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Contrasting legal solutions and the comparability of EU and US experiences

Pierre Larouche*

In the broad area of economic regulation, comprising general competition/antitrust law as well as sectoral regulation, ideas flow very easily and very extensively across the Atlantic, with the USA remaining the center of gravity, however.

This free flow of ideas is stimulated by a broadly shared willingness to base economic regulation on economic analysis. Economics is meant to be unique, i.e. applicable in a variety of specific national contexts without losing its universality. On the other hand, lawyers typically like to point out at differences between the legal systems – and more broadly, alleged differences in “legal culture” – to argue for diverging solutions. These claims are also often exaggerated, and indeed recourse to economic analysis helps to debunk them. Nevertheless, in some cases, legitimate legal differences between the EC and the US on matters of economic regulation might affect the universal applicability of economic science.

By way of illustration of the above, this paper examines two specific issues relating to competition law and telecommunications regulation:

- (I) the hierarchy in the application of competition law and sector-specific regulation: the US Supreme Court decision in *Trinko* and the Commission decision in the *Deutsche Telekom* price squeeze case evidence two different approaches;
- (II) the principle of technological neutrality and the place of competition law principles in sector-specific regulation: here the approach of the FCC under the Communications Act can be compared with that of the Commission under the new electronic communications framework.

I. THE HIERARCHY BETWEEN COMPETITION LAW AND REGULATION

In the USA as in the EU, network industries such as telecommunications, post, energy, etc. are typically seen as “regulated” industries, meaning that they are subject to a set of regulation specifically designed for the industry in question (so-called “sector-specific regulation”). At the same time, the firms in these industries typically fulfill the basic conditions for competition law to be applicable to them.¹

A. Background

Given the potential applicability of two regulatory frameworks, one general and one specific, their relationship, in particular the hierarchy between the two, becomes a key issue, for both substantive and procedural reasons.

With respect to substance, on the assumption that there is overlap between the two frameworks (more on this below), it seems desirable to avoid conflicting decisions by authorities within the same jurisdiction. “Conflicting decisions” are to be understood as a situation where a single firm would be the addressee of two incompatible decisions – for instance, one which would authorise a certain course of action, and the other which would prohibit it – which are both applicable at the same location and at the same time.² Beyond the confines of this definition (i.e. where the two decisions are not entirely incompatible or where they emanate from different jurisdictions), it is less clear that coordination should be sought: lawyers tend to overemphasize uniformity and consistency and often ignore the advantages of maintaining some form of “regulatory competition” writ large.³ Indeed, in a context of uncertainty and change – as is evidenced especially in the converged telecommunications, IT and media sector – it might be preferable to experiment with regulatory solutions and engage into “learning-by-doing” across jurisdictions, even at the expense of some legal certainty. Nevertheless, the potential for conflicting decisions and the need for coordination are stronger across regulatory frameworks than within individual frameworks.

With respect to procedure, again on the assumption that there is overlap between competition law and regulation, having two or more authorities to choose from might be a blessing to a given plaintiff or complainant, and on the aggregate it might thus contribute to put more pressure on the defendant (often the incumbent) to comply. Such an advantage is transitory, and as the law moves away from a newcomer vs. incumbent pattern (when liberalization starts to take hold), that advantage is overcome by the risk of substantive conflict (mentioned above), excessive enforcement (each authority wanting to justify its existence) or procedural delays.

In the light of the above, we now examine how the USA and the EU deal with the relationship between the competition law and regulatory frameworks. Interestingly enough, within the space of a few months in 2003-2004, two cases dealt with that issue, namely the Commission decision in *Deutsche Telekom (Price Squeeze)*⁴ and the US Supreme Court judgment in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*.⁵ These two cases will be used as a basis for the comparison between the US and EU approaches to the relationship between competition law and regulation.

B. The Supreme Court judgment in *Trinko*

In *Trinko*, the defendant Verizon Communications had been the subject of enforcement action under sector-specific regulation (the Telecommunications Act 1996) concerning its failure to comply with the requirement to give its competitors access to its Operations Support Systems (OSS) (47 U.S.C. § 251(c)(3)), which was also part of the “checklist” of requirements to be complied with before a LEC could

venture into long-distance (47 U.S.C. § 271(c)(2)(B)). Following some complaints, the Federal Communications Commission (FCC) intervened to obtain additional commitments from Verizon (in a consent decree).⁶ The day after the consent decree was entered, *Trinko*, a client of a competitor of Verizon, filed a class action against Verizon, alleging among others a breach of § 2 of the Sherman Act (15 U.S.C. § 2), in that Verizon failed to give competitors access to its OSS systems (the very issue which had given rise to the intervention of the FCC). The case found its way to the US Supreme Court.

The Supreme Court opinion in *Trinko* is remarkable in many ways. On the substance of the case, the Supreme Court confirms the restrictive attitude of US law towards the use of competition law to impose duties to deal upon dominant firms. This has been a standard feature of US law ever since the *Colgate* decision in 1919.⁷ Since then, only in comparatively few cases has a duty to deal been imposed by US courts. In *Trinko*, the majority gives a restrictive reading to the most relevant of these few cases, *Aspen Skiing*,⁸ characterizing it as falling “at or near the outer boundary of § 2 liability”. According to the *Trinko* court, *Aspen Skiing* is restricted to cases where the refusal to deal concerned a service which was already offered by the dominant firm to others; in contrast, § 2 of the Sherman Act cannot be used to compel a dominant firm to offer to competitors a service which is currently not offered at all to anyone. The court also takes the opportunity once more to leave in limbo the “essential facilities” doctrine which had been crafted by lower courts, by refusing to either confirm or deny its existence.

The most interesting part of *Trinko* for our purposes is the discussion of the relationship between competition law and sector-specific regulation. At issue before the Court is whether the regulatory duties introduced by the Telecommunications Act 1996 can also support a claim under competition law. According to the Court, the wide-ranging nature of the Telecommunications Act would rather lead to the opposite conclusion, namely that it was intended to be a stand-alone regulatory regime, and that hence that the firms subject to that regime would be immune from competition law (“implied immunity” doctrine). The aim of that doctrine is to avoid regulatory decisions being frustrated by conflicting decisions under competition law. As the Court notes, however, the Telecommunications Act 1996 expressly leaves competition law applicable, which excludes any “implied immunity”.⁹

Since as noted before the current interpretation of § 2 of the Sherman Act does not support the claim of the plaintiff, the Court then examines whether the Telecommunications Act 1996 would not in and of itself justify making an exception to the abovementioned *Colgate* doctrine (according to which dominant firms have no duty to deal with competitors). To some extent, this is a re-run of the “implied immunity” argument, which the Court could not entertain because of the explicit text of the Telecommunications Act. The core of the Court’s reasoning is found at p. 696:

“One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, [t]here is nothing

built into the regulatory scheme which performs the antitrust function,¹⁰ the benefits of antitrust are worth its sometimes considerable disadvantages.”

Applying these principles to the facts, the Court finds that the Telecommunications Act 1996 contains quite an elaborate set of substantive and procedural provisions which made it “an effective steward of the antitrust function”.¹¹ When the risk of false positives in using competition law in such complex settings and the need for ongoing monitoring of remedies are put in the balance, then it must be concluded that using competition law on top of regulation would deliver no added value and could even be counter-productive.

C. The Commission decision in *DT*

The Commission decision in *DT* started from a similar factual background. Since 1997, under German law (originally) and later on under EC law as well,¹² DT is under an obligation to provide an unbundled local loop offering to its competitors.¹³ The tariffs for that offering must be cost-oriented, and the National Regulatory Authority (NRA) – at that time the *Regulierungsbehörde für Telekommunikation und Post* (RegTP)¹⁴ – must approve the tariffs.

At the same time, the retail tariffs of DT were subject to a price-cap system under German law, at least as far as PSTN and ISDN subscriptions were concerned.¹⁵ A first system, based on regulated baskets of services, was in force until the end of 2001. As of 2002, it was replaced by RPI-x price-cap regulation. Normally, the retail tariffs of DT should have been completely rebalanced when the German market was fully liberalized in 1998;¹⁶ beforehand, as was customary in Europe, the access tariffs (monthly subscription) were loss-making whilst the call charges were profit-making. Unfortunately, rebalancing was not yet complete at the time when the unbundled local loop offering was introduced.

The overall regulatory picture was therefore as follows:

- at the wholesale level, the RegTP had approved a series of tariffs for the unbundled local loop which were meant to be cost-oriented;
- at the retail level, the RegTP had introduced a price-cap system, where the starting point (the original tariffs) was sometimes below cost, for historical reasons.¹⁷

It is beyond the scope of this paper to review the various assessment formula put forward by the parties and the Commission in this case,¹⁸ but under certain circumstances, a comparison between the approved wholesale and retail tariffs actually resulted in a negative margin for competitors, or a very small positive margin, thus leading to complaints of margin squeeze under Article 82 EC.

In *DT*, the Commission dealt with these complaints. It identified relevant product markets for wholesale access (unbundled local loop) and for retail access (one-off connection and monthly subscription), the latter being split between narrowband and broadband access,¹⁹ the relevant geographical market being Germany.²⁰ Deutsche Telekom was found dominant on these markets.²¹ After dealing with a number of controversial methodological issues, the Commission ended up finding that DT had indeed engaged into margin squeeze²² and imposed a moderate fine on DT, given that

this was the first case where the Commission used this specific method to assess margin squeeze.²³

Much like *Trinko*, DT also raises the issue of the relationship between regulation and competition law, since DT claimed to have relied on regulatory approvals in assuming that its pricing practices were permissible. The Commission began by restating that DT was an undertaking within the meaning of EC competition law, meaning that it fell within the ambit of EC competition law *rationae personae*.²⁴ As long as DT retained some autonomy, its behaviour could still infringe Articles 81 and 82 EC: “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”.²⁵

According to the Commission, whilst DT had no autonomy as regards wholesale ULL tariffs, which were fixed by the RegTP, DT still had some room for autonomous action with respect to retail access tariffs. It could thus have sought to increase its retail subscription rates (in parallel with a reduction in call charges) so as to remove the margin squeeze. How DT could have done that depended on the details of the German regulatory framework. Under the price-cap system in force until the end of 2001, DT could have applied to the RegTP for an upwards adjustment in its monthly subscription tariffs (within the regulated basket).²⁶ This was all the more necessary since DT had otherwise applied for a reduction in the call charges; in the words of the Commission, “an increase in [DT’s] monthly and/or one-off charges for retail access was not only economically feasible but, in view of the margin squeeze, a legal requirement, provided that there was no breach of the price cap provisions in force” [our emphasis].²⁷ Under the new price-cap system in force since 2002, given the negative X-factor applied to monthly subscription tariffs, DT had leeway to increase them.²⁸ Finally, as regards the monthly subscription rates for ADSL, there was no retail regulation and DT was free at all times to raise its retail prices to remove the margin squeeze.²⁹ The Commission therefore concluded that DT had room for autonomous conduct, and that it used this room to abuse its dominant position. The fact that both wholesale and retail prices were regulated did give DT some reprieve, but only at the fining stage, where it led the Commission to apply a 10% discount.³⁰

D. Analysis of the different approaches

These two cases are the most recent and authoritative pronouncements on the relationship between competition law and regulation in the USA and the EU respectively.

The starting point in both cases is similar: competition law and regulation co-exist, and the application of sector-specific regulation does not as such exclude that competition law might also be applicable.

Beyond that common starting point, however, the two cases veer in separate directions.

In *Trinko*, it is apparent that the Supreme Court seeks to avoid the simultaneous application of both regimes. Indeed, the assumption underlying the opinion of the Court is that sector-specific regulatory regimes are usually so complete that they take

care of the whole of market regulation for the sector in question and thus also perform the “antitrust function”. In such a case, competition law will yield to sector-specific regulation. This is translated into the doctrine of “implied immunity”, which the Court could not apply to quickly deal with *Trinko*, given the text of the Telecommunications Act 1996, which explicitly kept competition law applicable. Even then, the Court refuses to apply competition law to the case, arguing that § 2 of the Sherman Act would not apply on the facts of *Trinko* and that the Telecommunications Act 1996 offers no basis to introduce a new exception to the *Colgate* rule that dominant firms are under no duty to deal with competitors. The end-result is thus that competition law is kept away from a case where regulation was already applied.

In contrast, in *DT*, the European Commission purportedly applied competition law even though the case had been dealt with under German regulation (itself based on EC instruments).

In the following paragraphs, we explore a number of possible explanations for that difference between US and EC law.

1. *Case-specific explanations*

First of all, some peculiarities of the *DT* case – as compared to *Trinko* – could explain the different result.³¹ Whilst in *Trinko* it seemed that the action of the FCC (and the New York PSC) has produced a desirable outcome, in *DT* at first sight it looks as if the RegTP was unable to tackle an obvious problem.³² Indeed the RegTP had approved wholesale ULL tariffs which were higher than the retail tariffs for monthly subscription to DT’s PSTN/ISDN network, which were also subject to regulatory control, seemingly putting competitors in an impossible situation where they face a negative spread between wholesale and retail prices. That would thus constitute a failure of the “antitrust function” of regulation under the *Trinko* rationale.³³ However, as the length and windedness of the Commission decision show, the case is not so simple, and there were also good arguments why the margin squeeze test used by the Commission is not correct (for instance, it artificially splits monthly subscription from call charges). So that explanation cannot alone account for the difference between *DT* and *Trinko* as to the relationship between competition law and regulation.

A second case-specific explanation would involve presenting *DT* as an aberration which cannot have the same precedential value as a Supreme Court decision such as *Trinko*. Indeed, to some extent, the Commission in *DT* punished Deutsche Telekom for the sins of the German authorities. Given that wholesale ULL tariffs were regulated on a cost-oriented basis, the source of the margin squeeze is obviously to be found in too low retail tariffs; those had remained low because Germany had failed to carry out tariff rebalancing ahead of liberalization in 1998, in breach of its obligations under Directive 90/388.³⁴ Accordingly, the Commission should have opened an infringement procedure under Article 226 EC against Germany and not a competition law case against DT.³⁵ Even if another recourse might have been preferable and actually more attuned to the real source of the problem, this does not necessarily turn *DT* into a freak case.

2. *Fundamental explanations*

Rather, one should assume that *DT* is also an authoritative decision which evidences that the relationship between competition law and sector-specific regulation is different under EC than under US law. One must then look for more fundamental differences.

a. Substance of competition law

As a first hypothesis, the difference could be due to divergences in substantive competition law. After all, the US Supreme Court made it clear that it did not see how *Trinko* could give rise to a claim under § 2 of the Sherman Act, given the *Colgate* line of case-law. The Commission, on the other hand, did not see any difficulty in applying Article 82 EC to what it perceived as a case of margin squeeze in *DT*. In general, indeed, EC competition law has been expanded to cover most of the major regulatory issues, among others via the so-called “essential facilities doctrine” (in access cases), the non-discrimination principle (broadened to include intra-firm dealings) or closer attention to pricing issues (including cross-subsidization, predatory pricing, price squeeze, etc.).³⁶ This substantive overlap between competition law and regulation in the EC might explain the greater willingness to apply competition law on top of regulation.³⁷ At the same time, the last part of the majority opinion in *Trinko* appears to admit that the presence of regulation could influence the interpretation of competition law and thus lead to a situation where competition law would apply in addition to regulation. The differences in the substantive coverage of US and EC competition law would therefore not suffice to explain *Trinko* and *DT*.

b. Regulatory policy and economics

A second hypothesis would put the explanation more at the level of regulatory policy and economics. The opinion of the Supreme Court reveals two rationales for keeping competition law out of the realm of regulation. A first rationale turns around what the Court terms the risk of “false positives”, namely that competition law would be used to intervene in a case where there should have been no intervention (and where indeed the application of regulation did not result in intervention). This comes close to a “double jeopardy” rationale: a firm which has already had to go through the regulatory process should not be subjected again to close scrutiny, this time under the guise of competition law. “False positives” are thus undesirable as such, and moreover they also send the wrong signal to other firms, namely that excessive intervention is to be expected. A second rationale is that courts acting on the basis of competition law are unlikely to be able to exert the kind of control which is necessary to implement the type of obligations arising out of regulation (especially an *ex nihil* access obligation such as in *Trinko*). Using competition law is thus likely to be ineffective and bring limited added value (if at all).

One might wonder why the Commission would not share that view. Actually, it probably does. However, other factors are also at play. As concerns the second rationale (ineffectiveness of intervention under competition law), the same argumentation is also made in the EC.³⁸ Yet enforcement of competition law is carried out primarily by the Commission and national competition authorities (NCAs), as opposed to national courts.³⁹ The Commission and NCAs, when applying competition law, are perhaps not as well equipped as NRAs in terms of expertise and resources,

but they are still better placed than courts. They can handle more difficult issues falling in the intersection between competition law and regulation.⁴⁰

As for the first rationale (risk of false positives), it is addressed in *DT* in a somewhat roundabout and disingenuous way. The Commission must answer *DT*'s argument that it is revisiting and second-guessing the work of RegTP. It does so by referring to the well-known Notice of 1998 on Access Agreements, where it is stated that “[g]iven the detailed nature of [sector-specific] rules and the fact that they may go beyond the requirements of Article [82 EC], undertakings operating in the telecommunications sector should be aware that compliance with the Community competition rules does not absolve them of their duty to abide by obligations imposed in the [regulatory] context, and vice versa”.⁴¹ Here *DT* is about the reverse situation, covered by a mere ‘vice versa’ in the 1998 Notice; yet the arguments set out in the above excerpt from the Notice (greater detail, more extensive requirements) are not reversible. So it cannot simply be assumed that because sector-specific regulation can go beyond competition law, the reverse is also true. The Notice is somewhat carelessly formulated on this point, and the Commission should not have relied upon it.

c. Legal and constitutional factors

A more convincing explanation for applying EC competition law in spite of the false positive/double jeopardy rationale put forward by the Supreme Court in *Trinko* and invoked by Deutsche Telekom lies at the constitutional level. It involves a fundamental issue of hierarchy of norms. Surprisingly, the Commission did not rely upon it in *DT*.

In the USA, it cannot be denied that the Sherman Act has over the years attained some kind of quasi-constitutional status.⁴² Nevertheless, it is and remains a federal statute. As such, it can be affected by other federal statutes.⁴³ Moreover, it can be interpreted by the Supreme Court and other courts.⁴⁴ The interpretation can be quite wide-ranging: the doctrine of “implied immunity” discussed in *Trinko* amounts to nothing less than a judicial *fiat* leaving aside the Sherman Act in cases where sector-specific regulation is deemed sufficiently complete to fulfill the functions of the Sherman Act. As mentioned above, this has been translated into an assumption that sector-specific regulation will actually be all-encompassing, so as to cover the functions of competition law. The regulated sector is thus entirely handed over to regulation and to the regulatory authorities, in the ideal situation where the doctrine of implied immunity would apply.

EC competition law takes a special place at the heart of EC law, so much so that it is enshrined in the EC Treaty and thus part of “primary EC law”. The key substantive provisions of Article 81 and 82 EC are as such beyond the reach of the Community institutions, be they acting in a legislative or judicial function. In the absence of exceptions in the Treaty itself,⁴⁵ the ECJ has never allowed any industry, especially a regulated one, to claim a complete exception from EC competition law.⁴⁶ Similarly, the Council and the Commission have not used their legislative and executive powers to take entire industries out of the realm of EC competition law.⁴⁷ Because they are part of primary EC law, Articles 81 and 82 EC cannot therefore be set aside through secondary EC law (legislation adopted on the basis of the Treaty by Community institutions) or ECJ case-law.

Sector-specific regulation, such as EC electronic communications regulation, is secondary EC law. It is adopted on the basis of a number of EC Treaty provisions, typically the legal bases concerning the internal market⁴⁸ or the harmonization of national legislation with a view to realizing the internal market.⁴⁹ As such, it cannot thus detract from EC competition law, being primary EC law. At best, sector-specific regulation can propose a specific construction of the law which can be influential in the interpretation of EC competition law, but it cannot replace or displace EC competition law.

Accordingly, when the Commission stated in *DT* that Article 82 EC remained applicable despite all the actions taken by the RegTP under German telecommunications law (which was largely based on EC directives), it did not merely issue a policy statement, it acknowledged the superior position of EC competition law in the basic architecture of EC law. The Commission could not take any other position.

The most which a competition authority (be it the Commission, a NCA or a national court) could do in the EU is to find that, in a given case, sector-specific regulation has been applied in such a way as to achieve the objectives of competition law and thus make the application of competition law superfluous. Such a conclusion depends on the outcome of sector-specific regulation in a given case, however, and cannot be generalized. The mere fact that sector-specific regulation would include provisions which, in the words of the Supreme Court, fulfil the “antitrust function” is not enough to exclude the application of competition law from the start.

In the end, the different outcome in *Trinko* and *DT* regarding the relationship between competition law and sector-specific regulation is best explained by basic differences in the legal framework. Whereas in US law the Supreme Court could in its ruling effectively assume that sector-specific regulation should be taking care of the “antitrust function” and that competition law would accordingly be kept outside of regulatory disputes, the Commission under EC law could not but conclude that competition law remained applicable irrespective of any prior application of sector-specific regulation.

3. *Implications*

In the USA, regulation would ideally replace competition law, while in the EU, regulation will not displace competition law. Since competition law remains, irrespective of regulation, it would follow that regulation should evolve in a way which takes into account the presence of competition law. This has a number of implications.

A first and more immediate implication is that “regulatory holidays”, which are enjoying some popularity as a means to spur investment in infrastructure, are worth much less in the EU than in the USA.⁵⁰ If an EU Member State in its wisdom would decide to grant a regulatory holiday to a firm – leaving aside a probable breach of EC law⁵¹ – it could only remove the threat of regulatory intervention from the NRA pursuant to sector-specific legislation. Whilst that might be the most immediate and significant threat, competition law remains applicable. Even if the NCA would

somehow also be tamed by the Member State in question, the Commission can still intervene pursuant to EC competition law. What is more, current EC competition policy is to foster the private enforcement of competition law, so that the competitors or customers of the firm could seriously disturb its regulatory holiday through competition law claims brought before national courts.

Secondly, the constitutional order of the EC implies that sector-specific regulatory tasks are left to the Member States in principle. They are carried out under national law. That law will either be derived from harmonization instruments based on the provisions of the Treaty mentioned above – typically directives whose implementation and application are left to Member States⁵² – or it will be “original” national law, in which case it is in any event subject to the EC Treaty. When it comes to the application and enforcement of sector-specific regulation, EC directives have typically not made any difference between a Community and a national area of competence (unlike in the USA where federal and State regulation co-exist).⁵³ On the other hand, the Community (through the Commission) has a central role in the application and enforcement of EC competition law. Given the overlap between competition law and regulation, EC competition law can then be used not only to control the behaviour of firms, but also to give a central impulse to the whole of economic regulation. As *DT* also illustrates, EC competition law can even serve indirectly to discipline Member States in their regulatory activities.

Thirdly, the persisting applicability of competition law also has implications for regulated firms. The policy rationales underlying *Trinko*, as outlined above, are comforting for firms, as they would allow them to concentrate on managing their relationship with a sector-specific regulatory authority, which in turn has wide-ranging powers to tell firms how to conduct their business. In the EC, this is not enough: a dominant firm, as the Commission implies in *DT*, must also ensure that it respects competition law. Such a duty could be construed as falling under the broader “special responsibility” of the dominant firm under Article 82 EC.⁵⁴ The latter concept is often hard to account for,⁵⁵ but it is most usefully seen as an indication that the dominant firm must take an active role in policing its conduct and cannot simply wait for authorities to intervene, if and when authorities would determine that there is a reason to intervene. Admittedly it is hard to reconcile such a special responsibility with the assumption of profit-maximizing behaviour. Yet involving firms actively in the regulatory process also brings advantages.⁵⁶ The “special responsibility” of the dominant firm would therefore imply that it should be pro-active in the regulatory process and should not simply hide behind sector-specific authorities when it sees that regulatory intervention would result in doubtful outcomes. Nevertheless, this special responsibility should not go too far; in *DT*, the Commission in fact concluded that *DT* should have gone back to the RegTP to ask for a revision of its approved tariffs so as to introduce new re-balanced tariffs.⁵⁷ This seems to be as much as, if not more than, one can expect from a regulated firm.

Fourthly, since competition law is always applicable and sector-specific regulation should be designed with competition law in mind, regulation is best seen as a complement to competition law. The two can be brought under a broader heading of “economic regulation”, competition law being the general part, surrounded by specific instances of regulation. The EC approach fosters a better integration of economic regulation, which can produce positive results as long as public authorities retain the

necessary discipline: sector-specific regulation must be designed and assessed in the light of competition law, and not the other way around. In other words, regulation serves a purpose when it either (i) serves the same objectives as competition law but fills gaps in enforcement or (ii) pursues valid policy objectives which are different from those of competition law, in a manner which is however as consistent as possible with the objectives of competition law. There is always a risk that competition law will rather be loosened up to serve regulatory objectives, and arguably this is happening in a number of instances in the EC.⁵⁸ With the necessary discipline on the part of public authorities, the EC approach can result in lighter, more efficient and more effective economic regulation.

Fifthly, the EC approach is advantageous from a dynamic perspective. In contrast with the US approach, the assumption under the EC approach would rather be that regulation is not complete, since it complements competition law. If an examination reveals that the application and enforcement of competition law can adequately achieve the relevant policy objectives, then there is no need for additional regulation. Such an examination can be conducted at regular intervals. In a liberalization process, where the aim is to go from a legal monopoly to a competitive market, this means that sector-specific regulation will be rolled back over time and perhaps even removed altogether. This line of thinking was influential in the design of the new EC electronic communications regulatory framework.⁵⁹ While there are certain specific purposes of telecom regulation which are likely to require sector-specific regulation in the longer-term,⁶⁰ the amount of regulation can indeed be reduced over time as competition takes hold of the sector. However, one can seriously question whether this has been happening in practice, given the expansion of regulation in new areas of the electronic communications sector since 2002,⁶¹ without any countervailing retreat from other areas.

II. TECHNOLOGY-NEUTRALITY AND THE PLACE OF COMPETITION LAW IN SECTOR-SPECIFIC REGULATION

A. US telecommunications regulation

In the USA, the structure of the Communications Act 1934 (which was not altered by the Telecommunications Act 1996) fosters a regulatory approach which rests heavily on technological considerations and on definitional issues. Broadly speaking, the Act distinguishes between telecommunications services (falling under Title II), radio services (including “commercial mobile services” which correspond to mobile telecommunications, falling under Title III) and cable services (falling under Title VI). The different titles of this Act create different regulatory regimes, and as such it is crucial to determine under which of these broadly defined categories a given offering falls. Of course, an offering can also fall outside of these definitions and therefore escape most if not all regulation under the Communications Act. Witness the concept of “enhanced service”, which the FCC introduced in the 1970s in the course of the Computer Inquiry, so as to define a category of services which were not basic telecommunications services and therefore escaped regulation;⁶² this outcome was subsequently incorporated in the Telecommunications Act 1996 via the concept of “information services”.⁶³ These are but the main concepts: at subsidiary levels in the regulatory framework, a large number of other definitions come to bear.

The definitions of “telecommunications services”, “commercial mobile services”, “cable services” and “information services”, sketched out above, are all based on technological considerations. In order to find out where a given offering falls, it is therefore necessary to study its technology.⁶⁴

The application of the US Communications Act therefore involves a definition game: the technology behind the offering in question in a given case is analyzed to see under which definition the offering falls, and the appropriate consequences are then drawn.

B. EC electronic communications regulation

In contrast, in the course of the review of electronic communications regulation in 1999-2002, the EC decided to try to make its regulation “technology-neutral”. It is still unclear precisely what technology-neutrality entails:⁶⁵ a weak version of that principle would probably not go much beyond a non-discrimination obligation, but a stronger version would entail that regulation be as much as possible framed without reference to technology. On the basis of the electronic communications regulatory framework, it can be argued that the EC chose the stronger version.

This choice is linked to the approach to the relationship between competition law and sector-specific regulation outlined previously. Indeed turning away from a technology-based system does not obviate the fundamental need to articulate the regulatory framework along some basic lines in order to make it operational. However, these basic lines are likely to be framed in much more general terms than under technology-based regulation, which can afford to be tailor-made for specific services. The set of alternative options for these basic lines is limited. Functional criteria can be used – such as the control of means of access to users – although if overspecified they come close to technology-based regulation. This is why the use of economic criteria – market power, presence of network effects – appears both desirable and unavoidable if the stronger version of technology-neutrality is to be realized in practice. During the legislative process leading up to the new EC electronic communications framework, the choice was made to bank on a close relationship with competition law and import economics-based concepts taken from classical competition law analysis – market definition, market power, a certain set of remedies – into regulation, in order (among others) to articulate it along technology-neutral lines. The outcome was a much more general regulatory framework than the previous one, where a large number of issues were left to further stages of implementation and application.

So far, the EC has lived up to the principle of technology-neutrality as the regulatory framework was progressively rolled out through derived instruments from the Commission and the NRAs. In particular, the first Commission Recommendation on relevant markets⁶⁶ remained relatively true to the ideal of technology-neutrality, despite the constraints put on the Commission by the Annex to the Framework Directive.⁶⁷ What is more, with its three criteria for the selection of relevant markets – high and persistent barriers to entry, limited prospects for competition behind these barriers and relative inefficiency of competition law to police the market – the Recommendation actually improved on the generality of the competition law concepts introduced in the Framework Directive by focusing on the kind of market problems most likely to require sector-specific regulation.

To put it crisply, whereas the traditional technology-based approach of US telecommunications regulation leads to a definitional exercise to be carried out on an offering per offering basis, with an outcome largely determined by the “pigeonhole” in which the offering is deemed to fit, the EC aims for a strong version of technology-neutrality, where the examination of technological characteristics is replaced by an analysis based on more general functional/economic concepts, with a more open-ended outcome. The US approach probably fosters legal certainty, at least once the definitional game is over. The EC approach, on the other hand, is liable to be more flexible over time, again provided it is applied with sufficient discipline.

C. The challenge of broadband networks and services

It is interesting to see how both approaches are rattled by the current evolution of the telecommunications sector, in particular the transition towards broadband networks and services.

1. The US answer

In the USA, the FCC came relatively late to the issue, and its first policy statement, at the beginning of 2002, showed the consequences of the technology-based approach. The FCC was then faced with four separate proceedings concerning:

- (i) the treatment of broadband access over cable: is it a cable service, a telecommunications service or something else? (*Cable Modems*);⁶⁸
- (ii) the treatment of broadband access offered by the telecom incumbents: is it a basic service or an information service? (*ILEC Broadband*);⁶⁹
- (iii) the applicability to broadband of unbundling obligations imposed on incumbents for narrowband services, so that service-based competition can arise on broadband as well (as part of a broader proceeding known as the *Triennial Review*);⁷⁰ to which the FCC added
- (iv) a general proceeding aiming to bring all these issues under one roof (*Wireline Broadband*).⁷¹

The FCC indicated that it would follow the same regulatory principles in all of these proceedings:⁷²

- first, the regulatory authorities must seek to promote the ubiquitous availability of broadband-capable infrastructure to all Americans;
- secondly, ‘broadband’ includes any platform where communications and computing converge to provide content requiring broadband capacity (i.e. not just cable modem or ADSL technologies);
- thirdly, the regulatory environment must foster investment and innovation;
- fourthly, regulation should be rationalized so that harmonized rights and obligations are applied to similarly-situated services across different technological platforms.

It is apparent from the regulatory principles mentioned above that the FCC intends to use its powers to make the US regulatory framework technology-neutral. At the same time, the pigeonhole approach described above is difficult to abandon after so many decades. To a certain extent, such as approach is mandated by the Communications

Act itself, which as said above enshrines separate treatment according to specific technological models, and the FCC cannot abandon it.

Accordingly, in these proceedings, distinctions are made between “wireline broadband Internet access services”, “cable modem services” and similar services provided over other platforms (satellite, terrestrial wireless, power line, etc.).⁷³

In the first proceeding (*Cable Modem*), the FCC had in 2001 already reached the conclusion that “cable modem services” (broadband access offered over cable) constituted “information services”.⁷⁴ That conclusion was challenged before federal courts; ultimately, in June 2005, the Supreme Court confirmed the FCC order.⁷⁵ It is interesting to note that the main argument raised against the FCC order was that “cable modem services” comprised both “telecommunications services” and “information services” and should therefore have been subject also to Title II of the Act.⁷⁶ The Supreme Court was divided on this issue but upheld the reasoning of the FCC.⁷⁷

That Supreme Court judgment prompted the FCC to conclude the second and fourth proceedings. In September 2005, the FCC issued an order finding that “wireline broadband Internet access services” (broadband access offered over DSL) also fell entirely under “information services” and therefore escaped Title II of the Act.⁷⁸ At the same time, the FCC relieved incumbents providing these services from any obligations (separation, non-discrimination, provision of special access forms such as bitstream, etc.) arising from the *Computer Inquiry* proceedings. In parallel to the order, the FCC also made a policy statement claiming jurisdiction to regulate certain aspects of these broadband services under Title I of the Act.⁷⁹

Finally, the third proceeding has a complex story, since it extended to unbundling requirements for both narrowband and broadband services. A first order was issued in 2003,⁸⁰ wherein the FCC sought to heed adverse Court decisions and limit the list of network elements to be unbundled through a more restrictive interpretation of the concepts of “necessity” and “impairment” found in the Communications Act.⁸¹ As far as broadband was concerned, the FCC concluded that the incumbents should be under limited unbundling obligations for Fiber-to-the-Home (FTTH) and hybrid loops. In order to reach that conclusion, the FCC referred to § 157 of the Act,⁸² whereby it has the mandate to ensure that “advanced telecommunications capability” is deployed throughout the USA. Subsequently, that order was vacated in part by the DC Court of Appeal, but the parts concerning broadband were upheld.⁸³ On the strength of the latter finding, the FCC then lifted unbundling requirements as well for fiber loops serving apartment blocks⁸⁴ and for Fiber-to-the-Curb (FTTC) deployments.⁸⁵ Finally, using the regulatory forbearance provisions of the Act,⁸⁶ the incumbents were also relieved from incumbent-specific unbundling obligations under § 271 of the Act.⁸⁷

In the end, all wire-based broadband Internet services – whether provided over cable or DSL – were put in the “information services” pigeonhole and thereby subjected to light regulation only. Existing regulation was removed. If technological neutrality is achieved in the USA, it results thus more from an effort by the FCC to tie together those various strands at the implementation level – so that the different technology-based regimes reach similar outcomes – rather than from the deliberate design of the regulatory framework. Indeed, as the previous paragraphs show, a large amount of

definitional work is needed and the outcome remains dependent on technology-based definitions (“wireline broadband Internet access service”, “cable modem service”, etc.).

2. *The EC answer*

At the same time as the FCC is trying its best to implement some form of technology-neutrality and move towards the EC approach, the EC is under pressure to abandon technology-neutrality when dealing with new developments. For instance, Ofcom has opened a consultation on Next Generation Networks (NGNs), which are defined in a technology-based fashion and for which Ofcom would like to carve out a specific regulatory niche.⁸⁸

In contrast, the Framework Directive,⁸⁹ the Commission’s SMP Guidelines⁹⁰ and the ERG Common Position on Remedies⁹¹ all rely on the concept of “emerging markets” to indicate that new technological developments, whatever they might be, can and must be dealt with within the technology-neutral framework.

On the one hand, the new services or networks can constitute separate relevant markets, where no SMP is present because of the nascent nature of the market, and then no regulation will be applied besides competition law and the non-SMP parts of electronic communications regulation. Under certain circumstances, there might be leveraging issues which would warrant regulatory attention, but as the ERG suggests, any regulatory intervention should then bear on the existing market from which SMP could be leveraged onto the emerging market (and not on the emerging market directly).

On the other hand, it could also be that the new services or networks do not arise on separate relevant markets, as could be the case with Voice over IP (VoIP) if and when it develops into a mainstream alternative to the PSTN. In such a situation, there is no reason to absolve SMP players from sector-specific regulation simply because they are introducing new technologies on existing relevant markets. At the same time, the remedies could be adapted to reflect changes in technology. In the longer term, these new technologies could contribute to eliminating the market power of incumbents, in which case regulatory obligations should be lifted. It might thus be advisable to subject markets undergoing technological changes to close scrutiny so as to spot the erosion of market power early and not maintain regulation beyond its useful life.

In the end, therefore, the EC would be well-advised to resist the call to exempt “Next Generation Networks” or another similarly defined concept from sector-specific regulation. While there might be enough academic and research material floating around from the USA and UK debates to support such an initiative, it would undermine technology-neutrality, one of the most positive elements in the new EC electronic communications framework. Furthermore, this would overlook the fact that despite all the definitional games which were played in the USA, the FCC is actually attempting to move towards technology-neutrality. At the very least, should the EC reintroduce a technology-based element in its new framework, it should use it to fence off the existing services as opposed to the emerging ones,⁹² so that technological evolution would not be affected by the need to comply with certain definitions.

III. CONCLUSION

This paper illustrates, with two examples, how different (but legitimate) choices of legal and regulatory policy can lead to differences in the legal frameworks such that the universal applicability of economics might be impaired, or perhaps to put it more positively, that it might require further refinement to properly factor in these legal differences.

With respect to the relationship between competition law and sector-specific regulation, basic constitutional considerations provide the best explanation why US and EC law would differ, as evidenced by the contrasting outcomes in the two most recent leading cases, *Trinko* and *DT*. There are advantages and disadvantages to each approach: the US approach might foster legal certainty, while the EC approach might be more conducive to the rollback of regulation over time. Accordingly, it is to be expected that EC economic regulation might fall short of fulfilling the “antitrust function” completely, and that EC competition law would step in. In the light of the underlying differences, this cannot immediately be seen as a deficiency of EC law.

Similarly, with respect to technology-neutrality and the place of competition law in telecommunications regulation, the USA and the EC follow different routes, which here as well can be explained by the different design of the US Communications Act and of EC electronic communications regulation. It is interesting to note, however, that the FCC appears to be attempting to steer US law in the direction of EC law through its policy statements and its interpretation of the Act. At the same time, EC policymakers would be well-advised not to abandon their approach and reintroduce technology-based regulation. Available economic evidence from the USA (and to some extent from the UK as well) should therefore be assessed accordingly.

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Notes

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¹ In the EC, for example, they constitute “undertakings” within the meaning of Articles 81 and 82 EC, since they are engaged in economic activity. The “solidarity” exception carved out in cases such as *Albany International* and *AOK* does not apply to them. Firms in network industries might fall under Article 86(1) (as publicly-owned firms or holders of monopoly rights) or 86(2) (as providers of services of general economic interest) EC, but that does not take away from their characterization as undertakings.

² See Larouche (2005).

³ We are not necessarily dealing with regulatory competition in the classical sense of the term here, since market players have a limited ability to “vote with their feet” to signal their preferred regulatory solution. Indeed, once they are committed to doing business in a given jurisdiction, they must comply with the regulation in force in that jurisdiction.

⁴ Decision 2003/707 of 21 May 2003, *Deutsche Telekom AG* [2003] OJ L 263/9 [hereinafter *DT*]. This decision is now pending before the Court of First Instance of the European Communities for review.

⁵ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 US 682 (2004) [hereinafter *Trinko*].

⁶ The Public Service Commission (PSC) of New York State also intervened to impose additional reporting obligations on Verizon. These, and the consent decree, were later on lifted following satisfactory compliance.

⁷ *United States v. Colgate & Co.*, 250 U. S. 300 (1919).

⁸ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U. S. 585 (1985).

⁹ 47 U.S.C. § 152.

¹⁰ *Silver v. New York Stock Exchange*, 373 U. S. 341, 358 (1963) [in original].

¹¹ *Supra*, note 5 at 698.

¹² Regulation 2887/2000 of 18 December 2000 on unbundled access to the local loop [2000] OJ L 336/4.

¹³ Among others; *DT* was also bound to offer line sharing.

¹⁴ Now the *Bundesnetzagentur* (BNetzA).

¹⁵ ADSL subscriptions were left without any *ex ante* price regulation scheme, however they were subject to regulatory oversight and in fact there had been proceedings concerning the cost-orientation of the retail ADSL monthly subscription tariffs.

¹⁶ Directive 90/388 of 28 June 1990 on competition in the markets for telecommunications services [1990] OJ L 192/10 (as amended by Directive 96/19 of 13 March 1996 [1996] OJ L 74/13), Art. 4c, 3rd alinea. See also the discussion in *DT, supra*, note 4, para. 120-129.

¹⁷ In 2002, the RegTP even introduced a negative X-factor in the RPI-x price-cap formula, to give room to *DT* to increase its tariffs: *DT, supra*, note 4, Rec. 43.

¹⁸ Key issues were whether to isolate access charges from call charges, and how to account for the various retail services (telephony, Internet access, etc.) which could be provided on the basis of a single wholesale offering (unbundled local loop).

¹⁹ *DT, supra*, note 4, para. 59-82.

²⁰ *Ibid.*, para. 92-95.

²¹ *Ibid.*, para. 96-101.

²² *Ibid.*, para. 102-183.

²³ *Ibid.*, para. 200-212.

²⁴ *Ibid.*, para. 52. See also para. 104-105.

²⁵ The Commission relied for that statement on ECJ, 11 November 1997, Joined Cases C-359/95 and C-379/95 P *Commission v. Ladbrooke Racing* [1997] ECR I-6225, CFI, 7 October 1999, Case T-228/97, *Irish Sugar v. Commission* [1999] ECR II-296 and CFI, 30 March 2000, Case T-513/93, *Consiglio Nazionale degli Spedizionieri Doganali* [2000] II-1807.

²⁶ *DT, supra*, note 4, para. 163-170.

²⁷ *Ibid.* at para. 166.

²⁸ Ibid. at para. 171-173. DT argued that it could not increase its monthly subscription rate because of competitive pressures and political implications, but the Commission did not accept that argument.

²⁹ Ibid. at para. 174-176.

³⁰ Ibid. at 212.

³¹ Geradin (2004) at 1548-1550 emphasizes this point in explaining the difference between the two cases. However, it is not so easy to distinguish between the “efficient” and the “lazy” regulator, so that this would not seem to be a reliable criterion on which to decide whether competition law should be used once regulatory intervention has taken place.

³² The RegTP faced severe criticism from the *Monopolkommission* (Monopolies Commission), which is entrusted under § 121(2) of the *Telekommunikationsgesetz* (Telecommunications Act) of 22 June 2004 (BGBl.I.1190), as last amended by Art. 3 of the Act of 18 February 2007 (BGBl.I.106) (formerly § 81(3) of the *Telekommunikationsgesetz* as it was in force at the time of the facts. According to the Monopolies Commission, the retail tariffs which the RegTP authorized contained a rebate which prevented competition on the market and hence did not comply with § 24(2)2. of the *Telekommunikationsgesetz* as it was in force at the time. Instead, the RegTP should have taken the retail tariffs for monthly subscriptions out of the price-cap basket and regulated them individually so as to remove the price squeeze: see *Monopolkommission* (2002) at para. 221 and ff.

³³ It is interesting to ask exactly how the fulfillment of the “antitrust function” is to be assessed. In *Trinko*, the US Supreme Court looked not only at the scheme of telecommunications regulation, but also examined the action of the regulatory authorities in the actual case and found it satisfactory. That would imply that the fulfillment of the “antitrust function” cannot be assessed on a general basis but rather depends on the action of the authority(ies) in a given case. Such a test actually gives an incentive to litigate under competition law after regulatory proceedings have been concluded, since in every single case a court ruling under competition law would examine whether the regulatory authorities correctly did their work from the perspective of competition law. It would seem more consistent with the thrust of the reasoning in *Trinko* to make a more general determination about the adequacy of the regulatory scheme, even if this might mean that in some cases the regulatory authorities would be allowed to escape with a course of action in the given case that is not entirely satisfactory in the view of the court ruling under competition law.

³⁴ See *supra*, note 16. The rebalancing obligations of Directive 90/388 were addressed to Germany and not to DT as such, since they were part of the measures to be taken while the incumbent still enjoyed monopoly rights, in the run-up to liberalization.

³⁵ It cannot be denied that, in practice, the infringement proceedings would have been a far less effective recourse, since it would have resulted in a condemnation against Germany, which would then have had to take the necessary steps (presumably via regulatory action) to remove the margin squeeze. In comparison, the competition law case against DT led to a finding directed against DT, which was then under intense pressure to change its tariffs as quickly as possible for fear of further litigation (including damage claims by competitors).

³⁶ C.f. Larouche (2000).

³⁷ It certainly explains why competition law would be seen as a model for regulation: on this see *infra*, Part II.

³⁸ Indeed the relative ineffectiveness of competition law in comparison to sector-specific regulation is one of the three criteria used to select those markets to which sector-specific regulation can potentially be applied: see Directive 2002/21 of 7 March 2002 (Framework Directive on electronic communications) [2002] OJ L 108/33 at Rec. 27 as well as the Recommendation 2003/311 of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21 [2003] OJ L 114/45 and its explanatory memorandum.

³⁹ The role of courts is likely to increase over time as a consequence of the enactment of Regulation 1/2003 of 16 December 2002 [2003] OJ L 1/1 and of the developments in case law (in the wake of ECJ, 20 September 2001, Case C-456/99, *Courage v. Crehan* [2001] ECR I-6297) making private enforcement of EC competition law more attractive.

⁴⁰ Actually, unless there are serious misgivings between the two sets of authorities, the substantive overlap means that the Commission and NCAs can actually work in tandem with NRAs, or at least expect NRAs to take their cue from the actions of competition law authorities and step in to support them at the remedial stage.

⁴¹ Notice of 22 August 1998 on the application of the competition rules to access agreements in the telecommunications sector [1998] OJ C 265/2 at para. 22.

⁴² The Supreme Court in *US v. Toipco Assoc. Inc.*, 405 U.S. 596, 610 (1972) famously branded the Sherman Act “the Magna Charta of free enterprise”.

⁴³ As is evidenced *a contrario* by the Telecommunications Act 1996 which expressly provides that the Sherman Act remains applicable, as discussed in *Trinko* itself.

⁴⁴ As the majority of the Supreme Court recently restated in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (28 June 2007) not yet reported: see the majority opinion of Kennedy J. under IV.

⁴⁵ Within the EC Treaty, exceptions are made only for agriculture at Art. 36 EC. EC competition law was made applicable to agriculture, with certain modifications to take into account the common agricultural policy, through Regulation 26/62 of 4 April 1962 [1962] OJ 993. Article 86(2) EC allows for exceptions to be made for firms entrusted with “services of general economic interest”, but such an exception is subject to a number of conditions and designed not to be larger than is necessary.

⁴⁶ See the judgments of 14 July 1981, Case 172/80, *Züchner v. Bayerische Vereinsbank* [1981] ECR 2021 (banking), 20 March 1985, Case 41/83, *Italy v. Commission* [1984] ECR 873 (telecommunications) and 27 January 1987, Case 45/85, *Verband der Sachversicherer v. Commission* [1987] ECR 405 (insurance).

⁴⁷ Pursuant to Article 83(2)(c) EC, the Council is empowered to specify how Articles 81 and 82 EC apply to certain economic sectors. This power has been used among others to empower the Commission to issue a few sectoral block exemptions from Article 81 EC (the only ones remaining now concern the insurance sector and car vehicle distribution).

⁴⁸ Article 40, 44, 47, 55 EC.

⁴⁹ Article 95 EC.

⁵⁰ The set of FCC decisions concerning broadband services, as set out *infra* under heading II.C.1., amounts in practice to a regulatory holiday.

⁵¹ The Commission has taken a very hard stance on the German legislative proposal to grant regulatory holidays to Deutsche Telekom, opening a fast-track infringement proceeding against Germany. According to the press releases, the Commission sees two infringements of EC law. Firstly, the German law would breach the objectives of the electronic communications framework, in effectively weeding out competition on the higher-speed broadband market (VDSL). Secondly and perhaps more importantly, such a legislative action would run counter to the scheme of electronic communications regulation, whereby these types of decisions belong to the NRA and not to the executive or the legislature, and must be taken only after the notification and comment procedures of the Framework Directive have been complied with. See “Commission launches ‘fast track’ infringement proceedings against Germany for ‘regulatory holidays’ for Deutsche Telekom”, Press Release IP/07/237 (26 February 2007), “Telecoms: Commission takes next step in infringement proceedings because of Germany’s ‘regulatory holiday’ law”, Press Release IP/07/595 (3 May 2007) and “Telecoms: Commission to take Germany to Court over its ‘regulatory holiday’ law”, Press Release IP/87/889 (27 June 2007).

⁵² Member States have so far – rightly or wrongly – resisted demands by the industry and others to bring the application and enforcement of EC economic regulation (in network industries) at the EC level.

⁵³ The EC regulation of electronic communications, post, energy, among others, is not limited to “cross-border” situations, essentially for practical reasons. It would be quasi-impossible to draw the line between the internal and cross-border dimensions (given the reliance on integrated networks), and furthermore regulation would be made much more complex for little apparent gain. In contrast, it can be noted that EC land transport regulation (rail, road) tends to be limited to cross-border transport.

⁵⁴ This “special responsibility” is featured in the case-law under Article 82 EC since the judgment of 9 November 1983, Case 322/81, *Michelin v. Commission* [1983] ECR 3461, at para. 57. It was invoked in *DT*, *supra*, note 4 at para. 178.

⁵⁵ To some extent it is superfluous, given that the “special responsibility not to allow its conduct to impair genuine undistorted competition on the common market” (as stated in *Michelin*, *ibid.*) amounts in practice to a duty to refrain from abusive conduct and thus comply with Article 82 EC.

⁵⁶ Not just for the firm – which can then have more influence on the regulatory process – but also for society at large, since this can contribute to reducing the cost of regulation.

⁵⁷ Which implied that the access charges went up, as discussed before. A firm, dominant or not, is unlikely to raise prices of its own motion in an increasingly competitive environment. This is why Member States were put under a duty to ensure that incumbents rebalanced their tariffs ahead of liberalization.

⁵⁸ See Larouche (2000).

⁵⁹ See statements made by the Commission in Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review COM(1999)539 (10 November 1999) at 49 and the EP Resolution of 13 June 2000 [2001] OJ C 67/53 at 54.

⁶⁰ For instance, the prevention of network externalities, the regulation of monopolistic bottlenecks, universal service, interoperability, etc.

⁶¹ One can think in particular of the regulation of mobile termination tariffs and of wholesale broadband access.

⁶² These inquiries aimed at ascertaining the scope of FCC jurisdiction as regards then emerging telecommunications services which also relied on data processing (e.g., electronic mail). See Second Computer Inquiry, Docket 20828, Final Decision, FCC 80-189, 77 FCC 2d 384 (7 April 1980) and subsequent modifications, Third Computer Inquiry, CC Docket 85-229, Report and Order, FCC 86-252, 104 FCC 2d 958 (15 May 1986) and subsequent modifications. "Enhanced services" are not subject to the extensive sector-specific regulation concerning telecommunications in Title II of the Communications Act, but they remain subject to the general powers of the FCC under Title I of the Act.

⁶³ Defined at 47 U.S.C. 153(20).

⁶⁴ Of course, in practice, a feedback effect also arises: offerings can be designed in such a way as to fall within one definition or the other, if this is desirable.

⁶⁵ See van der Haar (2007).

⁶⁶ *Supra*, note 38.

⁶⁷ *Supra*, note 38.

⁶⁸ FCC, *Cable Modems*, GN Docket 00-185, Declaratory Ruling and NPRM, FCC 02-77 (14 March 2002).

⁶⁹ FCC, *Incumbent LEC Broadband Telecommunications Services*, CC Docket 01-337, NPRM, FCC 01-360 (20 December 2001).

⁷⁰ FCC, *Triennial Review of LEC Unbundling Obligations*, CC Docket 01-338, NPRM, FCC 01-361 (20 December 2001).

⁷¹ FCC, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, NPRM, FCC 02-42 (14 February 2002).

⁷² These objectives were confirmed in the FCC Strategic Plan 2006-2011, available at www.fcc.gov.

⁷³ See for instance the *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* proceeding, *supra*, note 71 at para. 1.

⁷⁴ *Cable Modems*, *supra*, note 68 at para. 34-59,

⁷⁵ *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005).

⁷⁶ Which could have led to cable operators facing an obligation to offer competitors wholesale broadband access.

⁷⁷ Scalia, Souter and Ginsburg JJ. dissenting.

⁷⁸ FCC, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Order, FCC 05-150 (23 September 2005).

⁷⁹ FCC, *Policy Statement regarding Internet Regulation*, FCC 05-151 (23 September 2005). The FCC set out therein four principles that it intends to implement in its activities: "(1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers." That policy statement eventually led to the network neutrality debate which is now taking the US by storm and has led the FCC to revisit the matter, perhaps with a view to take a more interventionist stance: see FCC, *Broadband Industry Practices – Notice of Inquiry*, WC Docket No. 07-52 (16 April 2007).

⁸⁰ FCC, *Triennial Review Order*, CC Docket Nos. 01-338, 96-98, 98-147, 18 FCC Rcd 16978, (2003).

⁸¹ 47 U.S.C. § 251(c)(3) and (d)(2).

⁸² 47 U.S.C. § 157.

⁸³ *US Telecommunications Association (USTA) v. FCC*, 359 F. 3d 554 (2 March 2004), cert. denied, 125 S.Ct. 313, 316, 345 (2004). The FCC went on to issue yet another order on narrowband issues: FCC, *Triennial Review Remand Order*, CC Docket No. 01-338, FCC 04-290 (4 February 2005).

⁸⁴ FCC, *MDU Reconsideration Order*, CC Docket No. 01-338, FCC 04-191, 19 FCC Rcd 15856 (8 September 2004).

⁸⁵ FCC, *FTTC Reconsideration Order*, CC Docket Nos. 01-338, 19 FCC Rcd 20293 (18 October 2004).

⁸⁶ 47 U.S.C. § 160.

⁸⁷ FCC, *Broadband 271 Forbearance Order*, CC Docket Nos. 01-338, 19 FCC Rcd 21496 (27 October 2004).

⁸⁸ See Ofcom (2005).

⁸⁹ *Supra*, note 38, Recital 27.

⁹⁰ Commission Guidelines on market analysis and the assessment of Significant Market Power [2002] OJ C 165/6, para. 32.

⁹¹ ERG Common Position on the approach to appropriate remedies in the new regulatory framework, ERG (03) 30 rev 1, available at erg.eu.int, at pp. 14, 20-22, 89-90.

⁹² I.e. make the current regulation the exception rather than the lack of regulation for new technologies. The rule would then be that there is no sector-specific regulation unless the offering in question falls under the definition of the older technologies.