is enough if there is “reduced profitability” or it is made “at least more difficult for the operators concerned to trade on the market concerned.”¹⁵¹

This assessment is narrowly based on “equality of opportunity,” where pricing is considered a barrier to entry. This approach, as we have argued, is problematic and potentially detrimental to consumer welfare. This is true *a fortiori* when it is applied in circumstances where there is no regulated duty to supply and the general elements of the refusal to supply test in *Bronner* are not required.¹⁵²

¹⁴⁴ *Id.* ¶ 72.

¹⁴⁵ *Id.* ¶ 69.

¹⁴⁶ *Id.* ¶ 70.

¹⁴⁷ *Cf.* Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, 2004 E.C.R. I-5039.

¹⁴⁸ Comments of Mazák, *supra* note 135, ¶ 20.

¹⁴⁹ *TeliaSonera*, 2011 ECJ EUR-Lex LEXIS 42, ¶ 72.

¹⁵⁰ *Id.* ¶¶ 66-67 (citing Case C-280/08 P, *Deutsche Telekom AG v. Comm’n*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 254 (Oct. 14, 2010)).

¹⁵¹ *Id.* ¶ 74.

¹⁵² The ECJ goes on to state that an exclusionary effect can be outweighed by proof of efficiencies as an objective justification. *Id.* ¶ 76. A successful efficiency argument, however, should lead to an initial finding that the vertically integrated dominant supplier’s prices do

The ECJ in *TeliaSonera* also established that liability for a margin squeeze should not be dependent on whether the wholesale supply concerned a previous course of dealing or supply to a new customer.¹⁵³ As we have seen in *Trinko* and *linkLine*, the U.S. courts are unlikely to impose a duty to deal (and therefore liability for a margin squeeze) in circumstances where there has been no previous voluntary arm's length dealing. This reasoning is derived from the finding in *Aspen* where the termination of a presumably profitable supply agreement (joint venture) without legitimate business reasons suggested a willingness to forsake short-term profits to achieve an anticompetitive end, giving rise to an inference of an exclusionary purpose. The same inferences, of a possible anticompetitive motive being drawn from the defendant's prior conduct, cannot be drawn, however, either in a situation of a regulated duty to deal or where there has been no previous voluntary course of dealing.

This highlights a crucial difference between the EU and U.S. approaches to competition law and the regulation of a margin squeeze in particular. In the United States, an understanding of prior conduct is crucial to the antitrust question of whether an exclusionary purpose exists. In the European Union, the prior conduct is considered irrelevant¹⁵⁴ because it is thought to have no bearing on the effect of the conduct on an "as efficient competitor" or the creation of barriers that prevent new entrants.¹⁵⁵ The European Union is less focused on investigating whether the defendant has an exclusionary purpose and more focused on ensuring an "adequate margin" between the wholesale and retail prices to achieve "equality of opportunity."

The decision of the ECJ in *TeliaSonera* significantly broadens liability for a margin squeeze in non-regulated industries. Liability will be imposed when a vertically integrated dominant undertaking sets its upstream and downstream prices negatively or merely insufficiently to cover downstream incremental costs. Apart from its lack of specificity as an antitrust standard, the dominant firm has an incentive to avoid liability by increasing downstream prices to the detriment of consumers. Most significantly, in the absence of a regulated duty to supply, it serves as a disincentive for the dominant undertaking to supply the input in the first place. Alternately, where

not constitute a margin squeeze, as found by the German regulator in *Deutsche Telekom*. See *infra*.

¹⁵³ *TeliaSonera*, 2011 ECJ EUR-Lex LEXIS 42, ¶ 95.

¹⁵⁴ Previous EU case law has placed emphasis on the existence of a previous course of dealing, but for reasons that differ from *Aspen* and that mainly concern the effect that the refusal will have on the customer's relationship-specific investments, made in the expectation of continuance of the supply agreement. *United Brands v. Comm'n*, 1978 E.C.R. 207, [1978] 1 C.M.L.R. 429, ¶ 182; cf. *Liptons Cash Registers Hugin*, 1978 O.J. (L 22) 23, [1978] 1 C.M.L.R. D19.

¹⁵⁵ *TeliaSonera*, 2011 ECJ EUR-Lex LEXIS 42, ¶ 94.

there is a duty to supply the wholesale input under Article 102, the undertaking may decide to withdraw from the downstream retail market altogether, thereby reducing (or distorting) competition and efficiency in that market.¹⁵⁶ It is also in opposition to the general principle under Article 102 that being in a dominant position *per se* is not an abuse,¹⁵⁷ as the charging of a monopoly price is generally lawful for a dominant undertaking. While this latter principle is qualified in the European Union by the abuse of excessive pricing, as we have seen, wholesale or retail prices do not have to be abusive in themselves for a finding of a margin squeeze.

C. The Analysis of a Margin Squeeze in Network Markets with Learning Effects

The ECJ in *TeliaSonera* was also asked to decide whether the test for a margin squeeze should be modified in the case of a rapidly developing technology market.¹⁵⁸ Prices for high technology services such as broadband in innovative and emerging markets, are often priced low initially, achieving lower levels of profitability or even a loss, in order to take into account likely future network and learning effects. High start-up costs are seen as an investment in future profits, where costs can be averaged over a larger customer base. In this way, prices, although they do not cover notional product-specific costs in the short run, may not reflect an exclusionary purpose, because network effects can have consumer benefits.

The dominant undertaking in *Teléfonoica* had argued that it was using lower prices to stimulate demand and take account of likely future earnings in a non-mature new technology market.¹⁵⁹ The Commission applied the long-run average incremental cost (LRAIC) benchmark to make allowance for the higher fixed costs and long-run lower incremental costs in these network markets.¹⁶⁰ Difficulties arise, however, concerning how the common costs of the downstream asset should be allocated.¹⁶¹ The Commission applied both the “period by period”¹⁶² and the discounted cash flow (DCF) approaches to examine profitability. The latter approach allows some idea of the firm’s future growth and profitability to be taken into account by aggregating the expected future cash flows to result at net

¹⁵⁶ Carlton, *supra* note 13, at 278.

¹⁵⁷ Case 322/81, *Nederlandsche Banden-Industrie-Michelin v. Comm’n*, 1983 E.C.R. 3461, ¶ 57.

¹⁵⁸ *TeliaSonera*, 2011 ECJ EUR-Lex LEXIS 42, ¶ 12.

¹⁵⁹ *Id.* ¶ 646.

¹⁶⁰ *Id.* ¶¶ 317-18, 323. The Commission indicated in its Guidance on Article 102, *supra* note 5, ¶ 80, that they will generally use the benchmark of the LRAIC of the downstream division of the integrated dominant undertaking in margin squeeze cases.

¹⁶¹ *Teléfonoica*, *supra* note 65, ¶ 431.

¹⁶² As applied in Case C-202/07 P, *France Télécom SA v. Comm’n*, 2009 E.C.R. I-2369.

present value (NPV) over the economic life of the asset, allowing the recovery of initial losses by future profits.

The Commission was wary, however, of a positive NPV under the DCF approach, as it could equally be interpreted as either the absence of a margin squeeze or as the outcome of abusive behavior: “That is, short-run losses might lead to higher long-run profits, not due to any natural development in the market, but due to the strengthening of the dominant undertaking’s market power.”¹⁶³ The DCF could be biased because it can include the rewards from anticompetitive behavior.¹⁶⁴

While the Commission was ready to acknowledge that significant economies of scale or strong learning effects, in exceptional cases, could justify temporary prices below LRAIC, these could not serve to legitimize a margin squeeze that enables the vertically integrated company to impose losses upon its competitors that it does not incur itself.¹⁶⁵

It is unclear, however, when these exceptional circumstances will arise for the Commission. In dynamic markets, the exclusionary/non-exclusionary basis of these projected earnings will rarely be clear, particularly if they require a profit projection where there are likely network effects. In the United States, this level of uncertainty in innovation and network markets will largely caution against antitrust intervention to avoid the risk of false positives and possible discouragement of significant and risky investment.¹⁶⁶

Instead of acknowledging that intervention in these markets may be problematic, the contrary approach was adopted by the ECJ in *TeliaSonera*:

Particularly in a rapidly growing market, Article 102 TFEU requires action as quickly as possible, to prevent the formation and consolidation in that market of a competitive structure distorted by the abusive strategy of an undertaking...before the anti-competitive effects of that strategy are realised.¹⁶⁷

¹⁶³ *Telefónica*, *supra* note 65, ¶ 334.

¹⁶⁴ Eur. Comm’n, *Margin Squeeze: Working Paper No. 2 on Competition and Regulation 32* ¶ 28 (DAF/COMP/WP2/WD, 2009).

¹⁶⁵ *Telefónica*, *supra* note 65, ¶¶ 650, 652. Both methods, according to the Commission, exhibited a margin squeeze. *Id.* ¶ 541. “Telefónica’s downstream losses cannot be regarded as temporary or aimed at searching scale economies and learning effects because Telefónica’s downstream activity still generates losses more than 5 years after its start.” *Id.* ¶ 650. There were other less restrictive ways of achieving these efficiencies.

¹⁶⁶ See generally George Priest, *Flawed Efforts to Apply Modern Antitrust Law to Network Industries*, in *HIGH STAKES ANTITRUST* (Robert Hahn ed., AEI-Brookings Joint Center for Regulatory Studies 2003); POSNER, *supra* note 33, ch. 8.

¹⁶⁷ Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 ECJ EUR-Lex LEXIS 42, ¶¶ 108, 111 (Feb. 17, 2011). The Commission in *Telefónica* stated that Article 102 does not provide for an exception for new technology markets where the market is growing rapidly and is not fully mature. *Telefónica*, *supra* note 65, ¶ 623; cf. Case T-340/03, *France Télécom v. Comm’n*, 2007 E.C.R. II-107 ¶ 107. Similar views were expressed by the General Court in *Microsoft*. Case T-201/04, *Microsoft Corp. v. Comm’n*, 2007 E.C.R. II-3601, ¶ 562.

The ECJ stated that this intervention was particularly important when the market was still highly influenced by the former state monopolistic structure.¹⁶⁸ In *Teléfonoica*, the Commission went even further and stated that the provision of the broadband services did not require significant new investment because “Teléfonoica’s infrastructure is to a large extent the fruit of investments that were undertaken well before the advent of broadband in Spain and that thus bore no relation to the provision of broadband services (but for the provision of traditional fixed telephony services).”¹⁶⁹ The cost incurred to upgrade the network did not compare with the cost of building a completely new upstream infrastructure.¹⁷⁰ Prior knowledge of a duty to supply would not have affected the investment decision.¹⁷¹

Even if this is true, it is difficult for an antitrust court to make this distinction (the requirement of significant new investment versus the development of existing ex-state funded infrastructure) in order to determine intervention.

D. The Analysis of a Margin Squeeze in a Regulated Industry

These decisions also highlight major differences in the U.S. and EU treatment of the intersection between antitrust and sector-specific regulation. *Deutsche Telekom*, *Teléfonoica*, and *TeliaSonera* all concerned previously state-owned monopolies in liberalized telecommunications markets. Many of the access and pricing issues in *Deutsche Telekom* and *Teléfonoica* were also subject to national regulation.

In the United States, the presence of a federal and state statutory access regime in the telecommunications market was thought to “significantly diminish the likelihood of major antitrust harm”¹⁷² in *Trinko*, making it unnecessary to impose a judicial doctrine of forced access under section 2 of the Sherman Act.¹⁷³ The Supreme Court stated that antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue, including awareness of the significance of regulation:¹⁷⁴ “In short, the regime was an effective steward of the antitrust function. Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs.”¹⁷⁵

¹⁶⁸ *TeliaSonera*, 2011 ECJ EUR-Lex LEXIS 42, ¶ 109. See *infra*.

¹⁶⁹ *Teléfonoica*, *supra* note 65, ¶ 304.

¹⁷⁰ *Id.* ¶ 305.

¹⁷¹ *Id.* ¶ 306.

¹⁷² *Verizon Commc’ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412 (2004); cf. *Credit Suisse Securities LLC v. Billing*, 551 U.S. 264, 284 (2007).

¹⁷³ *Trinko*, 540 U.S. at 411.

¹⁷⁴ *Id.* at 410-11.

¹⁷⁵ *Id.* at 414.

In *linkLine*, AT&T had been previously required by regulation to supply the wholesale service. In his separate concurring judgment, Justice Breyer stated that a price squeeze case should not be available to a purchaser from a regulated firm when “a regulatory structure exists to deter and remedy anti-competitive harm,” as “the costs of antitrust enforcement are likely to be greater than the benefits.”¹⁷⁶

In contrast, the ECJ in *Deutsche Telekom* found that, while the regulatory framework applicable to the telecommunications sector was a relevant factor in the application of Article 102 to the undertaking,¹⁷⁷ it was not meant to remove or diminish the role of competition law, “since the competition rules laid down by the EC Treaty supplement in that regard, by an *ex post* review, the legislative framework adopted by the Union legislature for *ex ante* regulation of the telecommunications markets.”¹⁷⁸

Deutsche Telekom claimed that it could not be guilty of a margin squeeze because its wholesale charges for local loop access had been approved by the German telecommunications regulatory authority, Reg TP.¹⁷⁹ Its retail rates for analogue and broadband were also regulated under a price cap system.¹⁸⁰ Reg TP had even considered, on more than one occasion, whether *Deutsche Telekom*’s pricing could amount to a margin squeeze.¹⁸¹ It found there was a negative spread between the wholesale and retail prices but, unlike the Commission, declared that other operators could offer their end users competitive prices by resorting to cross-subsidized charges for access services and call charges.¹⁸² Thus, in its decision of April 29, 2003, Reg TP found:

[C]ompetitors are not so prejudiced with regard to their competitive opportunities in the local network by the slight difference between retail and wholesale prices as to make it economically impossible for them to enter the market successfully or even to remain in the market. . . . [That difference] was not so significant as to deprive competitors of any opportunity themselves to cross-subsidise their retail prices in order to be able to offer

¹⁷⁶ *Pac. Bell Tel. Co. v. linkLine Commc’ns Inc.*, 555 U.S. 438, 459 (2009) (citing *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990) (in *Town of Concord*, both wholesale and retail prices were subject to regulation)).

¹⁷⁷ Case C-280/08 P, *Deutsche Telekom AG v. Comm’n*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 224 (Oct. 14, 2010).

¹⁷⁸ *Id.* ¶ 92.

¹⁷⁹ The TKG states that wholesale “[r]ates shall be based on the costs of efficient service provision.” *Id.* ¶ 24(10).

¹⁸⁰ *Deutsche Telekom*’s retail rates for analog and broadband, which consist of a basic monthly charge and a one-off charge for a new connection, are regulated under a price cap system. Prices for services were not regulated separately but were regulated within a basket consisting of groupings of different services. A new system was introduced in 2002 with differing baskets. Some prices for services within the basket were subject to prior notification of price increases. ADSL charges were not subject to advance notification of price changes.

¹⁸¹ Case T-271/03, *Deutsche Telekom v. Comm’n*, 2008 E.C.R. II-477, ¶ 115.

¹⁸² *Id.* ¶ 116.

their end-users connections at a price as attractive as that offered by the applicant, or even at a lower price. That applies particularly to the higher-value and costlier ISDN and ADSL connections, which have increased markedly in number on account of the significant expansion of internet penetration, as well as of the marketing of faster and better access to the internet.¹⁸³

Deutsche Telekom argued that the principle of legal certainty demanded that they should be able to rely on the correctness of the national regulation and that, instead of a competition law investigation under Article 102, an action should be brought against Germany for failure to observe its obligations under the Treaty.¹⁸⁴

The Commission found, however, that Deutsche Telekom had the scope or autonomy to avoid the margin squeeze by adjusting the retail prices of its narrowband access services to end users, while respecting the overall ceilings for baskets of residential and business services. The German regulator's finding did not create a legitimate expectation that the charges were lawful under Article 102,¹⁸⁵ as Deutsche Telekom could not jettison its special responsibility under the Treaty not to distort competition.¹⁸⁶

The ECJ pointed out that liability for an abuse could only be avoided because it has been required by national regulation in the very limited circumstances, where

anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part . . . In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings.¹⁸⁷

¹⁸³ *Id.* ¶ 117.

¹⁸⁴ Article 226 of the EC Treaty (now Article 258 of the TFEU); *Deutsche Telekom*, 2008 E.C.R. II-477, ¶ 117.

¹⁸⁵ *Deutsche Telekom*, 2008 E.C.R. II-477, ¶ 269 (approved by the ECJ in Case C-280/08 P, *Deutsche Telekom AG v. Comm'n*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 67 (Oct. 14, 2010)). However, the Commission reduced the fine by 10 percent on this basis.

¹⁸⁶ *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 67.

¹⁸⁷ *Id.* ¶ 80. Articles 101 and 102 may apply, however, “if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings.” Joined Cases C-359/95 P & C-379/95 P, *Commission & France v. Ladbroke Racing*, 1997 E.C.R. I-6265, ¶¶ 33-34 (and the cases cited therein). *Cf.* Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 ECJ EUR-Lex LEXIS 42, ¶ 49 (Feb. 17, 2011). There have been very few decisions that have accepted that liability under the Treaty has been avoided by national legislation. *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 81; *see* Case 41/83, *Italy v. Comm'n*, 1985 E.C.R. 873, ¶ 19; Joined Cases 240/82, 242/82, 261/82, 262/82, 268/82 & 269/82, *Stichting Sigarettindustrie & Others v. Comm'n*, 1985 E.C.R. 3831, ¶¶ 27-29; Case C-198/01 *Conorzio Industrie Fiammiferi (CIF) v. Autorita Garante della Concorrenza e del Mercato*, 2003 E.C.R. I-8055, ¶¶ 56, 67. The “Court has held that if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles [101] and [102 TFEU].” *Id.* ¶ 82 (citing Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 & 114/73, *Suiker Unie & Others v. Comm'n*, 1975 E.C.R. 1663, ¶¶ 36-73).

It is difficult in practice, however, to apply the standards “required by national legislation” and “a legal framework which itself eliminates any possibility of competitive activity” to determine the relative spheres and limits of expertise for national regulators (*ex ante*) versus the Commission (*ex post*) in competition law decisions. Reasonable regulators can differ in their application of standards such as the “as efficient competitor,” especially when the assessment is based on such uncertain facts as the imputed costs of the vertically integrated firm. Could, for example, a pricing decision made by a sector specific regulator (particularly when the possibility of a margin squeeze has been considered) within the context of the EU regulatory framework, qualify as one made under “a legal framework which itself eliminates any possibility of competitive activity”?¹⁸⁸

In this case, for example, the German regulator applied the “as efficient competitor” test to the margin squeeze issue but merely came to a different conclusion based on a market-oriented approach. While the Commission is not bound to adhere to the national regulatory decision, if reasonable minds can differ on the determination of the economic issues, there should be greater deference to the regulator, who has sector-specific knowledge, especially where the market is characterized by dynamic competition.

As Giorgio Monti points out, “applying EC competition law without any regard to the regulatory framework is undesirable[.]”¹⁸⁹ especially in the context of the “modernization” of EU competition law, which increases the role of the national competition authorities and national courts of the member states.¹⁹⁰ While national regulators are obliged to respect the provisions of the TFEU, they are also expected to apply national law, which may, as regards telecommunications policy, have objectives that differ from those of EU competition policy.¹⁹¹ These national objectives may also serve important public policy goals such as universal service provision.¹⁹² The more appropriate remedy in these circumstances is an action against the National

¹⁸⁸ The Commission applied a similar approach in *Telefónica*. Prior to liberalization of the Spanish telecommunications market in 1998, Telefónica was a state-owned monopoly that had been developed under exclusive rights and special concessions. After liberalization, it became subject to a regulated duty to supply. Unlike the German regulator in *Deutsche Telekom*, the Spanish regulator (CMT) had not ruled on the margin squeeze question, but in any event, the Commission found that Telefónica had autonomous action available to it to avoid the margin squeeze. Only 30 percent of the prices the Commission found subject to a margin squeeze (amounting to one of the two upstream products) were also subject to maximum prices set by the Spanish regulator, with the apparent implication that the company could possibly have avoided liability by raising prices on the other 70 percent. *Telefónica*, *supra* note 65, ¶ 675.

¹⁸⁹ Monti, *supra* note 126, at 127. Cf. Geradin & O’Donoghue, *supra* note 48, at 417-18.

¹⁹⁰ Council Regulation (EC) 1/2003, Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1; JONES & SUFRIN, *supra* note 100, at 116, 1031.

¹⁹¹ See Case T-271/03, *Deutsche Telekom v. Comm’n*, 2008 E.C.R. II-477, ¶ 113; *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 227.

Regulatory Authority, as argued by Telefónica.¹⁹³ As the Commission continues to intervene in this manner, we can expect more references to the ECJ's decisions, such as *TeliaSonera*, as state regulators and courts try to grapple with the ensuing uncertainty.

As we have seen, on other occasions, the Commission and the courts have taken account of issues within the sphere of national regulation. In *Deutsche Telekom*, the Commission applied the regulatory tool of “rebalancing” to Deutsche Telekom’s retail prices but refused to take account of the differing regulatory burdens imposed on the dominant undertaking due to operator (pre)selection and universal service when they applied the concept of “equality of opportunity.” The Commission, in *Telefónica* and its *Guidance on Article 102*,¹⁹⁴ and the ECJ, in *TeliaSonera*, have also stated that if there is a regulated duty to supply, there is no need to consider whether the margin squeeze constitutes the abuse of a refusal to supply, because the relevant questions about balancing the *ex ante* investment decisions and the promotion of competition in the downstream market have already been undertaken by the regulatory authority.

In *Telefónica*, the Commission goes on to state:

In any event, Telefónica’s *ex ante* incentive to invest in its infrastructure are not at stake in the present case... those original investments were undertaken in a context where Telefónica was benefiting from special or exclusive rights that shielded it from competition. The investment criteria used by the former monopoly at that time would have led to the investment being made even if there would have been a duty to supply.¹⁹⁵

This analysis introduces special duties for former state-owned enterprises, as opposed to privately owned enterprises. The market power derived from the special or exclusive rights would have already been reflected in the sale price of the asset on privatization. It is not appropriate therefore to subject these assets to special duties (beyond those conferred by regulation) on account of historical ownership.¹⁹⁶ If the assets are only partially privatized, it is also

¹⁹² For a discussion of, for example, the goal of security of energy supply versus competition goals in national energy markets, see Monti, *supra* note 126, at 136-38.

¹⁹³ Geradin & O’Donoghue, *supra* note 48, at 419.

¹⁹⁴ Guidance on Article 102, *supra* note 5, ¶ 82.

¹⁹⁵ *Telefónica*, *supra* note 65, ¶ 304. The ECJ in *TeliaSonera* noted that the “competitive structure is also still highly influenced by the former monopolistic structure.” Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 ECJ EUR-Lex LEXIS 42, ¶ 109 (Feb. 17, 2011); *cf.* Opinion of Advocate General Poiares Maduro, Case C-109/03, *KPN Telecom BV/Onafhankelijke Post* (Nov. 25, 2004); *cf.* Joined Cases C-544/03 & C-545/03, *Mobistar SA v. Commune de Fléron*, 2005 E.C.R. I-7723, ¶ 49.

¹⁹⁶ A duty is already imposed by regulation on infrastructure assets with “significant market power” by the liberalization framework. The ECJ clearly maintains that liberalization policy is a relevant consideration for competition law because it found that the Commission was entitled to characterize Deutsche Telekom’s margin squeeze as a serious offence which strengthened “the barriers to entry to the recently liberalised markets.” *Deutsche Telekom*, 2010 ECJ EUR-Lex LEXIS 882, ¶ 275. Advocate General Jacobs in *Bronner* also indicated

not appropriate to confer more onerous duties and reduced profitability (treasury and shareholder returns) on the “citizen/owners” as opposed to “private-owners” of comparable assets.¹⁹⁷ The risk imposed by these higher duties will also considerably reduce the value of the assets on privatization. As Advocate General Mazák pointed out in his Opinion in *TeliaSonera*, it is not always easy to determine whether the source of funding was public or private in origin. He argued that Article 102 does not provide a textual basis for this distinction, and Article 345 of the TFEU does not permit discrimination between property rights along these lines.¹⁹⁸

If this approach has validity, then, as Telefónica argued, it should also be applied to its competitors in the market.¹⁹⁹ The firms seeking wholesale access to Telefónica’s services were generally not small startup enterprises in need of special protection, but the subsidiaries of ex-state monopolies such as France Telecom, developed under similar exclusive rights in other European member states.

In order to avoid these apparent inconsistencies, the EU courts may be advised to adopt the approach of the U.S. Supreme Court in *Trinko* of a diminished role for antitrust in regulated industries. But this idea is not so easily transferable to the historical and institutional context of the European Union. Utility assets in the United States have traditionally been privately owned, and the issue of bottleneck inputs in vertically integrated industries is normally considered to be an exclusively regulatory matter. The EU telecommunications sector only began to undergo liberalization in the 1990s after a period of predominately state ownership. In this context, the EU approach may therefore be more conducive to harmonization of law within the member states, particularly after “modernization.” The supremacy of Community Law and the duties imposed on member states to enforce the

that state funding may result in an asset being indispensable on the basis of cost alone. The cost of duplicating a facility might alone constitute an insuperable barrier to entry; “[t]hat might be so particularly in cases in which the creation of the facility took place under non-competitive conditions, for example, partly through public funding.” Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint, 1998 E.C.R. I-7791, ¶ 66 (AG Jacobs).

¹⁹⁷ The requirement of a partially privatized firm to pursue the objective of profit maximization also imposes a restraint on the otherwise greater incentive and ability of a fully state-owned enterprise to engage in anticompetitive conduct, such as price predation, through recourse to cross-subsidizations or by incurring non-recouped losses. See generally J. Gregory Sidak, *Acquisitions by Privatized Firms: The Case of Deutsche Telekom and VoiceStream*, 54 FED. COMM. L.J. 1 (2001); David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 ANTITRUST L.J. 479 (2003).

¹⁹⁸ Comments of Mazák, *supra* note 135, ¶ 27. As we have seen, the ECJ in *TeliaSonera* and the Commission in *Telefónica* invoked Article 102 to support their view that the Treaty does not discriminate between mature and non-mature markets, yet they wish to apply a different standard—which has no foundation in the Treaty—to former state monopolies as opposed to private enterprises.

¹⁹⁹ *Telefónica*, *supra* note 65, ¶ 340; *cf. id.* ¶ 348.

Treaty differ in fundamentally distinct ways to the situation of the application of two federal statutes (the Sherman Act and the Telecommunications Act of 1996) in *Trinko*. The harmonization of EU law and the liberalization framework may be jeopardized if national interests, such as preserving a national champion, are prioritized by regulators (which may also be subject to regulatory capture). Even so, however, if concerns regarding the efficacy of the national regulation formed the basis of the EU margin squeeze decisions, the more appropriate remedy is an action against the National Regulatory Authority rather than a competition law solution, which imposes uncertain liability on dominant firms and creates an incentive to increase retail prices, to the detriment of consumers.²⁰⁰

IV. CONCLUSION

This examination has identified significant differences in approach to the regulation of a price or margin squeeze in U.S. and EU competition law. In the United States after *linkLine*, the likelihood of a successful claim in this area has been significantly diminished. This is true particularly where there has been no prior course of voluntary dealing and no evidence of predatory pricing at the downstream level. Price squeezes have traditionally been treated as a form of a constructive refusal to deal, but the viability of the refusal to deal cases, except possibly in very limited circumstances, has been cast into doubt by the Supreme Court decisions in *Aspen*, *Trinko*, and *linkLine*. It is also difficult after *Trinko* and *linkLine* to see how high wholesale prices could even be considered abusive and thereby amount to a constructive refusal to supply in the United States.

In contrast, the ECJ, as in its most recent pronouncement in *TeliaSonera*, clearly views a margin squeeze as an independent form of abuse under Article 102, where the violation can be identified purely on the assessment of costs and prices. This decision significantly broadens the scope of potential liability for a margin squeeze in non-regulated industries in the European Union. This legal position has the potential to distort *ex ante* upstream investment decisions and create a disincentive for the dominant undertaking to supply the input in the first place. The failure to consider the abuse within the elements of a constructive refusal to supply under *Bronner* means that an exclusionary purpose would not be identified. Unlike in the United States, there is no suggestion that there is a safe harbor under EU law for a dominant firm that has never voluntarily sold at arm's length in the upstream market. Rather, there is a focus on the "as efficient competitor" test as one of preserving "equality of opportunity" in narrowly construed downstream markets. Faced with the uncertainty that this standard poses as a theory of antitrust liability, in particular the imputation of costs of the

²⁰⁰ Telcel Declaration of Economists, *supra* note 12, at 10.

vertically integrated firm, the dominant firm has an incentive to avoid liability by hypothesizing about its rivals' costs and raising its retail price to the level of the least-efficient retailer.

There are also significant differences in the U.S. and EU treatments of this issue within regulated industries. In *Trinko*, the presence of a statutory regime imposing a duty to deal did not create any new claims that went beyond those arising under section 2. In the European Union, a regulated duty to supply is equated to a finding of indispensability of the input under *Bronner*. The regulator is assumed to have already determined the relevant weighing of the *ex ante* investment decisions against the promotion of downstream competition. More problematic (because it has no foundation in the Treaty) is the willingness in the European Union of the Commission and the courts to make this assumption in liberalized markets, even in the absence of a regulated duty to deal, when the dominant enterprise was developed under special concessions and state investment. Competition law in the European Union becomes a *de facto* tool for liberalization to promote new entry in the EU telecommunications market. Sidak has argued that the need to increase competition in previously state-owned or state-granted industries may provide an explanation (or perhaps even justification) for the EU approach,²⁰¹ but the *TeliaSonera* principle is not confined to these liberalized markets. The likely outcome is that, while competition may be maintained in the short term, the failure to consider this issue within the context of an exclusionary purpose may be ultimately detrimental for consumer welfare. The decision also continues to place significant distance between the position of the European courts and that of the Commission's purported move towards a "more economic" and "consumer welfare" interpretation of competition law more generally.

This significant extension of potential competition law liability for a margin squeeze as a form of *de facto* regulation in the European Union, even beyond that contemplated by Judge Learned Hand in *Alcoa*, cannot merely be traced to differing histories and goals for competition law in the European Union and the United States. The criticism expressed in the *Amicus Brief in linkLine* may therefore have some justification. The European Union may see "antitrust law [as] . . . simply one more tool of industrial policy, and thus its application may permissibly compromise consumer welfare to advance the welfare of competitors."²⁰² These differing standards also no longer remain as merely conflicting approaches in distinct jurisdictions but play out to increase uncertainty and risk for transnational firms in global markets.

²⁰¹ Sidak, *supra* note 12, n.69.

²⁰² Amicus Brief, *supra* note 12, at 5.