# The influence of essential facilities doctrine in matter of regulation and competition policy in energy network industries

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- The 2004 US Supreme Court's decision in Trinko marks a major divergence between US and European antitrust policies
- The larger degree of acceptance of the essential facilities doctrine in the European competition policy may induce more frequent mandatory access decisions to dominant firms' strategic assets
- If such access-based policies may enhance consumer welfare in the short-term, they could compromise dynamic efficiency because they reduce investment returns and so the incentives to invest
- At the opposite, the US antitrust tends to favour infrastructure-based policies
- It promotes dynamic efficiency by allowing the firm, even a dominant one, to take all the benefits of its previous investment, even by charging monopoly prices

- In a first part, we analyse the essential facility doctrine (EFD) by stressing the divergence between US and Europe.

  → These one reveals two different conception of what is competition

- In a second part, we focus on the EFD implementation in the energy sector

  → In a context of market building, the EFD is widely used by European competition authorities

  → In a more prospective way, the EFD should be reconsidered in a context of high-fixed costs investments

  → It could induce a new trade-off between short-term and long-term efficiencies

# I – EFD in competition policy: what are we talking about ?

1. EFD in the US and European case-law

- The US case law

- The EFD could lead to compel a dominant firm to grant access to one of its inputs to competitors
- A concept built from the US case-law but never explicitly used by the US Supreme Court
- The EFD was crafted by several decisions of US courts of appeals

→ 4 criteria were defined in the MCI decision

1. The owner of the facility must be a monopolist
2. It is practically or reasonably impossible to duplicate the facility
3. The use of the facility is denied to competitors
4. Providing the facility is feasible.

# I – EFD in competition policy: what are we talking about ?

1. EFD in the US and European case-law

   - The European appropriation of the concept

- Like the US Supreme Court, the ECJ has never formally recognised the EFD, but we observe a wide implementation in network industries

- In “exceptional circumstances” a dominant firm could be forced to grant access to one of its assets to its competitors in order to preserve a “structure of effective competition”

# I – EFD in competition policy: what are we talking about ?

1. EFD in the US and European case-law

   - The European appropriation of the concept

- Three criteria were defined by the European case-law (Bronner, 1998)

1. The refusal prevents any competition.
2. The access is essential for carrying out the applicant's business
3. The access is denied without objective

# I – EFD in competition policy: what are we talking about ?

## 2. A comparative perspective : 3 keys of understanding

The US Supreme Court decision in Trinko puts into relief three critical points, which could partially explain transatlantic divergences

- The debate ex ante / ex post (regulation and competition policy)
- The conception of a competition on the merits
- The special responsibility of the dominant firm

# I – EFD in competition policy: what are we talking about ?

- Trinko and the debate ex ante / ex post

- The Trinko Supreme Court's decision (2004) about the access to local loop of telecommunications radically circumscribes both the scope of the EFD in the United States and the range for antitrust interventions in network industries

- Trinko contrasts with the Deutsche Telekom decision of the European Commission (2003)

- According to the US Supreme Court, where sector-specific remedies should apply, there is a very little scope left for antitrust intervention

# I – EFD in competition policy: what are we talking about ?

- Constrasted views on the competition on the merits

- There is no systematic duty to assist a competitor by granting it an access to the fruits of previous investments

- A refusal to deal constitutes a violation of the section 2 of Sherman act only in the case of exclusionary or predatory strategies

- The Supreme court rejects in the harshest possible words the EFD

1. In the Trinko case, the doctrine serves no purpose
2. The EFD should not be applied in regulated sectors

# I – EFD in competition policy: what are we talking about ?

- The special responsibility of the dominant firm in the European competition policy

- Trinko reveals that the difference between US and European antitrust lies predominantly in the meaning of the word competition itself

- Europe sees competition in terms of rivalry between competitors

- USA sees competition in terms of incentives according to the post-Chicago synthesis

- There is no clear relationship between the number of firms and the degree of competition

# I – EFD in competition policy: what are we talking about ?

- The special responsability of the dominant firm in the European competition policy

- In the US, a dominant firm has no special duty towards its competitors

- On the contrary, in Europe, a dominant firm has a special responsibility to preserve an effective competition structure

- The competitive hindrance could be the pure result of the firm dominant position itself and not of some anticompetitive conducts

- Such a logic allows restricting the strategic autonomy of the dominant firm

- Consequently, a larger implementation of the EFD

# I – EFD in competition policy: what are we talking about ?

- The special responsability of the dominant firm in the European competition policy

- The main risk induced by the European conception of competition is first to protect competitors, not competition

- In order to prevent type II errors (false positive), the US antitrust runs the risk to be excessively tolerant with dominant firms (type I error) or to intervene too late when the damages to competition are irreversible

- → What's the implementation of the EFD in the European case law in the energy sector ?

# II - The Essential Facility Doctrine (EFD) in Energy: from Short to Long term Efficiency Criteria

- If EFD has rarely been used explicitly in the energy sector, a broad range of decisions and legislative acts have been inspired by related concepts

- The use of EFD in Europe has largely coincided with the liberalization of network industries

- For example, the concept of third party access reflects such an influence

- We envisage first the role of EFD in the current phase of liberalization and after the current trends

# II - The Essential Facility Doctrine (EFD) in Energy: from Short to Long term Efficiency Criteria

1. **Today's Challenges: EFD and the Building of Competitive Markets**

- TPA and unbundling as emanations of EFD

- TPA grants to economically dependent third parties a right to access and to use an infrastructure developed by another company even against its will and its business interest

- TPA induces a duty to contract for the asset's owner.

- Unbundling, which aims at mitigating the risk of discrimination in the access to the networks belongs to the same logic

# II - The Essential Facility Doctrine (EFD) in Energy: from Short to Long term Efficiency Criteria

1. **Today's Challenges: EFD and the Building of Competitive Markets**

- Possible grounds for abuses in energy

- EFD and refusal to deal do not have an autonomous legal basis in the EC Treaty

- But it was used extensively in the EU case law (intent are seen as sufficient)

- To constitute an abuse under article 82, the behavior of the dominant company must substantially influence the market structure and thus weaken competition in related markets

- Such refusals can take different forms (unattractive access terms, margin squeeze)

- Few objective justifications are likely to be accepted

# II - The Essential Facility Doctrine (EFD) in Energy: from Short to Long term Efficiency Criteria

1. **Today's Challenges: EFD and the Building of Competitive Markets**

- Relevant behavioral and structural remedies

o In numerous decisions, TPA access have been imposed or accepted as commitment

1. Decisions concerning TPA access itself
   → In cross border issues, decisions take into account the differences between new investments and already existing interconnections

2. Cases of under-investment in essential facilities

3. Direct – and voluntary – divestitures of EF (E.On / RWE)

# II - The Essential Facility Doctrine (EFD) in Energy: from Short to Long term Efficiency Criteria

1. **Today's Challenges: EFD and the Building of Competitive Markets**

1. The extension of the EFD Principles in energy appears as the consequence of the inability of sector specific regulation to truly enforce TPA

2. At the opposite of the US practices, we observe an increased implementation of the EFD in Europe

3. A special responsibility of the dominant firm is again confirmed

# II - The Essential Facility Doctrine (EFD) in Energy: from Short to Long term Efficiency Criteria

## 2. Tomorrow's Challenges: EFD and Long-term Investment Incentives

- A duty to supply may create pervese investments' incentives for firms

- The competition authorities make a trade-off between short-term market builiding objectives and long term investment's incentives

- Two opposite trends in the European practices

1. The narrowing of the EFD by the merchant lines
2. A possible widening to generation capacities

# II - The Essential Facility Doctrine (EFD) in Energy: from Short to Long term Efficiency Criteria

A – The case of merchant investments

- Under-investment in cross-border capacities is one of the main issues for the internal energy market
- Merchant transmission investments, private investments partly or fully exempted from TPA, are a possible way forward
- The objective is again to arbitrate between short term efficiency gains through TPA and long term gains through an increased investment level

# II - The Essential Facility Doctrine (EFD) in Energy: from Short to Long term Efficiency Criteria

A – The case of merchant investments

- The purpose is to provide a sufficient legal certainty to investors
- But, in the gas sector, we observe a lack of consistency between the decisions taken by the member states
  - → And perhaps, a regulatory comptetition, which could lead to a race to the bottom
- In electricity, the issue concerns the right of incumbent TSOs and dominant generators to build their own merchant lines
  - → It could raise new forms of anticompetitive strategies

# II - The Essential Facility Doctrine (EFD) in Energy: from Short to Long term Efficiency Criteria

B – An extension to nuclear facilities ? The EDF / Direct Energy case

- Direct Energy is a new retailing entrant, without generation capacities who sue EDF for violation of article 82
- Three grounds : margin squeeze, price discrimination and discriminatory access to nuclear capacities
- The French Competition Council concluded to a presumption of margin squeeze and imposed a long term VPP to EDF
- Nuclear generation capacities are seen as an essential asset to effectively compete in the downstream market.

# II - The Essential Facility Doctrine (EFD) in Energy: from Short to Long term Efficiency Criteria

B – An extension to nuclear facilities ? The EDF / Direct Energy case

→ According to the Competition Council Decision

→ EDF cannot be considered having obtained its competitive advantage through its own merits

- DE is not able to invest in its own base load capacities
- The access to EDF's nuclear capacities is indispensable for new entrants

→ Two issues

1. Is the existence of regulated tariffs the real roots of the problem ?
2. Has the Council protected competition or competitors ?

# CONCLUSIVE REMARKS

- The mechanical approach of the European implementation of the EFD induces two risks for competition :

1. The first one is to reduce investment's incentives for the competing undertakings

2. The second one is to favour strategic lawsuits, which are made easier by the ambiguity of the essential facility concept

- As AG Jacob wrote in Bronner :

"The mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it".

# CONCLUSIVE REMARKS

- The best summary of the US position in these transatlantic debates

  - between static and dynamic efficiencies
  - between divergent assessments of the consequences of type 1 (false negative) and type 2 errors (false positive)

  was given by Richard Posner in its opinion in the Olympia decision in 1986

# CONCLUSIVE REMARKS

"As the emphasis of antitrust policy shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency… it became recognised that the lawful monopoly power should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors…Today, it is clear that a firm with a lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches".