

Fordham International Law Journal

Volume 28, Issue 4

2004

Article 4

A Tale of Two Jurisdictions and an Orphan Case: Antitrust, Intellectual Property, and Refusals to Deal

Eleanor M. Fox*

*

Copyright ©2004 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

A Tale of Two Jurisdictions and an Orphan Case: Antitrust, Intellectual Property, and Refusals to Deal

Eleanor M. Fox

Abstract

This Essay examines both the U.S. law and the EU law through the window of a recent U.S. case: *New York Mercantile Exchange v. Intercontinental Exchange* (“NYMEX”). The NYMEX facts are similar in concept to the facts in *IMS* but present a stronger case for liability. The Essay argues that the opinion in NYMEX, along with a growing set of U.S. cases, interprets *Trinko* to impose rigid requirements on a Section 2 plaintiff, not all of which are inherent in *Trinko*. It argues that the formalistic post-*Trinko* analysis, which would require dismissal of cases that do not fit within one of two “black boxes,” immunizes some conduct that is anticompetitive in both purpose and effect, while the EU rule (although itself not perfect) can recognize and remedy a broader set of problems.

A TALE OF TWO JURISDICTIONS AND AN ORPHAN CASE: ANTITRUST, INTELLECTUAL PROPERTY, AND REFUSALS TO DEAL

*Eleanor M. Fox**

INTRODUCTION

The United States and the European Union (“EU”) share a perspective on antitrust, intellectual property (“IP”), and unilateral refusals-to-deal. The owner of IP normally has no duty to license it and, particularly, no duty to grant a license to competitors to help them compete against the IP owner.¹ There are, however, exceptions, and at this point the systems diverge. U.S. courts take their cue from *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* (“Trinko”),² which, although not an IP case, mandates dismissal of most refusal-to-deal cases under Section 2 of the Sherman Act.³ In the EU, the case of particular relevance is *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG* (“IMS”), in which the Court of Justice laid down limited conditions under which a dominant firm’s refusal to license IP to a competitor constitutes an abuse of a dominant position in violation of Article 82 of the Treaty establishing the European Community.⁴

* Walter J. Derenberg Professor of Trade Regulation at New York University School of Law. This Essay is dedicated to my dear friend Valentine Korah, whose countless intellectual and personal kindnesses continually enrich me.

1. See *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695 (Fed. Cir. 2001); *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, Case C-418/01, [2004] E.C.R. ____.

2. 540 U.S. 398 (2004).

3. See *id.* Section 2 of the Sherman Act prohibits monopolization and attempts to monopolize. See 15 U.S.C. § 2 (2004).

4. See *IMS*, [2004] E.C.R. ____, ¶ 17; see also The Treaty Establishing the European Community, art. 82, Feb. 7, 1992, O.J. 224/1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty]; *incorporating changes made by Treaty on European Union*, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, [hereinafter TEU]. The Treaty on European Union (“TEU”) amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], as amended by Single European Act, O.J. L. 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA]. The Treaty establishing the European Community (“EC Treaty”) was amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam]. These amendments were incorporated into the EC

This Essay examines both the U.S. law and the EU law through the window of a recent U.S. case: *New York Mercantile Exchange v. Intercontinental Exchange* (“NYMEX”).⁵ The NYMEX facts are similar in concept to the facts in *IMS* but present a stronger case for liability.⁶ The Essay argues that the opinion in NYMEX, along with a growing set of U.S. cases,⁷ interprets *Trinko* to impose rigid requirements on a Section 2 plaintiff, not all of which are inherent in *Trinko*.⁸ It argues that the formalistic post-*Trinko* analysis, which would require dismissal of cases that do not fit within one of two “black boxes,”⁹ immunizes some conduct that is anticompetitive in both purpose and effect, while the EU rule (although itself not perfect) can recognize and remedy a broader set of problems.

There remain many larger antitrust/IP problems beyond the scope of this Essay. This Essay seeks merely to show that there are pro-competitive applications of the *IMS* rule and anticompetitive applications of the *Trinko* rule, and that *Trinko* combined with post-*Trinko* decisions widen the gap between U.S. and EU law. Furthermore, despite the rhetoric of enthusiasm for convergence of law, neither side of the Atlantic Ocean is likely to be convinced by the other within the subject matter of this Essay. This is because the United States is now wedded to a principle of noninterference with unilateral decisions and especially abhors affirmative duties, even if a rule of law imposing such duties would increase competition,¹⁰ and the EU has

Treaty, and the articles of the EC Treaty were renumbered in the Consolidated version of the Treaty establishing the European Community, O.J. C 340/3 (1997), 37 I.L.M. 79 [hereinafter Consolidated EC Treaty], incorporating changes made by Treaty of Amsterdam, *supra*.

5. See generally *N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc.* 323 F. Supp. 2d 559 (S.D.N.Y. 2004) [hereinafter NYMEX].

6. See *id.* at 568-70.

7. See, e.g., *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 672-73, 675-76 (D.C. Cir. 2005); see also *Metronet Serv. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1131-34 (9th Cir. 2004); *Covad Communications Co. v. Bell South Corp.*, 374 F.3d 1044, 1048-49 (11th Cir. 2004); *Morris Communications Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1296-97 (11th Cir. 2004); *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F. Supp. 2d 513, 535-39 (E.D. Tex. 2004).

8. See NYMEX, 323 F. Supp. 2d at 568-70 (citing *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004)).

9. The boxes are: 1) a crippled essential facilities doctrine; and 2) a “limited *Aspen* exception.” See *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 399, 409 (2004).

10. See, e.g., *Trinko*, 540 U.S. at 411.

neither a principle of noninterference nor an aversion to affirmative duties.¹¹

I. *IMS*

We first review the facts and law of our two guideposts, *IMS* and *Trinko*, and then ask how *NYMEX* fits within them.

IMS Health, Inc. (“*IMS*”), a market research company, provides services to the pharmaceutical industry.¹² Working with the pharmaceutical industry, it devised a “brick structure” in which it divided Germany into 1860 geographic areas (the “1860 brick structure”) that it used to measure and report sales of individual pharmaceutical products.¹³ *IMS* used the 1860 brick structure as a format for categorizing and reporting data that is the central feature of *IMS*’ German regional and wholesaler data-information services.¹⁴ German copyright law allegedly protects this format.¹⁵

National Data Corporation (“*NDC*”) entered the German market to provide marketing data to the pharmaceutical industry, in competition with *IMS*.¹⁶ When it endeavored to use its own formatting data, it found the industry resistant; the companies demanded the data formatted in the 1860 brick system, to which they had become accustomed.¹⁷ *NDC* asked *IMS* for a license for the brick structure format, but *IMS* refused.¹⁸ *NDC* thereupon began selling marketing data to the pharmaceutical industry based on copies of the 1860 brick structure, thereby, according to *IMS*, infringing the German copyright.¹⁹

While proceedings pended in the Commission, *IMS* sued in a German court to prohibit *NDC* from using the *IMS* brick struc-

11. See generally VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE chs. 4 & 5, including point 5.2.5.2 at 150 (2004).

12. See *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, Case C-418/01, [2004] E.C.R. ___, ¶ 4.

13. See *id.*

14. See *id.* ¶ 5.

15. Two German courts, the Landgericht Frankfurt am Main and the Oberlandesgericht Frankfurt am Main, held in 2001 that German copyright law protected *IMS*’ right to use of the brick structure. See *id.* ¶ 10.

16. See *id.* ¶ 7. A former *IMS* manager left the company in 1998 and founded Pharma Intranet Information AG, which was later acquired by National Data Corp. (“*NDC*”).

17. See *id.*

18. See *id.* ¶ 9.

19. See *id.* ¶¶ 7, 10.

ture.²⁰ The national court referred to the European Court of Justice questions concerning the circumstances under which a refusal to license constitutes an abuse of dominance under Article 82 of the EC Treaty.²¹ The Court of Justice replied that the exercise of an exclusive right may constitute an abuse of dominance only in exceptional circumstances.²² First, access to the product, service, or IP must be indispensable to enable the undertaking to carry on business in a market.²³ To find indispensability, it must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal, or economic obstacles capable of making it impossible or unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services.²⁴

If access is indispensable, three additional conditions are sufficient: “[N]amely, [1] that that refusal is preventing the emergence of a new product for which there is a potential consumers demand, [2] that it is unjustified and [3, that it is] such as to exclude any competition on a secondary market.”²⁵

The secondary product or service need not be marketed separately from the product/service to which access is sought.²⁶ “[I]t is sufficient that a potential market or even hypothetical market can be identified.”²⁷ The German national court then had the duty to apply these principles.

II. *TRINKO*

*Trinko*²⁸ was a regulated industries case. Verizon Communi-

20. See *id.* ¶¶ 9, 10.

21. See *id.* ¶¶ 17, 21.

22. See *id.* ¶¶ 36-38.

23. See *id.* ¶ 22.

24. See *id.* ¶ 28.

25. *Id.* ¶ 38.

26. See *id.* ¶ 43.

27. *Id.* ¶¶ 43-44. The Court continued:

Transposed to the facts of the case in the main proceedings, that approach prompts consideration as to whether the 1860 brick structure constitutes, upstream, an indispensable factor in the downstream supply of German regional sales data for pharmaceutical products.

Id. ¶ 46

28. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

cations, Inc. ("Verizon") was the incumbent local telecommunications carrier in the northeastern United States.²⁹ As such it controlled the local loop, access to which is necessary for any telecommunications carrier to provide local service.³⁰ When new technologies allowed for competition in the local markets, Congress passed the Telecommunications Act of 1996,³¹ intended to facilitate entry and competition in the local markets and, among other things, requiring the incumbent to give other local service providers access to the local loop equal to the access it enjoyed, at a price set by the Federal Communications Commission ("FCC") on the basis of cost plus a reasonable return on investment.³² Verizon failed to give equal access to its rivals.³³ It degraded their access. The FCC so found and imposed remedies, and Verizon settled with the discriminated-against rivals for large sums.³⁴ Customers of the discriminated-against rivals, through the lead plaintiff — a lawyer who claimed to have lost clients as a result of the inferior telephone service, then launched an antitrust case under Section 2 of the Sherman Act.³⁵ The case came to the Supreme Court on Verizon's motion to dismiss.³⁶

The Court considered dismissing the antitrust claims on grounds of preemption by the 1996 Telecommunications Act.³⁷ But the 1996 Act expressly provides that the antitrust laws continue to apply, side by side the regulatory obligations; so preemption was not an available route.³⁸

The Court then turned to Section 2 of the Sherman Act.³⁹ It emphasized the limits of Section 2, formulating the question before it as whether Verizon's conduct fell within one of two possible exceptions from the strong principle of freedom to refuse to deal.⁴⁰ The Court stated that there are two possible excep-

29. *See id.* at 402.

30. *See id.*

31. *See generally* 47 U.S.C. § 222 (1996).

32. *See* 47 U.S.C. § 251(c) (2004); *see also Trinko*, 540 U.S. at 402.

33. *See Trinko*, 540 U.S. at 403-04.

34. *See id.* at 404.

35. *See id.* at 404-05.

36. *See id.* at 405.

37. *See id.* at 405-07.

38. *See id.* at 406.

39. *See id.* at 407.

40. *See id.* at 407-08.

tions from the freedom-not-to deal principle: 1) the *Aspen Skiing*⁴¹ exception,⁴² and 2) the essential facilities exception.⁴³ As to the latter, the Court said it has never endorsed the existence of an essential facilities doctrine; but if there is such a doctrine, it is available only where the defendant has deprived rivals of complete access to the essential facility or an agency has the power to order access.⁴⁴ The rivals in *Trinko* already had access to the local loop, and the FCC had ordered access.⁴⁵ Therefore, the essential facilities exception, if any, did not apply.⁴⁶

Aspen Skiing Co. v. Aspen Highlands Skiing Corp. was more complicated. In *Aspen Skiing* the Supreme Court unanimously affirmed a jury verdict condemning Aspen Skiing Company, owner of the three flagship ski mountains in Aspen, for refusing to cooperate with its small (one-mountain) rival in providing a four-mountain ticket — which skiers desired.⁴⁷ The Court in *Aspen Skiing* articulated a duty-to-deal principle: a monopolist's refusal to deal is illegal when it significantly excludes rivals, unless defendant proves an efficiency justification.⁴⁸ The *Trinko* Court, not sympathetic with *Aspen Skiing*, set about to distinguish the case on its facts as well as to limit its scope.⁴⁹ In doing so it emphasized the following: The Aspen Skiing Company had previously cooperated with its rival, Aspen Highlands; the termination of this cooperation was the refusal to deal.⁵⁰ Presumably the prior course of dealing was profitable or it would not have occurred. Therefore the refusal to deal "suggested a willingness to forsake short-term profits to achieve an anticompetitive end."⁵¹ By way of contrast, Verizon never voluntarily gave its ri-

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

42. *See Trinko*, 540 U.S. at 408.

43. *See id.* at 410.

44. *See id.* at 411.

45. *See id.* at 403.

46. *See id.* at 411. Prior to *Trinko*, in some of the most compelling essential facilities cases, the firm that controlled the essential facility gave its rivals partial access to that facility. This was true in the *AT&T* cases, pre-break-up. AT&T did not refuse long distance competitors access to the local loop (to enable delivery of their signals to their destination); it "merely" found multitudinous ways to frustrate this access. *See United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981).

47. *See generally Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). *See Trinko*, 540 U.S. at 408-09.

48. *See Aspen Skiing*, 472 U.S. at 605, 608.

49. *See Trinko*, 540 U.S. at 409.

50. *See id.*

51. *Id.*

vals access to the local loop; it probably would not have done so absent statutory compulsion.⁵² “Here, therefore, the defendant’s prior conduct sheds no light upon the motivation of its refusal to deal — upon whether its [conduct was] prompted not by competitive zeal but by anticompetitive malice.”⁵³

Thus, the *Trinko* Court used Aspen Skiing’s shift from a prior course of dealing to infer that Aspen Skiing’s refusal imposed short-term losses on it (although this was not necessarily the case),⁵⁴ and suggested that anyone who would choose short-term losses must be up to no good (this choice reflected “anticompetitive malice” rather than “competitive zeal”).⁵⁵ Bundled in this thought and leading to the inference of malice was the statement that Aspen Skiing was apparently willing to forsake short-term profits — words that strikingly resemble a popular proposed liability test that would confine the reach of Section 2; namely, the proposition that a (monopoly) firm does not violate Section 2 unless it sacrifices profits *en route* to enhancing its power, recouping its investment in predation, and charging higher monopoly prices in the longer run.⁵⁶

The *Trinko* opinion is a conservative one. The author, Justice Scalia, is no admirer of Section 2 of the Sherman Act. But the opinion does not articulate a liability rule for Section 2 (e.g., a sacrifice-of-profits test). In the passages it devotes to *Aspen Skiing* it does not canvass the possible liability rules for Section 2, much less find the sacrifice-of-profits test sufficient to catch anticompetitive strategies and superior to its alternatives. Rather, it makes factual if not factitious distinctions,⁵⁷ thereby disposing of

52. *See id.*

53. *Id.*

54. It may be presumed that Aspen Skiing Company made more money by shifting skiers to an all-Aspen Skiing ticket than it would have made from the four-mountain ticket under a revised formula for sharing revenues. In addition, it probably made money by refusing to sell Highlands its tickets at retail because it could sell those tickets directly to the skiers, and would probably sell more tickets if it declined to support Highlands’ packet.

55. *See Trinko*, 540 U.S. at 409.

56. *See* Thomas Kauper, Section 2 of the Sherman Act: The Search for Standards, Presentation at the Third Annual Miles W. Kirkpatrick Antitrust Lecture (Mar. 30, 2004), in GEO. L.J. (discussing the sacrifice-of-profits test) (in publication).

57. An example of this is that the Court distinguishes *Aspen* on grounds that Aspen Skiing’s particular conduct gave rise to an inference of anticompetitive malice and Verizon did not engage in that particular conduct. But of course there are many other routes to proof of anticompetitive malice, if that is needed. *See Trinko*, 540 U.S. at 399.

Aspen Skiing as precedent. Then it drives inexorably toward its conclusion that Verizon's alleged anticompetitive practices were mere "regulatory lapses" that the sector regulation took care of and were not of antitrust dimension.⁵⁸

In *Trinko's* aftermath, lower courts tend to require that refusal-to-deal cases involve either complete denial of access to an essential facility or fit the *Aspen Skiing* exception; and for the latter they tend to require that defendant 1) engaged in a prior course of dealing with the firms harmed, and 2) engaged in a sacrifice-of-profits scenario.⁵⁹ *NYMEX* is no exception.

III. NYMEX

In *NYMEX*,⁶⁰ the Intercontinental Exchange ("ICE") developed a new, computer-based exchange to compete against the monopoly incumbent, New York Mercantile Exchange ("NYMEX"), in providing a market for the trading of certain natural gas and oil futures contracts.⁶¹ NYMEX operated by the old methodology of "open outcry:" brokers and traders transacted business in physical communication on a physical trading floor.⁶² ICE's presence on the market would add a modern virtual alternative.⁶³

An exchange matches buyers and sellers who wish to make a transaction in the same quantities at the same prices.⁶⁴ After a match occurs, NYMEX would act as the clearing house.⁶⁵ The clearing house assumes the credit risk of each party, guaranteeing its performance to the other.⁶⁶ During the time that contracts remain open, each party pays or receives money based on the value of the contract.⁶⁷ The value of the contract and its

58. *See id.* at 409-10, 412.

59. *See, e.g.,* Covad Communications Co. v. Bell Atlantic Corp., 398 F.3d 666, 672-73, 675-76 (D.C. Cir. 2005); Metronet Serv. Corp. v. Qwest Corp., 383 F.3d 1124, 1131-34 (9th Cir. 2004); Covad Communications Co. v. Bell South Corp., 374 F.3d 1044, 1048-50 (11th Cir. 2004); Morris Communications Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1296-98 (11th Cir. 2004); Z-Tel Communications, Inc. v. SBC Communications, Inc., 331 F. Supp. 2d 513, 535-39 (E.D. Tex. 2004).

60. 323 F. Supp. 2d 559 (S.D.N.Y. 2004).

61. *See id.* at 564.

62. *See id.* at 562.

63. *See id.* at 564.

64. *See id.* at 562.

65. *See id.*

66. *See id.*

67. *See id.*

changes in value are assessed by reference to a settlement price.⁶⁸ NYMEX determined the settlement price, through its settlement committee, at the end of each day.⁶⁹ Allegedly, this determination was the necessary result of formulaic calculations.⁷⁰ NYMEX's settlement prices became the standard.⁷¹ Contract parties would not accept a settlement price other than NYMEX's.⁷²

The sector regulator, the Commodities Future Trading Commission ("CFTC"), required contract markets to make their settlement prices "readily available to the news media and the general public no later than the business day following the day to which the [settlement prices] pertain[]."⁷³ NYMEX provided its settlement prices to subscribers on a "real time" basis, usually within a half hour of NYMEX's release of the data.⁷⁴ However, it required subscribers to agree to use the data only for their internal business and not to use the "real time" prices in competition with NYMEX.⁷⁵

ICE, as noted, entered the market for executing the trades.⁷⁶ It alleged that, after the collapse of Enron, market participants became especially concerned with counterparty credit risk, and they began to demand that it, ICE, provide clearing services as well as execution services.⁷⁷ ICE began to do so, taking NYMEX settlement prices centrally into account, as it had to do.⁷⁸

At that point NYMEX, allegedly to quash the threat that ICE posed as an electronic trading market, claimed that its settlement prices were subject to copyright protection, and it sued ICE for infringement.⁷⁹ ICE counterclaimed for violation of Sec-

68. *See id.*

69. *See id.*

70. *See id.* at 562-63.

71. *See id.* at 563.

72. *See id.* at 565 ("ICE alleges that if it did not finally settle its cleared contracts against the NYMEX price, the contracts would have little value to market participants, because even a small discrepancy results in the introduction of unacceptable 'basis risk,' which is the risk of incorrectly matching offsetting transactions.").

73. *See id.* at 569 (quoting 17 C.F.R. § 16.01 (2004)).

74. *See id.* at 563.

75. *See id.*

76. *See id.* at 562-64.

77. *See id.* at 565.

78. *See id.*

79. *See id.* at 566.

tion 2 of the Sherman Act, based on NYMEX's refusal to allow instantaneous use of its settlement prices.⁸⁰

NYMEX moved to dismiss the counterclaim.⁸¹ Its motion was granted on the basis of *Trinko*.⁸² The district court held that the facts did not come within the limited "*Aspen Skiing* exception" from the freedom-to-not-deal principle, nor did they come within the essential facilities doctrine.⁸³

The district court held the essential facilities doctrine was not available because ICE had some access to the data (although this access was not timely enough for ICE's effective competition), and because the CFTC had the power to regulate the scope of access.⁸⁴ It held the *Aspen Skiing* exception unavailable because ICE and NYMEX had no prior history of cooperation in sharing the use of the settlement prices.⁸⁵ Therefore, it said:

NYMEX's "prior conduct sheds no light upon the motivation of its refusal to deal." There is no indication that NYMEX is flouting consumer demand and foregoing short-term profits by refusing to cooperate with ICE. And unlike the defendant in *Aspen Skiing*, NYMEX has proffered a legitimate business justification for its refusal to deal with ICE. NYMEX has a legitimate business interest in preventing its competitor, ICE, from free-riding on NYMEX's settlement prices.⁸⁶

IV. APPLYING EUROPEAN LAW; COMPARING TRINKO

If facts identical to *NYMEX* arose in the EU, the questions and answers would predictably follow the following script:

1. Was ICE's timely access to the NYMEX settlement prices indispensable to ICE's business as a trading market?⁸⁷ A fact-finder could find: Yes. Without immediate access to the settlement prices, it would be "unreasonably difficult for any undertaking seeking to operate in the market to create . . . the alternative products or services."⁸⁸

80. *See id.* at 567-68.

81. *See id.* at 560-61.

82. *See id.* at 568-70.

83. *See id.* at 571-72.

84. *See id.* at 568.

85. *See id.* at 571.

86. *Id.* (citations omitted).

87. *See* IMS Health GmbH & Co. OHG and NDC Health GmbH & Co. KG, Case C-418/01, [2004] E.C.R. ___, ¶ 28.

88. *Id.*

2. Was the “refusal . . . preventing the emergence of a new product for which there is a potential consumer demand”?⁸⁹ Yes; the refusal would — as intended — prevent the emergence of an electronic market, which was launched to compete with the “out-cry” market.⁹⁰

3. Was the refusal unjustified?⁹¹ A fact-finder could find: Yes. This would be so unless a decision not to license IP is its own justification.⁹²

4. Does the refusal exclude any competition on the market for execution of the futures contracts?⁹³ Apparently, yes. If, as alleged, the settlement prices were merely derived from application of a formula, the inference that a duty to deal would not impair creativity would strengthen ICE’s case.⁹⁴ If ICE could prove the facts it alleged, *NYMEX* would seem to be a relatively easy case for an abuse of dominance violation under EU law. *NYMEX* is a stronger case for liability than is *IMS* because: 1) ICE more clearly had a new product (an electronic market) that was a dynamic addition to competition and could not be carried on without access to the settlement-price standard;⁹⁵ 2) in *IMS* the beneficiaries/consumers of the data participated in the creation of the IP and presumably had some power to protect themselves;⁹⁶ and 3) the existence of two separate markets is clearer

89. *Id.* ¶ 38.

90. The New York Mercantile Exchange (“NYMEX”) responded to the competition not only by trying to cut off ICE from use of the settlement prices but also by creating its own electronic market. *See NYMEX*, 323 F. Supp. 2d at 566.

91. *See IMS*, [2004] E.C.R. ___, ¶ 38.

92. This justification seems more attractive under U.S. law than under European law. *Compare* *In re Indep. Serv. Org. Antitrust Litig.*, 203 F.2d 1322 (Fed. Cir. 2000), *with* *Image Technical Serv., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997). The reliance on IP rights in *NYMEX* seems to be an afterthought, as it was in *Kodak*. *See Kodak*, 125 F.3d at 1219. Free riding was not the issue, since ICE was willing to pay for use of the settlement prices. *See Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451 (1992):

[A]ccording to Kodak, the [independent service organizations] are free-riding because they have failed to enter the equipment and parts markets. This understanding of free-riding has no support in our case law. To the contrary, as the Court of Appeals noted, one of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously.

Id. at 485 (footnote omitted).

93. *See IMS*, [2004] E.C.R. ___, ¶ 38.

94. *See NYMEX*, 323 F. Supp. 2d 559 (S.D.N.Y. 2004).

95. *See id.*

96. *See IMS*, [2004] E.C.R. ___, ¶ 5.

in *NYMEX* than in *IMS*.⁹⁷

NYMEX is also a stronger case for liability than is *Trinko* for three reasons. First, regulation. In *Trinko*, the regulator had and enforced rules to give rival local telecom service providers non-discriminatory access to the local loop, and the period of degraded service to rivals was short, the harm was remedied, and the period of harm was apparently over.⁹⁸ In *NYMEX*, the CFTC had the *power* to order sufficient access to the settlement prices; but it had not done so,⁹⁹ and long experience shows that regulatory agencies are often more sympathetic to incumbents than to competition.¹⁰⁰ No good reason existed to trust the regulator more than open market competition as preserved by antitrust. Second, the *Trinko* Court made a point of the fact that the elements to which Verizon's downstream rivals needed access were not previously either visible or on the market.¹⁰¹ In *NYMEX* the settlement prices were an existing product.¹⁰² They were open, obvious and demanded.¹⁰³ Third, in *Trinko* the Court characterized Verizon's default as a mere "regulatory lapse" and saw no sign of Verizon's intent to harm competition.¹⁰⁴ By contrast, *NYMEX*'s purpose and intent and the probable effect of its conduct was to harm competition.¹⁰⁵

In short, *NYMEX*'s conduct harmed competition.¹⁰⁶ It prevented emergence of new competition against a monopolist in the principal market.¹⁰⁷ It did so by withholding access to a nec-

97. See *NYMEX*, 323 F. Supp. at 559.

98. See *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 405, 407 (2004).

99. See *NYMEX*, 323 F. Supp. 2d at 568.

100. See *United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 1336, 134-52 (D.D.C. 1981) (revealing history of regulatory toleration of AT&T's restraints; AT&T's anticompetitive conduct was normally consistent with FCC regulation).

101. See *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

102. See *NYMEX*, 323 F. Supp. 2d at 562-63 (explaining how the settlement prices were decided upon).

103. See *id.* at 563.

104. See *Trinko*, 540 U.S. at 409. This, however, was contrary to the alleged facts. Plaintiff alleged that Verizon degraded service to rivals to handicap them in their competition and thereby induce its customers not to abandon it.

105. See *NYMEX*, 323 F. Supp. 2d at 572. The court, however, found that there was no evidence that this was their sole purpose.

106. See *id.* at 560.

107. See *id.*

essary input which was merely mechanistic, not creative.¹⁰⁸ NYMEX had no reason to withhold this input other than to harm competition in a second market (the principal market).¹⁰⁹ But under U.S. law there was no antitrust cause of action because the plaintiff could not meet the formalistic requirements of prior voluntary course of dealing¹¹⁰ and sacrifice of profits.¹¹¹

V. *FORM AND STYLE OF JURISPRUDENCE*

Trinko and *IMS* present a contrast of styles. *Trinko* is pure common law jurisprudence. *IMS* is a product of the European Court of Justice's blend of common law and civil law jurisprudence. Moreover, the *IMS* judgment itself is a product of a procedure that has no U.S. counterpart. A Member State court may pose to the Court of Justice a question essentially asking what is the EU law on point.¹¹² The Court's response is intended to enable the national court to apply the applicable EU law. The very nature of this procedure tends to abstract the law from the facts and to induce the "making" of law top down (theoretical) rather than bottom up (inductive). The nature of the U.S. process lends itself, contrariwise, to tightly limiting the law of the case to the facts; courts are not charged with formulating general principles for purposes of future guidance, and normally abstain from doing so. U.S. courts do not normally announce rules, but they may articulate principles.¹¹³

A possible cost of the EU approach, especially on references from national courts as in *IMS*, is that the European Court is called upon to announce "the law" without the chance to appreciate the variety of fact-configurations that may come within its scope. If *NYMEX*-type facts should occur in Europe, this would not be a problem, as this Essay demonstrates, for the *IMS* framework is particularly fitting for the *NYMEX* case.¹¹⁴ The pitfall may be illustrated, rather, by the facts of the European *Microsoft*

108. *See id.* at 560, 563.

109. *See id.* at 572. The court, however, found that NYMEX had a "legitimate interest" in disallowing competitors to free ride on their settlement prices.

110. *See id.* at 571.

111. *See id.*

112. *See* EC Treaty, *supra* note 4, art. 234, O.J. C 224/1 (1992).

113. *See* *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (renouncing "formalistic line drawing").

114. *See generally* *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, Case C-418/01, [2004] E.C.R. ____.

case.¹¹⁵ In *Microsoft*, the European Commission found, among other things, that Microsoft engaged in a strategy to give insufficient interface information to workgroup server rivals so that the rivals' servers would function less well with Windows than did Microsoft's servers.¹¹⁶ The interface information includes IP.¹¹⁷ In examining the *Microsoft* facts under the rules of *IMS*, one would naturally ask: Is Microsoft's conduct a refusal to license within *IMS*? Should exclusion of all competition in the workgroup server market be a necessary condition to an Article 82 abuse? Or should it be enough if Microsoft's conduct had the purpose and effect of handicapping competitors, entrenching Microsoft's dominance, and thereby hurting consumers? However these questions should be answered, it is apparent that the *IMS* conditions were not tailored for a *Microsoft* case; yet they could govern it because the pronouncement in *IMS* is categorical.

The United States has a different style of jurisprudence. Americans often pride themselves on the inductive flexibility and judicial limits provided by the common law system. Yet *Trinko* and the cases in its aftermath do not fully fit the model. The *Trinko* Court did much more than decide the case before it. If constraint were the guide, the Court may have dismissed the case for lack of standing, as the three-Justice concurrence would have done.¹¹⁸ Even addressing the merits, the Court might have dismissed the case on the basis of the unusually tight connection between the pro-competitive regulatory commands and the plaintiffs' antitrust claims; that is, it might have handled the case solely as a regulated industries case. Alternatively, it might have ruled that the period of denial of full access was so short as to be trivial, thus below the radar screen of Section 2. But the Court went much farther. It took the opportunity to reframe the jurisprudence of Section 2 of the Sherman Act, declaring a strong principle of freedom-to-not-deal and denouncing "forced sharing" ordered by courts.¹¹⁹ Although the *Trinko* Court did not go

115. Commission Decision No. Comp/C-3/37.792/EEC, [2004] E.C. Comm. 1, available at <http://www.worldlii.org/eu/cases/ECComm/2004/1.html> (last visited May 10, 2005); stay of relief denied; appeal from Commission decision pending.

116. See *id.* ¶¶ 747, 992.

117. See *id.* ¶ 190.

118. See *Trinko*, 540 U.S. at 416 (Stevens, J., concurring).

119. See *Trinko*, 540 U.S. at 411-15.

so far as to declare a liability test for Section 2 of the Sherman Act, ironically, lower courts have done so in the name of *Trinko*, mechanistically using the Court's bases for distinguishing *Aspen Skiing* to set up necessary conditions for a Section 2 violation.¹²⁰

Despite their idiosyncrasies, *Trinko* and *IMS* tellingly reveal basic characteristics and trend-lines of their own systems. *Trinko* embodies the sentiment of twenty-first century U.S. policy to beware antitrust intervention against non-cartel activity, and especially to avoid positive duties. *IMS*, while demonstrating some reserve regarding duties to deal, nonetheless proceeds to pronounce the necessary conditions for a refusal-to-deal abuse.¹²¹ *NYMEX* does not test the limits of *IMS*, as the *Microsoft* case could do, but it does test the limits of *Trinko*. Even if one must acknowledge that competition in futures contracts would be enhanced by competing markets' access to the standard settlement prices, Justice Scalia would surely stand by his penultimate lines in *Trinko*: Section 2 of the Sherman Act "seeks merely to prevent *unlawful monopolization*. . . . The Sherman Act . . . does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."¹²²

While *carte blanche* is out of the question, Article 82 serves a more activist mission.

120. See, e.g., *Covad Communications Co. v. Bell Atl. Corp.*, 398 F.3d 666, 672-73, 675-76 (D.C. Cir. 2005); *Metronet Serv. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1131-34 (9th Cir. 2004); *Covad Communications Co. v. Bell South Corp.*, 374 F.3d 1044, 1048-49 (11th Cir. 2004); *Morris Communications Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1296-97 (11th Cir. 2004); *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F. Supp. 2d 513, 535-39 (E.D. Tex. 2004).

121. *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, Case C-418/01, [2004] E.C.R. ____.

122. *Trinko*, 540 U.S. at 415-16.