Margin Squeeze

Where competition law and sector regulation compete

Friso Bostoen

Onder wetenschappelijke begeleiding van
Prof. Dr. W. Devroe en Dhr. W. Wijsmans

1. INTRODUCTION

1.1. OVERVIEW

1. OVERVIEW – This paper discusses abusive pricing practices by dominant undertakings. It starts with an overview of the different ways an undertaking can abuse its dominant position through pricing (*chapter 2*). The focus of this work is on margin squeeze. We start by defining margin squeeze (*chapter 3*), and then look at how margin squeeze is assessed (*chapter 4 and 5*). It will be examined why some undertakings appear to be more susceptible to this abuse than others (*chapter 6*). The last part of this paper investigates the place of margin squeeze in the European legislative framework. It first considers which kind of competition law abuse margin squeeze could be and currently is (*chapter 7*), and then focuses on the interaction of this competition law approach with the regulatory approach (*chapter 8*).

1.2. RELEVANCE

2. JURISPRUDENTIAL AND DOCTRINAL INTEREST – Margin squeeze only entered the European competition scene slowly. For the last decade, however, it has been the subject of intense enforcement by the Commission. Cases often make their way up the European courts. National competition and regulatory authorities have also actively pursued margin squeeze cases. This may be explained by the recent liberalisation of certain sectors, often under EU direction. Margin squeeze is closely connected to this greater European project, and spans both competition law and regulation. All of this may help to explain why doctrinal interest in margin squeeze has soared recently. However, the field is certainly not occupied. It leaves plenty of space for this contribution.

1.3. RESEARCH QUESTIONS

3. RESEARCH QUESTIONS – The following questions require a specific answer:

1. How do the European courts assess whether there is a margin squeeze abuse? (*chapter 4 and 5*)
2. Where does margin squeeze fit in the European legislative framework? This question consists of two sub-questions:
   a. Theoretically, where could margin squeeze fit in the competition law framework, and how do the European courts currently conceive margin squeeze? (*chapter 7*)
   b. How does the competition law approach interact with the regulatory approach? (*chapter 8*)

1.4. METHODOLOGY

4. FIRST QUESTION – The answer to the first research question is evidently found in the case law of the European courts. Commission decisions are also of value, as they are the starting point of the European courts' judgments. To get the full picture, it is useful to work through the judgments chronologically. The doctrine may provide rationalisation, critique and alternatives.

5. SECOND QUESTION – To answer the second research question, the doctrine is the starting point. Certain authors construe the margin squeeze differently than the European courts. Their findings will be analysed and grouped along the alternatives they present, and shortfalls will be identified. The case law of the European courts provides us with a clear answer. For the interaction between the competition and the regulatory approach, we return to the case law of the European courts. Again, the doctrine may provide guidance.

6. COMPARATIVE APPROACH – The answers to these questions will benefit from a comparison with the approach to margin squeeze in the United States. We will look at the jurisprudence of the highest court in the US, more specifically the *linkLine* case. In this judgment, the US Supreme Court clearly set out its position on margin squeeze claims. It handles the antitrust abuse and its interaction with sector-specific regulation very differently than the ECJ.

2. ABUSIVE PRINCING PRACTICES

7. LEGISLATIVE FRAMEWORK – Abusive pricing practices are combatted under Art. 102 TFEU, which reads as follows:

> *"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:*
> *(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
> *(b) limiting production, markets or technical development to the prejudice of consumers;*
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
> *(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."*

Art. 102 TFEU prohibits undertakings to abuse their dominant position. The provision targets unfair purchase or selling prices in various ways. However, the list is not exhaustive; other abuses are possible.[1]

8. POLICY FRAMEWORK – Recital 23 of the Guidance Paper establishes the following framework for price setting by undertakings:

> *"Vigorous price competition is generally beneficial to consumers. With a view to preventing anti-competitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking."*[2]

The Commission shall thus only intervene when price competition actually becomes anti-competitive.

2.1. EXCESSIVE PRICING

9. CHARGING EXCESSIVELY HIGH SELLING PRICES – Art. 102, a) TFEU prohibits "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions". In the landmark case of *United Brands*, the ECJ considered a price excessive when "it has no reasonable relation to the economic value of the product supplied."[3] This excess can be determined

---

[1] ECJ 21 February 1973, case 6/72, ECLI:EU:C:1973:22, *Europemballage Corporation and Continental Can Company Inc.*, ECR 1973, 215, para. 26; ECJ 14 November 1996, case C-333/94 P, ECLI:EU:C:1996:436, *Tetra Pak II*, ECR I-5951, para. 37.

[2] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 23 with reference to ECJ 3 July 1991, case C-62/86, ECLI:EU:C:1991:286, *AKZO Chemie*, ECR 1991, I-3359, para. 72 and CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 172.

[3] ECJ 14 February 1978, case 27/67, ECLI:EU:C:1978:22, *United Brands*, ECR 1978, 207, para. 250.

objectively "by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin."[4] The next question is whether the imposed price is unfair in itself, or when compared to competing products.[5]

10. EXTRACTING EXCESSIVELY LOW PURCHASE PRICES – Art. 102, a) TFEU also explicitly prohibits imposing unfair purchase prices. This targets the situation where a dominant undertaking, contracting as a buyer, forces a seller to charge excessively low prices. For an undertaking to be able to do this, it must have buyer power.[6] Supermarkets are the usual suspects when it comes to this abuse.[7]

2.3. PRICE DISCRIMINATION

11. ABUSE – Art. 102, c) TFEU prohibits "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". This Article gives courts the clear guideline to establish (i) the equivalence of the transactions; (ii) the dissimilarity of the conditions; and (iii) the competitive disadvantage. An undertaking cannot only discriminate by conducting a regular pricing policy; granting rebates or bonuses are common forms of price discrimination.[8] Landmark cases in this area are *Hoffman-La Roche*[9], *Irish Sugar*[10] and *British Airways*[11].

2.4. REBATE SCHEMES

12. CLASSIFICATION – Rebates come in many forms. Consequently, they have been classified in many ways. The following classification is the one that runs through the European Commission's documents[12], i.e. a distinction between conditional and bundled rebates.

13. 1) CONDITIONAL REBATES – Conditional rebates are rebates that "are granted to customers to reward a certain (purchasing) behaviour of these customers in a particular period of time."[13] These rebates may infringe

[4] ECJ 14 February 1978, case 27/67, ECLI:EU:C:1978:22, *United Brands*, ECR 1978, 207, para. 251.
[5] ECJ 14 February 1978, case 27/67, ECLI:EU:C:1978:22, *United Brands*, ECR 1978, 207, para. 252; P. AKMAN and L. GARROD, "When are excessive prices unfair?" in *Journal of Competition Law & Economics* 2011, 403-426.
[6] On that topic, see European Commission, Note to the OECD Roundtable on Monopsony and Buyer Power, DAF/COMP/WD (2008) 80.
[7] The Declaration of the European Parliament on investigating and remedying abuse of power by large supermarkets operating in the European Union of 19 February 2008 may serve as an illustration.
[8] *Infra* title 2.4 "Rebate schemes".
[9] ECJ 13 February 1979, case 85/76, ECLI:EU:C:1979:36, *Hoffmann-La Roche*, ECR 1979, 461.
[10] ECJ 10 July 2001, case C-497/99 P, ECLI:EU:C:2001:393, *Irish Sugar*, ECR 2001, I-5333.
[11] ECJ 15 March 2007, case C-95/04 P, ECLI:EU:C:2007:166, *British Airways*, ECR 2007, I-2377.
[12] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20.
[13] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, para. 151; Guidance on the Commission's enforcement priorities in applying Article

competition law because they (i) restrict the purchaser in his possible choices of sources of supply and deny other producers access to the market; and (ii) result in the application of dissimilar conditions to equivalent transactions with different trading parties (price discrimination, Art. 102, c) TFEU).[14]

Conditional rebates usually come in the form of target rebates.[15] A target rebate means that the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold.[16] The rebate can then either be granted on all purchases (retroactive rebates) or only on those purchases that exceed the required threshold (incremental rebates).[17] On top of those mentioned earlier,[18] the cases *Michelin I* and *Michelin II* are relevant, certainly with regard to the reference period.[19]

14. 2) MULTI-PRODUCT REBATES – Multi-product rebates are a particular kind of rebates. This abuse consists in conditioning a rebate on cumulated purchases in separate product markets. According to the Commission, "[a] multi-product rebate may be anti-competitive on the tied or the tying market if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle" (tying, Art. 102, d) TFEU).[20] Leading cases on these rebates include *Hoffman-La Roche*[21] and *Hilti*[22].

15. JUSTIFICATION – According to consistent case law, "only discounts or bonuses which are not based on any economic counterpart to justify them must be regarded as an abuse."[23] The Commission labels this 'the efficiency

82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 37 contains an almost identical definition.

[14] ECJ 13 February 1979, case 85/76, ECLI:EU:C:1979:36, *Hoffmann-La Roche*, ECR 1979, 461, para. 90.

[15] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, para. 151; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 37.

[16] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, para. 151; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 37.

[17] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, paras 152-165 and paras 166-169, respectively; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 37.

[18] *Supra* nr. 11 "ABUSE".

[19] ECJ 9 November 1983, case 322/81, ECLI:EU:C:1983:313, *Michelin I*, ECR 1983, 3461; CFI 20 September 2003, case T-203/01, ECLI:EU:T:2003:250, *Michelin II*, ECR 2003, II-4071.

[20] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 60; see also DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, paras 193-194.

[21] ECJ 13 February 1979, case 85/76, ECLI:EU:C:1979:36, *Hoffmann-La Roche*, ECR 1979, 461.

[22] CFI 12 December 1991, case T-30/89, ECLI:EU:T:1991:70, *Hilti*, ECR 1991, II-1439.

[23] ECJ 15 March 2007, case C-95/04 P, ECLI:EU:C:2007:166, *British Airways*, ECR 2007, I-2377, para. 84, with reference to ECJ 13 February 1979, case 85/76, ECLI:EU:C:1979:36, *Hoffmann-La*

defence'.[24] A prime example is when the rebate scheme leads to cost or other advantages that are passed on to the customer.[25] But a rebate may also be justified because it is indispensable to provide the incentive for the dominant supplier to make certain relationship-specific investments in order to be able to supply a particular customer.[26]

2.5. PREDATORY PRICING

16. DEFINITION – In its 16th Report on Competition Policy, the Commission defines predatory pricing as "fixing artificially low prices so that a competitor is either eliminated or disciplined." [27] An undertaking usually compensates those losses with profits in one or more different markets.

17. *AKZO CHEMIE*: CRITERIA – In the leading case in this area, the undertaking AKZO Chemie tried to drive a small competitor (ECS) out of the flour-additives market.[28] ECS wanted to expand into the organic peroxides market, another market in which AKZO was dominant. AKZO first threatened ECS, and then executed that threat by adopting a long-term policy of uneconomic prices. The ECJ deemed this abuse particularly serious "since the behaviour complained of was intended to prevent a competitor from extending its activity into a market in which AKZO held a dominant position."[29]

The ECJ formulated two criteria to assess whether pricing practices are abusive:

1. "Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive."[30]
2. "Moreover, prices below average total costs (that is to say, fixed costs plus variable costs), but above average variable costs, must be

Roche, ECR 1979, 461, para. 90 and ECJ 9 November 1983, case 322/81, ECLI:EU:C:1983:313, *Michelin I*, ECR 1983, 3461, para. 73.

[24] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, para. 172; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 46.

[25] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, para. 173; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 46; D. VANDERMEERSCH, *De Mededingingswet*, Mechelen, Kluwer, 2007, 233.

[26] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, para. 175.

[27] EC, 16th Report on Competition Policy, 1987, para. 334.

[28] ECJ 3 July 1991, case C-62/86, ECLI:EU:C:1991:286, *AKZO Chemie*, ECR 1991, I-3359.

[29] ECJ 3 July 1991, case C-62/86, ECLI:EU:C:1991:286, *AKZO Chemie*, ECR 1991, I-3359, para. 162.

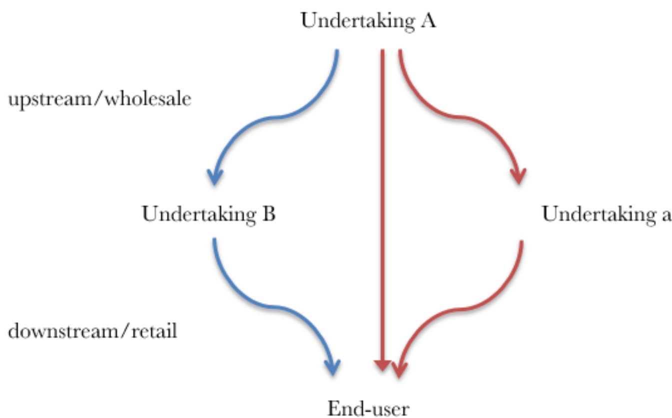
[30] ECJ 3 July 1991, case C-62/86, ECLI:EU:C:1991:286, *AKZO Chemie*, ECR 1991, I-3359, para. 71.

regarded as abusive if they are determined as part of a plan for eliminating a competitor."[31]

3. MARGIN SQUEEZE DEFINITION

18. DEFINITION – In its Guidance Paper, the Commission defines a margin squeeze as the situation where a dominant undertaking charges "a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis."[32] This definition is based on consistent jurisprudence.[33]

19. FIGURE 1 – Let us start from this simple figure:



Undertaking A produces a product (or renders a service).

- Undertaking A provides its product to undertaking B on the upstream market. Undertaking B then sells the product to end-users (blue).
- Undertaking A also sells its product to end-users on the downstream market. It does this directly, or through its subsidiary undertaking a (red).

20. FIGURE 2 – Now take a look at the following figure[34]:

[31] ECJ 3 July 1991, case C-62/86, ECLI:EU:C:1991:286, *AKZO Chemie*, ECR 1991, I-3359, para. 72.

[32] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 80.

[33] *Infra* title 4. "Margin squeeze assessment".

[34] Oxera Agenda 2009, "No margin for error: the challenges of assessing margin squeeze in practice", 1.

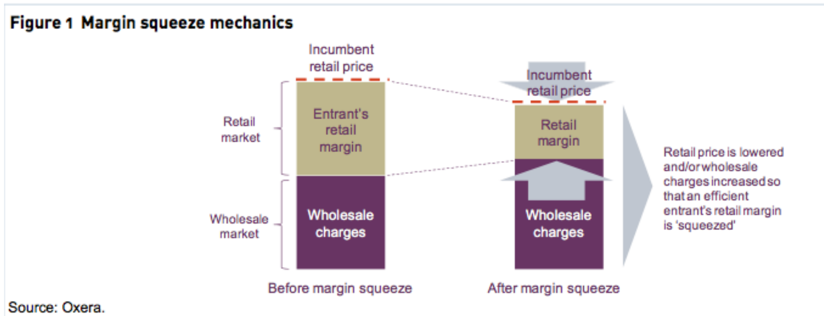


Figure 1 Margin squeeze mechanics

Source: Oxera.

Undertaking B pays undertaking A wholesale charges, and then makes a profit by selling the product to end-users.[35] However, undertaking A can 'squeeze' undertaking B's retail margin by

- increasing its wholesale charges (purple); or
- lowering its retail price, forcing competitors to do the same (beige).

The next two chapters focus on when this practice constitutes an abuse.

21. EXAMPLES – Margin squeezes are found in a variety of sectors. In *Napier Brown – British Sugar*, for example, the product was sugar.[36] British Sugar charged its competitors a high price on the upstream market (wholesale sugar), leaving its competitors a margin that was too small to compete on the downstream market (retail sugar). More recently, most cases originate in the telecom industry. Often, one provider owns the network. As a consequence of the European liberalisation of the telecom industry, this provider is obliged to grant competitors access to its network for a fee (upstream market). If this fee is too high, or the retail price too low, those competitors cannot compete in providing end-users with services (downstream market).

[35] Of course, the profit of undertaking B will not be equal to the price it charges the end-users minus the wholesale charges; just like undertaking A, undertaking B has to factor in a variety of costs to actually provide the product to end-users.
[36] EC 18 July 1988, case IV/30.178, *Napier Brown – British Sugar*, OJ L 284, 19.10.1988, 41

4. MARGIN SQUEEZE ASSESSMENT

4.1. COMMISSION DOCUMENTS

22. AS-EFFICIENT-COMPETITOR TEST – The Commission indicates that a margin squeeze can be demonstrated "by showing that the dominant company's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company."[37] This is the 'as-efficient-competitor test'.[38]

23. REASONABLY-EFFICIENT-COMPETITOR TEST – The Commission also formulates a second test: "a price squeeze could also be demonstrated by showing that the margin between the price charged to competitors on the downstream market (including the dominant company's own downstream operations, if any) for access and the price which the network operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit (unless the dominant company can show that its downstream operation is exceptionally efficient)."[39] This is the (now presumably abandoned)[40] 'reasonably-efficient-competitor test'. Let us take a look at the evolution of these tests.

4.2. NATIONAL CARBONISING

24. MARGIN SQUEEZE CONCEPT – The Commission first identified a margin squeeze in the *National Carbonising* case (an application for interim measures in the coal industry).[41]

> *"The Commission accepts that an undertaking which is in a dominant position as regards the production of a raw material (in this case coking coal) and therefore able to control its supply to manufacturers of derivatives (in this case, coke) and which is itself manufacturing the derivatives in competition with its own customers, may abuse its*

[37] Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ C 265, 22.08.1998, 2-28, para. 117; DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, para. 220.
[38] We also find this criterion in the margin squeeze definition in Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 80.
[39] Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ C 265, 22.08.1998, 2-28, para. 118. Note that while these tests are formulated in the framework of the telecommunications sector, they are generally applicable, see para. 6: "As this Notice is based on the generally applicable competition rules, the principles set out in this Notice will, to extent that comparable problems arise, be equally applicable in other areas."
[40] The ECJ, or rather its president, has only withheld the Commission's reasonably-efficient-competitor test in the first margin squeeze case, see President of the ECJ 22 October 1975, case 109/75 R, ECLI:EU:C:1975:133, *National Carbonising*, ECR 1975, 1193 (*infra* title 4.2 "National Carbonising").
[41] President of the ECJ 22 October 1975, case 109/75 R, ECLI:EU:C:1975:133, *National Carbonising*, ECR 1975, 1193.

> *dominant position if it acts in such a way as to eliminate the competition from its customers in the market for the derivatives."*[42]

The Commission describes the concept of a margin squeeze in clear wording (even though it does not use the term yet) and assesses margin squeeze as an abuse of dominant position.

25. REASONABLY-EFFICIENT-COMPETITOR TEST – The Commission then formulates the relevant test:

> *"The Commission accepts that in such a situation the enterprise in a dominant position may have an obligation to arrange its prices so as to allow a reasonably efficient [downstream competitor] a margin sufficient to enable it to survive in the long term."*[43]

The test described here is the reasonably-efficient-competitor test. However, it is combined with the rather vague criterion of a margin sufficient for long-term survival.

4.3. NAPIER BROWN – BRITISH SUGAR

26. AS-EFFICIENT-COMPETITOR TEST – Thirteen years later, in *Napier Brown*, the Commission used a different test.[44] It exchanged the reasonably efficient competitor for the as efficient competitor.

> "*The pricing information indicated above shows that BS has engaged in a price cutting campaign leaving an insufficient margin for a packager and seller of retail sugar, as efficient as BS itself in its packaging and selling operations, to survive in the long term."*[45]

The Commission no longer evaluates the long-term survival of a reasonably efficient competitor. Instead, it establishes an objective measure of costs: the as-efficient-competitor test. However, those costs are again assessed by a vague standard: the sufficiency of the margin for long-term survival.[46] Still, undertakings can now evaluate with more certainty whether they are abusing their dominant position.

---

[42] President of the ECJ 22 October 1975, case 109/75 R, ECLI:EU:C:1975:133, *National Carbonising*, ECR 1975, 1197.
[43] President of the ECJ 22 October 1975, case 109/75 R, ECLI:EU:C:1975:133, *National Carbonising*, ECR 1975, 1197.
[44] EC 18 July 1988, case IV/30.178, *Napier Brown – British Sugar*, OJ L 284, 19.10.1988, 41.
[45] EC 18 July 1988, case IV/30.178, *Napier Brown – British Sugar*, OJ L 284, 19.10.1988, 41, para. 65.
[46] N. DUNNE, "Margin squeeze: theory, practice, policy – part I" in *European Competition Law Review* 2012, 5.

4.4. INDUSTRIES DES POUDRES SPHÉRIQUES (IPS)

27. PATCHWORK QUILT APPROACH – Only 25 years after the Commission encountered margin squeeze, the Court of First Instance (currently General Court; hereafter CFI) decided on a margin squeeze in the *IPS* case.[47] The Court held that an undertaking abuses its dominant position when it "sets the price at which it sells the unprocessed product at such a level that those who purchase it do not have a sufficient profit margin on the processing to remain competitive on the market for the processed product."[48] Referring to "those who purchase it" (downstream competitors) and the sufficiency of the margin, the Court seems to follow the Commission in *National Carbonising*. But formally, this standard is even less rigorous than the reasonably-efficient-competitor test, as "those who purchase it" may include inefficient competitors as well. However, the Court then applied this test restrictively. It concluded that the pricing policy could not be characterised as abusive "[i]n the absence of abusive prices being charged […] for the raw material, […] or of predatory pricing for the derived product."[49] This way, margin squeeze is not an independent abuse, but rather a patchwork of other abusive pricing practices.

4.5. DEUTSCHE TELEKOM AND TELIASONERA

28. RATIONALISED MARGIN SQUEEZE THEORY – In the cases *Deutsche Telekom* [50] and *TeliaSonera* [51] the Commission and the European courts rationalised the margin squeeze theory. The following excerpt from the *Deutsche Telekom* judgment established three important principles. The ECJ subsequently confirmed each principle in the *TeliaSonera* judgment.

> *"[A] margin squeeze is capable, in itself, of constituting an abuse within the meaning of Article [102 TFEU] in view of the exclusionary effect that it can create for competitors who are at least as efficient as the appellant. The General Court was not, therefore, obliged to establish, additionally, that the wholesale prices for local loop access services or retail prices for end-user access services were in themselves abusive on account of their excessive or predatory nature, as the case may be."*[52]

29. STAND-ALONE ABUSE – First of all, the ECJ determines that, according to European law, margin squeeze constitutes a stand-alone abuse

---

[47] CFI 30 November 2000, case T-5/97, ECLI:EU:T:2000:278, *Industries des Poudres Sphériques (IPS)*, ECR 2000, II-3755.
[48] CFI 30 November 2000, case T-5/97, ECLI:EU:T:2000:278, *Industries des Poudres Sphériques (IPS)*, ECR 2000, II-3755, para. 178.
[49] CFI 30 November 2000, case T-5/97, ECLI:EU:T:2000:278, *Industries des Poudres Sphériques (IPS)*, ECR 2000, II-3755, para. 179.
[50] EC 21 May 2003, case COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom*, OJ L 263, 14.10.2003, 9; CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477; ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555.
[51] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527.
[52] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 183.

("in itself").[53] It rejects the thesis by the CFI in *IPS* that the prices charged on the wholesale or retail market should in themselves be abusive or predatory.

30. AS-EFFICIENT-COMPETITIOR TEST 2.0 – Secondly, the ECJ confirms the *Napier Brown* ruling of the Commission by affirming the as-efficient-competitor test as the relevant test to assess margin squeeze.[54] However, it drops the sufficiency of the margin for long-term survival as a relevant criterion.

31. ANTI-COMPETITIVE EFFECT – Thirdly, the Court establishes that an anti-competitive effect must be demonstrated. [55] It elaborates on this requirement in *TeliaSonera*:

1. If the margin is negative, an effect that is at least potentially exclusionary is probable. The margin is negative when the wholesale price the undertaking charges its competitors is higher than the retail price it charges end-users. In such a situation, as-efficient-competitors would be compelled to sell at a loss.[56]
2. If the margin remains positive, it must be demonstrated that the application of that pricing practice was (by reason, for example, of reduced profitability) likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned.[57]

The second criterion means there may be a margin squeeze infringement even where (as efficient) competitors maintain the ability to competitively sell their products at prices above costs.[58] Authors have criticised this 'positive margin squeeze theory'.[59] Some argue that this theory has been overruled in the case of *Post Danmark*[60], where the ECJ defined "a zone of antitrust immunity for above cost pricing conduct under Article 102 TFEU."[61] The ECJ stated that, "as a general rule", pricing above costs is lawful for a dominant firm because

[53] Confirmed in ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 31.
[54] The ECJ elaborates on the specifics of this test in ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, paras 196-202, and reaffirms them in ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, paras 31-33.
[55] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 252, confirmed in ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 64.
[56] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 73.
[57] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 74.
[58] N. PETIT, "Price squeezes with positive margins in EU competition law: economic and legal anatomy of a zombie", *SSRN* 2014, 1.
[59] N. PETIT, "Price squeezes with positive margins in EU competition law: economic and legal anatomy of a zombie", *SSRN* 2014, 10 p. (who holds the theory is both economically and legally invalid); C. BERGQVIST and J. TOWNSEND, "Enforcing Margin Squeeze Ex Post Across Converging Telecommunications Markets", *Konkurrensverkets Working Paper Series in Law and Economics* 2015:2, 21-22 (who concur).
[60] ECJ 27 March 2012, case C-209/10, ECLI:EU:C:2012:172, *Post Danmark*, ECR 2012, 0.
[61] N. PETIT, "Price squeezes with positive margins in EU competition law: economic and legal anatomy of a zombie", *SSRN* 2014, 6.

equally efficient competitors can profitably stay in the market.[62] The deviation from this general rule in relation to margin squeeze may be explained by regulatory objectives.[63]

4.6. TELEFÓNICA

32. DETERMINE, CONFIRM, REAFFIRM – The most recent margin squeeze case before the ECJ concerned Telefónica, a Spanish telecom operator.[64] As in the *Deutsche Telekom* case, the infringer previously held the state telecommunications monopoly. The ECJ reaffirmed every important principle it established or confirmed in the *Deutsche Telekom* and *TeliaSonera* judgments.

33. STAND-ALONE ABUSE – First of all, margin squeeze constitutes an independent form of abuse. Specifically, margin squeeze is a "form of abuse distinct from that of refusal to supply, to which the criteria established in *Bronner*[65] are not applicable."[66]

34. AS-EFFICIENT-COMPETITOR TEST 2.0 REVISITED – Secondly, the appellants claimed that the General Court erred in law in its assessment of the abuse. The ECJ rejected the claim, confirming the General Court's as-efficient-competitor test:[67]

> *"[T]he appropriate test for establishing the margin squeeze consist[s] in determining whether a competitor having the same cost structure as that of the downstream activity of the vertically integrated undertaking would be in a position to offer downstream services without incurring a loss if that vertically integrated undertaking had to pay the upstream access price charged to its competitors."*[68]

35. ANTI-COMPETITIVE EFFECT – The ECJ then elaborated on the requirement of anti-competitive effect. It reiterated that the potential to exclude as efficient competitors suffices, which means that evidence of actual effects is not necessary:

> *"[I]n order to establish that a practice such as margin squeeze is abusive, that practice must have an anti-competitive effect on the market, although the effect does not necessarily have to be concrete, it being sufficient to demonstrate that there is a potential anti-*

---

[62] ECJ 27 March 2012, case C-209/10, ECLI:EU:C:2012:172, *Post Danmark*, ECR 2012, 0, para. 38; N. PETIT, "Price squeezes with positive margins in EU competition law: economic and legal anatomy of a zombie", *SSRN* 2014, 7.
[63] *Infra* nr. 92 "MARKET ENTRY".
[64] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0; ECJ 19 December 2013, case C-295/12 P, ECLI:EU:C:2013:852, *Telefónica*, ECR 2013, 0.
[65] ECJ 6 November 1998, case C-7/97, ECLI:EU:C:1998:569, *Oscar Bronner v. Mediaprint*, ECR 1998, I-7791, the landmark case establishing the criteria to assess a refusal to deal.
[66] ECJ 19 December 2013, case C-295/12 P, ECLI:EU:C:2013:852, *Telefónica*, ECR 2013, 0, para. 96.
[67] ECJ 19 December 2013, case C-295/12 P, ECLI:EU:C:2013:852, *Telefónica*, ECR 2013, 0, paras 104-105.
[68] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 194.

> *competitive effect which may exclude competitors who are at least as efficient as the dominant undertaking.*"[69]

The ECJ sets out the reason for this policy in the *Microsoft* case.[70] It would undermine the effectiveness of Art. 102 TFEU if a competition authority or claimant had to wait until harm had eventuated before taking action against anti-competitive conduct.[71] In the same sense, criminal law does not have to wait for a dead body. The objective of Art. 102 TFEU is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market.[72]

4.7. RECENT COMMISSION ACTIVITY

4.7.1. Deutsche Bahn

36. DEUTSCHE BAHN – The *Deutsche Bahn* case did not make it past the Commission, as the (alleged) infringer settled it with commitments.[73] But even in its very short preliminary assessment, the Commission closely stuck to the theory. It voiced its concern that the spread between the price charged to competitors for traction current (wholesale product) and the price charged to consumers for rail transport (retail product), may prevent equally efficient competitors to trade profitably.[74] Then, the Commission remarked that this is liable to hinder the maintenance of the degree of competition existing in the downstream market […] or the growth of that competition", thereby establishing (potential) anti-competitive effect.[75]

[69] ECJ 19 December 2013, case C-295/12 P, ECLI:EU:C:2013:852, *Telefónica*, ECR 2013, 0, para. 124.
[70] ECJ 17 September 2007, case T-201/04, ECLI:EU:T:2007:289, *Microsoft*, ECR 2007, II-3601.
[71] ECJ 17 September 2007, case T-201/04, ECLI:EU:T:2007:289, *Microsoft*, ECR 2007, II-3601, para. 561; V. ROSE and D. BAILEY (eds.), *Bellamy & Child's European Union Law of Competition*, Oxford, Oxford University Press, 2013, 788.
[72] ECJ 17 September 2007, case T-201/04, ECLI:EU:T:2007:289, *Microsoft*, ECR 2007, II-3601, para. 561.
[73] EC 18 December 2013, cases AT.39678 and AT.39731, *Deutsche Bahn I* and *II*, no integral OJ publication. Doctrine also picked up the case, see T. STEINVORTH, "*Deutsche Bahn*: Commitments End Margin Squeeze Investigation" in *Journal of European Competition Law & Practice* 2014, 628-630 and U. SCHOLZ and S. PURPS, "The Application of EU Competition Law in the Energy Sector" in *Journal of European Competition Law & Practice* 2015, 203-204. Note that the Commission settled another margin squeeze case with commitments in 2009, see EC 18 March 2009, case COMP/39.402, *RWE Gas Foreclosure*, no integral OJ publication. As in *Slovak Telekom* (*infra* title 4.7.2 "*Slovak Telekom*"), the margin squeeze was secondary to the refusal of supply.
[74] EC 18 December 2013, cases AT.39678 and AT.39731, *Deutsche Bahn I* and *II*, no integral OJ publication, paras 49-53.
[75] EC 18 December 2013, cases AT.39678 and AT.39731, *Deutsche Bahn I* and *II*, no integral OJ publication, paras 55-63 (quote from para. 57).

4.7.2. Slovak Telekom

37. SLOVAK TELEKOM – In the most recent margin squeeze case, Slovak Telekom was fined together with its parent company Deutsche Telekom.[76] The abuse consisted mainly of a refusal to supply. Additionally, Slovak Telekom abused its dominant position to commit margin squeeze. In its decision, the Commission stuck neatly (and very explicitly) to the existing case law. Dealing with margin squeeze as an independent abuse,[77] the Commission used the as-efficient-competitor test and established anti-competitive effect.[78]

4.8. COMMISSION ENFORCEMENT PRIORITY

38. COMMISSION ENFORCEMENT PRIORITY – Fulfilling the margin squeeze conditions will not necessarily lead to an investigation. Before the Commission assesses a margin squeeze, the situation must lie within its priorities. In its Guidance Paper, the Commission states it will consider margin squeeze as an enforcement priority *"if all the following circumstances are present:*
— the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,
— the refusal is likely to lead to the elimination of effective competition on the downstream market, and
— the refusal is likely to lead to consumer harm."[79]

The question, however, is whether the Commission sticks to these – at first sight pretty rigorous – criteria. Whether the input should be indispensable (criterion 1) is particularly subject to debate, and will be discussed below.[80] As for the other two criteria, the case law shows an evolution. In its decisions leading up to the publication of the enforcement priority (*Telefónica* and *RWE Gas Foreclosure*), the Commission does seem to have that in mind. Especially in *Telefónica*, it specifically mentions that the margin squeeze was capable of foreclosing competition in the retail market (criterion 2), and has harmed consumers (criterion 3).[81] However, in subsequent decisions (*Deutsche Bahn* and *Slovak Telekom*), these criteria are given no particular attention.[82] Given this evolution, the Commission enforcement priority cannot currently be relied on.

---

[76] EC 15 October 2014, case AT.39523, *Slovak Telekom*, no integral OJ publication; discussed in A. BAVASO and D. LONG, "The Application of Competition Law in the Communications and Media Sector: A Survey of 2014 Cases" in *Journal of European Competition Law & Practice* 2015, 13-14.
[77] EC 15 October 2014, case AT.39523, *Slovak Telekom*, no integral OJ publication, para. 822.
[78] EC 15 October 2014, case AT.39523, *Slovak Telekom*, no integral OJ publication, paras 223-224, 229-230 and paras 825, 1046-1109, respectively.
[79] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 81.
[80] *Infra* nr. 61-64, and especially nr. 62 "COMMISSION: OSCAR BRONNER OR 'TELEFÓNICA EXCEPTIONS'".
[81] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, para. 8, but see also EC 18 March 2009, case COMP/39.402, *RWE Gas Foreclosure*, no integral OJ publication, paras 33-36 and 36, respectively.
[82] Their consideration is virtually absent in EC 18 December 2013, cases AT.39678 and AT.39731, *Deutsche Bahn I* and *II*, no integral OJ publication, and only surfaces in EC 15 October 2014, case AT.39523, *Slovak Telekom*, no integral OJ publication, paras 1046-1183 (finding potential anti-competitive effect) and 1183 (finding a claim alleging the absence of consumer harm unfounded).

4.9. CONCLUSION

39. FROM CHAOS TO ORDER – In *National Carbonising*, its first encounter with margin squeeze, the Commission created uncertainty. The Commission then got it right in *Napier Brown*, creating legal certainty with the as-efficient-competitor test. In an apparent moment of confusion, the CFI returned to legal uncertainty in its *IPS* judgment. In a series of judgments (*Deutsche Telekom, TeliaSonera, Telefónica*), however, the Commission and the European courts adopted a rational margin squeeze theory. The Commission has not deviated from that theory in recent decisions (*Deutsche Bahn, Slovak Telekom*). Given this string of consistency, one may presume the current theory is here to stay.

5. AS-EFFICIENT-COMPETITOR TEST

40. AS-EFFICIENT-COMPETITOR TEST – As noted above, [83] the Commission defines margin squeeze as the situation where a dominant undertaking charges "a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even *an equally efficient competitor* to trade profitably in the downstream market on a lasting basis."[84]

41. COSTS AND PRICES DOMINANT UNDERTAKING – To evaluate if an equally efficient competitor can trade profitably, we first need to know its costs and prices. How do the Commission and the European courts determine these costs and prices? As a general rule, reference is made to the costs and prices of the dominant undertaking itself.[85] This approach conforms to the principle of legal certainty, as an undertaking knows its own costs and prices, but not those of its competitors. This way, the dominant undertaking can assess the lawfulness of its conduct.[86]

42. PROFITABLE TRADE – In particular, it is examined whether the dominant undertaking could offer its retail product to end-users profitably if it were obliged to pay the price it charges its downstream competitors for the wholesale product[87] If, given that cost, the dominant undertaking would be

---

[83] *Supra* nr. 18 "DEFINITION".
[84] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 80 (italics added).
[85] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 200; ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 41; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 190.
[86] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 202; ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 44; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 192.
[87] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 201; ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 42; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 191.

unable to offer its retail product profitably, that would mean competitors who might be excluded by the pricing practice cannot be considered less efficient than the dominant undertaking.[88] This risk of exclusion would be the result of distorted competition, i.e. competition that is not based solely on the respective merits of the undertakings concerned.[89]

43. COSTS AND PRICES COMPETITORS – However, the ECJ does not rule out that the costs and prices of competitors may be relevant to the examination of the pricing practice. The scope for this deviation is rather limited, which the ECJ explains by stating that "any other approach [than relying on the dominant undertaking's prices and costs] could be contrary to the general principle of legal certainty."[90]

Only where it is not possible, in particular circumstances, to refer to the costs and prices of the dominant undertaking, should the costs and prices of its competitors on the same market be examined.[91] The ECJ has designated three situations where this might particularly be the case:

1. "[W]here the cost structure of the dominant undertaking is not precisely identifiable for objective reasons";
2. "[W]here the service supplied to competitors consists in the mere use of an infrastructure the production cost of which has already been written off, so that access to such an infrastructure no longer represents a cost for the dominant undertaking which is economically comparable to the cost which its competitors have to incur to have access to it";
3. "[W]here the particular market conditions of competition dictate it, by reason, for example, of the fact that the level of the dominant undertaking's costs is specifically attributable to the competitively advantageous situation in which its dominant position places it".[92]

44. PRODUCT BUNDLES – Telecom operators offer a wide range of products with a correspondingly wide range of prices. This has lead the Commission to ask at which aggregation level the margin squeeze test should be applied: either at the highest level of detail (i.e. at the level of each individual product) or at the aggregate portfolio level (i.e. at the level of the mix of products marketed on the retail market).[93]

---

[88] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 43.

[89] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 43.

[90] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 192; ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 143.

[91] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 46; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 193.

[92] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 45.

[93] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, para. 386; EC 15 October 2014, case AT.39523, *Slovak Telekom*, no integral OJ publication, para. 831.

In *Deutsche Telekom*, the Commission and the European courts chose to assess every product (access and call services) separately.[94] Deutsche Telekom protested this method, arguing that the decisive consideration is the point of view of the end-user, and thus the bundle of products.[95] However, the Commission responded that "[t]he primary consideration here is the effect on market entry by competitors, and not the question whether the end-user regards access services and calls as a single bundle of products."[96] This is thus the more competitor-friendly approach. But as these products are virtually always bundled, it could be argued that this approach disregards the economic reality.[97]

Conversely, in *Telefónica* and *Slovak Telekom*, the Commission chose to conduct the margin squeeze test on the basis of an 'aggregated approach', i.e. on the basis of the product bundles offered by the telecom operators on the retail market.[98] This is more favourable to the incumbent, since it gives it maximal flexibility to spread the costs that are common to its retail products.[99] Entrants are forced to assess the profitability of their investment by considering the complete range of products they are able to offer.[100] But, as BERGQVIST and TOWNSEND demonstrate, this aggregated approach may give dominant undertakings an opportunity to 'muddle' the margins, thereby escaping an otherwise positive finding of margin squeeze.[101]

When will the Commission use the individual approach, and when will it use the aggregated one? This depends on whether competitors are able to profitably replicate the incumbent's product pattern.[102] So the question is: are

---

[94] EC 21 May 2003, case COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom*, OJ L 263, 14.10.2003, 9, paras 117, 119-120; CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, paras 195-197; Opinion of AG MAZÁK 22 April 2010, case C-280/08 P, ECLI:EU:C:2010:212, *Deutsche Telekom*, ECR 2010, I-9555, para. 55; ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, 226.

[95] EC 21 May 2003, case COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom*, OJ L 263, 14.10.2003, 9, para. 117.

[96] EC 21 May 2003, case COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom*, OJ L 263, 14.10.2003, 9, para. 127.

[97] R. O'DONOGHUE, "Regulating the Regulated: *Deutsche Telekom v. European Commission*" in *Global Competition Policy* 2008, 16; G. HAY and K. MCMAHON, "The diverging approach to price squeezes in the United States and Europe" in *Journal of Competition Law & Economics* 2012, 274-275.

[98] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, paras 386-388; EC 15 October 2014, case AT.39523, *Slovak Telekom*, no integral OJ publication, paras 831-842.

[99] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, para. 388; EC 15 October 2014, case AT.39523, *Slovak Telekom*, no integral OJ publication, paras 832.

[100] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, para. 388.

[101] C. BERGQVIST and J. TOWNSEND, "Enforcing Margin Squeeze Ex Post Across Converging Telecommunications Markets", *Konkurrensverkets Working Paper Series in Law and Economics* 2015:2, 24-25.

[102] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, para. 388; EC 15 October 2014, case AT.39523, *Slovak Telekom*, no integral OJ publication, para. 832; in the same sense, but without reference to the Commission practice, Z. BIRO, G. HOUPIS and M. HUNT, "Applying Margin Squeeze in Telecommunications: Some Economic Insights" in *Journal of European Competition Law & Practice* 2011, 590-591.

competitors able to offer what the incumbent offers? Since the unbundling of the local loop, this is technically always the case.[103] It may be inferred that, in the future, the Commission will only compare product bundles.

6. UNDERTAKINGS SUSCEPTIBLE TO MARGIN SQUEEZE

45. INTRODUCTION – By looking for common traits, this chapter tries to put together a profile of the companies engaging in margin squeeze. The question is then raised why certain sectors are more susceptible to margin squeeze than others.

6.1. COMMON TRAITS

46. HOU'S HYPOTHESIS – HOU indicates that "[t]he limited number of case laws seems not to suggest that every vertically integrated dominant undertaking could engage in price squeeze, but that only some can."[104] He presents the thesis that to engage in a margin squeeze, an undertaking must

1. have at least super-dominance or quasi-monopoly on the upstream market;
2. be under an obligation to supply downstream competitors; and
3. be dominant on the downstream market.[105]

This thesis is attractive to vertically integrated undertakings, as it would allow them to assess their conduct with more certainty.

47. THE ECJ'S REALITY – However, case law has proven this thesis wrong. But while HOU's profile is legally incorrect, it may have practical merit.

1. At least super-dominance on the upstream market. Dominance on the upstream market is a minimum requirement for margin squeeze liability. Evidently, there needs to be a dominant position to be abused. However, the ECJ does not require super-dominance. In that regard, it has stated that "the degree of dominance in the market concerned is not relevant".[106] Then again, an undertaking with a 40% market share cannot have an indispensable input (*infra 2*), unless other actors face significant capacity constraints. In the same sense, other authors argue that the dominant position of the incumbent must be unassailable for the foreclosure to be effective.[107]

---

[103] EC 15 October 2014, case AT.39523, *Slovak Telekom*, no integral OJ publication, para. 836.
[104] L. HOU, "Some aspects of price squeeze within the EU: a case law analysis" in *European Competition Law Review* 2011, 2.
[105] L. HOU, "Some aspects of price squeeze within the EU: a case law analysis" in *European Competition Law Review* 2011, 5-6.
[106] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 82.
[107] L. COLLEY and S. BURNSIDE, "Margin Squeeze Abuse" in *European Competition Law Journal* 2006, 202-203; C. BERGQVIST and J. TOWNSEND, "Enforcing Margin Squeeze Ex Post Across Converging Telecommunications Markets", *Konkurrensverkets Working Paper Series in Law and Economics* 2015:2, 5.

2. Obligation to supply downstream competitors. The ECJ does not require an obligation to supply to find a dominant undertaking liable for margin squeeze,[108] but notes that, without an indispensable input, there may be no anti-competitive effect.[109] Moreover, the Commission requires the input to be essential for margin squeeze to be an enforcement priority (at least formally).[110] Consequently, the Commission concedes that one common feature in margin squeeze cases has been the objective necessity of that input for effective competition on the downstream market.[111] The relation between margin squeeze and refusal to supply will be discussed extensively later on in this paper.[112]

3. Dominance on the downstream market. The ECJ has held that dominance on the downstream market is not a condition for margin squeeze liability.[113] However, the European courts do require margin squeeze to have an anti-competitive effect.[114] When the vertically integrated undertaking is not dominant on the downstream market, exclusion of competitors on that market, and thus anti-competitive effect, seems less likely.

6.2. SUSCEPTIBLE SECTORS

48. TELECOMMUNICATIONS SECTOR – Four out of the eight previously discussed cases[115] originated in the telecom industry.[116] BIRO, HOUPIS and HUNT find the reason for this in the EU liberalisation model for the telecommunications market.[117] This liberalisation model reflects the concept of a 'ladder of investment', where access to different levels ('steps') of an incumbent's network has been mandated. Entrants are expected to climb the

---

[108] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, paras 54-59; ECJ 19 December 2013, case C-295/12 P, ECLI:EU:C:2013:852, *Telefónica*, ECR 2013, 0, paras 180-182 and 184; *contra*, Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, paras 8-33 (*infra* title 7.4 "Constructive refusal to supply").

[109] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, paras 69-72.

[110] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 81 (*supra* title 4.8 "Commission enforcement priority").

[111] OECD, Roundtable on Margin Squeeze, DAF/COMP (2009) 36, 256.

[112] *Infra* title 7.4 "Constructive refusal to supply".

[113] ECJ 19 December 2013, case C-295/12 P, ECLI:EU:C:2013:852, *Telefónica*, ECR 2013, 0, paras 146 and 185; HOU recognised that dominance on the downstream market was a questionable criterion, but held that at least the ability to manipulate the price on the downstream market was required, see L. HOU, "Some aspects of price squeeze within the EU: a case law analysis" in *European Competition Law Review* 2011, 9-10.

[114] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 252; ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 64; ECJ 19 December 2013, case C-295/12 P, ECLI:EU:C:2013:852, *Telefónica*, ECR 2013, 0, para. 124.

[115] Broad interpretation of "cases", also including preliminary questions.

[116] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555; ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527; ECJ 19 December 2013, case C-295/12 P, ECLI:EU:C:2013:852, *Telefónica*, ECR 2013, 0.

[117] Z. BIRO, G. HOUPIS and M. HUNT, "Applying Margin Squeeze in Telecommunications: Some Economic Insights" in *Journal of European Competition Law & Practice* 2011, 590.

ladder over time by undertaking more significant investments. Regulation has therefore sought to promote downstream competition by allowing rivals to rely on upstream inputs based on incumbents' networks.[118] This obligation to supply upstream inputs to downstream competitors creates the perfect climate for margin squeeze.[119]

The Commission also concedes that "margin squeeze most often occurs where there are dominant vertically integrated firms which were previously monopolists and which control access to facilities which are not easily replicable i.e. legacy infrastructure (such as in telecommunications)."[120] In the same sense, the OECD concludes from its survey that many of the margin squeeze cases arise in newly liberalised sectors.[121] Aside from telecommunications, these include the water sector, railways, postal services, pharmaceuticals, pay television, gasoline and funeral services.[122]

7. COMPETITION LAW APPROACH TO MARGIN SQUEEZE

49. INTRODUCTION – In this chapter, we delve deeper into the competition law approach to margin squeeze. As discussed earlier,[123] the ECJ conceives margin squeeze as a stand-alone abuse. But are there other possibilities? And what can we learn from the US approach?

7.1. ATLANTIC DIVIDE

50. EUROPEAN UNION – Although different undertakings may be involved in case of a margin squeeze[124], these undertakings will usually constitute a single economic entity.[125] This way, margin squeeze must be examined under Art. 102 TFEU, prohibiting an abuse of a dominant position of said economic entity as a whole. The next question is under which heading of Art. 102 TFEU the margin squeeze belongs. Authors and judges have held that margin squeeze is a form of price discrimination, predatory pricing, constructive refusal to deal… Or is the ECJ right by conceiving margin squeeze as a stand-alone abuse?[126]

---

[118] Z. BIRO, G. HOUPIS and M. HUNT, "Applying Margin Squeeze in Telecommunications: Some Economic Insights" in *Journal of European Competition Law & Practice* 2011, 590.
[119] The same view is held by D. GERADIN and R. O'DONOGHUE, "The concurrent application of competition law and regulation: the cases of margin squeeze abuses in the telecommunications sector" in *Journal of Competition Law & Economics* 2005, 360 and 409.
[120] OECD, Roundtable on Margin Squeeze, DAF/COMP (2009) 36, 295.
[121] OECD, Roundtable on Margin Squeeze, DAF/COMP (2009) 36, 8.
[122] OECD, Roundtable on Margin Squeeze, DAF/COMP (2009) 36, 8.
[123] *Supra* nr. 29, 33, 36-37; *infra* title 7.5 "Stand-alone abuse".
[124] The dominant undertaking can sell directly on the downstream market or through one or more of its subsidiaries.
[125] The parent company and its subsidiaries qualify as one economic entity, see CFI 10 July 1990, case T-51/89, ECLI:EU:T:1990:41, *Tetra Pak I*, ECR 1990, II-309.
[126] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 183; Advocate General MAZÁK shares the same point of view, see Opinion of AG

51. UNITED STATES – US antitrust law may also provide insight as to the position of margin squeeze in competition law, as it conceives margin squeeze differently than European law. The US Supreme Court requires a refusal to deal or predatory pricing to establish a margin squeeze. The Supreme Court articulated its standpoint very clearly in the *linkLine* judgment:

> *"The problem, however, is that amici have not identified any independent competitive harm caused by price squeezes above and beyond the harm that would result from a duty-to-deal violation at the wholesale level or predatory pricing at the retail level. […] To the extent a monopolist violates one of these doctrines, the plaintiffs have a remedy under existing law. We do not need to endorse a new theory of liability to prevent such harm."*[127]

Evidently, this judgment has not escaped criticism either.[128]

7.2. PRICE DISCRIMINATION

52. ABUSE – Art. 102, c) TFEU prohibits price discrimination, and describes this practice as "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." Where the dominant undertaking charges a higher input price to its competitors than its downstream subsidiary, this may constitute anti-competitive price discrimination.[129] The European institutions have looked at possible[130] margin squeezes through the lens of price discrimination numerous times.[131]

MAZÁK 22 April 2010, case C-280/08 P, ECLI:EU:C:2010:212, *Deutsche Telekom*, ECR 2010, I-9555, para. 44; ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 31; ECJ 19 December 2013, case C-295/12 P, ECLI:EU:C:2013:852, *Telefónica*, ECR 2013, 0, para. 96.

[127] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 15.

[128] To get a sense of both ends of the spectrum, see W. CARLTON, "Should "price squeeze" be a recognized form of anticompetitive conduct?" in *Journal of Competition Law & Economics* 2008, 271-278 (who is against any theory at all) versus E. HOVENKAMP and H. HOVENKAMP, "The Viability of Antitrust Price Squeeze Claims" in *Arizona Law Review* 2009, 273-304 (who believe the theory should be broadened) and E. MERIWETHER, "Putting the "Squeeze" on Refusal to Deal Cases: Lessons from Trinko and LinkLine" in *Antitrust Law Journal* 2010, 65-74 (who also criticises the narrow avenues claimants are left with under the current theory).

[129] G. FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 257; N. DUNNE, "Margin squeeze: theory, practice, policy – part I" in *European Competition Law Review* 2012, 3.

[130] Meaning that the situation under investigation closely resembled a margin squeeze. The European institutions did not always label it that way, but the doctrine was often less prudent. For an overview, see D. GERADIN and N. PETIT, "Price Discrimination under EC Competition Law: The Need for a case- by-case Approach" in *The Global Competition Law Centre Working Papers Series* 2005, 29-32.

[131] CFI 21 October 1997, case T-229/94, ECLI:EU:T:1997:155, *Deutsche Bahn,* ECR 1997, II-1689; interestingly, Deutsche Bahn recently ended a similar case with commitments, see EC 18 December 2013, cases AT.39678 and AT.39731, *Deutsche Bahn I* and *II*, no integral OJ publication (*supra* title 4.7 "Deutsche Bahn"); EC 18 March 2009, case COMP/39.402, *RWE Gas Foreclosure*, no integral OJ publication; see also EC, Press Release, "Settlement reached with Belgacom on the publication of telephone directories - ITT withdraws complaint", Brussels, 11 April 1997, and EC 20 March 2001, case COMP/35.141, *Deutsche Post*, OJ L 125, 05.05.2001, 27.

53. RECENT EXAMPLES – In the case of *RWE Gas Foreclosure*, the dominant undertaking, RWE, discriminated between its own downstream operations and its competitors through a system of rebates.[132] These – high – rebates were theoretically also available to competitors, but in practice almost only RWE benefited from its rebate scheme. This way, RWE squeezed its competitors' margins.[133] In the aforementioned *Deutsche Bahn* case, rebates were also at the heart of the margin squeeze.[134] Again only in practice, these rebates discriminated between Deutsche Bahn's own downstream operations and its competitors.[135] The Commission concluded that "the pricing system […], including its discounts, fulfils the conditions necessary for finding a margin squeeze."[136]

54. SHORTFALLS – There are, however, a number of objections against this theory. Firstly, not every vertically integrated undertaking uses a subsidiary. If the vertically integrated undertaking does not operate through such a subsidiary, but sells directly on the downstream market, there can be no price discrimination. Secondly, vertically integrated undertakings that do work with subsidiaries can easily circumvent the price discrimination assessment. The dominant undertaking may choose to charge its downstream subsidiaries and its downstream competitors equally. This way, profits are made at the wholesale level and not at the retail level. This loophole can be closed by combining price discrimination with predatory pricing. A third counterargument may be the difficulty of establishing price discrimination.[137]

7.3. PREDATORY PRICING

55. ABUSE – When the dominant undertaking charges its downstream subsidiaries and competitors equally, it can still drive competitors from the market by taking advantage of its vertical integration. The downstream subsidiaries can price the goods or services below the transfer price they pay.[138] This conduct would be captured by the abuse of predatory pricing.[139]

---

[132] EC 18 March 2009, case COMP/39.402, *RWE Gas Foreclosure*, no integral OJ publication, para. 34.

[133] EC 18 March 2009, case COMP/39.402, *RWE Gas Foreclosure*, no integral OJ publication, para. 34.

[134] EC 18 December 2013, cases AT.39678 and AT.39731, *Deutsche Bahn I* and *II*, no integral OJ publication, paras 22-26 (*supra* title 4.7 "Deutsche Bahn").

[135] EC 18 December 2013, cases AT.39678 and AT.39731, *Deutsche Bahn I* and *II*, no integral OJ publication, para. 25.

[136] EC 18 December 2013, cases AT.39678 and AT.39731, *Deutsche Bahn I* and *II*, no integral OJ publication, para. 42.

[137] R. O'DONOGHUE and J. PADILLA, *The Law & Economics of Article 102 TFEU*, Oxford, Hart Publishing, 2013, 339; price discrimination is even absent from the Commission's enforcement priorities (Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20), as remarked by PETIT, see N. PETIT, "Price squeezes with positive margins in EU competition law: economic and legal anatomy of a zombie", *SSRN* 2014, 9.

[138] D. PETZOLD, "It Is All Predatory Pricing: Margin Squeeze Abuse and the Concept of Opportunity Costs in EU Competition Law" in *Journal of European Competition Law & Practice* 2015, 2-3, where he gives an illuminating example.

[139] ECJ 3 July 1991, case C-62/86, ECLI:EU:C:1991:286, *AKZO Chemie*, ECR 1991, I-3359, paras 71-72 (*supra* nr. 17 "*AKZO CHEMIE*: CRITERIA").

Exceptionally, however, this below-cost pricing does not mean the undertaking has to suffer losses.[140]

56. US AND EU JURISPRUDENCE – The US Supreme Court requires predation at the retail level (or a duty to deal at the wholesale level) to establish a price squeeze.[141] It must be noted that in the *IPS* case, the CFI also looked for predation at the wholesale and retail level.[142] However, the European courts have abandoned this kind of test in their recent jurisprudence. In *Deutsche Telekom*, for example, the ECJ decided that it was not necessary to establish "that the wholesale prices for local loop access services or retail prices for end-user access services were in themselves abusive on account of their excessive or predatory nature, as the case may be."[143]

57. SHORTFALLS – The predation approach has a lot of advocates, including PETZOLD[144], COLLEY & BURNSIDE[145], SIDAK[146], CARLTON[147], and FAELLA & PARDOLESI[148]. Predatory pricing is generally seen as the most adequate alternative for a separate theory of margin squeeze abuse. However, seeing margin squeeze (exclusively) as a case of predation has its deficiencies.

Price identification. The most evident shortfall is that this theory does not cover the situation where the vertically integrated undertaking does not operate through a subsidiary. As there may be no internal transfer charges in a single vertically integrated entity, identifying a predatory price may turn out to be impossible.[149]

Price discrimination. The predation theory does cover the situation where the dominant undertaking charges a higher input price to its competitors and a lower price to its subsidiaries. When the subsidiaries then charge a price above the costs they bear, there is no predation.[150] This price can still be lower than

---

[140] *Infra* nr. 57 "SHORTFALLS".
[141] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 10-12, with reference to Supreme Court of the United States 21 June 1993, docket no. 92-466, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*.
[142] CFI 30 November 2000, case T-5/97, ECLI:EU:T:2000:278, *Industries des Poudres Sphériques (IPS)*, ECR 2000, II-3755, para. 179.
[143] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 183.
[144] D. PETZOLD, "It Is All Predatory Pricing: Margin Squeeze Abuse and the Concept of Opportunity Costs in EU Competition Law" in *Journal of European Competition Law & Practice* 2015, 5 p.
[145] L. COLLEY and S. BURNSIDE, "Margin Squeeze Abuse" in *European Competition Law Journal* 2006, 185-210.
[146] J. SIDAK, "Abolishing the Price Squeeze as a Theory of Antitrust Liability" in *Journal of Competition Law & Economics* 2008, 279-309.
[147] W. CARLTON, "Should "price squeeze" be a recognized form of anticompetitive conduct?" in *Journal of Competition Law & Economics* 2008, 271-278.
[148] G. FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 255-284.
[149] G. FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 259.
[150] Above-cost pricing would not pass the predation test, as the ECJ requires an undertaking to charge prices at least below the total average cost of the undertaking in order to establish predation,

the price downstream competitors have to charge to avoid losses. However, as noted above,[151] this situation is covered by the abuse of price discrimination (Art. 102, c) TFEU). FAELLA and PARDOLESI agree that "[i]f there is neither downstream predation nor upstream discrimination, there is no risk of exclusion of equally efficient competitors."[152] They notice that "we are then left with the possibility that the upstream price to non-integrated rivals is excessive under Article 102(a) TFEU, which would be true whether or not there were a separate abuse of margin squeeze."[153] Excessive pricing is more often mentioned to supplement a margin squeeze theory.[154]

Costless predation. The real difference between predatory pricing and margin squeeze becomes apparent when one looks at the long-term viability of these strategies. When engaging in predatory pricing, a dominant undertaking necessarily suffers losses in the short term, to then recoup these losses after driving competitors off the market.[155] But margin squeeze does not require such a trade-off.[156] The losses that the subsidiary incurs by selling below transfer price are compensated by the profits of the parent company. In the end, the group balance is still positive, which is why this practice is called 'costless predation'.[157] So, while this strategy can remain profitable, it can drive as efficient competitors off the market, as they incur losses they cannot recover from a wholesale level. This then opens the door for price elevation.

---

see ECJ 3 July 1991, case C-62/86, ECLI:EU:C:1991:286, *AKZO Chemie*, ECR 1991, I-3359, paras 71-72 (*supra* nr. 17 "*AKZO CHEMIE*: CRITERIA").

[151] *Supra* nr. 54 "SHORTFALLS".

[152] G. FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 259.

[153] G. FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 258-259.

[154] D. GERADIN and R. O'DONOGHUE, "The concurrent application of competition law and regulation: the cases of margin squeeze abuses in the telecommunications sector" in *Journal of Competition Law & Economics* 2005, 365-366; M. RAUBER and N. DELLAFIOR, "Case C-52/09, Konkurrentsverket v TeliaSonera Sverige AB, [2011] ECR I-527 - confirming an inappropriate assessment framework for margin squeeze" in *European Competition Law Review* 2013, 4.

[155] Recoupment (or the chance thereof) is not a strict legal requirement, see ECJ 14 November 1996, case C-333/94 P, ECLI:EU:C:1996:436, *Tetra Pak II*, ECR I-5951, para. 44. However, it may still be required in fact, see L. COLLEY and S. BURNSIDE, "Margin Squeeze Abuse" in *European Competition Law Journal* 2006, 190. On why it should be required, see P. SICILIANI, "Exclusionary pricing and consumers harm: the European Commission's practice in the DSL market" in *Journal of Competition Law & Economics* 2007, 255.

[156] D. GERADIN and R. O'DONOGHUE, "The concurrent application of competition law and regulation: the cases of margin squeeze abuses in the telecommunications sector" in *Journal of Competition Law & Economics* 2005, 367; L. BRAVO and P. SICILIANI, "Exclusionary pricing and consumers harm: the European Commission's practice in the DSL market" in *Journal of Competition Law & Economics* 2007, 248; D. PETZOLD, "It Is All Predatory Pricing: Margin Squeeze Abuse and the Concept of Opportunity Costs in EU Competition Law" in *Journal of European Competition Law & Practice* 2015, 2-3, where he gives an illuminating example. The OECD describes a similar process, see OECD, Roundtable on Margin Squeeze, DAF/COMP (2009) 36, 9. Conversely, COLLEY & BURNSIDE argue margin squeeze does require (incremental) losses, see L. COLLEY and S. BURNSIDE, "Margin Squeeze Abuse" in *European Competition Law Journal* 2006, 2.

[157] Legally, 'costless predation' is an oxymoron, because when an undertaking does not engage in below-cost pricing, it does not pass the ECJ's predation test, see ECJ 3 July 1991, case C-62/86, ECLI:EU:C:1991:286, *AKZO Chemie*, ECR 1991, I-3359, paras 71-72 (*supra* nr. 17 "*AKZO CHEMIE*: CRITERIA").

58. OPPORTUNITY COSTS – In any case, a theory of margin squeeze based solely on predation seems unworkable. PETZOLD disagrees. In line with the US Supreme Court, he argues convincingly that "the category of abuse 'margin squeeze' is redundant as there is no independent harm to competition that would exceed the harm which can be remedied under the existing case law governing predatory pricing abuses."[158] PETZOLD recognises that a margin squeeze allows for costless predation, but instead of filling this gap with the abuse of price discrimination, he factors opportunity costs in the predatory pricing assessment.[159]

7.4. CONSTRUCTIVE REFUSAL TO SUPPLY

59. ABUSE – In principle, undertakings are free to decide whom they deal with. However, a refusal to supply may be in breach of Art. 102 TFEU. The strict conditions of this abuse were set out in the case of *Oscar Bronner*.[160] The Commission notes that a refusal typically becomes problematic when the dominant undertaking competes on the downstream market with the buyer whom it refuses to supply.[161] For a finding of abuse, an actual refusal is not required. A 'constructive refusal', for example imposing unreasonable conditions in return for the supply, may also qualify.[162] This closely resembles margin squeeze.

60. US: NO DUTY TO DEAL, NO PROBLEM – The US Supreme Court requires an antitrust duty to deal at the wholesale level (or predatory pricing at the retail level) in order to condemn an alleged margin squeeze. In *linkLine* it held that "if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous."[163] The OECD takes account of a number of similar submissions pointing out that "it does not make sense to impose potential liability for engaging in a margin squeeze when the integrated firm has no duty to deal, since, in this case, the firm could avoid liability simply

[158] D. PETZOLD, "It Is All Predatory Pricing: Margin Squeeze Abuse and the Concept of Opportunity Costs in EU Competition Law" in *Journal of European Competition Law & Practice* 2015, 1.

[159] D. PETZOLD, "It Is All Predatory Pricing: Margin Squeeze Abuse and the Concept of Opportunity Costs in EU Competition Law" in *Journal of European Competition Law & Practice* 2015, 3-4.

[160] ECJ 6 November 1998, case C-7/97, ECLI:EU:C:1998:569, *Oscar Bronner v. Mediaprint*, ECR 1998, I-7791, paras 40-46.

[161] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, para. 209; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 76.

[162] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 79.

[163] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 9, with reference to Supreme Court of the United States 13 January 2004, docket no. 02–682, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*. Note that it has to be an *antitrust* duty to deal; a duty to deal imposed by the regulator does not qualify. Besides *Trinko*, the landmark case on refusal to deal in the US is Supreme Court of the United States 19 June 1985, docket no. 84-510, *Aspen Skiing v. Aspen Highlands Skiing*.

by refusing to sell the essential input at all."[164] Because of its simple logic, this argument seems hard to counter.

61. EU: EVOLUTION – In the EU, the relation between margin squeeze and refusal to supply has been heavily debated. The Commission, the Advocate General and the European courts all weighed in on the issue, each with a different point of view. Evidently, the doctrine chose a side. The question was: does margin squeeze require (i) the input to be indispensable (*Oscar Bronner*); (ii) a regulatory obligation to supply?

62. COMMISSION: OSCAR BRONNER OR 'TELEFÓNICA EXCEPTIONS' – The early case law did not explicitly discuss the relationship between margin squeeze and refusal to supply. However, both *Napier Brown* and *IPS* show a close connection between the two abuses.[165] In its Guidance Paper, the Commission stated that, for it to pursue a case, the practice would have to meet three criteria that effectively mirror those established in *Oscar Bronner*.[166] Thus, the input would have to be indispensable.

When the issue came up in *Telefónica*, however, the Commission took the view that the particular circumstances of the case fundamentally differed from those in *Oscar Bronner*.[167] It held that the *Oscar Bronner* test must not be met, as (i) Telefónica was under a regulatory duty to supply the wholesale product; and (ii) the investment in Telefónica's infrastructure had been undertaken while special or exclusive rights shielded it from competition.[168] These two '*Telefónica* exceptions' also made their way into the Guidance Paper.[169]

63. AG MAZÁK: OSCAR BRONNER OR REGULATORY OBLIGATION TO SUPPLY – In *TeliaSonera*, Advocate General MAZÁK wrote at length on the relation between margin squeeze and refusal to supply.[170] He argues:

---

[164] OECD, Roundtable on Margin Squeeze, DAF/COMP (2009) 36, 8.

[165] EC 18 July 1988, case IV/30.178, *Napier Brown – British Sugar*, OJ L 284, 19.10.1988, 41 (where the Commission found both a margin squeeze and a refusal to supply); CFI 30 November 2000, case T-5/97, ECLI:EU:T:2000:278, *Industries des Poudres Sphériques (IPS)*, ECR 2000, II-3755 (where the availability of alternative resources was an important reason to reject the margin squeeze allegation).

[166] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 81.

[167] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, para. 302.

[168] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, paras 303-309.

[169] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.02.2009, 7-20, para. 82. These '*Telefónica* exceptions' have been criticised, see G. FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 273; D. GERADIN, "Refusal to supply and margin squeeze: A discussion of why the "*Telefónica* Exceptions" are Wrong" in *TILEC Discussion Paper Series* 2011, 10 p; H. AUF'MKOLK, "The 'Feedback Effect' of Applying EU Competition Law to Regulated Industries: Doctrinal Contamination in the Case of Margin Squeeze" in *Journal of European Competition Law & Practice* 2012, 155.

[170] Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, paras 8-33; R. SUBIOTTO, F. MALONE, D. LITTLE, C. DE BROSSES and C.

"[A] margin squeeze is abusive only where the dominant undertaking has a regulatory obligation to supply the input in question or where that input is indispensable. If the dominant undertaking's input is not indispensable, for instance, if there are substitutes available, it cannot be the subject of an abusive margin squeeze, because competitors do not need to acquire it, either at the dominant undertaking's price or indeed at all."[171]

Thus, MAZÁK requires either (i) the indispensability of the input, in line with *Oscar Bronner*;[172] or (ii) a regulatory obligation to supply. He contends that there is no independent competitive harm caused by the margin squeeze above and beyond the harm that would result from a duty-to-deal violation at the wholesale level.[173]

MAZÁK's logic to this position is remarkably similar to that of the US Supreme Court:

"If a dominant undertaking could lawfully have refused to provide the products in question, then it should not be reproached for providing those products at conditions which its competitors may consider not advantageous."[174]

MAZÁK warns that, if margin squeeze were conceived any other way, there would be a number of negative implications. First of all, dominant undertakings' willingness to invest would be reduced.[175] Secondly, they would be likely to raise end-user prices lest they be charged with a margin squeeze.[176] Thirdly, the dominant undertakings would simply choose not to deal with competitors.[177] MAZÁK also recommends that Art. 102 TFEU should not be used to protect the position of particular competitors.[178] It must be noted that a great number of authors endorse the same view.[179]

SUCIU, "Recent EU Case Law Developments: Article 102 TFEU" in *Journal of European Competition Law & Practice* 2011, 144-145.

[171] Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, para. 11.

[172] Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, paras 8-33 include multiple references to ECJ 6 November 1998, case C-7/97, ECLI:EU:C:1998:569, *Oscar Bronner v. Mediaprint*, ECR 1998, I-7791, paras 40-46.

[173] Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, para. 16.

[174] Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, para. 21; compare with Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 9.

[175] Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, paras 21 and 23.

[176] Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, para. 21.

[177] Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, para. 23.

[178] Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, para. 30.

[179] D. GERADIN and R. O'DONOGHUE, "The concurrent application of competition law and regulation: the cases of margin squeeze abuses in the telecommunications sector" in *Journal of Competition Law & Economics* 2005, 396-399; R. O'DONOGHUE, "Regulating the Regulated: *Deutsche Telekom v. European Commission*" in *Global Competition Policy* 2008, 20; G. FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 267-273; D. GERADIN, "Refusal to supply and margin squeeze: A discussion of why the "*Telefónica*

64. ECJ: DISTINCT ABUSES – The ECJ, however, did not agree. Firstly, it held that his interpretation of *Oscar Bronner* would "amount to a requirement that before any conduct of a dominant undertaking in relation to its terms of trade could be regarded as abusive the conditions to be met to establish that there was a refusal to supply would in every case have to be satisfied".[180] In other words, every abuse would require a refusal to supply. This would make Art. 102 TFEU ineffective.[181] Secondly, the presence of any regulatory obligation to supply is also irrelevant.[182] In *Telefónica*, the ECJ reiterated that margin squeeze is a "form of abuse distinct from that of refusal to supply, to which the criteria established in *Bronner* are not applicable."[183]

7.5. STAND-ALONE ABUSE

65. INDEPENDENT ABUSE – Notwithstanding the doctrinal opposition and the differing US approach,[184] the ECJ has decided on several occasions that margin squeeze constitutes an independent form of abuse.[185] The ECJ holds that a margin squeeze results from the unfairness of the spread between an undertaking's wholesale and retail prices, and not of the level of those prices as such.[186] It clarifies that a margin squeeze may be the result not only of an

---

Exceptions" are Wrong" in *TILEC Discussion Paper Series* 2011, 10 p; H. AUF'MKOLK, "The 'Feedback Effect' of Applying EU Competition Law to Regulated Industries: Doctrinal Contamination in the Case of Margin Squeeze" in *Journal of European Competition Law & Practice* 2012, 156-157; N. DUNNE, "Margin squeeze: theory, practice, policy – part II" in *European Competition Law Review* 2012, 7-8; G. HAY and K. MCMAHON, "The diverging approach to price squeezes in the United States and Europe" in *Journal of Competition Law & Economics* 2012, 282-285; M. HARKER, "EU competition law as a tool for dealing with regulatory failure: the broadband and margin squeeze cases" in *Journal of Business Law* 2013, 5-8; M. RAUBER and N. DELLAFIOR, "Case C-52/09, Konkurrentsverket v TeliaSonera Sverige AB, [2011] ECR I-527 - confirming an inappropriate assessment framework for margin squeeze" in *European Competition Law Review* 2013, 4-6; C. BERGQVIST and J. TOWNSEND, "Enforcing Margin Squeeze Ex Post Across Converging Telecommunications Markets", *Konkurrensverkets Working Paper Series in Law and Economics* 2015:2, 5 and 15.

[180] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 58.

[181] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 58.

[182] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 59.

[183] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 180; ECJ 19 December 2013, case C-295/12 P, ECLI:EU:C:2013:852, *Telefónica*, ECR 2013, 0, para. 96.

[184] Apart from the aforementioned authors and the US Supreme Court, it is worth remarking that the Body of European Regulators for Electronic Communications (formerly European Regulators Group) does not conceive margin squeeze as an independent abuse either, see European Regulators Group, Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework, ERG (06) 33, May 2006, 38.

[185] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 183; AG MAZÁK shares the same point of view, see Opinion of AG Mazák 22 April 2010, case C-280/08 P, ECLI:EU:C:2010:212, *Deutsche Telekom*, ECR 2010, I-9555, para. 44; ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 31; ECJ 19 December 2013, case C-295/12 P, ECLI:EU:C:2013:852, *Telefónica*, ECR 2013, 0, para. 96.

[186] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 167.

abnormally low price in the retail market, but also of an abnormally high price in the wholesale market.[187]

66. *RATIO* – The ECJ does not, however, explain (explicitly) why it recognises margin squeeze as a separate violation of Art. 102 TFEU. DUNNE argues that a stand-alone margin squeeze offence addresses the impact of vertical integration of the dominant undertaking in a way that assessing wholesale or retail prices separately for evidence of discrete abuses cannot.[188] FAELLA & PARDOLESI also argue that vertical integration, and the possible lack of internal transfer charges that comes with it, makes existing abuses difficult to observe.[189] That is why a separate analytical framework may be required. These suggestions are consistent with the earlier finding of this paper that no existing abuse can fully capture margin squeeze.[190] The independence of margin squeeze as an abuse may also be explained by the objective of market entry.[191]

67. SHORTFALLS – To which possible shortfalls is an independent (and broad) margin squeeze theory susceptible? The most often voiced critiques can be summarised as follows:

1. The abuse may protect the welfare of competitors instead of the welfare of consumers;[192]
2. The abuse may reduce undertakings' willingness to invest;[193]

---

[187] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 98.

[188] N. DUNNE, "Margin squeeze: theory, practice, policy – part II" in *European Competition Law Review* 2012, 1.

[189] G. FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 266.

[190] See "7.2 Price discrimination", "7.3 Predatory pricing" and "7.4 Constructive refusal to deal". The same conclusion is drawn in L. BRAVO and P. SICILIANI, "Exclusionary pricing and consumers harm: the European Commission's practice in the DSL market" in *Journal of Competition Law & Economics* 2007, 249-250.

[191] *Infra* title 7.6.1 "Price competition" and title 8.3.3 "Taking into account sector-specific regulation in the European Union".

[192] Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, para. 30; J. SIDAK, "Abolishing the Price Squeeze as a Theory of Antitrust Liability" in *Journal of Competition Law & Economics* 2008, 294-295; G. FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 265; N. DUNNE, "Margin squeeze: theory, practice, policy – part II" in *European Competition Law Review* 2012, 1 and 6 G. HAY and K. MCMAHON, "The diverging approach to price squeezes in the United States and Europe" in *Journal of Competition Law & Economics* 2012, 296; M. HARKER, "EU competition law as a tool for dealing with regulatory failure: the broadband and margin squeeze cases" in *Journal of Business Law* 2013, 13; M. RAUBER and N. DELLAFIOR, "Case C-52/09, Konkurrentsverket v TeliaSonera Sverige AB, [2011] ECR I-527 - confirming an inappropriate assessment framework for margin squeeze" in *European Competition Law Review* 2013, 6-7.

[193] Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, para. 21; FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 271-273; N. DUNNE, "Margin squeeze: theory, practice, policy – part I" in *European Competition Law Review* 2012, 2; G. HAY and K. MCMAHON, "The diverging approach to price squeezes in the United States and Europe" in *Journal of Competition Law & Economics* 2012, 261; M. COLANGELO, "The interface between competition rules and sector-specific regulation in the telecommunications sector: evidence from recent EU margin squeeze cases" in *Competition and Regulation in Network Industries* 2013, 236; M. HARKER, "EU competition law as a tool for dealing with regulatory failure: the broadband and

3. Undertakings (that are not under an obligation to supply) may stop providing the upstream input to avoid liability;[194]
4. Undertakings may increase retail prices to avoid liability;[195]
5. Competition law is used to solve a regulatory issue.[196]

While these critiques will not be systematically discussed in this paper, most of them are given elaborate treatment.[197]

7.6. POLICY CONSIDERATIONS

68. INTRODUCTION – Examining the margin squeeze jurisprudence of the ECJ and the US Supreme Court, two policy considerations stand out: price competition and legal certainty. On both topics, the courts hold a different view. As these different views underlie their differing legal approaches, they deserve to be discussed in more detail here.

7.6.1. Price competition

69. US: LOW RETAIL PRICES – The US Supreme Court and the ECJ approach price competition differently. The United States is known to have a relatively free market economy. This does seem to hold true when it comes to conceiving margin squeeze as a competition law infringement. As noted earlier,[198] the US Supreme Court requires either a duty to deal or predatory pricing. One of its arguments is the following:

---

margin squeeze cases" in *Journal of Business Law* 2013, 13; *contra*, EC, Memo, "Antitrust: Commission decision against Telefónica - frequently asked questions", Brussels, 4 July 2007.

[194] Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, para. 23; W. CARLTON, "Should "price squeeze" be a recognized form of anticompetitive conduct?" in *Journal of Competition Law & Economics* 2008, 278; J. SIDAK, "Abolishing the Price Squeeze as a Theory of Antitrust Liability" in *Journal of Competition Law & Economics* 2008, 282; G. FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 265; G. HAY and K. MCMAHON, "The diverging approach to price squeezes in the United States and Europe" in *Journal of Competition Law & Economics* 2012, 286-287; M. HARKER, "EU competition law as a tool for dealing with regulatory failure: the broadband and margin squeeze cases" in *Journal of Business Law* 2013, 12.

[195] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 11; Opinion of AG MAZÁK 2 September 2010, case C-52/09, ECLI:EU:C:2010:483, *TeliaSonera*, ECR 2011, I-527, para. 21; W. CARLTON, "Should "price squeeze" be a recognized form of anticompetitive conduct?" in *Journal of Competition Law & Economics* 2008, 278; G. FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 265.

[196] R. O'DONOGHUE, "Regulating the Regulated: *Deutsche Telekom v. European Commission*" in *Global Competition Policy* 2008, 16-17; G. FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 264-265; A. HEIMLER, "Is margin squeeze an antitrust or a regulatory violation?" in *Journal of Competition Law & Economics* 2010, 888-889; G. EDWARDS, "Margin squeezes and the inefficient "equally efficient" operator" in *European Competition Law Review* 2011, 3; E. DE GHELLINCK and C. HUVENEERS, "Who is Right on Margin Squeeze: Competition Law or Sector Specific Regulation?" in *Journal of European Competition Law & Practice* 2014, 97.

[197] For critique 1, see *infra* nr. 92 "MARKET ENTRY"; for critique 3, see *supra* title 7.4 "Constructive refusal to supply"; for critique 4, see *infra* title 7.6.1 "Price competition"; for critique 5, see *infra* nr. 92 "MARKET ENTRY" and title 8.4.1 "*Deutsche Telekom*".

[198] *Supra* nr. 51 "UNITED STATES".

> *"Recognizing a price-squeeze claim where the defendant's retail price remains above cost would invite the precise harm we sought to avoid in Brooke Group: Firms might raise their retails prices or refrain from aggressive price competition to avoid potential antitrust liability."*[199]

Under the title reserved for institutional concerns, the Court cites *Trinko*, stating that charging monopoly prices is an important element of the free market system.[200] It concludes that the Sherman Act encourages price competition at the retail level, as long as the prices being charged are not predatory.[201]

70. EU: CONSUMER CHOICE – The European Courts, on the contrary, seem to have less of a problem with an increase in retail prices, even in the absence of predatory pricing. In *Deutsche Telekom*, the ECJ stated:

> *"However, the mere fact that the appellant would have to increase its retail prices for end-user access services in order to avoid the margin squeeze of its competitors who are as efficient as the appellant cannot in any way, in itself, render irrelevant [the as-efficient-competitor test.]"*[202]

At the time of the *Telefónica* case, the retail product (broadband internet access) was up to 85% more expensive than the European average.[203] But even then, the General Court considered an increase in retail prices an appropriate strategy to avoid margin squeeze.[204] This can be explained by the ECJ's position that "price competition does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be given."[205]

More specifically, the ECJ sets out the following reasoning: a margin squeeze reduces the degree of competition on the market, thereby strengthening the dominant undertaking's position on that market. That way, a margin squeeze has the effect that consumers suffer detriment as a result of the limitation of the choices available to them, consequently diminishing the prospect of a longer-term reduction of retail prices as a result of competition exerted by competitors

---

[199] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 11.
[200] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 14.
[201] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 15.
[202] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 181, confirming EC 21 May 2003, case COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom*, OJ L 263, 14.10.2003, 9, paras 163-175 and CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 105 sq.
[203] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 404.
[204] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, paras 336-337, confirming EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, para. 724. Note, however, that the Commission at least mentioned a decrease in wholesale prices in this case, see paras 334-335 and paras 653, 675, 724, respectively.
[205] ECJ 25 October 1977, case 26/76, ECLI:EU:C:1977:167, *Metro SB-Großmärkte GmbH & Co. KG*, ECR 1977, 1875, para. 21; ECJ 9 September 2003, case C-198/01, ECLI:EU:C:2003:430, *Consorzio Industrie Fiammiferi (CIF)*, ECR 2003, I-8055, para. 68 (quote).

who are at least as efficient in that market.[206] In other words, higher prices in the short term are justified by consumer choice and thus welfare in the long term. But is market entry not a task for the regulator?[207]

71. US/EU DISAGREEMENT – *Amici curiae* also raised the consumer choice concern in the *linkLine* case. They contended that "price squeezes may impair nonprice competition and innovation in the downstream market by driving independent firms out of business."[208] The Supreme Court responded that there is no independent competitive harm beyond the harm that would result from a duty-to-deal violation or predatory pricing.[209] As the Supreme Court does not identify any harm that is not covered by existing abuses, it does not endorse a new competition law abuse. It is tempting to conclude the ECJ is thinking more ahead. But the courts truly disagree on what is more valuable: a future greater number of competitors, or an immediate lower retail price.

7.6.2. Legal certainty

72. US: UNCERTAINTY FOR COURTS AND UNDERTAKINGS – The US Supreme Court and the ECJ also have opposed views on legal certainty, to which the US Supreme Court devotes a separate title of its *linkLine* judgment. After setting out that the predatory pricing and refusal to deal infringements suffice, legal certainty is in fact the US Supreme Court's second argument against recognising margin squeeze as an independent abuse. The Court highlights the challenge of margin squeeze theory for the courts:

> *"It is difficult enough for courts to identify and remedy an alleged anticompetitive practice at one level, such as predatory pricing in retail markets or a violation of the duty-to-deal doctrine at the wholesale level."*[210]

But it also stresses the difficulty for undertakings:

> *"Perhaps most troubling, firms that seek to avoid price-squeeze liability will have no safe harbour for their pricing practices. […] At least in the predatory pricing context, firms know they will not incur liability as long as their retails prices are above cost."*[211]

The Court even takes account of lawyers, noting that antitrust rules "must be clear enough for lawyers to explain to their clients".[212]

---

[206] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 182.
[207] *Infra* nr. 92 "MARKET ENTRY".
[208] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 15.
[209] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 15.
[210] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 13.
[211] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 13.
[212] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 13.

73. EU: CERTAINTY FOR UNDERTAKINGS – The European courts seek to accommodate neither courts, nor lawyers (at least not explicitly). They do, however, take great care to ensure legal certainty for undertakings. The European courts have always defended the as-efficient-competitor test because it allows undertakings to assess the lawfulness of their conduct.[213]

74. US/EU DISAGREEMENT – Interestingly, the American Antitrust Institute also prompted the US Supreme Court to judge the as-efficient-competitor test (or, in its words, "transfer price test") in an *amicus curiae* brief. The Supreme Court is apparently unwilling to go into it. It does not elaborate on the adequacy of this test, but only notes that "[w]hether or not that test is administrable, it lacks any grounding in our antitrust jurisprudence."[214] On the one hand, this is remarkable as the Supreme Court does highlight the substantive flaws of the "fair" or "adequate" margin standard (another test) in the same judgment.[215] On the other hand, critique may be redundant if the rejection really is a necessary consequence of past choices. In any way, as with consumer welfare, the courts hold opposing views on legal certainty. In the end, the US Supreme Court rejects margin squeeze as an abuse because it cannot be tested, while the ECJ accepts the as-efficient-competitor standard as it allows margin squeeze to be tested.

8. MARGIN SQUEEZE ASSESSMENT IN REGULATED MARKETS

75. INTRODUCTION – Every margin squeeze case from *Deutsche Telekom* onwards originated from a regulated sector. This raises the question: how do competition authorities assess margin squeeze in regulated markets? This final chapter starts with an overview of the similarities and differences between competition law and sector-specific regulation, and continues with an introduction on how conflicts between EU competition law and EU or national regulation are resolved. The main part of this chapter then looks at the way in which the Commission and the European courts assess margin squeeze in regulated markets.

---

[213] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 192; ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 202; ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 44; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 192.

[214] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 14.

[215] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 13-14.

8.1. NATURE OF COMPETITION LAW AND SECTOR-SPECIFIC REGULATION

76. GOAL – Competition law and sector-specific regulation exhibit both similarities and differences.[216] Competition law and sector-specific regulation share their main goal: to realise effective competition, and thus consumer welfare. Regulation may have a broader objective, such as liberalisation, although competition law is also used to that end.

77. METHOD – However, sector-specific regulation and competition law use a different method to achieve this similar goal. This is demonstrated by their Latin denominations "*ex ante*" and "*ex post*", respectively. Sector-specific regulation is by nature *ex ante*; it tries to prevent an anti-competitive environment, or even aims at increasing the level of competition. Competition law operates *ex post*; it punishes anti-competitive behaviour to maintain the level of competition.

78. BLURRED LINES – You could say sector-specific regulation promotes competition while competition law ensures it. But as with the ends, the lines between the different means have blurred over time. Competition law has turned into 'regulatory antitrust' and sector-specific regulation operates as 'pre-emptive competition law'.[217] Concentration control, for example, falls between these categories, as the name '*ex ante* competition law' indicates.

79. DIFFERENT CONTRASTS – DE STREELE elaborates on the classic paradigm. He argues that the two differences between antitrust and sector regulations are that

1. "sector regulation mainly deals with unsatisfactory market structures whereas competition law deals with unsatisfactory firms' behaviours, and
2. the burden of proof for sector regulation to intervene on the selected markets is lower than antitrust law."[218]

The International Competition Network presents another contrast along similar lines.[219] It reports that regulation typically focuses only on the main aspects of business conduct, providing a framework that regulated undertakings need to follow. Competition law prohibitions on agreements and abuses are expressed in more general terms. The Network concludes that competition law plays a residual role,[220] catching infringements that fall through the cracks of the regulatory framework.

---

[216] Disclaimer: this account of those similarities and differences will necessarily simplify things.
[217] A. DE STREELE, "The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications" in *Reflets et perspectives de la vie économique* 2008, para. 1.
[218] A. DE STREELE, "The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications" in *Reflets et perspectives de la vie économique* 2008, para. 43.
[219] International Competition Network, Antitrust Enforcement in Regulated Sectors Working Group, Report to the Third ICN Annual Conference, 2004, 3.
[220] International Competition Network, Antitrust Enforcement in Regulated Sectors Working Group, Report to the Third ICN Annual Conference, 2004, 3.

80. WHEN TO REGULATE? – While competition law applies to every sector, sector-specific regulation does not. A specific sector is only regulated when competition law remedies would not suffice to solve the competition problems.[221] In this sense, sector-specific regulation is subsidiary, at least in its creation. In the telecommunications sector, the Commission has identified three cumulative criteria that make a sector susceptible to *ex ante* regulation:[222]

1. The market has high and non-transitory barriers to entry;
2. The market does not tend towards effective competition within a relevant time horizon;
3. The application of competition law alone would not adequately address the market failure(s) concerned.

Applying this test, the Commission listed four specific markets in 2014,[223] down from eighteen in 2003.[224] National regulatory authorities are to act upon this recommendation.

8.2. INTERACTION BETWEEN COMPETITION LAW AND REGULATION

81. INTRODUCTION – In the European Union, sectors can be regulated both at the EU and the national level. EU competition law takes precedence over both EU and national regulation. In practice, the difference between national and EU regulation is not always as clear-cut, as the former often derives from the latter.[225]

82. HORIZONTAL RELATIONSHIP – The core provisions of EU competition law are enshrined in the Treaty on the Functioning of the European Union and accordingly enjoy the status of primary law. The EU adopts sector-specific regulation in regulations and directives, which constitute

[221] A fact of which we are reminded in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.04.2002, 33-50, recital 27.

[222] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.04.2002, 33-50, recital 27; interpreted by Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 295, 11.10.2014, 79-84, paras 11-16.

[223] Annex to Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 295, 11.10.2014, 79-84.

[224] Annex to Commission Recommendation 2003/311/EC 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/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, OJ L 114, 08.05.2003, 45-49.

[225] See e.g. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.04.2002, 33-50, that is in turn part of the 'Telecoms Package' that has to be implemented by Member States. For more information, see http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al24216a.

secondary law. That is why EU competition law has priority over EU regulation. EU regulatory measures can only deviate from EU competition law when this is provided for by primary law itself (e.g. Art. 42 TFEU, that allows exemption for agriculture). However, the European courts avoid conflict with their so-called 'co-existence doctrine', according to which EU competition law and EU regulation (and the national regulation deriving from it) apply side-by-side and undertakings must comply with both simultaneously.[226]

83. VERTICAL RELATIONSHIP – According to the principle of primacy of EU law, EU law takes precedence over national law.[227] Therefore, EU competition law has priority over national regulation. In its *Arduino* judgment, the ECJ stated that Art. 101 and 102 TFEU, read in conjunction with Art. 4(3) TEU, "require Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings."[228] But what is the faith of undertakings if Member States do introduce measures that conflict with the EU competition rules? That is where the 'state compulsion defence' comes in. EU competition law does not apply "[i]f anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part".[229] However, the burden of proof for this defence is high: an undertaking must show that the regulatory scheme "eliminated any margin of autonomy on the part of those undertakings".[230]

8.3. MARGIN SQUEEZE ASSESSMENT IN REGULATED MARKETS

84. INTRODUCTION – Under EU law, sector-specific regulation and competition law are complementary. It is only under very strict conditions that the presence of sector-specific regulation excludes the possibility of a margin squeeze. Whether the ECJ's margin squeeze test is suitable in regulated markets is a point of on-going debate. Under US law, by contrast, sector-specific regulation more easily makes competition law inapplicable to an

[226] ECJ 6 December 2012, case C-457/10 P, ECLI:EU:C:2012:770, *AstraZeneca*, ECR 2012, 0, para. 154; A. ARENA, "The relationship between antitrust and regulation in the US and the EU: can legal tradition account for the differences?" in *Cambridge Journal of International and Comparative Law* 2014, 5; see also *infra* title 8.3.1 "Complementarity in the European Union".

[227] ECJ 15 July 1964, case 6/64, ECLI:EU:C:1964:66, *Flaminio Costa v. E.N.E.L.*, ECR 1964, 585; Intergovernmental Conference, Declaration (no. 17) concerning primacy, attached to the Treaty of Lisbon, OJ C 306, 17.12.2007, 231-271.

[228] ECJ 19 February 2002, case-35/99, ECLI:EU:C:2002:97, *Arduino*, ECR 2002, I-1529, para. 34 and the case-law cited there; subsequently confirmed in (amongst others) ECJ 5 December 2006, joined cases C-94/04 and C-202/04, ECLI:EU:C:2006:758, *Meloni*, ECR 2006, I-11421, with reference to ECJ 17 February 2005, case C-250/03, ECLI:EU:C:2005:96, *Mauri*, ECR 2005, I-1267, para. 29 and the case-law cited there.

[229] ECJ 16 December 1975, joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, ECLI:EU:C:1975:174, *Suiker Unie*, ECR 1975, 1663, paras 65-72; ECJ 11 November 1997, joined cases C-359/95 P and C-379/95 P, ECLI:EU:C:1997:531, *Ladbroke Racing*, ECR 1997, I-6265, paras 33 and 34, and the case-law cited there.

[230] CFI 18 September 1996, case T-387/94, ECLI:EU:T:1996:120, *Asia Motor France*, ECR 1996, II-961, para. 65.

alleged margin squeeze. As (almost) always, there are arguments *pro* and *contra* each approach.

8.3.1. Complementarity in the European Union

85. CONCURRENT APPLICATION – There is no doubt that sector-specific regulation and competition law are complementary in the European Union. In its Access Notice, the Commission writes that competition law and sector-specific regulation form a coherent regulatory framework; they are concurrently applicable and mutually reinforcing.[231] In *Deutsche Telekom*, the ECJ held that "the competition rules laid down by the [TFEU] supplement in that regard, by an ex post review, the legislative framework adopted by the Union legislature for ex ante regulation".[232] Expressing his opinion in *Deutsche Telekom*, Advocate General MAZÁK wrote that "the regulatory framework in question completes competition law provisions and the two sets of rules should be considered to be complementary."[233] Acknowledging that *ex ante* regulation is by nature more elaborate than competition law rules, MAZÁK confirms that the latter "form a set of minimum criteria".[234]

86. STATE COMPULSION DEFENCE – But sector-specific regulation and competition law must not *always* be applied concurrently. As noted above, undertakings can rely on the state compulsion defence, albeit under strict conditions. The ECJ confirmed this defence in connection with margin squeeze:

> *"[I]t is only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that Articles [101 and 102 TFEU] do not apply. [I]f a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles Articles [101 and 102 TFEU]."*[235]

87. 1) SCOPE – In other words, "Article 102 TFEU applies only to anti-competitive conduct engaged in by undertakings on their own initiative."[236] The ECJ captures all of this with the word 'scope'. As long as an undertaking has scope to change its conduct, the restriction of competition is attributable to it. The ECJ concedes that the possibility to exclude anti-competitive conduct

[231] Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ C 265, 22.08.1998, 2-28, paras 57-58.
[232] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 92.
[233] Opinion of AG MAZÁK 22 April 2010, case C-280/08 P, ECLI:EU:C:2010:212, *Deutsche Telekom*, ECR 2010, I-9555, para. 19.
[234] Opinion of AG MAZÁK 22 April 2010, case C-280/08 P, ECLI:EU:C:2010:212, *Deutsche Telekom*, ECR 2010, I-9555, para. 16.
[235] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, paras 80 and 82, with reference to ECJ 11 November 1997, joined cases C-359/95 P and C-379/95 P, ECLI:EU:C:1997:531, *Ladbroke Racing*, ECR 1997, I-6265, paras 33 and 34, and the case-law cited there.
[236] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 49; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 328.

from the scope of competition law in this way has only been accepted to a limited extent.[237]

88. 2) FAULT – Once it has been established the undertaking has scope to change its conduct, competition law is applicable. The next step is then to consider whether there was 'fault' on its part by failing to use that scope to remedy the abuse. This fault is taken into account to determine whether the conduct constitutes an infringement and to set the fine.[238] This fault, however, can be either committing margin squeeze, or omitting to prevent it.[239] In the latter case, 'scope' and 'fault' are barely distinguishable.

89. EXAMPLES – *Deutsche Telekom* illustrates well how difficult it is to escape the applicability of competition law. The ECJ still found Deutsche Telekom had scope to avoid margin squeeze, even though national sector-specific regulation

- imposed a duty to deal;
- strictly set wholesale prices; and
- subjected retail prices to a steadily decreasing price cap over the time period concerned, with any retail price changes requiring permission of the regulator.[240]

There seems to be something wrong when an abuse is measured by the spread between two prices, but the undertaking can only alter one price (and even this requires permission). Prices were also regulated in *Telefónica*, although slightly less so than in *Deutsche Telekom*. While sector-specific regulation imposed a duty to deal,[241] it did not regulate the retail prices.[242] Neither did sector-specific regulation determine the price of the *national* wholesale product, but it did impose a maximum price for the *regional* wholesale product (Telefónica had to apply for reductions).[243]

90. CRITIQUE – It is clear that 'scope to reduce or end a margin squeeze' is interpreted very broadly. The *Deutsche Telekom* case in particular has drawn a lot of criticism. DUNNE criticises the ECJ for setting "the threshold for autonomous conduct at a nonsensically low level."[244] He contends that the ECJ

---

[237] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 81.
[238] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 89.
[239] This is implicit in ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, and explicit in ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 53.
[240] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, paras 1-24.
[241] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, paras 303 and 661.
[242] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, paras 336-337 (only one subsidiary had to apply for administrative authorisation, and only during a part of the infringement period).
[243] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, paras 331-335.
[244] N. DUNNE, "Margin squeeze: theory, practice, policy – part II" in *European Competition Law Review* 2012, 5.

should have considered the legality of Deutsche Telekom's retail prices in isolation, since Deutsche Telekom could only alter its retail prices, while an anti-competitive spread implies the need for at least two reference points.[245] A similar critique has been voiced earlier by MOORE. Commenting on the *Deutsche Telekom* case, she says that in regulated markets, "it is a pretence to involve the wholesale prices in the test at all."[246] When an undertaking has no control over the wholesale prices it charges, the retail prices as such must be abusive. These retail prices should only be considered abusive if they meet the established requirements for predatory pricing. This means it must be shown that the prices over which the undertaking has discretion are set at a profit-losing level in order to eliminate the competition.[247]

8.3.2. Immunity in the United States

91. REGULATORY IMMUNITY – Under US law, by contrast, courts more easily accept the state compulsion defence (or 'regulatory immunity').[248] This holds particularly true in margin squeeze cases. In the *linkLine* case, Justice BREYER put it as follows:

> *"When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits."*[249]

Almost the exact same wording was used in the earlier *Trinko* case.[250] But Justice BREYER referred to *Town of Concord v. Boston Edison Co.* as the precedent.[251] In this case, the court concluded that price regulation will, in most cases, prevent a price squeeze from constituting an 'exclusionary practice' of the sort that Sherman Act section 2 forbids.[252] The reasons for this position are twofold:

> *"Effective price regulation at both the first and second industry levels makes it unlikely that requesting such rates will ordinarily create a serious risk of significant anticompetitive harm. At the same time, regulatory circumstances create a significant risk that a court's*

---

[245] N. DUNNE, "Margin squeeze: theory, practice, policy – part II" in *European Competition Law Review* 2012, 5.
[246] M. MOORE, "Deutsche Telekom and the margin squeeze fallacy" in *European Competition Law Journal* 2008, 5.
[247] M. MOORE, "Deutsche Telekom and the margin squeeze fallacy" in *European Competition Law Journal* 2008, 5.
[248] The landmark case in this respect is Supreme Court of the United States 18 June 2007, docket no. 05-1157, *Credit Suisse Securities (USA) LLC, fka Credit Suisse First Boston LLC, et al. V. Billing et al.*
[249] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.* – J. BREYER, concurring in judgment, 2.
[250] "When there exists a regulatory structure designed to deter and remedy anticompetitive harm, the additional benefit to competition provided by antitrust enforcement will tend to be small", see Supreme Court of the United States 13 January 2004, docket no. 02–682, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 2 and 12.
[251] United States Court of Appeals (First Circuit) 21 September 1990, docket no. 89-1872, *Town of Concord v. Boston Edison Co*. This reference may be explained by the fact that Justice BREYER was Chief Justice of that court at the time.
[252] United States Court of Appeals (First Circuit) 21 September 1990, docket no. 89-1872, *Town of Concord v. Boston Edison Co.*, para. 5.

efforts to stop such price requests will bring about the very harms – diminished efficiency, higher prices – that the antitrust laws seek to prevent."[253]

In other words, there is not likely any harm for courts to prevent, but there may be harm for them to cause (note that antitrust enforcement is court-based in the US). A lot of competition authorities and courts do not see it this way, as the International Competition Network reports that this exemption approach has been progressively abandoned in most countries.[254]

8.3.3. Taking into account sector-specific regulation in the European Union

92. MARKET ENTRY – The EU margin squeeze assessment is not insensitive to the presence of sector-specific regulation either. In fact, the Commission and the European Courts take account of regulatory objectives, most notably the market entry (and growth) of competitors. The author identified three instances where this objective is explicitly or implicitly (but clearly) pursued.

1. Positive margin squeeze theory. As discussed earlier,[255] an undertaking may commit a margin squeeze even when it leaves positive margins for its competitors. The ECJ explains that even reduced profitability of those competitors would mean "a competitive disadvantage on that market which is such as to prevent or restrict their access to it or the growth of their activities on it."[256] In other words, promoting market entry and growth is the *rationale* of the ECJ's positive margin squeeze theory.

2. Individual assessment. As also discussed earlier,[257] the Commission may choose to conduct a margin squeeze assessment for every individual products rather than for product bundles. Arguably, this disregards the economic reality, but it certainly makes it easier for the Commission to find a margin squeeze. The explicit aim of this choice is to facilitate market entry by competitors.[258]

3. Disregarding certain costs. The Commission and the European courts do not consider *unavoidable costs* borne by entrants – but not by the vertically integrated undertaking – to check whether these entrants are as efficient.[259] The result is

---

[253] United States Court of Appeals (First Circuit) 21 September 1990, docket no. 89-1872, *Town of Concord v. Boston Edison Co.*, para. 5.
[254] International Competition Network, Antitrust Enforcement in Regulated Sectors Working Group, Report to the Third ICN Annual Conference, 2004, 3.
[255] *Supra* nr. 31 "ANTI-COMPETITIVE EFFECT".
[256] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 70.
[257] *Supra* nr. 44 "PRODUCT BUNDLES".
[258] EC 21 May 2003, case COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom*, OJ L 263, 14.10.2003, 9, para. 127.
[259] G. EDWARDS, "Margin squeezes and the inefficient "equally efficient" operator" in *European Competition Law Review* 2011, 3 (the author does not agree with the Commission as to what constitute unavoidable costs versus what are actually inefficiencies); E. DE GHELLINCK and C. HUVENEERS, "Who is Right on Margin Squeeze: Competition Law or Sector Specific Regulation?" in *Journal of European Competition Law & Practice* 2014, 97.

that a competitor will more easily be regarded as efficient as the vertically integrated undertaking. This means the threshold to establish a margin squeeze is lower. In *Deutsche Telekom*, for example, discontinuance charges were not taken into account.[260] The Commission did the same in *Telefónica*, explicitly confirming that this would allow entrants to climb the ladder of investment.[261]

In the same sense, and as discussed earlier,[262] the ECJ allows deviation from the as-efficient-competitor test when the *infrastructure cost* of the dominant undertaking has already been written off. In that case, the efficiency of a competing undertaking must not be measured against the dominant undertaking, but can be measured against other competitors.[263] This also lowers the threshold to establish a margin squeeze.

Mechanism. These three strategies to facilitate market entry use a similar mechanism. Each of them makes it easier for the Commission to conclude that an undertaking is executing a margin squeeze. As the threshold to establish a margin squeeze is lower, undertakings have to act accordingly; they have to avoid reaching the threshold, or have to remedy transgressing it. The way to do this is by either reducing wholesale prices, or increasing retail prices. Whichever way the undertaking chooses (if regulation leaves it a choice), market entry or growth of competitors will be facilitated. When it comes to increasing retail prices, the ECJ has explicitly confirmed that these higher prices (in the short term) are justified by the greater number of competitors, i.e. market entry (in the long term).[264] But the same goes for both increasing retail prices and decreasing wholesale prices: allowing slightly less efficient entry in the short-term will lead to long-term benefits for end-customers that more than compensate. However, it is often remarked that judgments of this nature fit more comfortably within the realm of *ex ante* regulatory policy, rather than of *ex post* competition law.[265]

---

[260] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 215 (where the ECJ does not accept Deutsche Telekom's objection to this practice).
[261] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, para. 392.
[262] *Supra* nr. 43 "COSTS AND PRICES COMPETITORS".
[263] ECJ 17 February 2011, case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera*, ECR 2011, I-527, para. 46; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 193.
[264] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 182.
[265] D. GERADIN and R. O'DONOGHUE, "The concurrent application of competition law and regulation: the cases of margin squeeze abuses in the telecommunications sector" in *Journal of Competition Law & Economics* 2005, 395; R. O'DONOGHUE, "Regulating the Regulated: *Deutsche Telekom v. European Commission*" in *Global Competition Policy* 2008, 16-17; G. FAELLA and R. PARDOLESI, "Squeezing Price Squeeze under EU Antitrust Law" in *European Competition Law Journal* 2010, 264-265; G. EDWARDS, "Margin squeezes and the inefficient "equally efficient" operator" in *European Competition Law Review* 2011, 3; A. HEIMLER, "Is margin squeeze an antitrust or a regulatory violation?" in *Journal of Competition Law & Economics* 2010, 888-889; G. HAY and K. MCMAHON, "The diverging approach to price squeezes in the United States and Europe" in *Journal of Competition Law & Economics* 2012, 296; M. HARKER, "EU competition law as a tool for dealing with regulatory failure: the broadband and margin squeeze cases" in *Journal of Business Law* 2013, 6; E. DE GHELLINCK and C. HUVENEERS, "Who is Right on Margin Squeeze: Competition Law or Sector Specific Regulation?" in *Journal of European Competition Law & Practice* 2014, 97; C. BERGQVIST and J. TOWNSEND, "Enforcing Margin Squeeze Ex Post Across Converging

93. FINES – Lastly, the Commission and the European courts take account of sector-specific regulation when setting fines. In *Deutsche Telekom*, the Commission considered it a mitigating circumstance that the retail and wholesale charges in question were subject to sector-specific regulation at the national level. It reduced the basic amount of the fine by 10%, which was later confirmed by the General Court and the ECJ.[266]

The ECJ reiterated that the undertaking's small contribution to the infringement in the light of the regulation of its charges do not alter the gravity of the infringement.[267] This is explained by the fact that "the role played by the undertaking concerned in the infringement is, in principle, not a mandatory factor but just one of a number of other factors to be taken into account in assessing the gravity of the infringement."[268] The national legal framework is only a mitigating factor once the level of the penalty is set.[269] In conclusion, the Commission and the European courts do not conceive a regulatory framework as an objective justification, but only as a factor for fine mitigation. This leaves the door open for follow-on actions, and recidivism becomes a possible aggravating factor in future offences.[270]

8.3.4. Evaluation of the state compulsion defence in the European Union

94. ARGUMENTS *PRO* – Firstly, the regulatory immunity approach takes pressure off competition authorities.[271] The division of work is simple: when an undertaking is regulated, the regulator deals with issues of competition; when it is not regulated, the competition authority must ensure effective competition. This way, the (often burdened) competition authorities do not end up doing or repeating the work of regulators.

Telecommunications Markets", *Konkurrensverkets Working Paper Series in Law and Economics* 2015:2, 15 and 19-20; D. PETZOLD, "It Is All Predatory Pricing: Margin Squeeze Abuse and the Concept of Opportunity Costs in EU Competition Law" in *Journal of European Competition Law & Practice* 2015, 5.

[266] EC 21 May 2003, case COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom*, OJ L 263, 14.10.2003, 9, para. 212; CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 313; ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 279.

[267] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 277.

[268] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 277.

[269] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 278.

[270] N. DUNNE, "Margin squeeze: from broken regulation to legal uncertainty" in *Cambridge Law Journal* 2011, 36.

[271] N. PETIT, "The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion" in *The Global Competition Law Centre Working Papers Series* 2004, 22; D. GERADIN and R. O'DONOGHUE, "The concurrent application of competition law and regulation: the cases of margin squeeze abuses in the telecommunications sector" in *Journal of Competition Law & Economics* 2005, 409; N. DUNNE, "Margin squeeze: theory, practice, policy – part II" in *European Competition Law Review* 2012, 4; M. COLANGELO, "The interface between competition rules and sector-specific regulation in the telecommunications sector: evidence from recent EU margin squeeze cases" in *Competition and Regulation in Network Industries* 2013, 231; M. HARKER, "EU competition law as a tool for dealing with regulatory failure: the broadband and margin squeeze cases" in *Journal of Business Law* 2013, 3.

The US Supreme Court promotes a division of work, writing that in a regulated sector "the costs of antitrust enforcement are likely to be greater than the benefits."[272] Justice BREYER then argues the courts are the wrong forum for at least part of the respondent's claim. He states they "could have gone to the regulators and asked for petitioners' wholesale prices to be lowered in light of the alleged price squeeze."[273] In other words, the regulatory authority should be the first (and only) forum.
The Commission voices a similar concern:

> *"[T]he Commission will aim to avoid unnecessary duplication of procedures, in particular competition procedures and national/Community regulatory procedures[.]"*[274]

The Commission specifies its commitment, writing that when "there are related actions before a relevant national or European authority or court, the Directorate-General for Competition will generally not initially pursue any investigation" into a possible competition law infringement.[275] It does seem that they are more willing to stick to this separation of work in the US than in the EU.

Secondly, the regulatory immunity approach also benefits undertakings by simplifying compliance. Satisfying both a regulatory and a competition regime is demanding and can create serious legal uncertainty. Overburdening undertakings may suffocate their business. That is not to say financial statements should take precedence over consumer welfare. That is simply to question whether there is no way to safeguard the latter without affecting the former.

Other noteworthy arguments in favour of the state compulsion defence are the specialisation of regulatory authorities and the increased risk of false positives when two authorities assess a conduct. [276]

95. ARGUMENTS *CONTRA* – Where the regulatory regime cannot remedy the margin squeeze, however, excluding the application of competition law to remedy the market problem may create a lacuna in the legal framework. Insufficient legal power, tight budgets or regulatory capture could prevent the regulatory agency from doing an effective job. As a 'second best' solution to

[272] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.* – J. BREYER, concurring in judgment, 2.
[273] Supreme Court of the United States 25 February 2009, docket no. 07-512, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.* – J. BREYER, concurring in judgment, 3.
[274] Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ C 265, 22.08.1998, 2-28, para. 150.
[275] Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ C 265, 22.08.1998, 2-28, para. 28.
[276] D. GERADIN, "Limiting the Scope of Article 82 of the EC Treaty: What can the EU learn from the U.S. Supreme Court's Judgment in *Trinko* in the wake of *Microsoft*, *IMS*, and *Deutsche Telekom*?" in *Common Market Law Review* 2004, 1549-1550; G. HAY and K. MCMAHON, "The diverging approach to price squeezes in the United States and Europe" in *Journal of Competition Law & Economics* 2012, 274 and 261, respectively; M. COLANGELO, "The interface between competition rules and sector-specific regulation in the telecommunications sector: evidence from recent EU margin squeeze cases" in *Competition and Regulation in Network Industries* 2013, 231.

safeguard consumer welfare (until the regulatory situation has been repaired), competition law seems useful, or even necessary.[277] Maybe this is also the interaction Advocate-General MAZÁK envisioned when he called competition law "a set of minimum criteria".[278] But repairing the regulatory situation should still be the priority. In that sense, The International Competition Network notes that when regulation is not fully effective the best alternative is to promote its amendment so as to improve it.[279]

It could also be argued that regulators and competition authorities have different methods that lead to different outcomes, which is why both the regulator and the competition authority should assess a conduct. But this concern could be alleviated by obliging the regulator to also apply competition law.[280] Or would that simply duplicate the work of the regulator instead of achieving an efficient division of work?

96. CONCLUSION – As it usually goes with extremes, neither of them is desirable. Exempting regulated sectors from competition law is problematic when the regulation is not doing its job. But fully subjecting undertakings to both sector-specific regulation and competition law may be too much of a burden. To combine or not to combine, that is the question. It is clear that competition law should step in where regulation is, for any reason, ineffective. Improving the regulatory framework is the preferable strategy, but may not be realistic in the short-term. In the meantime, competition law can play a valuable role.

97. COMPROMISE – But should competition law step in every time regulation fails? NITSCHE and WIETHAUS formulate two additional criteria to decide whether it is useful to complement *ex ante* with *ex post* intervention:[281]

[277] D. GERADIN, "Limiting the Scope of Article 82 of the EC Treaty: What can the EU learn from the U.S. Supreme Court's Judgment in *Trinko* in the wake of *Microsoft*, *IMS*, and *Deutsche Telekom*?" in *Common Market Law Review* 2004, 1550; D. GERADIN and R. O'DONOGHUE, "The concurrent application of competition law and regulation: the cases of margin squeeze abuses in the telecommunications sector" in *Journal of Competition Law & Economics* 2005, 419; T.T. NGUYEN, "Price squeezing: Linkline in the United States – no link to the European Union" in *International Review of Intellectual Property and Competition Law* 2010, 10; N. DUNNE, "Margin squeeze: theory, practice, policy – part II" in *European Competition Law Review* 2012, 3; M. HARKER, "EU competition law as a tool for dealing with regulatory failure: the broadband and margin squeeze cases" in *Journal of Business Law* 2013, 3 and 12.

[278] Opinion of AG MAZÁK 22 April 2010, case C-280/08 P, ECLI:EU:C:2010:212, *Deutsche Telekom*, ECR 2010, I-9555, para. 16.

[279] International Competition Network, Antitrust Enforcement in Regulated Sectors Working Group, Report to the Third ICN Annual Conference, 2004, 4.

[280] A model for this arrangement can be found in Supreme Court of the United States 13 January 2004, docket no. 02–682, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*; J.B. MEISEL, "Case comment – is Trinko a useful model for the European Union?" in *European Competition Law Review* 2013, 218-222; see also M. COLANGELO, "The interface between competition rules and sector-specific regulation in the telecommunications sector: evidence from recent EU margin squeeze cases" in *Competition and Regulation in Network Industries* 2013, 231 and 235; a similar solution is suggested by N. PETIT, "The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion" in *The Global Competition Law Centre Working Papers Series* 2004, 30.

[281] R. NITSCHE and L. WIETHAUS, "Competition Law in Regulated Industries: On the Case and Scope for Intervention" in *Journal of European Competition Law & Practice* 2012, 411-412.

1. "*Ex post* competition intervention in regulated industries appears more useful if it enforces competition on and end to end basis."
2. "*Ex post* competition intervention in regulated industries appears more useful if it relates to goods or services that are not tightly intertwined with other regulated goods or services."

The authors give the example of an airport.[282] In such an industry with a number of essential facilities, competition law would be unable to remove a competitive bottleneck on and end-to-end basis (criterion 1). Moreover, competition law would create inefficiencies because it does not take account of the relation between different regulated goods and services (criterion 2). They conclude that such a situation should only be subject to sector-specific regulation.[283] There is no place for such criteria in the courtroom, but it might be interesting if the Commission took account of them when determining its enforcement priorities.

Another solution would be to organise a temporal division of work between the Commission and the regulator.[284] When the Commission detects a competition problem, it could give the national regulator a specified amount of time to resolve it. If the regulator fails to do so in time, the Commission can step in to deal with the issue. This is not a revolutionary idea, as the Commission has chosen this course of action before.[285]

8.4. DIVERGING JUDGMENTS BY DIFFERENT AUTHORITIES

98. INTRODUCTION – Finally, we consider the interactions between the European Commission and the national regulatory authorities (and national courts). This interaction has been especially problematic in two cases: *Deutsche Telekom* and *Telefónica*.[286] A number of issues will be identified, the most salient one being diverging judgments from different authorities. The follow-up question whether these national authorities were at fault merits special consideration.

---

[282] R. NITSCHE and L. WIETHAUS, "Competition Law in Regulated Industries: On the Case and Scope for Intervention" in *Journal of European Competition Law & Practice* 2012, 411-412.
[283] R. NITSCHE and L. WIETHAUS, "Competition Law in Regulated Industries: On the Case and Scope for Intervention" in *Journal of European Competition Law & Practice* 2012, 413.
[284] D. GERADIN, "Limiting the Scope of Article 82 of the EC Treaty: What can the EU learn from the U.S. Supreme Court's Judgment in *Trinko* in the wake of *Microsoft*, *IMS*, and *Deutsche Telekom*?" in *Common Market Law Review* 2004, 1550; D. GERADIN and R. O'DONOGHUE, "The concurrent application of competition law and regulation: the cases of margin squeeze abuses in the telecommunications sector" in *Journal of Competition Law & Economics* 2005, 419.
[285] EC, Press Release, "Commission concentrates on nine cases of mobile telephony prices", Brussels, 27 July 1998; EC, Press Release, "Price decreases of up to 40% lead Commission to close telecom leased line inquiry", Brussels, 11 December 2002.
[286] There was also a diverging national court decision in *Deutsche Bahn* (see T. STEINVORTH, "*Deutsche Bahn*: Commitments End Margin Squeeze Investigation" in *Journal of European Competition Law & Practice* 2014, 628), but too little information is available to draw meaningful conclusions.

8.4.1. Deutsche Telekom

99. ISSUES – According to some, the real issue in *Deutsche Telekom*[287] was regulatory failure, in more than one way. Firstly, there was a lack of tariff rebalancing by Germany's telecommunications regulator RegTP. Secondly, RegTP failed to adequately supervise Deutsche Telekom's wholesale prices. Thirdly, RegTP authorised Deutsche Telekom's behaviour on numerous occasions. Each of these failures could have justified infringement proceedings against Germany.

100. 1) LACK OF TARIFF REBALANCING – Firstly, Germany failed to comply with its obligation to rebalance tariffs. This contention requires some background: historically, former state monopoly telecom providers (such as Deutsche Telekom) have made losses on certain services, subsidizing those with profits from other services. In 1990, the Commission adopted a directive to achieve effective competition in the telecom market,[288] and it amended this directive in 1996.[289] This amended directive required Member States to achieve a full rebalancing of the tariffs by January 1st 1998.[290] Tariff rebalancing means aligning tariffs with real costs. Specifically, that operation had to take the form of a reduction in the charges for regional and international calls and an increase in connection charges, the monthly rental and local call rates.[291] This would put an end to the common practice where telecom operators subsidised the losses on certain services with the profit of others ('cross-subsidisation').

Germany (through its regulator RegTP) did not achieve tariff rebalancing by January 1st 1998. Not incidentally, the duration of Deutsche Telekom's margin squeeze starts on January 1st 1998 (and ends on December 31st 2001).[292] If the Commission wanted to fix the root of the problem, it would have to bring infringement proceedings against Germany for its failure to fulfil an obligation under the Treaties (Art. 258 TFEU). The European courts admitted as much:

> *"While it is not inconceivable that the German authorities also infringed Community law […] by opting for a gradual rebalancing of connection and call charges, such a failure to*

---

[287] EC 21 May 2003, case COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom*, OJ L 263, 14.10.2003, 9; CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477; ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555.

[288] Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ L 192, 24.07.1990, 10-16.

[289] Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ L 074, 22.03.1996, 13-24.

[290] Art. 4c Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ L 074, 22.03.1996, 13-24, as interpreted in ECJ 7 January 2004, case 500/01, ECLI:EU:C:2004:8, *Commission v. Spain*, ECR 2004, I-583, para. 32.

[291] Opinion of AG LÉGER 10 July 2003, case 500/01, ECLI:EU:C:2003:405, *Commission v. Spain*, ECR 2004, I-583, para. 7.

[292] See CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 306.

> *act, if it were to be established, would not remove the scope which the applicant had to reduce the margin squeeze."*[293]

O'DONOGHUE strongly criticises the Commission's course of action, writing "it seems not only unfair, but also as a matter of administrative law wrong, for Deutsche Telekom to be the only firm penalised as a result of Germany's and the Commission's failures to take action."[294] HARKER also points out how this approach by the Commission produces uncertainty and unfairness for regulated undertakings.[295]

101. 2) POOR SUPERVISION OF WHOLESALE PRICES – Secondly, RegTP has drawn criticism for its role as supervisor of the wholesale prices. As noted,[296] RegTP strictly determined Deutsche Telekom's wholesale prices[297] (while only setting maximum retail prices)[298]. As also noted,[299] the European courts decided that Deutsche Telekom had sufficient scope to avoid a margin squeeze as it could increase its retail prices, provided the price cap was respected.[300] (Observe, however, that this was only possible because Deutsche Telekom previously lowered its retail prices under the price cap set by RegTP.)[301]
It could be argued, as some commentators do, that it would have made more sense for the European courts to focus on the wholesale prices that were simply set too high.[302] Again, this would involve bringing proceedings against Germany. In this regard, DUNNE remarks that "[t]he rational solution would have been to fix the broken regulation and reduce wholesale prices to the competitive level. Unfortunately, the Commission chose to pursue an abuse of dominance case against Deutsche Telekom rather than bringing infringement proceedings against Germany under Article 258 TFEU".[303] In the same sense, O'DONOGHUE writes that "any margin squeeze created as a result of the wholesale charges was a direct result of State action and could not have been attributed to DT."[304] Twice, it seems that the real problem was inadequate

[293] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 265; ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 14.
[294] R. O'DONOGHUE, "Regulating the Regulated: *Deutsche Telekom v. European Commission*" in *Global Competition Policy* 2008, 6.
[295] M. HARKER, "EU competition law as a tool for dealing with regulatory failure: the broadband and margin squeeze cases" in *Journal of Business Law* 2013, 11-12.
[296] *Infra* nr. 89 "EXAMPLES".
[297] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, paras 5-9.
[298] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, paras 10-24.
[299] *Infra* nr. 70 "CONSUMER CHOICE".
[300] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 181.
[301] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, paras 100-105.
[302] R. O'DONOGHUE, "Regulating the Regulated: *Deutsche Telekom v. European Commission*" in *Global Competition Policy* 2008, 8; N. DUNNE, "Margin squeeze: from broken regulation to legal uncertainty" in *Cambridge Law Journal* 2011, 36-37.
[303] N. DUNNE, "Margin squeeze: from broken regulation to legal uncertainty" in *Cambridge Law Journal* 2011, 36-37.
[304] R. O'DONOGHUE, "Regulating the Regulated: *Deutsche Telekom v. European Commission*" in *Global Competition Policy* 2008, 6.

regulation, but the Commission chose the competition law solution, and the European courts confirmed this choice.[305]

102. 3) DIVERGING JUDGMENTS – Thirdly, and perhaps most interestingly, RegTP examined the issue of margin squeeze in at least five separate decisions.[306] Each time, RegTP found a negative spread between Deutsche Telekom's wholesale and retails prices.[307] However, RegTP consistently took the view that other operators should be able to offer their end-users competitive prices by resorting to cross-subsidised charges for access services and call charges.[308] In other words, rivals could remain competitive. Translated to the EU's margin squeeze language: Deutsche Telekom failed the as-efficient-competitor test (negative spread), but there was no (sufficient) anti-competitive effect. As both the regulator and the Commission applied the as-efficient-competitor test, HAY and MCMAHON argue that "if reasonable minds can differ on the determination of the economic issues, there should be greater deference to the regulator, who has sector-specific knowledge".[309]

The CFI had a layered response to this situation. Firstly, it stated that "RegTP did not consider the compatibility of the charges in question with Article [102 TFEU] or, at any rate, that it applied Article [102 TFEU] incorrectly."[310] In any event, the CFI held that "[t]he Commission cannot be bound by a decision taken by a national body pursuant to Article [102 TFEU]."[311] Indeed, the Commission remains free to decide "even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision."[312] Thirdly, the CFI reiterated that it all comes down to Deutsche Telekom having scope to reduce or end the margin squeeze.[313] On a final note, the CFI remarked that "the German legal framework did not preclude RegTP from authorising proposed charges which are contrary to Article [102

[305] HAY and MCMAHON also maintain this position, see G. HAY and K. MCMAHON, "The diverging approach to price squeezes in the United States and Europe" in *Journal of Competition Law & Economics* 2012, 295.
[306] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 115.
[307] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 116.
[308] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 116.
[309] G. HAY and K. MCMAHON, "The diverging approach to price squeezes in the United States and Europe" in *Journal of Competition Law & Economics* 2012, 292.
[310] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 119.
[311] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 120, with reference to ECJ 14 December 2000, case C-344/98, ECLI:EU:C:2000:689, *Masterfoods Ltd v HB Ice Cream Ltd.*, ECR 2000, I-11369, para. 48.
[312] ECJ 14 December 2000, case C-344/98, ECLI:EU:C:2000:689, *Masterfoods Ltd v HB Ice Cream Ltd.*, ECR 2000, I-11369, para. 48.
[313] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 121.

TFEU]."[314] In conclusion, the regulatory authorisations cannot in any way change the finding of abuse.

While the first three reasons may appear counterintuitive, they at least rest on a solid legal basis. The last consideration raises questions.[315] It may be correct that the German regulatory framework did not preclude RegTP from authorising charges that were contrary to Art. 102 TFEU. But the case law determines the following:

> *"[T]he Treaty nevertheless strictly prohibits [national regulatory authorities] from giving encouragement, in any form whatsoever, to the adoption of agreements or concerted practices with regard to tariffs contrary to Article [101(1)] or Article [102], as the case may be."*[316]

In that sense, the CFI stated that "RegTP is obliged, like all organs of the State, to respect the provisions of the [Treaties]".[317] It then reasoned that RegTP was a telecom regulator, not a competition authority, and that its objectives differed from those of competition policy.[318] That may well be true, but RegTP was still not allowed to approve tariffs that were contrary to Art. 102 TFEU, and its decisions to do so should have resulted in action against Germany under Art. 258 TFEU.[319]

8.4.2. Telefónica

103. FACTS – During the infringement period in *Telefónica*[320] (September 2001-December 2006)[321] 55 conflicts in relation to access to the local network were brought before the CMT (the Spanish telecom regulator), most of which

[314] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 123.
[315] R. O'DONOGHUE, "Regulating the Regulated: *Deutsche Telekom v. European Commission*" in *Global Competition Policy* 2008, 9-10.
[316] ECJ 11 April 1989, case 66/86, ECLI:EU:C:1989:140, *Ahmed Saeed Flugreisen*, ECR 1989, 803, para. 52.
[317] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, 113, with reference to ECJ 9 September 2003, case C-198/01, ECLI:EU:C:2003:430, *Consorzio Industrie Fiammiferi (CIF)*, ECR 2003, I-8055, para. 49.
[318] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, 113. The CFI refers to Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ C 265, 22.08.1998, para. 13, but rather than backing its statement up, the notice reiterates that regulatory authorities have a duty not to approve any practice or agreement contrary to Community competition law.
[319] R. O'DONOGHUE, "Regulating the Regulated: *Deutsche Telekom v. European Commission*" in *Global Competition Policy* 2008, 10; G. HAY and K. MCMAHON, "The diverging approach to price squeezes in the United States and Europe" in *Journal of Competition Law & Economics* 2012, 292-293; C. BERGQVIST and J. TOWNSEND, "Enforcing Margin Squeeze Ex Post Across Converging Telecommunications Markets", *Konkurrensverkets Working Paper Series in Law and Economics* 2015:2, 19.
[320] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0; ECJ 19 December 2013, case C-295/12 P, ECLI:EU:C:2013:852, *Telefónica*, ECR 2013, 0.
[321] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, Article 1.

resulted in a decision against Telefónica.[322] In 2007, however, the Spanish National Competition Commission denied a similar claim.[323] CMT also worked with *ex ante* decisions designed to ensure that there was no margin squeeze, which Telefónica abided by.[324]

104. COURT'S ASSESSMENT – The General Court dismissed these decisions as irrelevant in similar fashion to the *Deutsche Telekom* case.[325] Firstly, CMT is not a competition but a regulatory authority, and it has never intervened to enforce Art. 102 TFEU.[326] Even if it did, the Commission cannot be bound by decisions taken by national authorities.[327] On top of that, CMT lacked certain information it needed to examine a margin squeeze.[328] Lastly, the cost model used by CMT in its *ex ante* decisions was not appropriate for the purposes of applying Art. 102 TFEU.[329]

105. INFRINGEMENT PROCEEDINGS – As in *Deutsche Telekom*, the argument was raised that the Commission ought to have brought an action for failure to fulfil obligations against Spain under Art. 258 TFEU. According to Telefónica, the CMT failed to ensure the absence of a margin squeeze and, therefore, did not comply with the 2002 regulatory framework.[330] The General Court responded that the Commission had made no such finding, and even if it did, that would no effect on the lawfulness of the contested decision.[331]

8.4.3. Underlying theory, alternative, conclusion

106. INTRODUCTION – The picture that emerges is the following: national regulatory authorities and courts are strictly prohibited from encouraging competition law abuses, but even far-reaching encouragements do not absolve the undertaking in question. Moreover, Member States can rest assured they will not face infringement proceedings for this encouragement. Two strong principles seem to underlie this position: the special responsibility of dominant undertakings and the Commission's discretion in bringing infringement proceedings.

107. 1) SPECIAL RESPONSBILITY – The theory of special responsibility is well established in the case law of the European courts. It holds that an undertaking in a dominant market position has a special responsibility not to

[322] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, paras 139-140; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 126.
[323] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 126.
[324] EC 4 April 2007, case COMP/38.784, *Wanadoo España v. Telefónica*, no integral OJ publication, paras 728-730; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 303.
[325] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, paras 301-303, see also paras 343-352.
[326] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 301.
[327] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 301.
[328] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 302.
[329] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 303.
[330] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 307.
[331] GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 307.

allow its conduct to impair genuine undistorted competition on the common market.[332] Such a special responsibility is justified because Art. 102 TFEU "refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure."[333]

This special responsibility has been specified in a margin squeeze context. The European courts have held that a regulated undertaking is obliged to submit applications for adjustment of its charges at a time when those charges have the effect of impairing genuine undistorted competition on the common market.[334] So when the national regulator is not implementing the European regulatory framework, the undertakings have to take this task upon them. In a way, this makes undertakings the national regulator's fail-safe. But there is inconsistency in the fact that these national regulators, through their Member States, do not get punished, while the undertakings further down the chain do. Apparently Member States bear no special responsibility. This status of immunity is not likely to give regulators incentives to take due account of European competition rules.[335]

108. 2) COMMISSION DISCRETION – In the end, the absence of infringement proceedings against Member States comes down to a protected unwillingness of the European Commission. The ECJ has repeatedly held the following:

> *"[U]nder the system established by Article [258 TFEU], the Commission enjoys a discretionary power as to whether it will bring an action for failure to fulfil obligations and it is not for the Court to judge whether that discretion was wisely exercised."*[336]

[332] ECJ 9 November 1983, case 322/81, ECLI:EU:C:1983:313, *Michelin I*, ECR 1983, 3461, para. 57; CFI 6 October 1994, case T-83/91, ECLI:EU:T:1994:246, *Tetra Pak II*, ECR 1994, II-755, para. 114; CFI 7 October 1999, case T-228/97, ECLI:EU:T:1999:246, *Irish Sugar*, ECR 1999, II-2969, para. 112; CFI 20 September 2003, case T-203/01, ECLI:EU:T:2003:250, *Michelin II*, ECR 2003, II-4071, para. 97; ECJ 2 April 2009, case C-202/07 P, ECLI:EU:C:2009:214, *France Télécom*, ECR 2009, I-2369, para. 105.

[333] ECJ 21 February 1973, case 6/72, ECLI:EU:C:1973:22, *Europemballage Corporation and Continental Can Company Inc.*, ECR 1973, 215, para. 26; ECJ 2 April 2009, case C-202/07 P, ECLI:EU:C:2009:214, *France Télécom*, ECR 2009, I-2369, para. 105 (quote).

[334] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 122; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 335; M. HARKER, "EU competition law as a tool for dealing with regulatory failure: the broadband and margin squeeze cases" in *Journal of Business Law* 2013, 8-9.

[335] N. PETIT, "The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion" in *The Global Competition Law Centre Working Papers Series* 2004, 22.

[336] ECJ 17 November 1990, case C-209/88, ECLI:EU:C:1990:423, *Commission v. Italy*, ECR 1990, I-4313, para. 16; ECJ 6 July 2000, case C-236/99, ECLI:EU:C:2000:374, *Commission v. Belgium*, ECR 2000, I-5657, para. 28; ECJ 26 June 2003, case C-233/00, ECLI:EU:C:2003:371, *Commission v. France*, ECR 2003, I-6625, para. 31.

In margin squeeze cases, the European courts have referred to this case law whenever the failure to fulfil obligations was brought up by the parties.[337] The possibility of the Commission to bring infringement proceedings in no way affects the lawfulness of its decision, as that decision merely finds the undertaking to infringe Art. 102 TFEU, a provision that only concerns economic operators.[338] In other words, the Commission's discretion is untouchable.

109. ALTERNATIVE – It must be pointed out that infringement proceedings are not an easy solution either. They are often cumbersome and lengthy, and when it comes to their 'national champions', Member States have shown themselves not to go down without a fight.[339] But the Commission's does not face a binary choice between infringement proceedings against the Member State and action against the regulated undertaking. It could also choose to use the power it was given by Art. 106(3) TFEU, namely to "address appropriate directives or decisions to Member States" in order to ensure the application of the competition rules.[340] This is by far the quickest course of action, as the Commission can directly impose such a decision.[341] It could prove to be a valuable alternative.

110. CONCLUSION – The problematic interaction between the Commission and national regulatory authorities have come up several times now, but never with a satisfying conclusion for the undertakings involved. The issue has been presented as an *ultra vires* application of Art. 102 TFEU, as a breach of the principles of subsidiarity, legal certainty and proportionality, and as a breach of the duty of sincere cooperation (Art. 4(3) TEU). However, the European courts seem partly unable and partly unwilling to meaningfully address the difficult situation regulated undertakings are in.

---

[337] ECJ 14 October 2010, case C-280/08 P, ECLI:EU:C:2010:603, *Deutsche Telekom*, ECR 2010, I-9555, para. 47; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 307.

[338] CFI 10 April 2008, case T-271/03, ECLI:EU:T:2008:101, *Deutsche Telekom*, ECR 2008, II-477, para. 271; GC 29 March 2012, case T-336/07, ECLI:EU:T:2012:172, *Telefónica*, ECR 2012, 0, para. 307.

[339] M. HARKER, "EU competition law as a tool for dealing with regulatory failure: the broadband and margin squeeze cases" in *Journal of Business Law* 2013, 12.

[340] D. GERADIN, "Limiting the Scope of Article 82 of the EC Treaty: What can the EU learn from the U.S. Supreme Court's Judgment in *Trinko* in the wake of *Microsoft*, *IMS*, and *Deutsche Telekom*?" in *Common Market Law Review* 2004, 1551-1552.

[341] ECJ 13 June 1988, case 226/87, ECLI:EU:C:1988:354, *Commission v. Hellenic Republic*, ECR 1988, 3611, paras 11-12.

9. CONCLUSION

The conclusion of this paper refers back to the research questions it started from. A concise answer to each of those questions is given. The author will also cautiously look to the future. However, as Niels BOHR famously said, "prediction is very difficult, especially if it's about the future."[342]

1. How do the European courts assess whether there is a margin squeeze abuse?

The early history of margin squeeze was confusing, but over the last decade, the Commission adopted a rational margin squeeze theory. Essentially, an undertaking may be held liable for margin squeezing when its upstream or downstream pricing policy does not allow an equally efficient competitor to trade profitably on the downstream market. Apart from relying on the as-efficient-competitor test, this theory conceives margin squeeze as a stand-alone abuse, and requires at least a potential anti-competitive effect. After confirmation and elaboration by the European courts, the Commission continues to apply this theory in recent decisions. Observing this string of consistency, the author expects future margin squeeze cases to be judged by the same standards. Change, if any, may occur in the relation between margin squeeze and refusal to deal. Maybe the Commission returns to its enforcement priority criteria. Maybe an Advocate General delivers another strong opinion, this time successfully prompting the ECJ to reassess its position on indispensability. But this would require a margin squeeze case to make it all the way up to the ECJ, which recent practice shows to be uncommon. In any case, the Commission and the European courts are not known for retracing their steps.

2. Where does margin squeeze fit in the European legislative framework?

a. Theoretically, where could margin squeeze fit in the competition law framework, and how do the European courts currently conceive margin squeeze?

Margin squeeze overlaps with a number of other abuses of dominant position. Price discrimination, predatory pricing and constructive refusal to deal all capture margin squeeze up to some point. But as this overlap is never perfect, squeezing margin squeeze under one of those abuses invariably falls short. Therefore, courts and authors often conceive margin squeeze as a combination of existing abuses. Finding a margin squeeze in the United States requires either a duty to deal at the wholesale level or predatory pricing at the retail level. This is a rather narrow margin squeeze theory (if it is one at all). Doctrine is most drawn to the combination of price discrimination and predatory pricing

[342] Although it is probable Niels BOHR said these words, it is unlikely that he coined them. As BOHR was a Danish physicist, he probably just employed the Danish proverb that existed (long) before. The quote is also attributed, in various forms, to Samuel GOLDWYN, Robert Storm PETERSEN, Yogi BERRA, Mark TWAIN and NOSTRADAMUS.

(supplemented by excessive pricing). But these theories are never able to fully account for the vertical integration of the dominant undertaking, especially when that undertaking does not operate on the downstream market through a subsidiary. To entirely capture this, the European courts conceive margin squeeze as a stand-alone abuse. Instead of investigating either the upstream price or the downstream price, they look at the spread between those prices. The author finds it hard to imagine the Commission and the European courts moving away from this conception, although, as noted, an approximation with refusal to supply is possible.

b. How does the competition law approach interact with the regulatory approach?

When it comes to margin squeeze, the interaction between competition law approach and the regulatory approach is problematic. The Commission and the European courts have chosen for complementarity between the two regimes, with the state compulsion defence serving as an exception. This exception is meant to balance liability between undertakings and the state, but, given its narrow scope, does not achieve its purpose. Firstly, national regulatory authorities and courts are strictly prohibited from encouraging competition law abuses, but even far-reaching encouragements do not absolve the undertaking in question. Secondly, Member States can rest assured they will not face infringement proceedings for this encouragement. This problematic interaction has come up several times now, but never with a satisfying conclusion for the undertakings involved. It seems like the special responsibility of dominant undertakings has been driven too far, but insofar as the European courts are able to address this issue, they are unwilling. Thus, change would realistically come from the Commission itself. This would mean a rethinking of its enforcement strategy, e.g. by putting more trust in national regulators and enhancing collaboration. A change of course could benefit both the Commission and the undertakings involved. As the previous Commission actions seem partly motivated by the project of liberalisation (of the telecom market), progress in that area may cause the Commission to re-evaluate its course.