[Vanderbilt Journal of Transnational Law](https://scholarship.law.vanderbilt.edu/vjtl)

Volume 43
Issue 4 *October 2010*

Article 4

2010

Did Trinko Really Kill Antitrust Price Squeeze Claims?

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Did *Trinko* Really Kill Antitrust Price Squeeze Claims? A Critical Approach to the *Linkline* Decision Through a Comparison of E.U. and U.S. Case Law

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ABSTRACT

This Article presents a critical analysis of the Linkline case that refuses to recognize price squeeze claims as antitrust claims under § 2 of the Sherman Act. It argues that Linkline gives a distorted reading of Trinko without giving proper attention to the application of § 2 of the Sherman Act. The Linkline decision takes a dogmatic position and thus, while refuting the Alcoa decision, appears to be a missed opportunity to more precisely define price squeezing.

This Article offers a comparison between the U.S. Supreme Court's decision and the recent European decisions delivered in broadband access cases that are pointing in a completely different direction. As U.S. antitrust law and E.U. competition law converge by seeking to protect consumer welfare through the application of law based on sound economic analysis, price squeezing illustrates the most acute difference between the U.S and E.U.: the fear of introducing regulatory principles through antitrust law in the U.S. as opposed to a more tolerant perception of state intervention in the E.U.

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I. INTRODUCTION

In *AT&T California v. Linkline Communications, Inc.*, a February 2009 case related to broadband access in the telecommunications sector, the U.S. Supreme Court curbed the development of price squeeze[1] claims under § 2 of the Sherman Act by

1. A price squeeze or margin squeeze occurs if a vertically integrated firm sets a too-high wholesale price, a too-low retail price, or a combination of both, creating an insufficient or negative spread between wholesale and retail prices. *See* 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 767c5, at 141–42 (3d ed. 2008) (defining "predatory price squeeze" and describing the situations in which it should be illegal); PAUL NIHOUL & PETER RODFORD, E.U. ELECTRONIC COMMUNICATION LAW:

refusing to recognize them as antitrust claims.[2] Shortly before *Linkline*, the European Commission[3] and the European Union's Court of First Instance[4] also each delivered a decision in a broadband access case. Their decisions pointed in a totally different direction than *Linkline*: the European decisions condemned price squeezing as an abuse of a dominant market position.[5]

Linkline reaffirms the Supreme Court's concerns—previously expressed in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*[6]—over protecting the incentive to invest and innovate, saving antitrust courts from acting as central planners,[7] and, ultimately, avoiding error costs.[8] Although *Linkline* relies heavily on *Trinko*, it distorts this precedent and fails to properly consider the application of § 2 of the Sherman Act. Rather than truly examining the issue of monopolization, the decision takes a dogmatic position. *Linkline* refutes *Alcoa* but misses an opportunity to more precisely define price squeezing; leaves certain questions unresolved; and draws a confusing connection between a price squeeze and the duty to deal, subordinating the first to the second.

This Article compares *Linkline* with recent European decisions, specifically *Commissioner v. Deutsche Telekom AG* and *Wanadoo España v. Telefónica*. It examines how courts on both sides of the Atlantic resolve questions surrounding price squeezing in antitrust cases. The cases analyzed in this Article are emblematic of the current development of antitrust law in the United States and in the European Union, and the outcomes of these cases show the differences in the treatment of similar claims within the same sector.

COMPETITION AND REGULATION IN THE EUROPEAN TELECOMMUNICATION MARKET § 4.219, at 427 (2004) (defining "price squeeze" and proceeding to list examples and strategies); Damien Geradin & Robert O'Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sectors*, 1 J. COMPETITION L. & ECON. 355, 357 (2005). This definition is further discussed *infra* Part III.

2. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1123 (2009).

3. Commission Decision of 4 July 2007, Case COMP/38.784—Wanadoo España v. Telefónica, http://ec.europa.eu/competition/antitrust/cases/decisions/38784/dec_en.pdf [hereinafter Telefónica]. For a summary of the European Commission's decision, see *Summary of Commission Decision of 4 July 2007*, 2008 O.J. (C 83) 6 [hereinafter *Telefónica* Summary].

4. *See* Case T-271/03, Deutsche Telekom AG v. Comm'n, 2008 E.C.R. II-477, 5 C.L.M.R. 9 (2008).

5. *See id.*; *Telefónica*, Case COMP/38.784, paras. 686–94.

6. 540 U.S. 398 (2004). Customers complained that Verizon Communications Inc., the incumbent local exchange carrier (LEC), was filling competitors' orders after those for its own service, failing to fill competitors orders in a timely manner in order to limit entry. *Id.* at 403–04. The Court concluded that Verizon had no antitrust duty to deal and therefore, no antitrust duty to provide sufficient assistance in the provision of service to rivals. *Id.* at 411.

7. *Id.* at 407–08.

8. *Id.* at 414.

Ultimately, this Article refutes the notion that diverging competition goals, an explanation for the divergence commonly propounded in the United States, can fully explain the differences between the U.S. and E.U. cases, because both U.S. and E.U. competition laws aim to protect consumer welfare.

The observations set forth in this Article address the telecommunications sector. All of the cases involve a vertically integrated, formerly monopolistic firm that still holds a dominant position on an input characterized by significant sunk costs in a telephone network extending to a local loop. This asset is uneconomical to duplicate. As a result, in each case, access to the integrated firm's network was opened to competitors through regulation to develop a competitive downstream market of DSL services. Each vertically integrated firm sells wholesale inputs and finished goods or services at the retail level, and new entrants are both customers (at the wholesale level) and competitors (at the retail level) of these integrated firms.

Part II of the Article briefly outlines three decisions: *Linkline*, *Deutsche Telekom AG*, and *Telefónica*. Part III defines a price squeeze claim by first looking at its historical development in the United States and European Union and then discussing several controversial aspects: the delineation of the market definition and the market power of a price squeeze; the values and economical references to consider when defining its abuse; and the legitimate business reasons that can justify the dominant firm's behavior. The Article then shifts to three questions intrinsically linked to price squeeze claims. Part IV examines whether a price squeeze implies a duty to deal. Part V examines the relationship between regulation and antitrust in the framework of a price squeeze. Finally, Part VI examines what antitrust goals are targeted from the perspective of a price squeeze claim. This Article concludes with the assertion that U.S. and E.U. laws both theoretically aspire to protect consumer welfare, but differing approaches to competition law bring about opposing results in price squeeze cases.

II. RECENT DECISIONS

A. Linkline

As a former monopolist, AT&T[9] controls most of the local telephone network and, in particular, the last mile, which connects the subscriber, private homes or businesses, and the local network exchange.[10] As a vertically integrated firm, AT&T sells both wholesale DSL access to Internet service providers (ISPs) and—in competition with these same ISPs—finished goods and services to individual consumers at the retail level.[11] Until 2005, AT&T was required by the regulatory authority to open its local loop to competitors in order to develop a competitive market for Internet services.[12] This forced-sharing requirement was then abandoned because of competition beyond DSL for high-speed Internet services, but AT&T remains bound "to provide wholesale 'DSL transport' service to independent firms at a price no greater than the retail price of AT&T's DSL service" as a condition of a recent merger.[13]

The plaintiffs in *Linkline* were four independent ISPs (hereinafter Linkline) that offer high-speed digital data transmission via telephone cable.[14] To provide their services to consumers, they needed access to the network elements provided by AT&T.[15] In their claims against AT&T, the plaintiffs alleged that their profit margins were being illegally squeezed because AT&T had sufficient market power to simultaneously raise prices in the wholesale market and cut the retail price of the finished goods, thus monopolizing or attempting to monopolize regional digital subscriber-line markets.[16]

While the case was pending at the district court, the Supreme Court issued the *Trinko* decision, holding that "a firm with no antitrust duty to deal with its rivals at all is under no obligation to provide those rivals with a 'sufficient' level of service."[17] AT&T then

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9. Petitioners are actually several corporate entities and subsidiaries referred to as AT&T. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1115 n.1 (2009).
10. *Id.* at 1115.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

argued that *Trinko* foreclosed the plaintiffs' claim.[18] The district court denied both parties' motions for judgment on the pleadings.[19]

On appeal, the Ninth Circuit held that Linkline stated a claim under price squeeze theory and granted certiorari. First, the court observed that price squeeze allegations had long been recognized as valid claims under § 2 of the Sherman Act, and a price squeeze could occur even if prices were regulated at both wholesale and retail levels.[20] Next, the court concluded that the Supreme Court's decision in *Trinko*[21] did not call for a reconsideration of this view.[22] *Trinko* explains that "claims that satisfy established antitrust standards" are preserved in particular regulatory contexts.[23] *Trinko* did not involve a price squeeze theory, and the Ninth Circuit concluded that a price squeeze claim remained a potentially viable antitrust claim.[24] Furthermore, the court concluded that *Trinko* did not bar the application of antitrust law in regulated industries, but a regulatory regime is "one factor" for a court to consider when determining antitrust liability.[25] In the case at hand, only wholesale prices were regulated and retail prices were constrained by antitrust law.[26] The court thus held that, if Linkline could prove that its allegation involved only unregulated prices, it could bring a valid antitrust claim.[27]

AT&T appealed to the Supreme Court.[28] The Supreme Court heard the case and disagreed with the Ninth Circuit. It concluded that the Sherman Act did not recognize a price squeeze claim.[29]

The Court's argument is seductive in its simplicity: following *Trinko*, if an undertaking "has no antitrust duty to deal with competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous."[30] Thus, the Supreme Court found no reason to distinguish between price and nonprice components of a transaction for antitrust

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18. *Id.* at 1115–16.
19. Linkline Commc'ns, Inc. v. SBC California, Inc., 305 F.3d 876, 877 (9th. Cir. 2007), *vacated*, 563 F.3d 853 (9th Cir. 2009).
20. *Linkline*, 305 F.3d at 880.
21. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).
22. *Linkline*, 305 F.3d at 883.
23. *Trinko*, 540 U.S. at 406.
24. *Linkline*, 305 F.3d at 883.
25. *Id.*
26. *Id.* at 885.
27. *Id.*
28. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109 (2009).
29. *Id.* at 1116–17.
30. *Id.* at 1119.

purposes, and it held that AT&T was not required to propose wholesale prices at the level its rivals would have preferred.[31]

With this argument, *Linkline* rules out all antitrust claims regarding price in the upstream market,[32] and leaves valid only claims concerning overly low prices in the downstream market.[33] To prevail in this type of claim, a plaintiff must demonstrate two conditions:[34] first, that "the prices complained of are below an appropriate measure of its rival's costs" and, second, that "there is a 'dangerous probability' that the defendant will be able to recoup its 'investment' in below-cost prices."[35] But "there [was] no allegation that AT&T's conduct met either of the *Brooke Group* requirements."[36]

In its decision, the Supreme Court reaffirmed the need—articulated in *Trinko*—for clear antitrust rules and emphasized the difficulty antitrust courts face when attempting to administer prices directly.[37] In the Court's view, "[r]ecognizing price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. And courts would be aiming at a moving target, since it is the *interaction* between these two prices that may result in a squeeze."[38] The Court rejected a transfer price test to evaluate a price squeeze because a transfer price test lacked any grounding in antitrust jurisprudence.[39] The Court thus reversed the judgment of the Ninth Circuit and remanded the case for further proceedings.[40]

B. Deutsche Telekom AG

Deutsche Telekom AG is the former telecommunications monopolist in Germany operating the country's fixed telephone network.[41] The company offers competing telecommunications operators and customers regulated access to a local loop.[42] The German regulatory authority partially regulates and controls access

31. *Id.*

32. *Id.* ("[S]uch claims are not cognizable under the Sherman Act in the absence of an antitrust duty to deal.").

33. *Id.* ("To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low.").

34. Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993).

35. *Linkline*, 129 S. Ct. at 1120 (citing *Brooke Grp.*, 509 U.S. at 222–24).

36. *Id.*

37. *Id.*

38. *Id.* at 1121.

39. *Id.* at 1121–22.

40. *Id.* at 1123.

41. Commission Decision of 21 May 2003, Case COMP/C–1/37.451, 35.578, 37.57—Deutsche Telekom AG, 2003 O.J. (L 263) 9, para. 6.

42. *Id.* para. 12.

price, but Deutsche Telekom still makes commercially independent decisions.[43] A commercial undertaking subject to price regulation must be able to avoid or suppress a price squeeze for competition laws to apply.[44] Indeed, the Court of Justice of the European Communities and the Court of First Instance of the European Communities "have consistently held that the competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition."[45] Furthermore, the telecommunications sector in Germany is subject to competition rules under the European Communities' *Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector.*[46] Deutsche Telekom potentially violated the competition rules, and the Commission had a duty to investigate.[47]

The European Commission (whose decision was confirmed by the Court of First Instance[48]) found that Deutsche Telekom held a dominant position in the relevant markets—wholesale access services for competitors, plus retail broadband and narrowband for individual and access customers.[49] The Commission then examined the price squeeze claim[50] and stated that a price squeeze claim must show a disproportion between wholesale and retail prices that restricts competition in one of those markets.[51] The Commission found that there is a margin squeeze "if 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."[52] A negative or excessively narrow margin may exclude competitors from the downstream market, even if they are as efficient as the established operator.[53] This means that the retail price does not need to be set below costs. Instead, the spread between wholesale

43. *See id.* para. 36.

44. *Id.* para. 105.

45. *Id.* para. 54.

46. *See Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector*, 1998 O.J. (C 265) 2 [hereinafter *Access Notice*].

47. *Deutsche Telekom AG*, Case COMP/C–1/37.451, 35.578, 37.57, para. 54.

48. Case T–271/03, Deutsche Telekom AG v. Comm'n, 2008 E.C.R. II–477, 5 C.L.M.R. 9 (2008).

49. *Deutsche Telekom AG*, Case COMP/C–1/37.451, 35.578, 37.57, para. 58.

50. *Id.* para. 102.

51. *Id.* para. 105.

52. *Id.* para. 107.

53. *Id.* para. 108.

and retail prices creates unfairness in the form of an abusive margin squeeze. If wholesale market prices are higher than retail prices, a negative spread constitutes a squeeze irrespective of the specific costs.[54] When wholesale prices are lower than retail prices, the margin is positive, but there still is a squeeze if the spread would not enable the incumbent to cover its product-specific costs of providing its services to customers.[55]

The Court of First Instance agreed that a dominant company's own charges and costs should be the reference to determine whether there is abusive behavior, taking the general principle of legal certainty into account.[56] Thus, the operator can assess the lawfulness of its behavior.[57] The Court found that Deutsche Telekom's abusive behavior raised such high barriers that no discernible improvement in competition could be seen in more than two years in the relevant markets.[58] At the time of writing, the case is pending on appeal to the Court of Justice.[59]

C. Telefónica

Telefónica is the former monopolist in Spain, with a nationwide telecommunications network.[60] ADSL, the main technology in Spain, provides broadband to consumers, and Telefónica controls the entire value chain.[61] Duplication of Telefónica's local network would be uneconomical,[62] and companies have not successfully breached the market with alternative technologies.[63] Therefore, alternative providers have had to contract wholesale access products built on Telefónica's local access network.[64] Telefónica dominates Spain's three relevant markets: the retail broadband "mass" market, and the wholesale broadband access markets at regional and national levels.[65]

The European Commission determined that Telefónica abused its dominant position in the form of a price squeeze created by a

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54. *Id.* para. 138.
55. *Id.*
56. Case T–271/03, Deutsche Telekom AG v. Comm'n, 2008 E.C.R. II–477, 5 C.L.M.R. 9, para. 2 (2008).
57. *Id.*
58. *Deutsche Telekom AG*, Case COMP/C–1/37.451, 35.578, 37.57, para. 181.
59. *See* Case C–280/08 P, Deutsche Telekom AG v. Comm'n, 2008 O.J. (C 223) 31.
60. Commission Decision of 4 July 2007, Case COMP/38.784—Wanadoo España v. Telefónica, para. 13.
61. *Id.* para. 82.
62. *Id.* para. 167.
63. *Id.* para. 276.
64. *Id.* para. 74.
65. *See id.* paras. 161, 208.

disproportion between its wholesale and retail prices, and this price squeeze could restrict competition in the retail market.[66]

Telefónica argued that the price squeeze under investigation amounted to a refusal to supply and, therefore, the conditions previously established by the European Court of Justice in relation to the essential facilities doctrine[67] must be fulfilled for the company to violate the antitrust rules.[68] In that respect, Telefónica argued that its upstream product must be proven indispensable to the downstream product before a price squeeze claim could be brought.[69]

The European Commission disagreed.[70] It found that Telefónica had a regulatory duty, proceeding from a balancing of interests, to supply wholesale services to promote downstream competition. The need to promote competition through the regulatory access exceeded the need to preserve Telefónica's ex ante incentive to invest and exploit the upstream infrastructure for its own benefit.[71] Furthermore, Telefónica's incentive to invest was not at stake because all of the investment in the network was made while the company was protected from competition by special or exclusive rights. Moreover, the investments in the network were made well before the advent of ADSL technology, and the company could not have considered mandatory access at that time.[72] Telefónica supported the cost of enabling the network element to support broadband traffic, but it did not have to establish a specific transport network.[73] Finally, Telefónica could have ended its abusive behavior, but the operator did not propose lower wholesale prices, even though prices were unregulated or regulated in the form of maximum prices.[74]

As a result, the European Commission found that Telefónica's behavior impaired the competition process and affected the competitors' ability to enter the market and exert a competitive pressure on Telefónica:

> The margin squeeze restricted competition by imposing unsustainable losses on equally efficient competitors: they were either ultimately forced to exit or in any event constrained in their ability to invest and to grow. Even if they met Telefónica both on prices and marketing expenditure, they were poorly placed in the long run to offer a vigorous

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66. *Id.* para. 285.

67. Case C–7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG, 1998 E.C.R. I–7791, para. 24.

68. *Telefónica*, Case COMP/38.784, para. 299.

69. *Id.* para. 300.

70. *Id.* para. 302.

71. *Id.* para. 303.

72. *Id.* paras. 303–08.

73. *Id.* para. 305.

74. *Id.* para. 675.

> competitive challenge to Telefónica as a result of their continuing losses. As a result, Telefónica's conduct was likely to delay the entry and growth of competitors. Therefore, Telefónica's conduct was likely to delay as long as possible the arrival of ADSL operators at a level of economies of scale which would have justified investments in their own infrastructure and, ultimately, the use of local loop unbundling.[75]

Telefónica's conduct resulted in actual harm to consumers because they would have benefitted from more aggressive competition in the form of lower prices and increased choice and innovation. The detrimental impact of Telefónica's conduct on end users could be measured: retail prices in Spain were among the highest in the European Community, and ADSL penetration was below the E.C. average without any demand or supply factors that explained the results.[76] At the time of writing, the case has been appealed to the Court of First Instance.[77]

III. PRICE SQUEEZE DEFINITION

To understand the origins of such diverging decisions and what underlies a price squeeze on each side of the Atlantic, this Part defines a price squeeze based on its historic developments. It compares the conditions that constitute monopolization or an attempt to monopolize on the one hand, with conditions that constitute an abuse of a dominant position on the other hand. It discusses how the market is framed and how market power is established. It compares the values and figures that the courts in the above decisions took into account to determine whether prices were squeezed. It finally examines which possible justifications for a price squeeze may arise.

A. *Price Squeeze Foundations in the United States and European Union*

1. United States

In the United States, the price squeeze question is based on § 2 of the Sherman Act and first appeared in *Alcoa*.[78] Alcoa sold aluminum ingots to its competitors on the upstream market and aluminum sheets on the downstream market.[79] Judge Hand found

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75. *Telefónica* Summary, *supra* note 3, at 8.
76. *See Telefónica*, Case COMP/38.784, para. 544.
77. Case T–336/07, Telefónica v. Comm'n, 2007 O.J. (C 269) 55.
78. *See* United States v. Aluminum Co. of Am. (Aloca), 148 F.2d 416 (2d Cir. 1945) (describing the plaintiff's price squeeze theory and analyzing whether it amounts to a monopoly under § 2 of the Sherman Act); Sherman Antitrust Act § 2, 15 U.S.C. § 2 (2006).
79. *Id.* at 422.

that Alcoa used its monopoly power to hold the price of ingots at a high level.[80] As a result, the cost of the aluminum ingot plus the cost of transforming the ingot into sheet for Alcoa's competitors was greater than the price at which Alcoa itself sold sheet. Consequently, competitors could not make a "living profit."[81] To come to this conclusion, Judge Hand considered Alcoa's own cost of rolling the sheet as a fair measure of its competitors' costs and assumed, in the absence of the proof to the contrary, that it was a reasonable supposition that Alcoa's rolling costs were not higher than those of its competitors.[82] Judge Hand then assumed that competitors needed to meet Alcoa's prices because of these costs. But competitors were unable to compete on the downstream market and were put out of business because the spread between the cost of ingot and the cost of rolling was insignificant or negative.[83]

Among other considerations, Judge Hand concluded that "it was unlawful to set the price of 'sheet' so low and hold the price of ingot so high . . . provided . . . that on [the] record the price of ingot must be regarded as higher than a 'fair price.'"[84]

Judge Hand based the decision on Alcoa's own costs and the spread between its wholesale and retail prices, but the decision provides no precise guidance as to what should be considered a "fair price" for wholesale goods or a "living profit" on the retail market.[85] The "Hand decision has been cited and discussed approvingly in many subsequent cases before the Supreme Court."[86] It is influential in electricity and telecommunications sector cases, although the price squeeze does not figure in any statute.[87] Nevertheless, these decisions leave the offense undefined.[88] *Alcoa* clarified the relationship between antitrust and regulation: the Federal Power Commission (now the Federal Energy Regulatory Commission) has to consider unregulated retail prices when setting wholesale rates to

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80. *Id.* at 445.

81. *Id.* at 437.

82. *Id.*

83. *Id.*

84. *Id.* at 438.

85. *See id.* (failing to define "fair price" or "living profit"); *see also* Town of Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990) (noting the difficulty of administering Judge Hand's price squeeze test).

86. Paul A. Grout, *Defining Price Squeeze in Competition Law*, *in* THE PROS AND CONS OF LOW PRICES 71, 73 (2003).

87. *Id.* at 74; *see* Paul L. Joskow, *Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition*, *in* ANTITRUST AND REGULATION: ESSAYS IN MEMORY OF JOHN J. MCGOWAN 173, 185 (Franklin M. Fisher ed., 1985).

88. *See, e.g.*, Fed. Power Comm'n v. Conway Corp., 426 U.S. 271, 279 (1976) (failing to define "price squeeze"); City of Mishawaka v. Am. Elec. Power Co., Inc., 616 F.2d. 976, 983–85 (7th Cir. 1980) (same).

avoid price squeeze.[89] Furthermore, public utilities' wholesale rates are not immune to the Sherman Act because public utilities can use administrative processes and threaten competitors.[90]

In another major decision addressing price squeeze, *Town of Concord v. Boston Edison Co.*, the First Circuit dissolved the relationship between wholesale and retail prices and split the definition of price squeeze into a too-high upstream price or a too-low downstream price.[91] Moreover, the Chicago School of economics influenced the court's rejection of the price squeeze theory.[92] First, the court found that the extension of monopoly power from the upstream market to the downstream market provides no incentive to exclude a rival because a firm does not gain added power to raise prices.[93] Second, the court found that if the primary-level monopolist carries out its second-level activities more efficiently than its competitors, price squeezing brings economics benefits.[94] Third, the court found that if the second-level firm is itself a monopolist, a price squeeze will benefit consumers.[95] Finally, the court found that, when both upstream and downstream markets are regulated, regulators are better equipped to assess whether prices reflect costs and thus to prevent the need to apply competition law.[96]

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89. *See Conway Corp.*, 426 U.S. at 280–82 (discussing Federal Power Commission rate-setting requirements, but not specifically referencing the *Alcoa* case).

90. *City of Mishawaka*, 616 F.2d. at 983–84.

91. Town of Concord v. Boston Edison Co., 915 F.2d 17, 18 (1st Cir. 1990) ("[A] price squeeze occurs when the integrated firm's price at the first level is too high, or its price at the second level is too low, for the independent to cover its costs and stay in business.").

92. Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age* (Univ. of Cal. Berkeley, Dept' of Econ., Working Paper No. E02–325, 2003), *available* at http://escholarship.org/uc/item/4dh7q2dd;jsessionid=8A87B66F86C6 97A136D77CC167092C56 ("By the late 1970s, however, the Chicago School of economics had taught mainstream antitrust thinking that vertical integration (e.g., merger) and many kinds of vertical contract had efficiency benefits and were unlikely to harm competition."); *see generally* ERNEST GELLHORN, WILLIAM E. KOVACIC & STEVEN CALKINS, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 137 (5th ed. 2004) (stating that "[w]here entry is easy, courts have declined to infer monopoly power even from high market shares because actual or threatened entry will drive prices to competitive levels.").

93. *Town of Concord*, 915 F.2d at 23 (stating that "the extension of monopoly power from one to two levels does not necessarily, nor in an obvious way, give a firm added power to raise prices"); *see also* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009) (discussing the single monopoly profit theory).

94. *Town of Concord*, 915 F.2d at 24.

95. *Id.*

96. *See id.* at 25–26 (noting that regulators try to set prices that reflect costs); *cf.* City of Mishawaka v. Am. Elec. Power Co., Inc., 616 F.2d. 976, 983–84 (7th Cir. 1980) (discussing a dual federal and state regulatory scheme).

In *Linkline,* Chief Justice Roberts based his opinion on antitrust law, mainly relying on the *Trinko* case, rather than economic grounds, like in *Town of Concord.*[97] He considered the price squeeze claim to be a new form of antitrust liability, which he saw no need to recognize.[98] Following the First Circuit's reasoning in *Town of Concord,* he divided the case into two claims: an antitrust duty to deal claim in the upstream market and a predatory pricing claim in the downstream market.[99] Chief Justice Roberts concluded that when there is no duty to deal on the upstream market, wholesale pricing conditions cannot be considered and the plaintiff is left to prove predatory pricing.[100]

2. European Union

In the European Union, Article 102 of the Treaty on the Functioning of the European Union (TFEU), which entered into force December 1, 2009, prohibits abuse of a dominant position and, in particular, unfair selling prices, including excessive pricing.[101] But Article 102 does not exhaustively list the ways in which a dominant position may be abused.[102]

Price squeeze was first outlined in a 1975 European Commission decision[103] and further developed in *Napier Brown v. British Sugar.*[104] In the latter, a company dominated the sugar markets for both raw material and derived products.[105] The Commission found that the spread between the price charged for raw material and the price charged for its derived products was insufficient to reflect the company's cost of transformation.[106] This circumstance restricted competition in the derived products markets, and the Commission

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97. *See* Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1118–20 (2009) (relying primarily upon legal analysis of the *Trinko* decision to find that an alleged price squeeze did not constitute a violation of the Sherman Act when petitioners had no antitrust duty to deal with respondents in the wholesale market).

98. *Id.* at 1123.

99. *Id.* at 1119–20, 1123.

100. *Id.* at 1119–20.

101. Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Sept. 5, 2008, 2008 O.J. (C 115) 89 [hereinafter TFEU].

102. Commission Decision of 4 July 2007, Case COMP/38.784—Wanadoo España v. Telefónica, para. 280.

103 Commission Decision of 29 October 1975, National Carbonizing Company Limited, 1976 O.J. (L 35) 6.

104. *See* Commission Decision of 18 July 1988, Case IV/30.178—Napier Brown/British Sugar, 1988 EUR-Lex CELEX LEXIS 0518 [hereinafter Napier Brown].

105. *Id.* para. 66.

106. *Id.*

concluded that the company's behavior constituted abuse of a dominant position.[107]

In a 2000 decision, *Industrie des Poudres Sphériques*, the European Commission specified that applicants must demonstrate either abusive pricing in the upstream market or predatory pricing in the retail market, or that the price is aimed to exclude an equally efficient competitor because of an insufficient margin.[108] If pricing is not exclusionary, there is no need to look at the profit margin on the wholesale market.[109] Under these circumstances, if customers of the applicant will not pay a higher price, that demonstrates either that the price is too high, meaning that the competitor is not efficient enough, or that the proposed product is of better quality and the competitor is at least equally efficient, but there is no demand for this offer on the downstream market, which, of course, is not protected by competition law.[110]

The European Communities' *Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector* defines a price squeeze as an abuse of a dominant position. It also clarifies the conditions of a price squeeze, the basis of which is established in case law.[111] According to the notice, one of two alternative conditions must be fulfilled to demonstrate a price squeeze. First, "the dominant company's own downstream operations could not trade profitably on the basis of the upstream prices charged to its competitors . . . ."[112] Alternatively, "[i]n appropriate circumstances . . . the margin between the price charged to competitors on the downstream market . . . for access and the price which the network operator charges in the downstream market is insufficient to allow a reasonably efficient service provider . . . to obtain a normal profit" in the downstream market. In this case, though, the network operator can justify the insufficient margin by showing that its own downstream operation is exceptionally efficient.[113]

The notice concludes by stating that if the first condition can be demonstrated, the "competitors on the downstream market would be

107. *Id.*

108. Case T-5/97, Industrie des Poudres Sphériques v. Comm'n, 2000 E.C.R. II-3755, paras. 177–85. *Telefónica* confirms that there is no need to demonstrate that either the wholesale price is excessive in itself or that the retail price is predatory in itself. Commission Decision of 4 July 2007, Case COMP/38.784—Wanadoo España v. Telefónica, para. 283.

109. *Industrie des Poudres Sphériques*, 2000 E.C.R. II-3755, para. 183.

110. *Id.* para. 185.

111. *Access Notice*, *supra* note 46, paras. 117–19.

112. *Id.* para. 117.

113. *Id.* para. 118.

faced with a price squeeze which could force them out of the market."[114]

The *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*,[115] released in the framework of the Article 82 review, addresses the subject of a price squeeze as a refusal to supply.[116] Indeed, instead of refusing access, "a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis."[117] The European Commission generally relies on the long-run average incremental cost (LRAIC)[118] on the downstream division of the integrated dominant undertaking as a benchmark to determine the costs of an equally efficient competitor.[119]

The comparison of the very foundation of price squeeze in the United States and the European Union shows that E.U. case law stays very close to the principles established by Judge Hand in *Alcoa*, where the "fair price" is to be determined by the LRAIC.[120] Furthermore, while U.S. case law rejects price squeeze claims as a ground for liability under § 2 of the Sherman Act and the notion does not figure in any other statute, the European Union reinforces the case law by recognizing price squeeze claims through nonbinding acts. Price squeeze claims thereby gain policy recognition.

B. *Market Definition and Market Power*

To appreciate the impact of a firm's behavior on competition, one must first precisely identify the relevant market and know the firm's

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114. *Id.* para. 119.

115. *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C 45) 7 [hereinafter *Article 82 EC Guidance*]. The document lays out the Commission's enforcement priorities in applying Article 82 of the EC Treaty to exclusionary conduct and aims at achieving greater clarity and predictability regarding its framework analysis, without prejudice from the interpretation of the law by the Court of Justice and Court of First Instance. *Id.* paras. 2–3.

116. *Id.* paras. 75–82.

117. *Id.* para. 80 (citation omitted).

118. *See generally* 3A AREEDA & HOVENKAMP, *supra* note 1, ¶ 741e2, at 228–33 (discussing long-run incremental cost).

119. *Article 82 EC Guidance*, *supra* note 115, para. 80.

120. *See* United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 437 (2d Cir. 1945) (considering the downstream costs of rolling sheet as a fair measure of the costs for competitors).

position in that market.[121] With this understanding, the firm's power in that particular market can be assessed.[122] Two markets need to be delimited in order to examine price squeeze abuse: an upstream market, where a vertically integrated firm has a monopoly and sells wholesale goods to its competitors, and a downstream market, where this monopolist competes with the same competitors to sell its transformed retail services. Using a price squeeze, the vertically integrated firm tries to extend its position in the upstream market to the downstream market, leading to its competitors' exclusion.[123] Therefore, the cases discussed above need to define the markets and assess the market power.

1. Market Definition

The market definition consists of two dimensions: the product market and the geographic market.[124] When it comes to networks built under monopoly protection, the traditional formal product market definition in telecommunications networks comes up against several difficulties related to fixed costs and lack of market efficiency.[125] Moreover, the rapidly innovating sector blurs market delimitations and makes it difficult to appreciate potential

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121. *Access Notice*, *supra* note 46, para. 39 ("In the course of investigating cases . . . the Commission will base itself on the approach to the definition of relevant markets set out in the Commission's Notice on the definition of the relevant market for the purposes of Community competition law."); J. Gregory Sidak, *Abolishing the Price Squeeze as a Theory of Antitrust Liability*, 4 J. COMPETITION L. & ECON. 279, 280–81 (2008); *see also Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law*, 1997 O.J. (C 372) 5, 5 (explaining that market definition makes it possible to calculate market shares that convey meaningful information regarding market power).

122. *See, e.g.*, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458–59 (1993) (suggesting that the relevant market must be identified in order to assess a firm's market power); *Article 82 EC Guidance*, *supra* note 115, para. 9 ("The assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of Article 82."); *Access Notice*, *supra* note 46, paras. 63–69 (describing factors that may be relevant in determining if a company enjoys a dominant position in the market); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 938 (1981) ("The standard method of proving market power in antitrust cases involves first defining a relevant market in which to compute the defendant's market share, next computing that share, and then deciding whether it is large enough to support an inference of the required degree of market power.").

123. Sidak, *supra* note 121, at 280.

124. 2B PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW ¶ 530a, at 225 (3d ed. 2007).

125. Jordi Gual, *Market Definition in the Telecoms Industry*, *in* THE ECONOMICS OF ANTITRUST AND REGULATION IN TELECOMMUNICATIONS 45, 52–64 (Pierre A. Buigues & Patrick Rey eds., 2004).

competition, the impact of services bundling, and product integration.[126]

These difficulties probably explain why there is no specific product or geographic market analysis in the *Linkline* decision. Chief Justice Roberts only mentioned that the case involves the market for DSL services at both wholesale and retail levels, and he observed that competing DSL providers must generally obtain access to AT&T's facilities to serve their customers.[127] He also observed that the Federal Communications Commission (FCC) abandoned the forced-sharing requirement in the light of the emergence of a competitive market for high-speed Internet service. Moreover, DSL faced "robust competition" from cable companies, wireless, and satellite services.[128] At the same time, however, the decision reports that "AT&T owns much of the infrastructure and facilities needed to provide DSL services in California" and, in particular, that AT&T controls most of the "last mile."[129] The product and geographic markets remain confused.

Furthermore, although Chief Justice Roberts relied on the FCC observations, the sector regulation market definition does not substitute for an antitrust definition in specific cases. Each regulation and antitrust law considers markets for the purpose of the application of its own rules. Therefore, markets are delimited for the scope of application of the regulation or antitrust law and are not necessarily equivalent. Considering these differences, regulation and antitrust laws could pertain to different markets depending on the particularities of each specific case. As a consequence, the markets delimited by regulatory statutes and by antitrust laws are not necessarily the same. Where a regulatory statute identifies "robust competition" [130] in, say, a national broadband market, antitrust laws may define a smaller product and geographic market, like DSL in a specific regional. Of course, the bigger the market, the stronger the competition, and market delineation will influence the determination of market power.[131]

In *Deutsche Telekom*, the European Commission identified two relevant product and service markets: the market in local network access for competitors at the wholesale level and markets with access

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126. ANTONIO BAVASSO, COMMUNICATIONS IN EU ANTITRUST LAW 103–60 (2003); Gual, *supra* note 125, at 52–64; *see also* Sidak, *supra* note 121, at 300–01 (asserting that defining the proper market becomes more difficult with rapid technological change and product bundling).

127. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1115 (2009).

128. *Id.*

129. *Id.*

130. *Id.*

131. *See infra* Part III.2.b.

to narrowband and broadband connections at the retail level.[132] In Germany, no other infrastructure was sufficiently developed to be substitutable. No other network could reach the entire national territory or achieve such a level of capillarity because Deutsche Telekom's network had been developed with huge investments over many years and was protected by a monopoly.[133] The geographic market was national.

In *Telefónica*, the European Commission investigated the Spanish telecommunications markets with extreme care and identified all of the standard broadband products (whether provided through ADSL or any other technology) marketed on the "mass market" for both residential and nonresidential users as belonging to the relevant retail market.[134] The Commission found two relevant wholesale markets: "the market for wholesale broadband access for which traffic [was] delivered at the regional level and the market for wholesale broadband access for which traffic [was] delivered at one national hand-over point."[135] All other technologies distinct from ADSL were excluded because demand-side substitution at the wholesale level is firstly constrained by the significant cost of switching from one technological platform to another.[136] Demand-side substitution at the wholesale level is also constrained by the difference in geographic coverage between ADSL and other technologies: while ADSL covers the whole territory, only 40 percent or less of the population can get broadband access based on other technologies.[137] This fact would prohibit a wholesale purchaser of cable broadband access from offering its services throughout the entire Spanish territory.[138] Therefore, the geographic markets are national at both levels.[139]

2. Market Power

Once the relevant markets are delimited, market power is assessed by examining whether the integrated firm holds a position that confers the capacity to affect market conditions by setting the

132. Commission Decision of 21 May 2003, Case COMP/C-1/37.451, 35.578, 37.57—Deutsche Telekom AG, 2003 O.J. (L 263) 9, para. 96.

133. *Id.* paras. 13, 21, 83.

134. Commission Decision of 4 July 2007, Case COMP/38.784—Wanadoo España v. Telefónica, para. 161.

135. *Id.* para. 208.

136. *Id.* paras. 200, 208.

137. *See id.* para. 201 ("[O]nly about 40% of the population can get broadband access based on cable modem.").

138. *Id.* paras. 201–03.

139. *Id.* para. 219.

wholesale price:[140] "a firm lacking market power cannot possibly rise to the level of an antitrust violation because it has no chance of reducing consumer welfare."[141] A price squeeze involves two markets, which raises questions of how to assess the market power and in which market(s) the power should lie.

Although the usual market structure characteristics—such as market share, potential competition, and barriers to entry—are the criteria for assessing market power in the telecommunications sector, Erik and Herbert Hovenkamp note that the "ability to impose narrow margins that are harmful to unintegrated rivals does not require market power in the classic sense at all."[142] Even in a case where some competition can be observed, a firm's power can arise from a specific asset. For the cases studied here, that asset is the DSL network.[143] It represents an essential input for the competitors using it, in that they have no substitute because they made a substantial investment in a particular technology that "inexorably" links their business to the vertically integrated firm's asset.[144] This linkage leads to the leveraging theory.

Adopted by the Supreme Court in 1948,[145] the leveraging theory suggests that firms use monopoly power in one market to acquire a competitive advantage in a second market. It has been challenged in the United States and is often considered to be no longer viable because the element of an attempt to monopolize needs to be met for the second market as well.[146]

In the *Linkline* case, Chief Justice Roberts relied on the fact that the FCC abandoned the forced-sharing access requirement "in light of the emergence of a competitive market beyond DSL for high-speed Internet service," while DSL faced "'robust competition' from cable

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140. *See* Case C–333/94 P, Tetra Pak Int'l SA v. Comm'n, 1996 E.C.R. I–5951 (penalizing Tetra Pak for predatory pricing where there was a risk that competitors would be eliminated from the market); Case 85/76, Hoffmann-La Roche & Co. AG v. Comm'n, 1979 E.C.R. 461, para. 39 (explaining that large market share is one factor contributing to dominance and that dominant firms can influence market conditions); *cf. Access Notice*, *supra* note 46, paras. 65–69 (noting that in vertical telecommunications markets, infrastructure costs typically constitute the single largest cost of downstream operations, but that in other situations involving closely-related markets it may be possible for particular operators to exert a high degree of market power in other ways).

141. Sidak, *supra* note 121, at 305.

142. Erik N. Hovenkamp & Herbert Hovenkamp, *The Viability of Antitrust Price Squeeze Claims*, 51 ARIZ. L. REV. 273, 283 (2009).

143. *Id.*

144. *Id.*; *see also* Geradin & O'Donoghue, *supra* note 1, at 358–59 (noting that downstream competitors who rely on alternate technologies will not be as affected by price changes).

145. United States v. Griffith, 334 U.S. 100, 107–09 (1948).

146. 3 AREEDA & HOVENKAMP, *supra* note 1, ¶ 652b2, at 135–40; HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 321–22 (2005).

companies and wireless and satellite services."[147] No further analysis was provided and relevant markets were not properly defined to determine whether and to what extent AT&T retained its market power in the upstream or downstream market.[148] In fact, three unanswered questions related to market power from the perspective of the application of § 2 of the Sherman Act remain. First, is there a market power? Second, is the vertically integrated undertaking trying to obtain and maintain a monopoly power, and is it in the same market where it already has a market power or in a downstream market? Third, how does the price squeeze assist the vertically integrated firm in this project? Indeed, if DSL faces "robust competition"[149] in both the upstream and downstream markets, it is difficult to see how AT&T could achieve enough market power to violate § 2 of the Sherman Act, even if the company could exclude its DSL competitors from the market.[150] In this circumstance, there is no need to look for a price squeeze. If AT&T holds market power in the upstream market, does it need to fulfill the criteria of an attempt to monopolize in the downstream market? If AT&T does not need market power "in the classic sense" because it possesses an essential asset for competitors,[151] is the firm trying to leverage its upstream market power to the downstream market through a price squeeze? Is a "too-high price" in the upstream market relevant for the upstream or the downstream market?[152] Unfortunately, *Linkline* leaves these questions unanswered.

European jurisprudence applies Article 102 of the TFEU to the downstream market if the dominant firm uses its market power "on a neighbouring but separate market where it is not in a dominant position, with the possibility of eliminating all competition on that market."[153] Though the leading case concerns horizontal markets, the same analysis is applicable to a vertically integrated market.[154] However, as Damien Geradin and Robert O'Donoghue explain, if the firm is not dominant in the downstream market, there is a need for "some credible basis for saying that foreclosure concerns are likely to

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147. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1115 (2009).

148. *See id.* (declining to specifically address AT&T's market power).

149. *Id.* ("DSL now faces robust competition from cable companies and wireless and satellite services.").

150. *See* United States v. E. I. Du Pont De Nemours & Co., 351 U.S. 377, 394 (1956) ("[W]here there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others . . . .").

151. *See* Hovenkamp & Hovenkamp, *supra* note 142, at 283 (noting an integrated firm that provides an input to a downstream competitor can, in some cases, exercise a nontraditional form of market power that is not dependent on market share).

152. *See* discussion *infra* Part III.3.

153. Case T–83/91, Tetra Pak Int'l SA v. Comm'n, 1994 E.C.R. II–755, para. 115.

154. *Access Notice*, *supra* note 46, para. 65.

arise on a market in which no firm is dominant and that these concerns are likely to lead to higher prices over time."[155]

In the *Deutsche Telekom* case, the European Commission easily established Deutsche Telekom's market power by finding that the former monopolist still held a market share ranging from 90–100 percent in the relevant markets. Additionally, it was highly improbable that potential competitors could build a similar network at a national level in the foreseeable future, considering that it would not be economically profitable with existing technologies.[156] These barriers to entry were likely to restrict competition on the downstream market.

In the *Telefónica* case, the Commission again carefully examined Telefónica's market power. On the regional wholesale market, Telefónica maintained a de facto monopoly, not restrained by any potential entries.[157] Indeed, there were and are considerable structural barriers preventing competitors' investments in local loop unbundling from having a significant impact on competition in this market, and any such impact will never extend to the whole Spanish territory.[158] Moreover, economies of scale and scope, and vertical integration are not available for alternative competitors in the regional wholesale market.[159] At the national wholesale level, Telefónica's market share is eleven times larger than its largest competitor's market share.[160] The former monopolist benefits from economies of scale and scope in this market as well. Furthermore, Telefónica maintains its ability to significantly influence the availability of competing wholesale products because any wholesale alternative must be based on Telefónica's local loop.[161] Considering these barriers to entry, Telefónica was able to leverage its dominant position from the lower network levels (local loop and regional wholesale market) to the national wholesale market, thanks to its control over the infrastructure inherited from the former monopoly.[162] Thus, the Commission was able to find that Telefónica holds a dominant position in both wholesale markets.[163] Though it is not necessary under Article 102 of the TFEU to demonstrate a dominant position in the retail market to prove a margin squeeze, the

155. Geradin & O'Donoghue, *supra* note 1, at 408.

156. Commission Decision of 21 May 2003, Case COMP/C–1/37.451, 35.578, 37.57—Deutsche Telekom AG, 2003 O.J. (L 263) 9, paras. 96–101.

157. Commission Decision of 4 July 2007, Case COMP/38.784—Wanadoo España v. Telefónica, paras. 223–26.

158. *Id.* paras. 223–29.

159. *Id.* para. 226.

160. *Id.* para. 236.

161. *Id.* para. 240.

162. *Id.* para. 241.

163. *Id.* paras. 241–42.

Commission completed its analysis by establishing that Telefónica was dominant in this market as well.[164]

Telefónica demonstrates that foreclosure on the retail market was a rational and profitable strategy for three reasons:[165] first, the profit extracted from a high-level retail price surpassed the forsaken wholesale profit; second, creating and maintaining a leading position in the provision of retail broadband led to a loyalty effect on another market, namely, fixed lines; and, finally, Telefónica was preempting the future blooming market of Voice over Internet Protocol (VoIP) and television over broadband.[166]

C. *Values and References*

In *Alcoa*, Judge Hand concluded that Alcoa fixed its wholesale market price at such a high level that the spread between the cost of ingots and the costs of rolling was insignificant or negative, based on Alcoa's own costs, thus eliminating competitors from the downstream market.[167] This test is known as the "transfer price test."[168]

Linkline rejected this test as lacking any grounding in prior jurisprudence. The Court stated that "[a]n upstream monopolist with no duty to deal is free to charge whatever wholesale price it would like; antitrust law does not forbid lawfully obtained monopolies from charging monopoly prices."[169] This is true as long as it concerns only the upstream market and as long as upstream and downstream markets are strictly distinct. But, if the monopolist were trying to use a lawfully obtained monopoly to obtain a monopoly in another market not competing on the merits, then the level of the upstream price should matter, and it should be considered in relation to the downstream price.

An insufficient or negative spread between wholesale and retail prices can find its origin in a too-high wholesale price or a too-low retail price set by the integrated firm, or in a combination of both.[170] In *Linkline*, after refusing to consider the wholesale price because there was no duty to deal in the wholesale market, the Court

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164. *Id.* paras. 243–44.

165. *Id.* paras. 611–13.

166. *Id.*

167. United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 427–29 (2d Cir. 1945).

168. Joskow, *supra* note 87, 186–87.

169. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1122 (2009) (citing Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004)).

170. 3B AREEDA & HOVENKAMP, *supra* note 1, ¶ 767c, at 137; NIHOUL & RODFORD, *supra* note 1, at 427 (2004); Geradin & O'Donoghue, *supra* note 1, at 357–58 (explaining that a vertically-integrated dominant firm can use its control over downstream rivals in several different ways).

examined the assertion that the defendant's retail prices were too low to qualify as a predatory claim.[171] But a price squeeze should not be mistaken for predatory pricing. A price squeeze strategy implies two vertically related markets, where the competitors need the input from the dominant firm to compete downstream. The anticompetitive strategy used in the upstream market and its impact on price would not be evaluated properly under a predatory pricing claim. Indeed, the price in the downstream market is not necessarily so low as to be considered predatory, the dominant firm is not necessarily losing money applying its anticompetitive strategy, and retail customers do not necessarily benefit from a lower retail price as they would with predatory prices.[172] The abuse targets the competitors' investment capacity, based on all firm-relevant costs, rather than a retail price.[173] This is why there is no need to demonstrate that retail prices are abusive as such. Indeed, given that the abusive nature of the firm's behavior is connected to the unfairness of the spread, wholesale and retail prices should not be considered independently.[174]

In contrast to *Linkline*, the European Commission adopted the *Alcoa* cost framework in *Deutsche Telekom* in 2003.[175] The Commission determined that there is a margin squeeze 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."[176] The Commission added that this spread is negative if the wholesale charges are higher than the retail charges, and "in that case there is a margin squeeze in any

171. *Linkline*, 129 S. Ct. at 1118–19.

172. Geradin & O'Donoghue, *supra* note 1, at 367 (explaining five main differences between a margin squeeze and a pure predation case); Hovenkamp & Hovenkamp, *supra* note 142, at 293, 298 (suggesting that the *Brooke Group* test proposed in *Linkline* is not appropriate for a price squeeze strategy because it does not reflect anticompetitive strategies or fully appreciate the impact of upstream price manipulation).

173. Geradin & O'Donoghue, *supra* note 1, at 367 (stating that in a pure predation case the competition authority looks to all relevant costs of the dominant company, whereas in a margin squeeze case it looks only to the costs in the downstream market).

174. Case T–271/03, Deutsche Telekom AG v. Comm'n, 2008 E.C.R. II–477, 5 C.L.M.R. 9, para. 167 (2008) (finding that the Commission was not required to demonstrate specifically that Telekom's retail prices were abusive because the nature of the abusive conduct was connected with the unfairness of the price spread).

175. *Deutsche Telekom AG*, 5 C.L.M.R. para. 107; *see also* United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 438 (2d Cir. 1945) (holding that such a price spread was unlawful).

176. Commission Decision of 21 May 2003, Case COMP/C–1/37.451, 35.578, 37.57—Deutsche Telekom AG, 2003 O.J. (L 263) 9, para. 107.

event, irrespective of the product-specific costs."[177] If the wholesale charges are lower than the retail charges, the spread is positive.[178] When the spread is positive, there can be a price squeeze only "if the spread is not sufficient to enable the historic operator to cover the product-specific costs of providing its services to end-users," that is, if both prices are not above costs.[179] In other words, if both of its prices are above costs, the dominant firm is not abusing its position.[180]

The pricing practice was determined on the basis of the dominant undertaking's own costs, in conformity with European case law.[181] The Court of First Instance held that any other approach would be considered harmful to the general principle of legal certainty, because if the lawfulness of the dominant firm depended on the particular situation of the competitors, the dominant undertaking "would not be in a position to assess the lawfulness of its own activities" as it would depend on unknown cost data.[182] This "equally efficient competitor test" is preferred to a "hypothetical reasonably efficient competitor" test, which would demonstrate that the spread was insufficient to allow a reasonably efficient provider in the downstream market to make a reasonable profit.[183] Nevertheless, the "equally efficient competitor test" is favorable to the vertically integrated firm because its unit cost can be expected to be lower than those of a reasonably efficient rival, due to economies of scale and scope.[184]

Cost allocation is a key factor in setting the measure upon which a price squeeze is evaluated, especially in network industries, where there are large fixed costs.[185] Therefore, the European Commission considered that the relevant cost measure is the LRAIC, in order to

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177. *Id.* para. 138.

178. *Id.*

179. *Id.*

180. *Cf.* Hovenkamp & Hovenkamp, *supra* note 142, at 281 (noting that *Alcoa* never insisted on a showing that downstream prices were lower than cost).

181. Case T–5/97, Industrie des Poudres Sphériques v. Comm'n, 2000 E.C.R. II–03755, para. 179; Case C6–2/86, AKZO Chemie BV v. Comm'n, 1991 E.C.R. I–3359, para. 74; Commission Decision of 18 July 1988, Case IV/30.178—Napier Brown/British Sugar, 1988 EUR–Lex CELEX LEXIS 0518, para. 66.

182. Case T–271/03, Deutsche Telekom AG v. Comm'n, 2008 E.C.R. II–477, 5 C.L.M.R. 9, para. 192 (2008).

183. Commission Decision of 4 July 2007, Case COMP/38.784—Wanadoo España v. Telefónica, paras. 311, 313.

184. *Id.* para. 314; *cf.* Sidak, *supra* note 121, 298 (noting that a vertically integrated firm might have no incentive to use a price squeeze because the firm could merely raise the price of the bottleneck input and not need to manipulate the margin in order to extract the monopoly rent).

185. *See, e.g.*, WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 69, 78 (Cheryl Weissman ed., 1994) (discussing the application of the cost floor and price ceiling calculations to large firms with fixed costs).

assess the ability to operate profitably in the long term.[186] This cost measure is not contested in U.S. case law and economic literature, but U.S. jurisprudence does not consider the LRAIC to be an antitrust law issue, but rather a regulatory task for which antitrust courts are ill-suited.[187]

D. *Possible Justifications*

A price squeeze may be justified[188] if it enhances consumers' welfare[189] by bringing lower prices, better products, or more efficient production methods.[190] If the dominant undertaking is more efficient than potential efficient competitors, a price squeeze is not problematic.[191] E.U. law generally holds that an undertaking's conduct may be objectively necessary or produce substantive efficiencies outweighing any anticompetitive effects on consumers, but the conduct must be indispensible and proportionate "on the basis of factors external to the dominant undertaking."[192]

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186. *Telefónica*, Case COMP/38.784, para. 318; *Article 82 EC Guidance, supra* note 115, para. 80.

187. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1121 (2009) (quoting Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 415 (2004)); Sidak, supra note 121, at 296 (noting that in the United States, a price squeeze analysis resembles a public utilities commission rather than a federal judicial antitrust case); see Hovenkamp & Hovenkamp, supra note 142, at 292 (noting Linkline and other literature have concluded that price squeezes should only be condemned under a strict cost-based test).

188. *Article 82 EC Guidance, supra* note 115, paras. 28–31; *see generally* 3B AREEDA & HOVENKAMP, *supra* note 1, ¶ 773e, at 253–58 (discussing the role of reasonableness and justifications in the refusal to deal and essential facility doctrines); Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1046–47 (1987) (discussing the effects of efficiency justifications on antitrust analysis and enforcement).

189. *See infra* Part VI for a discussion of competition goals.

190. Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973) (stating that the Sherman Act assumes an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency); Sidak, *supra* note 121, at 305 (quoting Town of Concord v. Boston Ed. Co., 915 F.2d 17, 21–22 (1st Cir. 1990)).

191. Marcel Canoy, Paul de Bijl & Ron Kemp, *Access to Telecommunications Networks*, *in* THE ECONOMICS OF ANTITRUST AND REGULATION IN TELECOMMUNICATION, *supra* note 125, at 135, 150 (stating that "[i]f the incumbent operates more efficiently than its (potential) competitors and the customers reap the benefits, the lack of entrants/competitors is not an issue"); *see also Town of Concord*, 915 F.2d at 18, 20 (citing the *Alcoa* test that allows the dominant undertaking to be more efficient than potential efficient competitors).

192. *Article 82 EC Guidance, supra* note 115, paras. 28–30; *cf. Otter Tail Power Co.*, 410 U.S. at 380 n.10 (citing Village of Elbow Lake v. Otter Tail Power Co., 46 F.P.C. 675, 678 (1971)) (stating that public interest is far broader than the economic interest of a particular power supplier and that "[t]he private company's lack of

The defendant in *Telefónica* attempted to characterize its behavior as objectively necessary.[193] Telefónica alleged that it lowered its prices on the retail market to align with those charged by its competitors.[194] This "meeting competition" defense may be justified as defending a firm's own economic interests, but it "may not legitimize a behavior whose effects is to leverage and abuse an upstream dominance."[195] The Commission reminded Telefónica that a justifiable price squeeze must be suitable, indispensable, and proportionate based on factors external to the dominant undertaking.[196] In this case, a price squeeze resulting from a retail price reduction was not indispensable because Telefónica could have lowered its wholesale price to avoid this result.[197]

A firm can justify its behavior by demonstrating either that it is indispensable and proportionate, as Telefónica attempted to do, or that the behavior produces substantial efficiencies.[198] In the latter case, four conditions must be fulfilled: the efficiencies must be realized as a result of the conduct; the conduct must be indispensable; the efficiencies must outweigh any likely negative effects; and the conduct may not eliminate effective competition.[199] In relation to price squeezing, the Commission is careful to ensure that the dominant firm realizes an adequate return on investments to generate incentive to continue to invest, and that its own innovation is not negatively affected by the obligation to supply or by structural charges.[200]

In the United States, J. Gregory Sidak postulates that efficiency-enhancing conduct and competitive pricing allow vertically integrated firms to cut retail prices,[201] and this idea is compatible with E.U. competition law when the above-mentioned four conditions are met.

IV. PRICE SQUEEZE AND DUTY TO DEAL

In *Linkline,* the Court asked "whether a plaintiff can bring price-squeeze claims under [§ 2] of the Sherman Act when the defendant

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enthusiasm for the arrangement cannot deter us, so long as the public interest requires it").

193. Commission Decision of 4 July 2007, Case COMP/38.784—Wanadoo España v. Telefónica, paras. 637, 641.

194. *Id.* para. 637.

195. *Id.* para. 638.

196. *Id.* para. 639.

197. Id.

198. *Article 82 EC Guidance, supra* note 115, para. 30.

199. *Id.*

200. *Id.* paras. 89–90.

201. Sidak, *supra* note 121, at 294.

has no antitrust duty to deal . . . ."[202] The Court then looked for a duty to deal. Finding none, the Court concluded that, when there is no duty to deal, a firm can impose any contractual condition it pleases.[203] Thus, the Court linked price squeeze to a prior duty to deal. This Part considers whether the Court asked the right question and examines the possible link between price squeezes and refusals to deal. It concludes that a price squeeze constitutes a constructive refusal to deal that could violate § 2 of the Sherman Act.

A. *Link Between Price Squeeze and Duty to Deal*

In *Linkline*, the plaintiffs alleged that AT&T squeezed its margins to exclude competitors and preserve monopoly control.[204] Instead of asking whether this squeezing was anticompetitive and violated § 2, the Court first looked for a duty to deal before eventually analyzing the anticompetitive conditions of the deal. Thus, the Court subordinated the price squeeze to a prior duty to deal. The Court grounded its reasoning on *Trinko*, holding that "a firm with no antitrust duty to deal with its rivals at all is under no obligation to provide those rivals with a 'sufficient' level of service."[205]

Trinko alleged that the delay in providing telecommunication services constituted a refusal to supply: the delayed provision of service was a constructive refusal to deal, constituting a violation of § 2. But the Court found that a refusal to supply in this case could not be anticompetitive and violate § 2.[206] Consequently, *a fortiori*, the conditions of provision of the service could not be anticompetitve and violate § 2. The Court's reasoning did not subordinate the conditions of provision of the service to a prior duty to deal. Instead, *Trinko* recognized that, under certain circumstances, a refusal to cooperate with rivals could constitute anticompetitive conduct and can violate § 2 of the Sherman Act.[207] Second, the Court recognized

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202. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1116–17 (2009).

203. *Id.* at 1119 (stating that "a firm with no duty to deal in the wholesale market has no obligation to deal under terms and conditions favorable to its competitors").

204. *Id.* (stating that, just like the complaint in *Trinko*, the plaintiffs allege that the defendants abused their power in the wholesale market to prevent rivals from competing).

205. *Id.* at 1115, 1119 (citing Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410 (2004)).

206. *Trinko*, 540 U.S. at 408, 410, 416.

207. *Id.* at 409–11.

that the refusal to deal does not need to be expressly stated; it can be constructive.[208]

The imposition of an excessively high price "amounts to a refusal to supply at a commercially acceptable price."[209] This is the view taken by the Commission in the European Union, where, among other practices, a price squeeze is considered a constructive refusal to supply.[210] Consequently, and relying on *Trinko*, the price squeeze can itself constitute a refusal to deal.[211] As Chief Justice Roberts rightly stated, "for antitrust purposes, there is no reason to distinguish between price and nonprice components of a transaction."[212] For this reason, the only question to answer is whether AT&T monopolized or attempted to monopolize a certain market through a price squeeze. But subordinating a price squeeze to a prior duty to deal, like *Linkline* does, distorts *Trinko*'s reading, extending it beyond its intended reach. Indeed, limiting antitrust control over elements of a transaction to cases where there is a prior duty to deal, as *Linkline* asks, drastically reduces its scope.

B. *Price Squeeze Claim Under § 2*

In determining whether margin squeezing constitutes anticompetitive conduct in the same way as a refusal to cooperate, a court would, under § 2 of the Sherman Act, look for some evidence of monopolization or an attempt to monopolize.[213] Section 2 of the Sherman Act applies when there is a monopoly power, but the mere fact of monopoly power does not violate § 2: monopolization is illegal only when a firm tries to obtain or maintain a monopoly power through means that are anticompetitive or inefficient.[214] Contrary to Europe, where the application of Article 102 of the TFEU is, in

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208. *See id.* at 409 (noting that in *Aspen Skiing Co. v. Aspen Highands Skiing Co.*, 472 U.S. 585, 593–94 (1985), the Court held that a jury could have interpreted a defendant's refusal to recreate a joint ticket in the short term as a way of reducing competition in the long run).

209. VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 200 (9th ed. 2007).

210. *See Article 82 EC Guidance*, *supra* note 115, para. 80 (noting a dominant undertaking might charge a price for a product on the upstream market which does not allow an equally efficient competitor to trade profitably in the downstream market).

211. *Cf.* Ellen Meriwether, *Putting The "Squeeze" on Refusal to Deal Cases: Lessons from* Trinko *and* Linkline, 24 ANTITRUST 65, 66–67 (2010) (arguing that although the Supreme Court left open the possibility that a price squeeze claim can be recast as a predatory pricing claim, such claims must be grounded on an unlawful refusal to deal).

212. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1119 (2009).

213. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) (explaining the offense of monopoly under the Sherman Act).

214. *Id.*

principle, purely objective, [215] the firm's intent is the second element of the antitrust claim in the United States.[216]

1. Monopoly Power

In *Linkline,* the Court assumed that there was no duty to deal other than the duty derived from regulation.[217] The Court found it "quite unlikely" that AT&T had a duty to deal based on a monopoly power because the regulatory authority saw the market for high-speed Internet services as competitive.[218] This is a paradox of the *Linkline* decision. Indeed, if there is no monopoly power in the upstream market,[219] there cannot be any antitrust liability, whether based on a duty to deal or on a price squeeze itself, because the first condition of § 2 of the Sherman Act is not met.[220] To demonstrate liability under § 2 of the Sherman Act, a claimant needs to demonstrate both monopoly power and anticompetitive conduct.[221] If the Court actually intended to ask whether a plaintiff could bring

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215. Alexandros Stratakis, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine,* 27 EUR. COMPETITION L. REV. 434, 434–35 (2006) (comparing U.S. antitrust law to the European law, where intent is not an element of Article 82). Intent is nevertheless considered in cases of predatory pricing. *See* Barry E. Hawk, *Article 82 and Section 2: Abuse and Monopolizing Conduct, in* 2 ISSUES IN COMPETITION LAW AND POLICY 875, 875–76 (Wayne Dayle Collins ed., 2008) ("Although intent is not expressly a general substantive element of an Article 82 violation, it has been cited as an element in certain kinds of abuses, notably predatory pricing claims where the challenged prices are above average variable (or avoidable) cost but below average total cost."). *See generally* Commission Decision of 16 July 2003, COMP/38.233—Wanadoo Interactive, http://ec.europa.eu/competition/antitrust/cases/decisions/38233/en.pdf (analyzing the application of Article 82 of the EC Treaty, later renamed Article 102 of the TFEU).

216. *See, e.g.,* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct.*"); HERBERT HOVEMKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE, 278–79 (2d ed. 1999) (discussing the role of intent in various monopolization cases). *But cf.* 3 AREEDA & HOVENKAMP, *supra* note 1, ¶ 651c, at 109–16 (arguing that formulations requiring "purpose" or "intent" generally are unnecessary and sometimes harmful).

217. *Linkline,* 129 S. Ct. at 1113–14 (holding that there is no duty to deal while acknowledging the statutory limitations arising from the Sherman Act).

218. *Id.* at 1118 n.2. The Supreme Court implicitly acknowledges at least some market power as it observes that AT&T "remains bound to regulatory interconnection requirements," including a control on prices, but once again, the Court fails to provide a market definition. *Id.* at 1115.

219. *See supra* Part III.2 for a discussion of market defintion and market power.

220. *See Linkline,* 129 S. Ct. at 1120 (stating that the first condition of the Sherman Act is that the plaintiff must demonstrate the prices are below an appropriate measure of the rival's costs).

221. *Id.*

price squeeze claims under § 2 of the Sherman Act when the defendant has no monopoly power, the answer is rightly negative.[222]

2. Intent

If monopoly power can be demonstrated, a price squeeze claim can be brought under § 2 if it shows the "willful acquisition or maintenance of that power" as opposed to efficient and competitive behavior.[223] Regarding intent, U.S. and E.U. cases agree that a refusal to supply constitutes anticompetitive conduct if it suggests a willingness to achieve an anticompetitive end by foreclosing a market to rivals.[224] If AT&T maintained monopoly power in the upstream market, the question becomes whether there was anticompetitive conduct and, consequently, whether by reducing margins between the wholesale and retail prices, the firm intentionally attempted to exclude competitors from the downstream market or raise barriers to entry at the upstream input level, and, ultimately, whether such conduct harms consumers.[225]

U.S. case law places great importance on the notion of intent to determine whether the refusal to cooperate can constitute anticompetitive conduct. The Supreme Court case *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* infers the anticompetitive intent from the termination of a voluntary course of dealing and from the unwillingness to sell the final good to the competitor even at a retail price.[226] In *Trinko*, the Court could not find any anticompetitive intent in the reluctance to interconnect networks following the regulatory condition, nor in any prior conduct by the company.[227] In *Linkline*, however, the decision says nothing about AT&T's intent to reduce competition.[228]

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222. *See id.* (noting the Court has carefully limited the circumstances under which a plaintiff can state a Sherman Act claim in order to avoid chilling competition).

223. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

224. *See* Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 981, 1000–02 (1986) (comparing U.S. and European cases regarding intent); *see also, e.g.*, CHRISTOPHER W. BELLAMY & GRAHAM D. CHILD, COMMON MARKET LAW OF COMPETITION 618–19 (Viven Rose ed., 4th ed. 1993) (discussing exclusionary and exploitative abuse described in Article 82); Sidak, *supra* note 121, at 281 (comparing the *Trinko* holding to the Article 82 rule regarding price squeezes, both of which require a showing of an actual monopolization of a market).

225. Hovenkamp & Hovenkamp, *supra* note 142, at 278, 298; Sidak, *supra* note 121, at 305 (quoting Town of Concord v. Boston Ed. Co., 915 F.2d 17, 21–22 (1st Cir. 1990)).

226. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 603–04 (1985).

227. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004) (holding that the refusal to deal in the present case did not fit within the *Aspen Skiing* exception).

228. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109 (2009).

Because the Court overlooked both conditions of liability under the Sherman Act, the impact of *Linkline* is uncertain. However, this case gives the impression that the Court felt uncomfortable examining whether conditions of § 2 could be fulfilled.

C. *Protection of Investments*

Although the Court is concerned that compelled sharing may diminish incentive to invest and innovate,[229] the *Linkline* decision says nothing about the impact of pricing policy on investments. This concern probably led the Court to conflate the duty to deal based on the essential facilities doctrine (which is not pertinent since *Trinko* refused to consider an essential facilities doctrine as established law)[230] with a violation of § 2 of the Sherman Act. Therefore, the question is whether price squeezing is a valid claim under § 2 of the Sherman Act, despite the fact that there is no obligation to grant access to the network based on an essential facilities doctrine (either because the doctrine is not recognized or because the infrastructure is not indispensable to provide the downstream product).[231]

The European Commission confronted the same problem in *Telefónica*.[232] Indeed, Telefónica alleged in its defense that it was erroneous to consider its pricing policy as subject to Article 102 of the TFEU because there was no antitrust obligation to grant access to its network, given that the criteria applied in the European Union to define whether an essential facility has to be shared were not fulfilled.[233] Indeed,

> (i) there are real and/or potential alternatives to the regional and national wholesale access services of Telefónica (ULL and wholesale access to cable networks), (ii) the regional and national wholesale access services of Telefónica can be replicated and (iii) the alleged conduct is not likely to eliminate all competition on the downstream market.[234]

Telefónica argued that an efficient undertaking can reproduce the input, and, not having any duty to deal under Article 102 of the

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229. *Trinko*, 540 U.S. at 407–08.

230. *See id.* at 410 ("To the extent respondent's 'essential facilities' argument is distinct from its general [Sherman Act § 2] argument, [the Court] reject[s] it.").

231. Id.

232. See Commission Decision of 4 July 2007, Case COMP/38.784—Wanadoo España v. Telefónica, paras. 300–01 (describing Telefónica's arguments as to why it should not be subject to Article 82 of the EC Treaty, later renamed Article 102 TFEU).

233. Id. para. 301; see also Case C–7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG, 1998 E.C.R. I–7791, paras. 43–46 (applying the judgment in Magill, 1995 ECR I–743 (joining Cases C–241/91P and C–242/91P) to determine Article 82 abuse).

234. *Telefónica*, Case COMP/38.784, para. 301.

TFEU, it could not be compelled to control its wholesale price under competition law.[235]

The Commission examined the claim under the general framework of Article 102 of the TFEU because its list of abusive practices is not exhaustive.[236] The Commission first stated that there was a regulatory duty to deal.[237] Regarding the obligation to share an essential facility, the Commission explained that the ex ante incentive of the dominant firm to invest was not at stake, and therefore the legal test developed by the European Court of Justice in the framework of the application of the essential facilities doctrine was not applicable.[238] There were indeed no conflicting interests between consumers' welfare and Telefónica's incentive to invest in the network.[239]

The Commission further explained this conclusion in its *Article 82 Guidance*, released in December 2008.[240] According to the Commission, the obligation to supply a product or service at a specific price, even if the remuneration is fair, requires a careful consideration, as it may impact investments.[241] The Commission will consider a price squeeze an enforcement priority when the practice under scrutiny relates to a product or service that is objectively necessary to compete effectively in a downstream market, is likely to lead to the elimination of effective competition in the downstream market, and is likely to harm consumers.[242] But when the price control is not likely to affect the incentive to invest or innovate upstream, the Commission finds no need to consider the three above-mentioned circumstances and will apply the general enforcement standard of Article 102 of the TFEU to a likely anticompetitive foreclosure.[243] Incentive to invest or innovate is particularly unlikely to be affected if there is a regulation imposing an obligation to supply that already balances the risk of negative effects, if the input was developed under specific or exclusive rights, or if public resources financed the input.[244] Investment in Telefónica's network was made under the protection of special or exclusive rights with no consideration for mandatory access because Telefónica developed its

235. *Id.* paras. 192, 635, 643–45.
236. *Id.* para. 280.
237. *Id.* para. 303 (stating that Telefónica has a duty to supply the upstream inputs).
238. *Id.* para. 309.
239. *Id.* para. 634.
240. *Article 82 EC Guidance*, *supra* note 115, para. 75.
241. *Id.* para. 75.
242. *Id.* para. 81.
243. *Id.* para. 82.
244. *Id.* para. 82.

network well before the advent of ADSL technology.[245] There were some costs involved in supporting broadband traffic but no need to roll out a specific transport network.[246]

Again, the *Linkline* decision says nothing about any potential impact of a pricing policy on investments in the particular situation.[247] But the regulatory control of interconnections and the control of AT&T over the last mile in California suggest that the investments might not be affected and that, if European principles were followed, the conditions of § 2 of the Sherman Act could apply.[248]

V. RELATIONSHIP AND COORDINATION BETWEEN ANTITRUST AND REGULATION

Sector regulation and antitrust laws pursue different goals. While competition law principally addresses consumers' welfare, regulation may favor redistributive objectives such as common carriage in the United States, universal service and promotion of network investments,[249] or environmental objectives.[250] As *Trinko* explains regarding telecommunication regulation:

> The 1996 Act is, in an important respect, much more ambitious than the antitrust laws. It attempts "*to eliminate the monopolies* enjoyed by the inheritors of AT&T's local franchises." Section 2 of the Sherman Act, by contrast, seeks merely to prevent *unlawful monopolization*. It would be a serious mistake to conflate the two goals.[251]

Different authorities apply antitrust and regulatory procedures at different levels (state, inter-state, and federal levels in the United

245. Commission Decision of 4 July 2007, Case COMP/38.784—Wanadoo España v. Telefónica, para. 304.

246. *Id.* para. 305.

247. *See generally* Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109 (2009).

248. *See id.* at 1115 ("AT&T controls most of what is known as the 'last mile'—the lines that connect homes and businesses to the telephone network.").

249. *See Telefónica*, Case COMP/38.784, para. 681 (stating that protecting competition and promoting investment are among the goals of regulation).

250. *See* Michael Katz, *Antitrust or Regulation? U.S. Public Policy in Telecommunications Markets*, *in* THE ECONOMICS OF ANTITRUST AND REGULATION IN TELECOMMUNICATIONS, *supra* note 125, at 243, 245 (describing both similarities and differences between antitrust and regulatory approaches).

251. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 (2004) (citation omitted); *see also* Katz, *supra* note 250, at 246 (stating that the Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56, is much more aggressive against monopolies than the Sherman Act).

States,[252] and national and European Union levels in the European Union[253]), which may lead to conflicting interpretations or inconsistencies.[254] Inconsistencies can also arise from facts based on an ex ante regulatory decision in the European Union, whereas an assessment of price compatibility with Article 102 of the TFEU is executed ex post based on the most recent historical data.[255]

Moreover, margin squeezing can result from the incorrect allocation to the access price, of products and services that are actually related to another regulated market where costs are covered; from an incorrect reporting of internal transfer prices; or from an unbalanced report of charges that inadequately reflects costs.[256] Conflicting ratemaking principles can also lead to margin squeezing.[257] Considering these potential conflicts, this Part examines the coordination rules that govern in the event that antitrust and regulation rules apply concurrently.

Under U.S. law, regulated activities may be subject to antitrust laws unless the statute purposely insulated such activity from the operation of antitrust laws.[258] But, as Justice Scalia pointed out in *Trinko*, the regulatory framework is an important characteristic of an industry, and antitrust analysis must be "attuned" to this characteristic.[259] If the regulatory structure is "designed to deter and remedy anticompetitive harm, the additional benefit to competition provided by antitrust enforcement will tend to be small," but if the regulatory scheme does not perform the "antitrust function,"[260] "the benefits of antitrust are worth its sometimes considerable disadvantages."[261] There is a weighing of interests by the courts between what can be achieved through the application of the

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252. *See* City of Mishawaka v. Am. Elec. Power Co., Inc., 616 F.2d 976, 983–84 (7th Cir. 1980) (describing the legal and political maze created by differing federal and state regulatory procedures).

253. *See* Case T–271/03, Deutsche Telekom AG v. Comm'n, 2008 E.C.R. II–477, 5 C.L.M.R. 9, para. 11 (2008) (noting the possiblity of conflict between German national law and EC competition policy).

254. *City of Mishawaka*, 616 F.2d at 983–84; *Deutsche Telekom AG*, 5 C.L.M.R. para. 113; *see* Joskow, *supra* note 87, at 191, 204 (describing the confusion caused by the different approaches the courts and regulatory agencies take in regard to price squeezing).

255. *See* Commission Decision of 4 July 2007, Case COMP/38.784—Wanadoo España v. Telefónica, para. 494 (describing regulators' difficulty in predicting costs ex ante).

256. Canoy, et al., *supra* note 191, at 151.

257. *Id.*

258. Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973).

259. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004).

260. *Id.* at 412.

261. *Id.* (citing Silver v. N.Y. Stock Exch., 373 U.S. 341, 358 (1963)).

regulatory framework and a costs–benefits evaluation of the antitrust intervention.[262]

If an activity is fully regulated in both upstream and downstream markets, it is unlikely that a price squeeze could drive competitors out of the market, particularly if the regulation is very detailed compared to the more general regulatory framework applied in the European Union.[263] However, differing regulatory procedures can still offer opportunities to squeeze prices.[264] Even if only the wholesale price is regulated, the regulatory agency should consider the unregulated retail prices when setting wholesale rates, in order to avoid price squeezing.[265]

In *Trinko*, only the upstream market was regulated, but regulatory responses were given by the FCC and the New York Public Service Commission (PSC) to remedy and monitor the incumbent's failure to service competitors' orders.[266] The FCC imposed a fine and sophisticated weekly reporting requirements with specific penalties for failing to comply.[267] The PSC imposed fines and a daily reporting requirement.[268] The Court's opinion first examined whether there was an antitrust duty to deal.[269] It asked whether there was a need for such an antitrust obligation, but after considering the regulatory requirement and its enforcement, the Court ultimately found that "the [regulatory] regime is an effective steward of the antitrust function."[270]

In *Linkline*, AT&T was obligated by regulation to "provide wholesale DSL transport service to independent firms at a price no greater than the retail price of AT&T's DSL service."[271] The downstream price was not regulated but was taken into account to fix the regulated wholesale price.[272] Chief Justice Roberts explained that there was no antitrust duty to deal, and the plaintiffs were left to demonstrate that there was another antitrust liability for their claim.[273] No attention was given to the regulatory regime.[274] In his concurring opinion, Justice Breyer observed that the respondents did

262. *Id.* at 412–14.
263. Geradin & O'Donoghue, *supra* note 1, at 417.
264. City of Mishawaka v. Am. Elec. Power Co. Inc., 616 F.2d 976, 983–84 (7th Cir. 1980).
265. Fed. Power Comm'n v. Conway Corp., 426 U.S. 271, 279 (1976).
266. *Trinko*, 540 U.S. at 413.
267. *Id.*
268. *Id.*
269. *Id.* at 415.
270. *Id.* at 413.
271. Pac. Bell Tel. Co. v. Linkline Commc'ns, 129 S. Ct. 1109, 1115 (2009).
272. *Id.* at 1124 (Breyer, J., concurring).
273. *Id.* at 1122.
274. *See generally id.* at 1115–23.

not claim that regulated prices at the wholesale level made any difference; they "could have gone to the regulators and ask[ed] for the petitioners' prices to be lowered in light of the alleged price squeeze."[275]

In light of these two decisions, a claim asserting a regulated market in the context of a regulated industry should first be brought to the regulatory authority.[276] Then the plaintiff can go to a civil court, alleging that the antitrust function is not fully and adequately protected and that there is a ground for a liability under § 2 of the Sherman Act.[277] Under this condition, Justice Breyer's concurring opinion does not exclude a price squeeze claim outside the regulatory context.[278]

By comparison, regulation and competition rules apply concurrently in the European Union, each within its own scope. Undertakings abiding by sector-specific regulations are not absolved from observing competition law requirements.[279] If charges were previously subject to a national authority's decision, two principles apply. First, E.U. competition authorities are entitled to adopt a decision under Article 102 of the TFEU, even if there is already a decision by a national court on the matter or even if it may conflict with a national competition authority's decision.[280] Second, the case law constantly reaffirms that "competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition."[281]

Both of these rules justified the intervention of the Commission in *Deutsche Telekom*, where the rates were approved ex ante by the national regulatory authority and Deutsche Telekom was regulated

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275. *Id.* at 1124 (Breyer, J., concurring).

276. *See* Damien Geradin, *Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court's Judgment in* Trinko *in the Wake of* Microsoft, IMS *and* Deutsche Telekom?, 41 COMMON MKT. L. REV. 1519, 1523 (2004) (stating that when a regulatory structure exists, applying antitrust law is less desirable).

277. *See Linkline*, 129 S. Ct. at 1120 (describing the narrow circumstances under which a plaintiff can state a Sherman Act claim alleging that prices are too low).

278. Hovenkamp & Hovenkamp, *supra* note 142, at 282; *see also* Meriwether, *supra* note 211, at 69–70 (comparing *Trinko* with Justice Breyer's earlier decision in *Town of Concord*).

279. *Access Notice*, *supra* note 46, para. 19.

280. Commission Decision of 4 July 2007, Case COMP/38.784—Wanadoo España v. Telefónica, para. 677 (citing Case C–344/98, Masterfoods Ltd. v. HB Ice Cream Ltd., 2000 E.C.R. I–11369, para. 48).

281. Commission Decision of 21 May 2003, Case COMP/C–1/37.451, 35.578, 37.57—Deutsche Telekom AG, 2003 O.J. (L 263) 9, para. 54; *see also Telefónica*, Case COMP/38.784, para. 666 ("In this respect, the Court of Justice and the Court of First Instance have consistently held that competition rules may apply where sector specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distort competition.").

in both the wholesale and retail markets.[282] In *Telefónica,* the company was free to lower wholesale prices and raise retail prices despite regulatory rules.[283] Although the cost model used by the regulatory authority to assess the undertaking's wholesale prices was based on the LRAIC, it was used to define the maximum prices for wholesale access ex ante, while the assessment of price compatibility with Article 102 considered ex post historical data.[284]

Telefónica demonstrates that even if there is a national regulatory decision, the intervention of the Commission in the regulated prices under the framework of Article 102 does not violate the rule *ne bis in idem,* because the competition-related objectives of the regulation are much more general than its other objectives.[285] In addition, the national regulatory authority in *Telefónica* never analyzed whether there was a price squeeze and was not successful in avoiding such a competition law infringement.[286]

The European Commission is entitled to establish priorities and can decide "not to intervene in cases where a sector-specific regime provided appropriate solutions to competition related problems,"[287] but engages in a voluntary policy of opening the broadband market through competition law, and in particular, price squeeze prohibition.[288] Geradin asserts, however, that the competition authorities "should defer to the sector-specific regulator" if there is an effective regulatory remedy to the antitrust conduct, except when the regulatory authority fails to intervene adequately.[289]

To conclude, regulatory rules do not exclude the application of antitrust laws in either the United States or in the European Union. Practically speaking, when there is already a decision issued by a regulatory authority, the U.S. antitrust authority will carefully consider whether the antitrust function has been fully protected by the previous decision. When there is no regulatory decision, the undertaking should first seek a review of pricing by the regulatory authority, as antitrust courts are reluctant to consider price infringements of antitrust laws. E.U. competition authorities for their part consider a price squeeze claim to be a priority to open the telecommunication network to competition and will intervene despite regulation.

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282. *Deutsche Telekom AG,* Case COMP/C–1/37.451, 35.578, 37.57, para. 105.
283. *Telefónica,* Case COMP/38.784, paras. 125–27.
284. *Id.* para. 494.
285. *Id.* paras. 676–85.
286. *Id.* para. 684.
287. Geradin & O'Donoghue, *supra* note 1, at 418.
288. *Telecomunications Overview,* EUROPEAN COMM'N, http://ec.europa.eu/competition/sectors/telecommunica tions/overview_en.html (last visited Sept. 26, 2010).
289. Geradin, *supra* note 276, at 1553.

VI. COMPETITION GOALS

Many different competition goals have been pursued over the years in the United States and in the European Union. The goals were balancing conduct, structure, and performance, or protecting equity over efficiency or the contrary. These objectives have to be considered in the larger policy frameworks of the European Union's common market and the United States' economic influence over world markets.[290] Even if E.U. and U.S. law headed in diverging directions in the past,[291] they now converge with the common goal of protecting consumer welfare.[292]

Often used without a precise definition, this notion of consumer welfare has been a source of confusion.[293] The ultimate purpose of competition is to benefit consumers through lower prices, better quality, and more choice.[294] Consumer welfare is protected through an unfettered competition process that excludes competitors, if at all, solely through competition on the merits.[295] Protection of the competition process based on the merits means that consumer interests are protected not only directly, but also indirectly if the impact on effective competition structure would have a detrimental impact on consumers.[296] If a dominant undertaking is not competing on the merits but excluding a rival by other means, consumer welfare needs to be protected. Therefore, the concern over price squeezing is about protecting consumers' interests rather than competitors' interests.[297]

In the European Union, there is no need to demonstrate that an abuse of a dominant position (and specifically a price squeeze) has a

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290. *See* Brodley, *supra* note 188, at 1046 (discussing the factors to be considered in allowing cooperation to promote efficiency); Fox, *supra* note 224, at 982 (contrasting the approaches of the United States and the Common Market in seeking to protect the interests of consumers and the free flow of goods).

291. Fox, *supra* note 224, at 985.

292. MIRA BURRI NENOVA, EC ELECTRONIC COMMUNICATIONS AND COMPETITION LAW 46–49 (2007); Sidak, *supra* note 121, at 305.

293. Brodley, *supra* note 188, at 1032; John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 213 (2008); Gregory J. Werden, *Competition, Consumer Welfare & the Sherman Act*, 9 SEDONA CONF. J. 87, 91 (2008).

294. *Article 82 EC Guidance*, *supra* note 115, para. 19; Kirkwood & Lande, *supra* note 293, at 192.

295. *Article 82 EC Guidance*, *supra* note 115, para. 6; Werden, *supra* note 293, at 90, 97.

296. Commission Decision of 4 July 2007, Case COMP/38.784—Wanadoo España v. Telefónica, para. 544; *see also* Fox, *supra* note 224, at 1000–01 ("A refusal to deal by a firm in a monopoly position is impermissible if its natural effect is to lessen competition and thereby raise prices to consumers or otherwise degrade the price/service package offered to them.").

297. *See* Sidak, *supra* note 121, at 281 (arguing that careless enforcement of price squeezing regulations could be detrimental to consumer interests).

concrete effect because the notion of abuse is an objective concept.[298] It suffices to demonstrate that the abusive conduct is capable of restricting competition or is likely to restrict competition.[299] "The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence."[300] Therefore, it is not necessary to show that foreclosure effects force the rival to exit the market: "it is sufficient that the rivals are disadvantaged and consequently led to compete less aggressively," that their ability to invest and grow is constrained, and that an equally efficient competitor bears an unsustainable loss.[301] Nevertheless, the Commission examined the direct effects of price squeezing and found, in *Deutsche Telekom*, that the development of competition in the German market was "sluggish,"[302] and in *Telefónica*, that the dominant firm prices were high and the broadband penetration rate was below average in Spain compared to other E.U. nations.[303]

However, the United States requires actual harm to consumers arising from the price squeeze to justify an intervention in the competition process,[304] although antitrust law still protects consumer indirectly.[305] This view reflects a strong preference for competition over government regulation of market performance.[306] "[N]one of the U.S. antitrust statutes are regulatory in the sense of authorizing governmental intervention to fix price or output, control entry or exit, or determine of the fairness of . . . a bargain." In contrast, Europeans "tend to be less hostile to government as a regulator, and more skeptical of private corporations as servants of the public interest."[307] Indeed, one of the biggest concerns in the United States is having

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298. Case T–271/03, Deutsche Telekom AG v. Comm'n, 2008 E.C.R. II–477, 5 C.L.M.R. 9, para 233 (2008).

299. *Telefónica*, Case COMP/38.784, para. 543.

300. *Article 82 EC Guidance*, *supra* note 115, para. 19.

301. Jean-Christian Le Meur, Iratxe Gurpegui & Katja Viertiö, *Margin Squeeze in the Spanish Broadband Market: A Rational and Profitable Strategy*, COMPETITION POL. NEWSLETTER (Competition Dir.-Gen. of the European Commission, Brussels, Belg.), 2007 (No. 3), at 24–25.

302. Commission Decision of 21 May 2003, Case COMP/C–1/37.451, 35.578, 37.57—Deutsche Telekom AG, 2003 O.J. (L 263) 9, paras. 180–83.

303. *Telefónica*, Case COMP/38.784, paras. 602–03.

304. Erik and Herbert Hovenkamp, Gregory Sidak, and Gregory Werden only foresee one possibility where price squeezing would harm consumers—when it prevents a smaller rival from integrating itself into the primary market. *See* Hovenkamp & Hovenkamp, *supra* note 142, at 288–89; Sidak, *supra* note 121, at 305; Werden, *supra* note 293, at 96–97. However, such integration would be uneconomical in the context of the local loop.

305. *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610–11 (1985) (ruling against a company who was "willing to sacrifice short-term benefits and consumer goodwill").

306. Fox, *supra* note 224, at 982.

307. *Id.* at 983.

courts act like regulators.[308] This concern is linked to the belief that antitrust enforcement undermines consumer interests,[309] and that price squeeze liability would chill competition.[310]

Linkline illustrates this position:[311] the Court rejected the notion of harm to competition through the creation of entry barriers or the impairment of nonprice competition or innovation in the downstream market.[312] Furthermore, the plaintiffs had not identified any such harm.[313]

VII. CONCLUSION

U.S. antitrust law and E.U. competition law converge by and large because they both seek to protect consumer welfare through the application of law based on sound economic analysis.[314] On this

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308. *See* Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1120–21 (2009) ("We have repeatedly emphasized the importance of clear rules in antitrust law. Courts are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'" (quoting Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004))); Town of Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990) ("[A]ntitrust courts normally avoid direct price administration, relying on rules and remedies (such as structural remedies, *e.g.*, prohibiting certain vertical mergers) that are easier to administer."); *see also, e.g.*, Philip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989) ("No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise."); Brodley, *supra* note 188, at 1048 ("A court can impose structural remedies and simple regulatory controls, but is incapable of effectively supervising ongoing business activities, such as pricing and entry."); Hovenkamp & Hovenkamp, *supra* note 142, at 297 ("[T]he most commonly given objection to judicial recognition of price squeeze claims is an administrative one . . . ."); Sidak, *supra* note 121, at 294–96, 299 (arguing that courts are inadequate, and thus, inappropriate regulators of price squeezing by firms).

309. Fox, *supra* note 224, at 982; Werden, *supra* note 293, at 97.

310. Dennis W. Carlton, *Should "Price Squeeze" Be a Recognized Form of Anticompetitive Conduct*, 4 J. COMPETITION L. & ECON. 271, 277 (2008). The example given to demonstrate possible inefficiencies is not illustrative of a situation where the price squeeze concerns a telecommunications firm providing access to telecommunications service providers and competing with them to offer broadband services in the retail market. If the integrated firm raises its wholesale price—aiming at the exclusion of equally efficient rivals—it justifies condemnation under § 2 of the Sherman Act because a flawed competition process harms consumer interests. If the integrated firm raises its retail price, it loses the retail market. If it refuses access to competitors, the situation is identical to *Aspen Skiing*, 472 U.S. at 611, where the undertaking would have to give up immediate benefits, thus barring access to the market.

311. *Linkline*, 129 S. Ct. at 1122.

312. *Town of Concord*, 915 F.2d at 23–24.

313. Hovenkamp & Hovenkamp, *supra* note 142, at 282.

314. *Compare* Consumer Benefits and Harms: How Best to Distinguish Aggressive, Pro-Consumer Competition from Business Conduct to Attain or Maintain a Monopoly, 71 Fed. Reg. 17872 (Apr. 7, 2006) (seeking public comments on the best ways to identify anticompetitive conduct so as to protect consumer welfare), *with*

basis, they both condemn a refusal to deal if its aim is anticompetitive.[315] Price squeezing, however, illustrates the most acute difference between the competition laws of the United States and the European Union: the United States fears introducing regulatory principles through antitrust law while the European Union maintains a more tolerant perception of state intervention.

Indeed, in *Linkline*, this reluctance led the Court to overlook the basic conditions of the application of § 2 of the Sherman Act and to reject antitrust liability based on a price squeeze.[316] Unfortunately, the Court missed an opportunity to delineate certain unresolved aspects of price squeezing. It would have been interesting to read the Court's position on the market power needed in the relevant downstream market and the potential leveraging provided by an essential asset such as the telecommunications network. One regrets that the Court did not clarify the debate between the proponents and opponents of the claim by considering, for instance, possible justifications for the firm's conduct. Perhaps the result would have been different with a stricter application of the law. The *Linkline* case probably did not ask the right question because, in the end, it offers no answer about monopolization or an attempt to monopolize, hypothetically, on the downstream market.

Chief Justice Roberts further stated that "institutional concerns also counsel against the recognition of such claims"[317] as antitrust courts cannot and should not be transformed into regulatory agencies. In the end, the outcome of the case further restricts the already narrow possibility of raising the pricing aspect of an antitrust claim. Moreover, the outcome potentially contradicts another of the Chief Justice's statements that, "for antitrust purposes, there is no reason to distinguish price and nonprice components of a transaction."[318]

European case law, in turn, elaborates on *Alcoa*. Recently, the Commission refined its intentions for future intervention when it clarified that a price squeeze is considered a refusal to deal and

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Neelie Kroes, Eur. Comm'n in Charge of Competition Policy, Preliminary Thoughts on Policy Review of Article 82 (Sep. 23, 2005), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537 (opining that the primary purpose of Article 82 is to protect competition, not competitors, with the ultimate goal of protecting consumer welfare).

315. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408–09 (2004) (distinguishing between a refusal to deal motivated by competitive zeal and a refusal to deal motivated by anticompetitive malice); *Article 82 EC Guidance*, *supra* note 115, para. 85 (stating that the Commission will prohibit a refusal to supply if it is not in the long-term best interest of the consumer).

316. *Linkline*, 129 S. Ct. at 1122.

317. *Id.* at 1120–21.

318. *Id.* at 1119.

adopted LRAIC as a benchmark.[319] However, using antitrust rules to actively encourage the spread of high-speed Internet access in the European Union fosters a political goal, leading to the use of antitrust litigation for a regulatory purpose. The details and complexity of the required sector's market information are reflected in the length of the *Telefónica* decision.

Procedural differences between the United State and European Union partially explain these differing approaches: antitrust litigation cases are brought in civil courts in the United States, while European cases follow an administrative procedure. However, price squeezing as an antitrust claim should probably find its place in a balance between the approaches employed by the United States and the European Union.

319. *Article 82 EC Guidance*, *supra* note 115, para. 79.

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