Trinko: Going All the Way

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Tinkle: Going all the way

by George A. Hay*

I. INTRODUCTION

The Supreme Court's decision in Verizon Communications Inc. v. Law Offices of Curtis V. Tinkle, LLP (hereinafter Tinkle)1 was unanimous and the principal opinion was very short;2 yet, the opinion has already spawned substantial commentary.3 This is appropriate; while the case involved a very limited aspect of a highly regulated segment

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2 A concurring opinion was even shorter, taking a mere four paragraphs to indicate that the plaintiff lacked standing and that the case should have been dismissed entirely for that reason. Id. at 416–18.

of the economy, Justice Scalia's opinion has the potential of affecting antitrust jurisprudence on a much larger scale. I will leave it to others to discuss the intended or ideal relationship between the 1996 Telecommunications Act (the 1996 Act) and the antitrust laws and the nuances of *Trinko* insofar as it affects the telecommunications industry. Others may wish to address the standing issue that the principal opinion elected to ignore. My interest is in the broader implications of *Trinko* for section 2 jurisprudence, specifically the extent to which a monopolist may be required to deal or otherwise cooperate with a competitor. My basic argument is that *Trinko* exposed the soft underbelly of the monopolist's so-called "duty to deal." While the opinion did not reach a definitive conclusion on how the doctrine should be reformulated (or even whether it should be reformulated at all), it planted the seed for a complete overhaul. When *Trinko* is taken to its logical conclusion, it may be that the "duty to deal" has either been eliminated entirely or has been confined to a very tiny pocket of exceptional situations.

Since the opinion, with all the factual background, is discussed at length elsewhere, including in some of the other contributions to this special issue, I will spend only a minute on the preliminaries. The complaint alleged that Verizon, the incumbent local exchange carrier, refused to provide certain interconnection services to one or more of its rivals in order to limit entry and that this violated section 2 of the Sherman Act as well as several telecommunications-specific statutes.

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4 The case dealt with the telecommunications industry and the obligation under the Telecommunications Act of 1996 of an incumbent local exchange carrier to provide access to portions of its network to other firms seeking to provide local telephone service. The goal of the Act is to assist the development of competition in local exchange service. *Trinko*, 540 U.S. at 401.

5 Three of the Justices, although concurring in the judgment, thought that the case should have been dismissed on the grounds that the plaintiff lacked standing. See *Trinko*, 540 U.S. at 416–18.

The trial court had dismissed the entire action for failure to state a claim but the Second Circuit reinstated the complaint in part, including the antitrust claim. The Supreme Court granted certiorari, limited to the question of whether the court of appeals had erred in reversing the district court's dismissal of the plaintiff's antitrust claims.\(^7\)

The Court first discusses the interaction of the 1996 Act with the antitrust laws and concludes that the 1996 Act neither preempts the antitrust laws as they apply to the actions of a local exchange carrier nor creates any new substantive antitrust standards that govern the behavior of such carriers.\(^8\) This clears the way for a discussion of section 2 of the Sherman Act that is to some extent independent of the regulatory context in which the defendant's alleged actions occurred.

II. LIABILITY AND EXCEPTIONS TO LIABILITY UNDER SECTION 2 OF THE SHERMAN ACT

With respect to the Sherman Act, the Court notes first that section 2 does not create a status offense; the mere possession of monopoly power is not a violation.\(^9\) There is nothing new here. Despite some wishful ruminations to the contrary, Judge Hand in *Alcoa* made it clear that "to monopolize" means more than simply to possess monopoly power.\(^10\) As Justice Scalia notes, in addition to the possession of monopoly power in a relevant market, the offense of unlawful monopolization requires "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."\(^11\) Moreover, the potential ambiguity in what constitutes willful acquisition or maintenance has been clarified in numerous opinions so that it is now understood that the "willful acquisition or

\(^7\) *Trinko*, 540 U.S. at 405.

\(^8\) *Id.*, at 406-07.

\(^9\) *Id.* at 407-08.

\(^10\) United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

maintenance” of the monopoly must involve conduct which is not merely “willful,” as opposed to unintentional, but which can properly be described as something other than “competition on the merits.”

Significantly, the *Trinko* opinion notes also that the charging of monopoly prices does not convert the mere possession of monopoly power into an antitrust violation. While this will not come as news to experienced antitrust practitioners in the U.S., it provides a convenient and unequivocal citation of particular interest to those who practice in other jurisdictions (such as the EU) where, at least in principle, the charging of monopoly prices can violate the European counterpart to section 2. More importantly, as will be discussed below, it supports the claim that *Trinko* marks a more radical reinterpretation of traditional antitrust doctrine than may initially be apparent.

A. The right to refuse and the Colgate doctrine

If section 2 is not a status offense but requires some kind of illegitimate conduct aimed at acquiring or maintaining monopoly power, what kind of conduct qualifies? Specifically, for purposes of dealing with the allegations in *Trinko*, can a dominant firm violate section 2 by refusing to deal or in other ways refusing to cooperate

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13 *Trinko*, 540 U.S. at 407.

14 *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979).

15 RICHARD WHISH, COMPETITION LAW 635-6 (4th ed. 2001) (quoting the decision of the Court of Justice of the European Communities in Case 27/26, United Brands Co. v. Comm’n, 1978 E.C.R. 207, ¶ 250, “charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied is . . . an abuse”). The European counterpart to section 2 prohibits the abuse of a dominant position. This may at least partially explain the apparent diversity of the approaches of the U.S. and the EU, especially in light of the EU’s historic dedication to avoiding markets divided along national boundaries, which has led to actions when a dominant firm charges a higher price in one part of Europe than in others and takes steps to support this price discrimination by preventing arbitrage.
with actual or potential competitors? Justice Scalia quotes a well-known passage from the Court's 1919 opinion in *Colgate*: "[t]hus, as a general matter, the Sherman 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[.]'" Oddly, Justice Scalia omitted the important preamble to the so-called "Colgate doctrine." The full sentence from *Colgate* says, "[i]n the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal[.]"

What the quoted passage (including the preamble) has generally been understood to mean is that a firm with monopoly power can be liable for refusing to deal with a customer that is also an actual or potential competitor of the monopolist (typically, but not always, in some downstream market), and the product or service that is withheld is a critical input for the customer to be able to compete effectively against the monopolist. Thus, for example, the owner of the only stadium in a metropolitan area suitable for playing a professional sport may choose (without having to defend its decision as based on legitimate efficiency or related concerns) to allow one team to rent the stadium but deny the request of a second team (a potential entrant into the league) also to rent the stadium, so long as the stadium owner does not have any equity interest in the incumbent

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16 *Trinko*, 540 U.S. at 408 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

17 *Colgate*, 250 U.S. at 307 (emphasis added).

18 Thus, in most refusal cases there are two separate markets—an upstream market in which the defendant is a monopolist in the production of a product or service and a downstream market in which the dominant firm uses the product generated in the upstream market as an input to produce a separate product or service. The situation in the *Aspen Skiing* case referred to by the Court was unusual in that there was only a single market—that for skiing in Aspen—and the defendant refused to help its smaller rival to compete by declining to cooperate in the sale of certain kinds of combination tickets. *See* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).
team and acts unilaterally. On the other hand, a firm that participates in both the upstream market and the downstream market, and has a monopoly in the upstream market, may be exposed to antitrust risk by using its monopoly to deny a critical input to a potential competitor in the downstream market if the refusal to deal would allow the monopolist to maintain or achieve a monopoly in the downstream market as well.

So far, so good. The Colgate doctrine tells us there is no general duty to deal but there may be exceptions when the refusal allows a dominant firm to achieve or maintain a monopoly in some market. But if this was all there was to it, the plaintiffs in Trinko would still be in the ballgame. According to the allegations, the victims of Verizon's refusal to deal with respect to portions of its network were potential competitors of Verizon, and Verizon's refusal to deal with those potential competitors allowed Verizon to maintain its overall monopoly in local exchange service. The Court clearly believes that the Sherman Act leaves an even narrower window for plaintiffs since it asks "whether the allegations of respondent's complaint fit within the existing exceptions..." If the only facts needed to qualify for an "existing exception" were a) that the victim does or would compete

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19 See Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9 (1st Cir. 1987); PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶73e at 210-13 (2d ed. 2002).

20 If the owner of the stadium has an agreement with one team that it will not lease the stadium to any potential competitors of the team, the agreement may violate section 1 of the Sherman Act. See Hecht v. Pro-Football, Inc., 570 F.2d 982, 993 (D.C. Cir. 1977).

21 A few courts have held that a monopolist could violate section 2 if in an upstream market it withheld a critical input merely in order to gain a competitive advantage in the downstream market despite little likelihood of also achieving a monopoly in the downstream market. See Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979). Contra, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993), which undermined this type of leveraging theory by merging it with attempted monopolization, as reflected in Justice Scalia's footnote reference. Trinko, 540 U.S. at 415 n.4.

22 See Amended Complaint, supra note 6, at ¶¶ 2-8.

23 Trinko, 540 U.S. at 408.
against the defendant and b) that the refusal to deal will allow the defendant to maintain its monopoly, this question would be superfluous.

B. Aspen's duty to deal

What else then is required in order for the plaintiff to qualify for one of the "existing exceptions" to the general principle that there is no duty to deal? The Court refers to Aspen Skiing Co. v. Aspen Highlands Skiing Corp. as the "leading case for section 2 liability based on a refusal to cooperate with a rival," and, in passing, describes Aspen Skiing as "at or near the outer boundary of section 2 liability." Acknowledging the warning that Aspen Skiing may be a risky precedent for plaintiffs to rely on in the future, we can nevertheless ask what was special about the situation in Aspen Skiing that allowed it to qualify as an exception to the general principle that a seller (even a monopolist) does not have a duty to deal.

The Court focuses on two factors that were present in Aspen Skiing. First, the defendant's refusal to deal took the form of a withdrawal from previous voluntary participation in a joint venture. The Aspen Court was apparently willing to infer (or willing to allow a jury to infer) from the previous voluntary participation that the joint venture had been profitable for the defendant and that therefore termination of its participation suggested "a willingness to forsake short-term profits to achieve an anticompetitive end." Second, the

25 Trinko, 540 U.S. at 408-409.
26 See Aspen Skiing, 472 U.S. at 608, 610-11.
27 Trinko, 540 U.S. at 409. In principle, there could have been alternative explanations for why the defendant might have wished to cease cooperation with the plaintiff. Circumstances could have changed so that what was once a profitable collaboration was no longer so. Alternatively, defendant may have learned from its experience with the all-mountain pass that it was better off with 100% of the revenues from a three-mountain pass (which would involve only the defendant's mountains) than with some percentage of the revenues from a four-mountain pass. The Aspen Court did not make it clear whether the latter, if true, would qualify as a "legitimate business reason" for refusing to
fact that the defendant refused to renew its involvement even though it was compensated at a price equivalent to its normal retail price "revealed a distinctly anticompetitive bent."\textsuperscript{28} Presumably the Court believed that, like the cessation of previously voluntary cooperation, the refusal of the defendant to renew its involvement at what was presumably a profitable price meant that the jury was free to infer that the defendant was prepared to forgo immediate profits to achieve an anticompetitive result.

Of course, neither of these specific factors was present in \textit{Trinko}. Prior to the 1996 Act there had been no voluntary cooperation between Verizon and AT&T, Trinko’s competitive local carrier, and the price set under the regulatory regime created by the statute was a cost-based price bearing no particular relationship to any “retail” price that Verizon had ever charged or might charge were it free to set its own prices.\textsuperscript{29} Since the Court in \textit{Trinko} was ruling on defendant’s motion to dismiss the complaint, the Court must have decided that there was nothing else in the allegations that would allow a jury to infer that Verizon was “forsak[ing] short-term profits to achieve an anticompetitive end.”\textsuperscript{30}

\textsuperscript{28} \textit{Id.} (describing the Court’s rationale in \textit{Aspen}).

\textsuperscript{29} \textit{See id.} at 402, 405–06.

\textsuperscript{30} \textit{Id.} at 409. At first blush, it might seem that a cost-based price (if accurately calculated) would provide adequate short-term incentive for Verizon to cooperate since, if the price covered the relevant costs (including a “normal” profit), Verizon would be better off. Then one might conclude that Verizon’s failure to cooperate could not have been motivated by legitimate concerns about short-term profits. But what was presumably relevant for Verizon was not its accounting cost but its “opportunity cost,” since sales made by Verizon’s competitors in local exchange service would normally be sales that otherwise would have been made by Verizon. Hence, assuming Verizon’s retail price was profitable, additional sales by Verizon’s competitors (using some of Verizon’s network) could result in smaller profits for Verizon, notwithstanding the fact that Verizon would be “compensated” by competitors for the use of its facilities. \textit{See id.} at 405.
Apparently having already decided that Trinko did not fit within the limited exception recognized in Aspen Skiing, the Court goes on to suggest a factor that makes the case different from Aspen Skiing in a more fundamental way; viz., that the defendant in Aspen Skiing refused to provide its competitor with a product it already sold at retail, i.e., lift tickets.\(^3\) Verizon, in contrast, had never, prior to the 1996 Act, offered to lease access to any part of its network to any other entities and, presumably, would not have done so but for the 1996 Act. This observation by the Court is potentially significant. In highlighting this difference between Aspen and Trinko, the Court may be creating a safe harbor for vertically integrated firms that have never sold the intermediate input in arm’s-length transactions.\(^3\)\(^2\)

C. Essential facilities

Having determined that Verizon’s insufficient assistance to rivals is not “a recognized antitrust claim under this Court’s existing duty to deal precedents,” the opinion goes on to suggest that the outcome would be no different if the Court “considered to be established law the ‘essential facilities’ doctrine crafted by some lower courts. . . .”\(^3\)\(^3\) Even if the Court recognized the doctrine, an indispensable element needed to invoke the doctrine is “the unavailability of access to the

\(^3\)\(^1\) See Aspen Skiing, 472 U.S. 585 (1985). The Court notes that the other well-known duty to deal case decided by the Court, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), also involved a situation where the defendant was in the business of providing power transmission to some customers but denied it to certain customers that threatened to compete with it.

\(^3\)\(^2\) Interestingly, the most famous Australian case involving refusal to deal involved precisely such a situation. The monopolist manufacturer of Y-bar, a product required to make steel fence posts, had never sold the product at arm’s length, yet the plaintiff successfully argued that the defendant’s refusal to supply Y-bar on reasonable terms was a misuse of market power in that it allowed the defendant to maintain its dominance in the downstream market for steel fence posts. Queensland Wire Indus. Pty. Ltd. v. Broken Hill Proprietary Co. Ltd. (1989) 167 C.L.R. 177 available at www.austlii.edu.au /au/cases/cth/high_ct/167clr177.html.

\(^3\)\(^3\) Trinko, 540 U.S. at 410.
'essential facilities,'"34 and here the regulatory structure provided an alternative route for the plaintiff to achieve access.

For future plaintiffs the Court's lukewarm reference to the essential facilities doctrine is notable. While the Court finds no need "either to recognize it or to repudiate it here,"35 future plaintiffs are on notice that the doctrine may not receive a warm embrace should it ever become critical to the outcome in a case. Arguably, however, nothing of substance is lost. Putting to one side some of the fundamental problems inherent in the doctrine (discussed below), it is in any event superfluous.36 Any claim that would be viable under the essential facilities doctrine, as it has been interpreted, should also survive under a straightforward interpretation of traditional section 2 jurisprudence—a defendant, in refusing to provide access to the essential facility, is using its monopoly power either to fend off competition in the market where it enjoys a monopoly37 or, more typically, to maintain or achieve monopoly in a second, downstream market.38 The one potentially unique contribution of an essential facilities doctrine would be one that has been foreclosed by the developed law, viz., a situation where the monopolist denies access to one or more competitors in a market in which the defendant does not participate.39 This would make the statute more similar to the "abuse of a dominant position" statutes that exist in lieu of a monopolization statute in many jurisdictions such as the EU.40

34 Id. at 411.
35 Id.
38 Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Alternatively, if the essential facility is controlled by a number of firms through some kind of industry-wide joint venture, section 1 should be fully adequate to deal with the refusal to grant access to an individual competitor.
39 Official Airline Guide, Inc. v. FTC, 630 F.2d 920 (9th Cir. 1980).
Finally, having decided that the facts in *Trinko* fit neither the established exceptions to the general principle that a monopolist does not have a duty to cooperate with its competitors nor the essential facilities doctrine, the Court notes that traditional antitrust principles do not "justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors," because of the pervasive federal regulation that governs telecommunications suppliers and that provides an adequate substitute for antitrust enforcement.41 As the Court notes, the disadvantaged rival sought and received a remedy from the Federal Communications Commission by following the procedures that were set up under the 1996 Act.42 Indeed, the Court believes not only that federal regulation is a substitute for antitrust in this area but also that it is the preferred alternative given the complexities inherent in what would, in the Court's view, be continued supervision of a complex antitrust decree.43 The discussion below focuses on the specific problem of continuing supervision. The interplay of antitrust and regulation is discussed elsewhere in this special issue.44

To sum up, a claim under section 2 of the Sherman Act was not stated in *Trinko* for some combination of the following reasons:

1. there was no established pattern of cooperation with rivals from which Verizon withdrew;45

2. there was nothing else in the complaint that would support the conclusion that Verizon's purpose was to eliminate competition and preserve its monopoly as opposed to simply maximizing short-term profits;46

41 *Trinko*, 540 U.S. at 411.

42 *Id.*

43 See *id.* at 414-15.


45 See supra note 28 and accompanying text.

46 See supra note 6 and accompanying text.
3. Verizon had never sold access to pieces of its network to anyone prior to the 1996 Act\(^4\) (and presumably would not have done so but for the 1996 Act);

4. the 1996 Act provided an adequate regulatory remedy to a disappointed competitor;\(^4\) and

5. mandating access via the Sherman Act would require ongoing judicial supervision of a complex decree; a dedicated regulatory agency is a more efficient monitor of the defendant’s compliance.\(^4\)

**III. AFTER TRINKO: THE MONOPOLIST’S DUTY AND THE TERMS OF THE DEAL**

Some of the factors identified above are fairly specific to the regulatory context and will have little general application to the unregulated sectors of the economy, so we may have to do some extrapolation to work out whether *Trinko* has more general application. I have already discussed one possible generally applicable “bright line” rule that may emerge from *Trinko*, i.e., that a vertically integrated defendant is not required to provide access to an intermediate input that it has never “sold” at arm’s length.\(^5\) What other generalizations are possible?

To address this question, consider the following hypothetical. Defendant (M) is vertically integrated and is the only manufacturer of

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\(^4\) *Trinko*, 540 U.S. at 415.

\(^5\) If there is to be such a bright line rule, there may still be debate about when it would apply. One can imagine a situation in which a vertically integrated firm formally transfers an input from one division of the company to another, recording a transfer price in the process even though it has never sold at arm’s length. The plaintiff in such a situation might try to argue that since there are such transfers, it is entitled to be able to buy the input on the same terms as it is now “sold” to the downstream division. The plaintiff will seek to distinguish *Trinko* by arguing that in *Trinko* there was not even any kind of transfer transaction with respect to network access—Verizon used the entire network to provide, and never “priced out” even for internal purposes, individual elements of the network. But accepting this argument simply invites vertically integrated firms to manipulate the transfer price so that transfers take place at very high prices.
an input \((I)\) that is used in the production of some downstream product \((D)\) for which there are no good substitutes.\(^{51}\) To avoid the argument that there is no duty to deal where the monopolist has never sold at arm’s length, we will assume that \(I\) is produced in a wholly owned subsidiary of \(M\) and that, from time to time, \(M\) has made sales of \(I\) on the open market. (For convenience, we might assume that \(I\) has other uses besides the production of \(D\) and that these arm’s-length sales have been for one or more of these other uses. However, these assumptions are not necessary for the analysis.) Having a monopoly in the supply of \(I\), \(M\) naturally has charged a monopoly price any time it has made arm’s-length sales of \(I\). In addition, because of its control of \(I\), \(M\) has also generally enjoyed a monopoly in the production of \(D\) and has charged monopoly prices whenever it has made sales of \(D\).

Now, along comes another firm \((C)\) that sees how much profit \(M\) has been making on sales of \(D\) and concludes that, if only it can acquire the critical input \((I)\) at a “reasonable” price, it will be able to compete with \(M\) in the downstream market for sales of \(D\). \(C\) asks \(M\) to supply it with \(I\) on reasonable terms and \(M\) refuses. \(C\) sues under section 2. Prior to \(Trinko\), if the case had gone to the jury, the jury would have been instructed according to \(Otter Tail\) and \(Aspen Skiing\) that, while \(M\) is under no general duty to cooperate with \(C\), it may not use its monopoly power in one market to retain a monopoly in a second market.\(^{52}\) It may, however, refuse to deal with \(C\) so long as it has a legitimate reason for doing so (without being clear on what “counts” as a legitimate business reason). Now, we can ask, what does \(Trinko\) tell us about how such cases might be handled in the future?

The answer, I believe, is that \(Trinko\) forces us to confront and bring out into the open an issue that has often been ignored in the discussion of the duty to cooperate or the duty to deal, viz., the terms on which cooperation or related transactions will take place. The

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\(^{51}\) To avoid confusion, we will assume at this point that the input does not enjoy any intellectual property protection.

issue has also generally been ignored when refusals have been considered under the essential facilities doctrine. The traditional way of dealing with duty to deal cases has been to ask whether the defendant had a "legitimate business reason" for the refusal. Absent a legitimate business reason, the presumption would be that the purpose (and likely effect) of the refusal was to eliminate a competitor either in the principal market, as in Aspen Skiing, or in the downstream market, as in Otter Tail. Hence, the defendant might be forgoing short-run profits but these would be recouped by the additional profits that the defendant expects to earn after the plaintiff's demise, when the defendant should be in a position to charge monopoly prices without being undermined by a competitor.

However, the dichotomy between "legitimate business reason" and anticompetitive intent is more complicated. To understand the complexity, suppose that, when asked about his willingness to deal with C, M explains as follows:

Of course I don't want to sell to C. Currently (because of my control of D), I do not face any competition in the sale of D and I charge a monopoly price for D. When C says that he wants to buy I from me, he means that he wants to buy it at a reasonable price, viz., a price approximating my incremental costs for the production of I. But if I sell to C at a reasonable price, C will be able to undercut my current price for D. So either I will lose my dominant share of the D market or, to retain my dominant share, I will have to cut the price of D to a level which eliminates most or

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53 Aspen Skiing, 472 U.S. at 597.

54 One must be cautious with respect to the reference to "short-run profits." Even in competitive markets, firms are assumed to try to maximize profits over the long run (otherwise no firm would ever invest in long-lasting capital equipment). So the distinction one is trying to draw is that between conduct which maximizes profits under the current competitive conditions on the one hand and conduct which has as its goal the elimination of competition on the other, presumably allowing the firm to increase prices and achieve enhanced monopoly profits. Therefore when we say that there was no legitimate business reason, we mean that the conduct would not make sense (i.e., would not be profitable) but for the expectation of enhanced monopoly profits following the demise of the competitor. This in effect is the "recoupment" test now used in predatory pricing cases. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
all of my monopoly profits. So I do not want to sell to C at a reasonable price.

Of course I would be willing to sell I to C at a monopoly price. Indeed, my economist friends tell me that, if I choose the monopoly price carefully, I should be able to earn approximately the same profits regardless of whether I retain all the D business (in which case I earn the profits on the sale of D) or whether C takes over a portion of my D business (in which case I earn the profits on the sales of I to C). Either way, consumers would not experience any significant change in the price of D. Therefore my reason for not selling to C is simply that he is not willing to pay the monopoly price for I. I believe that is a "legitimate business reason."

The situation therefore is one in which M is trying to eliminate any competition from a competitor that M would be "subsidizing" with an artificially low price for the critical input I. But if M can charge enough for I that it makes the same profits even if C captures a significant share of the D business, then M has no need (and presumably no desire) to "eliminate" C except perhaps in a few pathological situations where M still has a long run interest in eliminating C as a competitor.

55 The most optimistic (legal) scenario for a defendant would be some kind of oligopoly equilibrium in which prices would remain well above the competitive level but M and C would share the market. But this would be only a short run equilibrium; if M is required to sell I to any potential competitor at a reasonable price, the monopoly profits that M heretofore earned in the sale of D would eventually dissipate completely.

56 There will not be any significant reduction in the price of D even if C takes sales away from M because C's costs reflect the high price it must pay for I. This conclusion would change only if C's own costs of converting I into D were so much lower than M's that it could pay the monopoly price for I and still sell D at a price less than what M has been charging.

57 For example, suppose, contrary to fact, that the plaintiff in Aspen Skiing had plans to develop several new ski areas in and around Aspen which would eventually cause the defendant to lose its dominant position. And assume further that these plans would be viable so long as the plaintiff could remain in business in the short run, even at a very high price for "sharing" the defendant's facilities. Or suppose that the municipal retail distributor in Otter Tail, which sought to obtain wholesale power from or through Otter Tail, had long range plans to build its own generating and long-distance transmission facilities, threatening an end to Otter Tail's dominance in the
In light of this evidence, how will the plaintiff fare after *Trinko*? Put differently, after *Trinko*, the question arises of how to state the monopolist's obligation, or how to articulate what qualifies as a legitimate business reason for a refusal to deal. Consider the following possibilities as to *M*’s obligations:

(a) *M* must offer to sell to *C* at a reasonable price, i.e., a cost-based or competitive price;

(b) *M* must offer to sell to *C* but can charge a price that does not require *M* to forgo any of the profits it currently earns from the sale of *D*;

(c) *M* must offer to sell to *C*, but *M* can set any price it wishes; or,

(d) *M* can do whatever it wants, including an outright refusal to deal with *C*.

As between (a) and (b), *Trinko* seems to rule out (a). *Trinko* provides one explicit rationale for not requiring a firm to sell at a competitive price and suggests a second.58 The explicit reason given in *Trinko* is the difficulty in supervising an ongoing obligation to sell at a competitive price.59 This has two components. First, a court would have to decide on a reasonable price, a task for which general purpose courts (as opposed to specialized regulatory agencies with dedicated staffs of accountants and economists) are ill-suited and which courts have historically been reluctant to undertake.60 Second, the very fact that the

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59 *Id.* at 414.

60 The point was put most poetically by Circuit Judge Taft in *Addyston*:

It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to
defendant would have to deal at a reasonable price would provide a strong motivation to attempt to evade the obligation. Therefore, the court must be prepared not only to set the price of access but also to police the ongoing business relationship to be sure that the defendant does not come up with some indirect way of avoiding its obligation.\(^6\)

(This has also been a problematic aspect of the essential facilities doctrine. It is one thing to assert that a firm controlling an essential facility is required to provide access to potential competitors but, absent special circumstances, the requirement to provide access is meaningless without some underlying criteria for determining and policing the terms on which access must be provided.)

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say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not.

United States v. Addyston Pipe & Steel Co., 85 F. 271, 283–4 (6th Cir. 1898). In some of the traditional cases, e.g., United States v. Terminal R. R. Ass’n of St. Louis, 224 U.S. 383 (1912), arguably the Court required merely that the joint venture owners of the facility not discriminate against other railroads that sought to become partners. But even a “do not discriminate” decree will incur complications when some time has elapsed between the setting of the price for the original owners and the petition for access by newcomers and even more complications when the original owners have incurred risks that the newcomers have not or have incurred to a lesser degree.

\(^6\) Imagine what would have happened in *Aspen Skiing* if the court had attempted to enforce a long-term decree requiring the defendant to cooperate with plaintiff on a combined ticket. Are they required to agree on the price of the ticket and what happens if they cannot agree? (The defendant, in order to boost sales of its own three-mountain ticket, would want the price of the all-mountain ticket to be relatively high; the plaintiff would want the price for the all-mountain pass to be attractive as compared to the price of defendant’s three-mountain pass.) How would the revenues be shared? Who would be responsible for promoting the all-mountain ticket and how would the costs of promotion be allocated? How might the right terms change over time and what mechanism would facilitate ongoing adjustment of the terms? Negotiations could legitimately break down on all these issues but would be much more likely to break down when the defendant does not really want to cooperate with the plaintiff in the first place. Fortunately for the courts (but perhaps not for Aspen skiers), some time after the lawsuit had concluded, the defendant bought the fourth mountain from the successor to the plaintiff. *Aspen Highlands Ski Area Sold, to Open Tuesday, Rocky Mountain News*, Dec. 12, 1993, at 43a.
The second possible reason for rejecting (a) is suggested by the introductory discussion in *Trinko* where the Court reminds us that "the mere possession of monopoly power, and the concomitant charging of monopoly prices is not only not unlawful, it is an important element of the free market system."\[^{62}\] The reference to the charging of monopoly prices would usually involve the basic situation in which a monopolist in a single market simply charges the profit-maximizing monopoly price (and naturally refuses to sell to any entity that will not agree to pay that price). But there is no reason that the same general principle would not apply just because the firm is active in two markets, even though allowing the firm to charge a monopoly price for the upstream product may make it impossible for purchasers of the input to compete effectively against the monopolist in a downstream market.\[^{63}\] If the Sherman Act cannot be used to regulate price in single, i.e., non-integrated, markets, there is no logical argument for trying to use antitrust to regulate price in vertically linked markets.

Moreover, allowing an unintegrated monopolist to charge monopoly prices but requiring a vertically integrated monopolist to sell the monopolized input at a cost-based price can create a significant distortion in the decision of the monopolist about whether to become vertically integrated in the first place. An integrated firm that could serve the downstream market more efficiently by virtue of the integration might nevertheless eschew integration if being vertically integrated would cause the firm to have to give up the monopoly profits it is otherwise legally entitled to earn.

If we reject (a) as an option, we are left with (b), (c), and (d). There is no practical difference between (c) and (d). If $M$ can choose any price it likes, there is no reason to actually refuse. $M$ can simply

\[^{62}\] *Trinko*, 540 U.S. at 406.

\[^{63}\] Technically, if the potential competitor is no less efficient at producing the downstream product than the vertically integrated firm, it should be able to pay the monopoly price for the input and compete against the vertically integrated firm in the downstream market, while still earning a competitive return. However, despite the appearance of competition, consumers will pay the same as they would have had there been no downstream entry.
choose a price at which no rational competitor would want to buy. Hence, while (c) requires at least the appearance of being willing to deal, as a practical matter, (c) allows M not to deal if it doesn't want to. So well-counseled firms will not refuse outright but can choose a price which has the same practical effect as an outright refusal.

The difference between (b) and (c) is that (b) leaves open the possibility of catching those few pathological cases where M has a long run interest in making sure that C is not viable even if M is not required to subsidize C's participation in the downstream market. It corresponds to the "no economic sense" standard advocated by the United States in its amicus briefs; i.e., the refusal to supply C would not make any economic sense except for the fact that it causes C's demise. However, one must question whether a general purpose court really has the ability to discriminate between (b) and (c) in all but the most obvious cases (such as the refusal of the Aspen defendant effectively to sell lift tickets to the plaintiff at retail prices).

As indicated above, the well-counseled defendant will not simply refuse to deal with C, but will choose a price that makes competition from C not viable. Thus the court would be required to decide that the price being offered by M is significantly above the profit-maximizing level. In Economics 101, students are taught that the profit-maximizing price can easily be identified by finding the output at which marginal revenue equals marginal cost and then finding the point on the demand curve that yields the price associated with that level of output. But demand curves, marginal revenue curves, and marginal cost curves are not normally found in the company's internal documents, as anyone who has been involved in a predatory pricing case can attest.

Moreover, unlike the situation in predatory pricing cases, where a price below variable cost serves as a "simple" bright-line test for anticompetitive conduct, since such a price cannot be rational save for its long-run adverse impact on competition, there is no corresponding simple bright-line test for when a price is too high to possibly be

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profit maximizing. If courts have problems determining whether price is above or below average variable costs, they will certainly have difficulty in determining whether price is above or below the profit-maximizing level.

Therefore, either courts will be engaged in the complex and error-filled process of distinguishing between profit-maximizing prices and prices that are intended simply to eliminate a competitor or the (b) standard will collapse into the (c) standard. The former has the added problem that, if courts cannot be counted on to get the calculus correct, firms are left with substantial uncertainty as to what price they can legitimately charge for access to a critical input. Therefore, if we accept the proposition that the monopolist should not be required to deal at a reasonable, i.e., cost-based, price, it is not a big leap to the next step of letting the monopolist sell at any price it chooses or even refuse to deal outright.65

Of course, allowing the monopolist to charge the monopoly price will eliminate the vast majority of cases in which the monopolist might otherwise not wish to assist its competitor. Note also that abandoning the duty to deal has the consequence of clearing up the confusion in the lower courts about whether a firm that owes its monopoly in the upstream market to intellectual property protection is exempt from any duty to deal under section 2.66 There was never a strong analytic case to be made for the proposition that monopolies based on intellectual property should be treated differently for these purposes than any other kind of monopoly. Abandoning the duty to deal in all cases eliminates the disparity.

65 Alternatively, we could preserve a small piece of the duty to deal by prohibiting discrimination against potential competitors. If the monopolist elects to sell the upstream product at all, it may not discriminate in price against a downstream competitor. And, of course, the same nondiscrimination approach would remain in cases brought under section 1 against joint ventures, recognizing, as discussed above, that even a straightforward nondiscrimination standard will pose enforcement challenges.

66 I refer here to the apparently different standards expressed by the appellate courts in the Kodak and Independent Service Organizations cases. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979); In re Independent Service Organizations Antitrust Litigation, 203 F.3d 1322, 1329 (Fed. Cir. 2000).
IV. CONCLUSION

There is a sense in which *Trinko* contains more answers than there were questions. Even ignoring the plaintiff's questionable standing, the special regulatory context in which the defendant's refusal to cooperate took place could have served to protect the defendant from antitrust liability. But whether it be mere *dicta* or material that is a substantive part of the holding in the case, parts of the opinion suggest that the Court has adopted a position on the rights and responsibilities that section 2 bestows on a dominant firm that will have a significant impact on the viability of future litigation involving the refusal of a dominant firm to sell a critical input to, or otherwise cooperate with, a potential competitor. If one follows the path carved out in the opinion to its logical conclusion, there will be few, if any, exceptions to the principle that a firm, even a monopolist, has absolutely no duty to sell to or cooperate with a potential competitor, and future references to the essential facilities doctrine will be relegated to historical interest.