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MARGIN SQUEEZE

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Margin Squeeze held by the Competition Committee (Working Party No. 2 on Competition and Regulation) in October 2009.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur l'Etranglement de Marge qui s'est tenue en octobre 2009 dans le cadre du Comité de la concurrence (Groupe de Travail No. 2 sur la Concurrence et la Réglementation).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

(1) A margin squeeze occurs when there is such a narrow margin between an integrated provider's price for selling essential inputs to a rival and its downstream price that the rival cannot survive or effectively compete. A margin squeeze can arise only when (a) an upstream firm produces an input for which there are no good economic substitutes, (b) the upstream firm sells that input to one or more downstream firms and (c) the upstream firm also directly competes in that downstream market against those firms. Many countries have investigated margin squeeze cases, particularly in newly liberalised sectors such as telecommunications.

In order for a margin squeeze case to arise, three elements must be present. First, an upstream firm must produce an essential or bottleneck input with no substitutes and no scope for other firms to provide the essential input themselves. Second, that firm must sell that essential input to one or more downstream firms which seek to use that input in the provision of some downstream product or service. Third, the upstream firm must itself use its own input to compete against those downstream firms in the market for that downstream product or service.

A margin squeeze is said to arise when the margin between the price at which the integrated firm sells the downstream product and the price at which it sells the essential input to rivals is too small to allow downstream rivals to survive or effectively compete, to the detriment of downstream consumers. The primary antitrust concern is that a firm engaging in a margin squeeze may limit, restrict or prevent the development of competition in the downstream market. Depending on the circumstances this may raise the price or reduce the quality or variety of products available to downstream customers. It may also undermine the success of reforms aimed at promoting competition in the downstream market.

Even in an industry structure in which a margin squeeze may arise, the integrated firm does not necessarily have an incentive to restrict competition by engaging in a margin squeeze. The incentive to engage in a margin squeeze is clearest when the industry is subject to an obligation to sell or maximum price regulation at the upstream or wholesale level, while being subject to little or no regulation at the downstream or retail level. In this case, engaging in a margin squeeze may be part of a profitable strategy to eliminate competition, and therefore expand margins in the less regulated downstream market. When the integrated firm is unregulated upstream the incentive to foreclose competition downstream is less clear. In some cases the integrated firm will be able to extract any monopoly rents through its pricing power in the upstream market and will receive no further benefit from restricting or eliminating competition downstream. As some submissions noted, there are circumstances where an unregulated firm may have a profit incentive to engage in an anticompetitive price squeeze.

Behaviour which resembles a price squeeze may be undertaken for efficiency or pro-competitive reasons. For example, a firm might choose to vertically integrate into a downstream market to eliminate a double-marginalisation, to more effectively price-discriminate in the downstream market or to meet competition from another technology. Either practice may improve overall economic efficiency. BIAC points out that temporarily low retail pricing may be necessary to stimulate retail take-up of a new or innovative product where downstream customers do not know how much they value the product until they

try it. In such cases, forcing the integrated firm to raise its downstream price may raise prices to retail customers and force consumers to forego some of the benefits of vertical integration. The Dutch competition authority rejected a complaint of a margin squeeze abuse. It states that "vertical integration of a network provider and a service provider which uses that network can lead to efficiencies of scale and synergy. Such efficiencies of scale and synergy can be consumer-welfare enhancing. Making use of such efficiencies of scale and synergy does not per se lead to an abuse of dominance".

Margin squeeze cases are relatively common. Many competition authorities have examined at least a few complaints involving a potentially illegal margin squeeze. Many of these cases arise in newly liberalised sectors – particular telecommunications, but also in the water sector, railways, postal services, pharmaceuticals, pay television, gasoline, and funeral services (amongst others).

In almost all cases, margin squeeze cases fall under the general prohibition of abuse of dominance provisions in national competition laws. Germany, however, has specific provisions in its competition law addressing margin squeeze cases in relation to small and medium-sized companies.

(2) Where a firm is alleged to be engaging in a margin squeeze, this must imply that either the price charged for the bottleneck input is too high, the price charged for the downstream product is too low, or both.

(2.1) Where the focus is on the access or input price of the incumbent firm being too high, a margin squeeze case might also be labelled as a refusal to deal. Imposing liability for a margin squeeze where there is no duty to deal might result in the upstream firm inefficiently refusing to sell to downstream rivals at all, or withdrawing from operating in the downstream market, in an attempt to avoid liability.

Some submissions pointed 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 by refusing to sell the essential input at all. This might reduce economic efficiency and foreclose what downstream competition remains. A few recent cases before the U.S. Supreme Court have suggested that where there is no pre-existing duty to deal, it makes no sense to impose liability for engaging in a margin squeeze. In the *Trinko* case the Court 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".

In a few cases, behaviour that might be categorised as a margin squeeze has, instead, been labelled as some other form of abuse of dominance such as illegal price discrimination (charging a different price for the input to a downstream affiliate than to rival firms downstream), or, possibly as excessive pricing (charging too high a price for the essential input), where the latter is an abuse of dominance. The submissions reported that some cases that had been brought as an illegal margin squeeze might equally have been brought as some other abuse of dominance.

(2.2) Where the primary concern is that the downstream price is too low, there is a question whether the economic behaviour that might be characterised as a margin squeeze might also be characterised as a form of predatory pricing.

There are two different ways in which rules against predatory pricing might be applied. One possible approach compares the integrated firm's downstream price to the entire (upstream plus downstream) cost of the incumbent as a whole. The second possible approach focuses on just the downstream sector, and

compares the downstream price with the costs incurred at the downstream stage by using an imputed cost for the essential input (equal, say, to the amount charged to unintegrated rivals).[1] .

Where the predatory pricing test would be applied by comparing the downstream price to the entire cost of the integrated firm there is a risk that the integrated firm could engage in anticompetitive behaviour without risking violating the rules against predatory pricing – by setting the upstream price sufficiently high as to eliminate competition downstream, while leaving the downstream price at a level sufficient to cover its total costs. In this case there is an argument that the doctrine of margin squeeze captures anticompetitive behaviour that would not otherwise be caught under competition law.

In many countries it appears that the legal threshold applied to cases of a margin squeeze differs from the one applied for cases of predatory pricing. The Canadian submission notes that "a firm that lowers its prices in order to squeeze … its unintegrated rivals, but nevertheless is still pricing at or above its avoidable costs, may potentially be engaged in downstream margin squeezing but not predatory pricing".[2] Many submissions noted that margin squeeze cases do not require proof of subsequent recoupment.[3]

A few submissions argued that there are substantive differences between the incentives to engage in a margin squeeze and the incentive to engage in predatory pricing and that there should be no need to prove recoupment for firms engaging in a margin squeeze. Specifically, the European Commission argues that while predatory pricing requires the firm to incur a loss, which must be recuperated later, the same isn't true for a margin squeeze – "a margin squeeze can be a profitable strategy for the dominant firm even during the period in which it engages in the margin squeeze: the profits extracted from a high level of retail prices may surpass by far the forsaken profits related to the forsaken wholesale sales as a result of the high wholesale prices relative to the retail prices".[4]

The U.S. submission acknowledges the overlap between the margin squeeze and predatory pricing doctrines, and acknowledges the need for consistency in treatment. However, it also notes that if the rules on predatory pricing are, for some reason, out-of-line with the overall goal of promoting competition and economic welfare (perhaps because they are too lenient, say), forcing margin squeeze into the same legal boxes as predatory pricing could compound these errors.

(3) In assessing whether a margin squeeze has occurred competition authorities typically carry out a multi-step analysis. A first step is a detailed inquiry into the nature of competition in both the upstream and downstream markets. A common requirement is that the firm allegedly squeezing margins has market power in the upstream market. Other steps in the analysis may include an assessment of whether or not an illegal margin squeeze exists, whether or not there is an anticompetitive purpose, whether or not downstream competition has been harmed and/or whether or not there is an objective justification for the conduct.

To demonstrate that a firm has engaged in an illegal margin squeeze, competition authorities typically analyse both the upstream and downstream markets. To engage in a margin squeeze the firm must be

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1 This approach is also known as an "imputation test".

2 The Hungarian submission similarly notes that "competition law infringement can be found without proving that the company has suffered losses. … [T]he potential harm would not necessarily be a subsequent increase in the downstream price (compared to previous levels)".

3 See, for example, the Portuguese submission.

4 Portugal makes a similar claim: "A margin squeeze alone can reach the goal of excluding competitors without harming its short term profits while a predatory price would necessarily harm its short term profits".

active in both the upstream and downstream markets – either directly or through wholly-owned or partially-owned subsidiaries or affiliates. The upstream firm must also have significant market power in the provision of the upstream service.

The analysis may also include an assessment of whether or not the input the integrated firm provides to itself is different to that provided to its rivals, whether there are any cost differences in providing the service to itself rather than its rivals, and the extent of any differences in the downstream retail products or services. There may also be a requirement that the essential input is a significant share of the production costs of the downstream product or service.[5]

Several jurisdictions require a demonstration that the margin squeeze was entered into for an illegal purpose such as to prevent or restrict competition downstream. Proving anti-competitive purpose or intent can be difficult. Requirements to prove intent in competition law cases are consequently unusual.

Several other jurisdictions reverse the burden of proof and merely require a demonstration of the absence of objective efficiencies or justifications for the conduct of the integrated firm. In the Czech Republic the dominant firm is given an opportunity to demonstrate that its strategy is efficient and/or promotes economic benefits (such as the introduction of new services), and that it does eliminate competition in the downstream market through its conduct.

Some submissions noted that, in order to establish a breach of the competition law, the anticompetitive effect or harm must be demonstrated. The French submission argued that, according to the case law, the existence of a margin squeeze is sufficient to demonstrate the abuse of a dominant position. Nevertheless it noted that the French competition authority has, in recent cases, assessed the extent of the resulting harm to downstream competition.

(4) In many margin squeeze case there arises a question as to what constitutes an illegal margin. In most jurisdictions, a negative margin (i.e., downstream price below the price at which the incumbent sells the essential input to its rivals) would constitute a breach of competition law. But how large should the margin be? Most jurisdictions broadly require the margin to be large enough to allow an equally-efficient competitor to compete. However, where there are economies of scale or scope, this broad principle may require further clarification. Should the margin be sufficient to enable a downstream rival to recover more than just its incremental costs?

What constitutes an illegal margin squeeze? Answering this question inevitably requires a comparison of the allowed margin with some measure of the costs of providing services in the downstream market. In almost all cases a negative margin would constitute an illegal price squeeze[6].

Many submissions mentioned the principle that the margin should be sufficient to allow an equally-efficient entrant to compete, but there is some difference in interpretation of exactly what this principle means. The European Commission states that in assessing whether a dominant firm's prices constitute an abuse of dominance, it examines the costs and prices of the dominant firm rather than those of actual or potential competitors[7], in order to provide legal certainty.[8] In contrast, the Czech submission notes that the

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5 The Czech competition authority also requires a showing that the downstream market is not effectively competitive.

6 See, for example, the German submission.

7 The same position is also emphasised in the French submission.

8 EC: "If the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly their cost structure, … the latter would not be in a position to assess the lawfulness of its own activities"

test is applied using the lower of either the dominant undertaking's costs or the costs of an entering competitor.

Estimating the costs of the downstream sector is complicated by the presence of economies of scale and scope, which give rise to fixed and/or common costs which must be allocated. Several submissions indicated a preference for the use of the long-run average incremental cost of the downstream service.[9] The EC submission notes that this includes all those costs that are incremental to the provision of the downstream product or service. This may include a share of the costs of any common assets whose capacity is progressively adapted to the varying short- and medium-term demand for the services that share the common asset.[10] Typically, capital costs are annualised using a cost of capital (typically a weighted average of the cost of debt and the cost of equity), with the cost of equity derived from an application of the Capital Asset Pricing Model.

The UK submission notes that where firms gain experience by operating in the market, a larger margin may be preferable: "Where competition is just being introduced into these sectors there may be a justification for applying the reasonably efficient entry rather than equally efficient test. Firms may need to gain efficiency through experience and potential investors may be more easily scared away if early entrants fail due to aggressive competitive responses". In the UK, the telecommunications regulator (which has parallel power to enforce the competition law), has considered the use of an 'adjusted equally efficient competitor' test where the competitor must incur unavoidable additional downstream costs beyond those of the vertically integrated firm. The Swedish competition authority also notes that the "reasonably efficient competitor test" could be justified in cases where "competitors cannot achieve sufficient economies of scale due to the existence of the behaviour of the dominant firm".

Where the entrant must incur sunk costs to enter the downstream market the question arises not just of current prices but of how the revenue earned by the entrant would evolve over time. The EC reports that it has used two approaches – one approach compares revenue and costs on a year-by-year basis. The second approach involves computing the net present value of the stream of revenues and costs. In the *Telefónica* case the Commission calculated the NPV over a period of more than five years.

Other issues to be resolved include identifying the relevant prices in both the wholesale and retail markets. This can be an issue where different prices are quoted to different firms or where there are volume or bundling discounts. The Czech submission notes that where prices are non-linear at the wholesale and retail levels (e.g., due to two-part charges, take-or-pay contracts, or volume discounts) price indices are compiled for the purpose of purpose of applying the imputation test. The Hungarian submission describes a case in railways in which there was no clear upstream or downstream prices but merely a large number of individual contracts. In that case the competition authority calculated the downstream cost on the tonne-kilometre basis.

Another complicating factor arises when the integrated firm sets terms and conditions at the wholesale level which allow downstream rivals to (in principle) compete profitably for some downstream business but not for others. This can occur when an integrated firm charges a wholesale tariff which includes a usage component, but then sets a downstream charge to some customers which has just a fixed fee and no usage component. The Swedish submission notes that "when revenues are based on fixed fees and the costs are variable" there will be implications for the margin squeeze test.[11]

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9 See, for example, the Portuguese submission and the EC submission.

10 The Portuguese submission notes the complication in one case when the integrated firm was operating at the retail level with three different subsidiaries (meaning three different cost structures).

11 This issue is discussed further in the OECD publication *Access Pricing in Telecommunications*.

(5) Margin squeeze cases – which often arise in sectors with some degree of price regulation – often raise questions of the jurisdiction of competition law and competition authorities relative to the jurisdiction of sectoral law and sectoral regulators.

Margin squeeze cases often arise in newly liberalised industries where incumbent firms have a regulatory obligation to provide certain essential inputs to downstream rivals. In some cases there are prohibitions against price or margin squeezes explicitly included in sector-specific regulation (even where there is no such explicit mention in the competition law). For example, several jurisdictions have explicit controls on margin squeeze in the laws governing the telecommunications sector.

The presence of regulatory obligations raises the question of the appropriate role for competition law. In the U.S., the courts are said to be unlikely to impose an antitrust duty to deal in an industry subject to the control of a sectoral regulator with the power to impose a duty to deal. In other words, the existence of the sectoral regulations partially removes the scope for a competition law remedy. In the EU, dominant firms accused of engaging in a margin squeeze have argued that the existence of sector-specific regulations should shield them from liability under the competition law. The European Court of First Instance has held that competition rules still apply where sector-specific legislation leaves open the possibility of competition which may be prevented, restricted, or distorted by the conduct of dominant firms. The European Commission observes that "ex ante regulation and ex post antitrust intervention go hand in hand, and complement each other".

In any case, coordination and co-operation between the competition authority and the sectoral regulator will usually be required. The Dutch competition authority has established co-operation protocols with the relevant sectoral regulators which specify that "the sector-specific regulator will take the lead in interventions if the specific regulatory regime permits it to do so". The Dutch submission also describes a vertical merger case in which behavioural conditions were imposed as a condition to protect against input foreclosure and margin squeeze. These conditions included strict non-discriminatory open-access rules and a price ceiling on the upstream product. These conditions were similar to the regulation already present in that sector and were defined in close cooperation with the regulator.

The control of anticompetitive margin squeezes is complex, involving competition authorities and courts in many price and costing issues. Going forward, the control of margin squeeze is likely to be an important tool for the promotion of competition, particularly in newly liberalised sectors. This is likely to involve continued co-operation between competition authorities and sector-specific regulators.

SYNTHESE

par le Secrétariat

(1) Il y a compression de marge lorsque la marge entre le prix d'un bien intermédiaire indispensable vendu par un fournisseur intégré verticalement à un concurrent et son prix en aval est si étroite que le concurrent ne peut pas survivre ou soutenir la concurrence. Il ne peut y avoir compression de marge que lorsque (a) une entreprise d'amont produit un bien intermédiaire pour lequel il n'existe pas de substituts économiques valables, (b) l'entreprise d'amont vend ce bien intermédiaire à une ou plusieurs entreprises d'aval et (c) l'entreprise d'amont concurrence aussi directement ces entreprises sur le marché d'aval. De nombreux pays ont mené des enquêtes sur des affaires de compression de marge, en particulier dans des secteurs nouvellement libéralisés comme celui des télécommunications.

Pour qu'on puisse parler de compression de marge, trois éléments doivent être réunis. Premièrement, une entreprise d'amont doit produire un bien intermédiaire indispensable pour lequel il n'existe pas de substituts ni aucune possibilité pour les autres entreprises de le fournir elles-mêmes. Deuxièmement, cette entreprise doit vendre ce bien intermédiaire indispensable à une ou plusieurs entreprises d'aval qui ont besoin de ce bien intermédiaire pour fournir un produit ou un service en aval. Troisièmement, l'entreprise d'amont doit elle-même utiliser son propre bien intermédiaire pour concurrencer ces entreprises d'aval sur le marché de ce produit ou service d'aval.

Il y a compression de marge lorsque la marge entre le prix auquel l'entreprise intégrée vend le produit en aval et le prix auquel elle vend le bien intermédiaire indispensable à ses concurrents en aval est trop faible pour que ces derniers survivent ou soutiennent la concurrence et ce, au détriment des consommateurs en aval. La principale entrave au libre jeu de la concurrence tient au fait qu'une entreprise pratiquant la compression de marge peut limiter, restreindre ou empêcher la concurrence sur le marché d'aval. Selon le cas, cela peut faire monter le prix ou réduire la qualité ou la variété de produits offerts aux clients en aval. Cela peut aussi saper les réformes visant à renforcer la concurrence sur le marché d'aval.

Même dans une configuration de l'industrie où il peut y avoir compression de marge, l'entreprise intégrée n'est pas nécessairement incitée à restreindre la concurrence par ce moyen. L'incitation à recourir à la compression de marge est manifeste lorsque le secteur est soumis à une obligation de vente ou à une réglementation de prix en amont ou au niveau du commerce de gros, tandis qu'il n'est guère ou pas soumis à une réglementation en aval ou au niveau du commerce de détail. Dans ce cas, la compression de marge peut s'inscrire dans le cadre d'une stratégie rentable visant à éliminer la concurrence et donc à gonfler les marges sur le marché d'aval moins réglementé. Lorsque l'entreprise intégrée n'est pas soumise à une réglementation en amont, l'incitation à éliminer la concurrence en aval est moins claire. Dans certains cas, l'entreprise intégrée sera en mesure de tirer des rentes de monopole grâce à son pouvoir de fixation des prix sur le marché d'amont et elle n'aura plus avantage à restreindre ou supprimer la concurrence en aval. Comme certains participants l'ont fait observer, il y a des cas où une entreprise qui n'est pas soumise à une réglementation peut être incitée, pour des raisons de rentabilité, à pratiquer un étranglement de prix anticoncurrentiel.

Une entreprise peut adopter un comportement de type compression de marge pour des raisons d'efficience ou pour favoriser la concurrence. Une entreprise pourrait, par exemple, choisir de s'intégrer verticalement dans un marché d'aval afin de supprimer une double marginalisation, de pratiquer plus efficacement une discrimination de prix sur le marché d'aval ou d'affronter plus efficacement la concurrence d'une autre technologie. L'une ou l'autre pratique peut améliorer l'efficience économique globale. Le BIAC fait remarquer qu'il peut être nécessaire de pratiquer temporairement des prix de détail peu élevés fin de stimuler d'adoption, au niveau du commerce de détail, d'un produit niveau ou innovant dans les cas où les clients en aval ne savent pas ce que vaut le produit tant qu'ils ne l'ont pas essayé. Dans ces cas, forcer l'entreprise intégrée à relever son prix en aval peut augmenter les prix de détail pour les clients et priver les consommateurs des avantages de l'intégration verticale. L'Autorité néerlandaise de la concurrence a rejeté une plainte relative à un abus de compression de marge, déclarant que l'intégration verticale d'un fournisseur de réseau et d'un prestataire de services utilisant ce réseau peut améliorer l'efficience grâce à des économies d'échelle et à des synergies, ce qui peut accroître le bien-être des consommateurs. L'exploitation de ces avantages ne constitue pas un abus de position dominante.

Les affaires de compression de marge sont relativement courantes. De nombreuses autorités de la concurrence ont examiné au moins quelques plaintes faisant état de compression de marge potentiellement illégale. Ces cas se présentent surtout dans des secteurs nouvellement libéralisés – les télécommunications en particulier, mais aussi l'eau, les chemins de fer, les services postaux, les produits pharmaceutiques, la télévision à péage, l'essence et les services funéraires (entre autres).

Dans presque tous les cas, les affaires de compression de marge tombent sous le coup de l'interdiction générale d'abus de position dominante prévue par la législation nationale relative à la concurrence. La législation allemande en matière de concurrence contient cependant des dispositions spécifiques qui traitent de la compression de marge dans le cas des petites et moyennes entreprises.

(2) Pour que l'on soupçonne l'existence d'une compression de marge de la part d'une entreprise, il faut que le prix de vente du bien intermédiaire indispensable soit trop élevé, que le prix auquel le produit est vendu en aval soit trop bas, ou les deux à la fois.

(2.1) Dans le cas où le problème tient au prix trop élevé de l'accès ou du bien intermédiaire imposé par l'entreprise en place, une compression de marge peut aussi être assimilée à un refus de vente. Imposer une responsabilité potentielle pour compression de marge lorsqu'il n'y pas d'obligation de vente pourrait conduire l'entreprise d'amont à refuser toute vente à ses concurrents d'aval, ou à renoncer à ses activités sur le marché d'aval afin de se soustraire à cette responsabilité, ce qui serait contraire à l'efficience.

Pour certains participants, cela n'a pas de sens d'imposer une responsabilité potentielle en matière de compression de marge lorsque l'entreprise intégrée n'est pas soumise à une obligation de vente, puisque, dans ce cas, l'entreprise en question pourrait se soustraire à cette responsabilité en refusant purement et simplement de vendre le bien intermédiaire indispensable. Cela pourrait réduire l'efficience économique et éliminer ce qu'il reste de concurrence en aval. Quelques affaires portées récemment devant les tribunaux des États-Unis laissent penser que lorsqu'il n'existe pas au préalable d'obligation de vente, il ne rime à rien d'imposer une responsabilité pour compression de marge. Dans l'affaire *Trinko*, le tribunal a fait valoir que si une entreprise n'est pas forcée par la législation antitrust de traiter avec ses concurrents au niveau du commerce de gros, elle n'est certainement pas soumise à une obligation de vente selon des modalités et des conditions que ses concurrents trouvent commercialement avantageuses.

Dans un petit nombre de cas, un comportement qui pourrait être considéré comme une compression de marge a plutôt été assimilé à une autre forme d'abus de position dominante, comme la discrimination illégale de prix (le fait de faire payer le bien intermédiaire à un prix différent, en aval, selon qu'il s'agit

d'une filiale ou d'entreprises concurrentes), ou éventuellement à un prix excessif (le fait de faire payer trop cher pour le bien intermédiaire indispensable), dans le cas où cette dernière pratique constitue un abus de position dominante. Dans les notes qu'ils ont soumises, les participants ont indiqué que certaines affaires qui avaient été portées en justice en tant qu'affaires de compression illégale de marge auraient pu l'être tout aussi bien en tant qu'autre forme d'abus de position dominante.

(2.2) Dans le cas où le problème principal tient au niveau trop bas du prix en aval, la question se pose de savoir si le comportement économique qui pourrait être assimilé à une compression de marge pourrait être considéré aussi comme une forme de fixation de prix de vente d'éviction.

La réglementation visant à lutter contre la fixation de prix d'éviction peut s'appliquer de deux manières différentes. Une possibilité consiste à comparer le prix en aval pratiqué par l'entreprise intégrée au coût total (en amont et en aval) pour l'entreprise en place dans son ensemble. La seconde possibilité consiste à s'intéresser uniquement au secteur d'aval, et à comparer le prix en aval aux coûts encourus au stade de l'aval, en utilisant un coût fictif pour le bien intermédiaire indispensable (égal, mettons, au montant que l'entreprise fait payer à ses concurrents non intégrés).[1]

Si l'on applique le critère de la fixation de prix d'éviction en comparant le prix en aval au coût total pour l'entreprise intégrée, cette dernière risque d'adopter un comportement anticoncurrentiel sans craindre de violer les règles interdisant la fixation de prix d'éviction – en fixant le prix d'amont à un niveau suffisamment élevé pour éliminer la concurrence en aval, tout en laissant le prix d'aval à un niveau suffisant pour couvrir ses coûts totaux. Dans ce cas, on peut faire valoir que la théorie de la compression de marge rend compte d'un comportement anticoncurrentiel que ne ferait pas ressortir le droit de la concurrence.

Dans bien des pays, il apparaît que le seuil légal appliqué en cas de compression de marge diffère de celui qui s'applique en cas de fixation de prix d'éviction. Dans sa note, le Canada fait remarquer qu'une entreprise qui abaisse ses prix afin d'étrangler ses concurrentes non intégrées, mais qui néanmoins maintient ses prix au niveau ou au-dessus de ses coûts évitables, peut pratiquer la compression de marge en aval mais pas la fixation de prix d'éviction.[2] Bon nombre de participants ont souligné dans leur note que les cas de compression de marge ne nécessitent pas la preuve du recouvrement ultérieur.[3]

Un petit nombre de participants ont fait valoir qu'il y a des différences notables entre les incitations à comprimer les marges et l'incitation à fixer des prix d'éviction et que les entreprises qui se livrent à la compression de marge ne devraient pas avoir à apporter la preuve du recouvrement des pertes. Plus précisément, la Commission européenne soutient que, s'il est vrai que la fixation de prix d'éviction oblige l'entreprise à subir une perte, qui doit être obligatoirement récupérée plus tard, il n'en va pas de même pour la compression de marge – la compression de marge peut être une stratégie rentable pour l'entreprise dominante même pendant la période où elle se livre à cette pratique : les bénéfices tirés de prix de détail élevés peuvent dépasser largement ceux auxquels l'entreprise a renoncé au niveau du commerce de gros du fait du niveau élevé des prix de gros par rapport aux prix de détail.[4]

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1 Cette méthode est aussi appelée méthode du « critère d'imputation ».

2 La note soumise par la Hongrie indique, de même, que l'on peut établir une infraction au droit de la concurrence sans avoir la preuve que l'entreprise a subi des pertes. [Le dommage potentiel ne prendrait pas nécessairement la forme d'une hausse ultérieure du prix en aval (par rapport aux niveaux antérieurs)]

3 Voir, par exemple, la note soumise par le Portugal.

4 Le Portugal déclare, de même, qu'une compression de marge peut, à elle seule, atteindre l'objectif d'éviction des concurrents sans réduire les bénéfices à court terme tandis qu'un prix d'éviction réduirait forcément les bénéfices à court terme.

Les États-Unis reconnaissent le chevauchement entre les théories de la compression de marge et de la fixation de prix d'éviction, et la nécessité d'assurer la cohérence du traitement. Ils notent aussi, toutefois, que si les règles relatives à la fixation de prix d'éviction sont, pour une raison quelconque, sans rapport avec l'objectif global de développement de la concurrence et du bien-être économique (peut-être parce qu'elles sont trop clémentes, par exemple), vouloir soumettre la compression de marge au même traitement juridique que la fixation de prix d'éviction pourrait aggraver ces erreurs.

(3) Pour déterminer s'il y a compression de marge, les autorités de la concurrence procèdent habituellement à une analyse en plusieurs étapes. La première étape consiste en une enquête approfondie sur la nature de la concurrence sur les marchés d'amont et d'aval. L'entreprise soupçonnée de comprimer ses marges doit généralement détenir un pouvoir de marché en amont. Les autres étapes de l'analyse peuvent consister à déterminer s'il existe ou non une compression de marge illégale, s'il existe ou non une finalité anticoncurrentielle, si la concurrence en aval s'en est ou non trouvée affaiblie et/ou s'il existe une justification objective à cette conduite.

Pour montrer qu'une entreprise a recouru à une compression illégale de marge, les autorités de la concurrence analysent généralement les marchés d'amont et d'aval. Pour se livrer à une compression de marge, l'entreprise doit opérer à la fois sur le marché d'amont et sur le marché d'aval – soit directement, soit par l'intermédiaire de filiales dont elle a le contrôle total ou partiel. L'entreprise d'amont doit aussi détenir un important pouvoir de marché dans la fourniture du service en amont.

Une des étapes de l'analyse peut aussi consister à déterminer si le bien intermédiaire que l'entreprise intégrée se fournit à elle-même est ou non différent de celui fourni à ses concurrents, s'il y a des différences de coût dans la fourniture du service à elle-même et à ses concurrents, et quelle est l'importance des éventuelles différences dans les produits ou services d'aval au niveau du commerce de détail. Une des conditions peut être aussi que le bien intermédiaire indispensable représente une part importante des coûts de production du produit ou du service d'aval.[5]

Plusieurs pays exigent la preuve que la compression de marge avait une finalité illégale, celle d'empêcher ou de restreindre la concurrence en aval, par exemple. Il peut être difficile de prouver la finalité ou l'intention anticoncurrentielle. Il est rare, par conséquent, que la preuve de l'intention soit exigée en matière de droit de la concurrence.

Plusieurs autres pays inversent la charge de la preuve et exigent simplement que soit prouvée l'absence de recherche d'efficience ou de justification objective de la conduite de l'entreprise intégrée. En République tchèque, l'entreprise dominante a la possibilité de monter que sa stratégie est efficiente et/ou renforce les avantages économiques (comme la mise sur le marché de nouveaux services), et qu'elle élimine effectivement la concurrence sur le marché d'aval par sa conduite.

Certains pays ont indiqué dans leur note que, pour établir une infraction au droit de la concurrence, il faut apporter la preuve de l'effet anticoncurrentiel ou du préjudice causé. La France a fait valoir que, selon la jurisprudence, l'existence d'une compression de marge suffit à prouver l'abus de position dominante. Néanmoins, l'autorité française de la concurrence a, dans des affaires récentes, évalué l'ampleur du préjudice causé à la concurrence en aval.

(4) Dans bon nombre d'affaires de compression de marge se pose la question de savoir en quoi consiste une marge illégale. Dans la plupart des pays, une marge négative (c'est-à-dire un prix en aval inférieur au prix auquel le fournisseur en place vend le bien intermédiaire indispensable

[5] L'autorité tchèque de la concurrence exige aussi la preuve que le marché d'aval ne peut pas affronter efficacement la concurrence.

à ses concurrents) constituerait une infraction au droit de la concurrence. Mais quelle doit-être l'ampleur de la marge ? La plupart des pays exigent généralement que la marge soit suffisante pour permettre à un concurrent aussi efficient de soutenir la concurrence. Cependant, lorsqu'il existe des économies d'échelle ou de gamme, ce principe général peut demander à être précisé. La marge doit-elle est suffisante pour permettre à un concurrent en aval de récupérer plus que ses coûts marginaux ?

En quoi consiste une compression de marge illégale ? Pour répondre à cette question, il faut inévitablement comparer la marge autorisée à une mesure des coûts de fourniture des services sur le marché d'aval. Dans presque tous les cas, une marge négative constitue une compression de prix illégale.[6]

De nombreux pays ont indiqué qu'en principe la marge doit être suffisante pour permettre à un concurrent aussi efficient qui entre sur le marché de soutenir la concurrence, mais il y a des divergences d'interprétation concernant le sens exact de ce principe. La Commission européenne déclare que, lorsqu'elle cherche à déterminer si les prix d'une entreprise dominante constituent un abus de position dominante, elle examine les coûts et les prix de l'entreprise dominante et non ceux de ses concurrents effectifs ou potentiels[7], afin d'apporter une sécurité juridique.[8] Par contre, la République tchèque indique que le critère est appliqué en prenant, des coûts de l'entreprise dominante ou de ceux du concurrent entrant sur le marché, ceux qui sont les plus bas.

L'estimation des coûts du secteur d'aval est compliquée par la présence d'économies d'échelle et de gamme, qui créent des coûts fixes et/ou communs qu'il faut imputer. Plusieurs pays déclarent préférer utiliser la moyenne sur longue période du coût marginal de la fourniture du service en aval.[9] La Commission européenne, elle, prend en compte tous les coûts qui augmentent à la marge avec la fourniture du produit ou du service en aval. Cela peut comprendre une part des coûts d'actifs communs dont la capacité est progressivement adaptée aux variations à court et moyen terme de la demande pour les services en question utilisant ces actifs.[10] Habituellement, les coûts d'équipement sont annualisés à l'aide d'un coût du capital (généralement une moyenne pondérée du coût des emprunts et du coût des fonds propres), le coût des fonds propres étant calculé à partir d'une application du Modèle d'évaluation des actifs financiers.

Le Royaume-Uni fait observer que, lorsque des entreprises acquièrent de l'expérience en opérant sur le marché, une marge plus importante est peut-être préférable : « Lorsque ces secteurs viennent d'être ouverts à la concurrence, il peut être justifié d'appliquer la norme du concurrent raisonnablement efficient plutôt que celle du concurrent aussi efficient. Les entreprises peuvent avoir besoin d'accroître leur efficience à travers l'expérience qu'elles acquièrent et les investisseurs potentiels peuvent être plus facilement dissuadés de se lancer si les nouveaux entrants échouent à cause de la réaction agressive des concurrents ». Au Royaume-Uni, l'autorité de réglementation des télécommunications (habilitée parallèlement à faire appliquer le droit de la concurrence), a envisagé l'utilisation d'une norme ajustée du concurrent aussi efficient où le concurrent doit supporter des coûts inévitables additionnels en aval, qui vont au-delà de ceux de l'entreprise verticalement intégrée. L'autorité suédoise de la concurrence note

6 Voir, par exemple, la note soumise par l'Allemagne.

7 La France a aussi exprimé la même position.

8 CE : « Si la légalité des pratiques de tarification d'une entreprise dominante dépendait de la situation particulière de ses concurrents, en particulier de la structure de leurs coûts… ces derniers ne seraient pas en mesure d'évaluer la légalité de ses propres activités. »

9 Voir, par exemple, les notes soumises par le Portugal et la CE.

10 Le Portugal souligne cette complication dans une affaire où l'entreprise intégrée opérait au niveau du détail avec trois filiales différentes (ce qui signifie trois structures de coûts différentes).

aussi que la norme du concurrent raisonnablement efficient pourrait être justifiée dans les cas où les concurrents ne peuvent pas réaliser d'économies d'échelle suffisantes à cause du comportement de l'entreprise dominante.

Dans le cas où le nouveau concurrent doit supporter des coûts irrécupérables pour entrer sur le marché d'aval, la question se pose non seulement des prix du moment mais de l'évolution des recettes du nouvel entrant au fil du temps. La CE signale avoir utilisé deux méthodes – dont l'une consiste à comparer les recettes et les coûts année par année. La seconde consiste à calculer la valeur actuelle nette des flux de recettes et de coûts. Dans l'affaire *Telefonica*, la Commission a calculé la valeur actuelle nette sur une période de plus de cinq ans.

Parmi les autres questions à régler figure l'identification des prix pertinents sur les marchés de gros et de détail. Il peut y avoir un problème lorsque des prix différents sont pratiqués pour différentes entreprises ou qu'il y est offert des ristournes sur le volume ou sur les lots. La République tchèque fait observer que lorsque les prix ne sont pas linéaires aux niveaux du gros et du détail (en raison, par exemple, de tarifs binômes, de contrats d'achat fermes ou de ristournes sur le volume), des indices de prix sont calculés en vue d'appliquer le critère de l'imputation. La Hongrie décrit une affaire dans le secteur des chemins de fer où il n'y avait pas de prix d'aval et d'amont clairs mais simplement une multitude de contrats individuels. Dans ce cas, l'autorité de la concurrence a calculé le coût en aval par kilomètre-tonne.

Un autre facteur qui complique les choses entre en ligne de compte lorsque l'entreprise intégrée fixe des modalités et conditions au niveau du commerce de gros qui permettent aux concurrents en aval (en principe) d'affronter valablement la concurrence pour certaines opérations en aval mais pas pour d'autres. Cela peut se produire lorsqu'une entreprise intégrée fait payer un prix de gros qui comporte un usage, mais fixe ensuite un prix d'aval pour certains clients qui comporte un droit fixe et pas d'usage. La Suède indique que lorsque les recettes sont basées sur des droits fixes et que les coûts sont variables, cela aura des conséquences pour le critère de la compression de marge.[11]

(5) Les affaires de compression de marge – qui se produisent souvent dans des secteurs où les prix sont plus ou moins réglementés – soulèvent souvent la question de la juridiction d'application du droit de la concurrence et de compétence des autorités de la concurrence par rapport à celle du droit sectoriel et des autorités chargées de la réglementation sectorielle.

Les affaires de compression de marge se produisent souvent dans des secteurs nouvellement libéralisés où les entreprises en place sont tenues, conformément à la réglementation, de fournir certains bien intermédiaires indispensables à leurs concurrents en aval. Dans certains cas, la réglementation sectorielle interdit expressément les compressions de prix ou de marge (même lorsque cela n'est pas mentionné textuellement dans la législation relative à la concurrence). Dans plusieurs pays, par exemple, les lois régissant le secteur des télécommunications prévoient expressément des contrôles en matière de compression de marge.

L'existence d'obligations réglementaires soulève la question du rôle que doit jouer le droit de la concurrence. Aux États-Unis, il est peu probable que les tribunaux imposent, dans le cadre de la législation antitrust, une obligation de vente à un secteur soumis au contrôle d'une autorité chargée de la réglementation sectorielle qui a elle-même le pouvoir d'imposer une obligation de vente. Au sein de l'UE, des entreprises dominantes accusées de compression de marge ont fait valoir que l'existence de réglementations sectorielles devrait les soustraire à l'application du droit de la concurrence. Le Tribunal européen de première instance a soutenu que les règles en matière de concurrence s'appliquent quand

[11] Cette question est examinée plus avant dans la publication de l'OCDE intitulée *La tarification de l'accès dans le secteur des télécommunications.*

même dans les cas où la législation sectorielle laisse ouverte la possibilité d'entraves, de restrictions ou de distorsions de la concurrence liées à la conduite des entreprises dominantes. La Commission européenne fait observer que la réglementation ex ante et l'intervention antitrust ex post vont de pair et se complètent.

En tout état de cause, il faudra généralement une coordination et une coopération entre l'autorité chargée de la concurrence et l'autorité chargée de la réglementation sectorielle. L'autorité néerlandaise de la concurrence a établi des protocoles de coopération avec les régulateurs sectoriels compétents qui précisent que le régulateur sectoriel prendra l'initiative d'intervenir si la réglementation spécifique le lui permet. Les Pays-Bas décrivent aussi une affaire de fusion verticale dans laquelle des conditions en matière de comportement sont imposées afin de protéger les concurrents de l'exclusion du marché des biens intermédiaires et de la compression de marge. Au nombre de ces conditions figurent des règles strictes d'accès ouvert et non discriminatoire et un plafonnement de prix pour le produit d'amont. Ces conditions sont analogues à la réglementation en vigueur dans ce secteur et sont définies en étroite coopération avec l'autorité de réglementation.

Le contrôle des pratiques anticoncurrentielles de compression de marge est difficile car il nécessite l'intervention des autorités chargées de la concurrence et des tribunaux pour de nombreux problèmes de prix et d'établissement des coûts. Dans l'avenir, la réglementation visant à lutter contre la compression de marge sera sans doute un outil important de renforcement de la concurrence, en particulier dans les secteurs nouvellement libéralisés. Cela requerra probablement une coopération continue entre les responsables de la concurrence et les autorités chargées de la réglementation sectorielle.

BACKGROUND NOTE[1]

1. Introduction

A "margin squeeze" is an exclusionary abuse of dominance that arises when a vertically-integrated monopolist sells an upstream bottleneck input to rival firms that also compete in a downstream market with the monopolist in the provision of a downstream product.[2] A margin squeeze is said to arise when the margin between the price at which the monopolist sells the downstream product and the price at which the monopolist sells the upstream bottleneck product to its rivals is "too small" to allow an efficient downstream rival to effectively compete.[3]

This paper takes as a starting point the observation that economically-equivalent actions or economically-equivalent market structures should be subject to equivalent treatment under competition law. Where this does not hold – that is, where different, but economically-equivalent, behaviours or market structures are handled differently under competition law, there arises a risk that dominant firms will be induced to re-arrange their activities or structures merely to reduce the risk of liability under competition law, with no offsetting economic benefit. In addition, there arises a risk that some firms may be able to escape liability for potentially anti-competitive activities partially or entirely while others may be forced to curtail potentially pro-competitive behaviour.

It is often noted that behaviour that could be characterised as a margin squeeze is economically equivalent to, and might equally be characterised as, some other form of abuse of dominance, such as refusal-to-deal, predatory pricing, price discrimination, or excessive pricing. This raises the question whether or not "margin squeeze" should be a separate, distinct, stand-alone form of abuse of dominance. Is the behaviour that margin squeeze is designed to control adequately and effectively controlled through existing, established, forms of abuse? Or is the notion of margin squeeze more general – encompassing behaviours or structures which are not adequately and effectively controlled through established competition law standards?

In order to stimulate discussion, this paper argues that, with one possible exception, nearly all the behaviour that can be characterised as a margin squeeze can be equivalently characterised as one of the other forms of abuse of dominance. This observation suggests that where margin squeeze is recognised as a distinct form of abuse, the principles and standards applied in prosecuting margin squeeze cases should be identical to the principles and standards applied if the case were prosecuted as the equivalent alternative form of abuse of dominance. For example, if the margin squeeze case could also be characterised as a case

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1 The attached background note was prepared by Dr. Darryl Biggar, Senior Economist at the ACCC and Consultant to the OECD Secretariat.

2 This is sometimes referred to as a "price squeeze".

3 In the last decade there has been a large increase in the number of competition cases alleging price squeeze elements, especially in the telecommunications sector. For a discussion of recent price squeeze cases see, for example, Alexiadis and Shortall (2009), Palmigiano (2009), Spector (2008) and Geradin and O'Donoghue (2005).

of, say, refusal-to-deal or predatory pricing, the margin squeeze case should be prosecuted using the established principles and evidentiary standards of refusal-to-deal or predatory pricing cases, respectively.[4]

It is possible that the notion of margin squeeze might control some anti-competitive behaviour that is not adequately controlled by established forms of abuse of dominance. This might arise in the case where the upstream firm is fully vertically integrated and has an obligation to deal. In this case there is a legal question whether or not setting a low downstream price relative to the upstream or access price could be successfully prosecuted as a case of predatory pricing focussing on the downstream sector alone. Such a case would require some form of determination or imputation of the access price at which the integrated firm sells the upstream input to its own downstream component.

In those countries where such behaviour could be successfully prosecuted as predatory pricing on the downstream component alone, the notion of margin squeeze seems to be largely redundant. In those countries where such a case is unlikely to be brought or to succeed, the notion of margin squeeze would seem to control exclusionary anti-competitive behaviour which is not otherwise effectively controlled in competition law.

Note that there are a large number of margin squeeze cases across countries. It is not the purpose of this paper to provide a general overview of these cases. Rather, this paper will only treat certain highly discussed cases that are central to the argument.

This background paper is organised as follows. The next section introduces the economics of margin squeeze – including a discussion of the market structure in which margin squeeze arises, the relationship of margin squeeze to the economic literature on access pricing, and some of the complicating factors which make analysing margin squeeze cases difficult in practice.

Section 3 focuses on those cases where the dominant firm does not have a pre-existing legal duty to deal. Since offering to sell the upstream input to rivals at a "high" price is economically equivalent to not offering to sell at all, the principle of consistency says that a firm should not be found liable for a margin squeeze when it offers to sell the upstream input, when it is lawful for the firm to not offer to sell the upstream input to rivals at all. Imposing a risk of liability for margin squeeze where there is no existing duty to deal runs the risk that the firm will simply withdraw from voluntarily selling the upstream bottleneck input to rivals at all (that is, will refuse to deal entirely). If rivals are producing the downstream service more efficiently, or are producing a different range of resulting downstream products than the integrated firm, inducing the integrated firm to withdraw the upstream input from sale to rivals raises the price or reduces the range of downstream products available to downstream consumers, lowering consumer welfare.

Alternatively, consistency might be restored by imposing a duty to deal when an integrated firm produces an essential or bottleneck input, which it could make available to rivals. In recent years, courts in some OECD countries (especially the U.S.) have been reluctant to impose a duty to deal except in exceptional circumstances. In other jurisdictions, such as Europe, the establishment of a company as "dominant" for a product has served as a basis for a duty to deal. A decision to impose a duty to deal in the name of an alleged "margin squeeze" where a firm does not already have a duty to deal, may risk eroding the property rights of the dominant firm, potentially undermining the incentive to engage in innovative or risk-taking behaviour which might allow the firm to acquire a dominant position in the first place.

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4 Note that if the principles and standards in the equivalent abuse of dominance concept deviate from those that would be preferred from a public policy perspective, it may be necessary to argue for a change in those principles and standards. If such a change is difficult because of legal precedent, applying these standards to margin squeeze cases may simply extend the reach of problematic principles and standards.

Section 4 of this paper focuses on those cases where there is a pre-existing duty to deal. This section is, in turn, divided into two parts, addressing, first, cases where the dominant firm is only partially integrated downstream and, second, those cases where the dominant firm is fully integrated downstream. In the cases where the dominant firm is only partially integrated downstream, the price at which the integrated firm sells the upstream product to itself can, in principle be observed and is economically meaningful. In this case, the behaviour known as margin squeeze might alternatively be variously characterised as an abuse of excessive pricing (i.e., setting the input price "too high", where such an abuse exists), price discrimination (i.e., selling the input to its own downstream subsidiary at a different price it sells to rivals), or, possible, as predatory pricing.

As before, as long as margin squeeze is to be recognised as a stand-alone form of abuse, consistency requires that the same principles and practices that have been established in the prosecution of these other forms of abuse should be applied when prosecuting margin squeeze cases. For example, if the case could equally be characterised as a predatory pricing case, the margin squeeze case should involve the same elements as a predatory pricing case – including a demonstration of pricing below some measure of cost, and the possibility of subsequent recoupment.

The second part of section 4 focuses on those cases where the dominant firm is fully vertically integrated. In this case, the price at which the integrated firm sells the bottleneck input to itself cannot be directly observed in the market but must be inferred or imputed. There are three possible methodologies for inferring the price of the upstream input – corresponding to the three possible abuses mentioned above - excessive pricing, price discrimination, and predatory pricing, respectively. Once the upstream price has been inferred using one of these three methodologies, this price can then be tested for abuse of dominance using one of the other two methodologies.

Again, the consistency principle requires that a case of alleged margin squeeze be handled in the same way as the equivalent abuse of dominance. For example, where an existing duty to deal exists, an upstream price might be imputed using the principle of no discrimination. The downstream price might then be examined for a possible breach of predatory pricing on the downstream component of the firm. Where the firm's downstream price would not be held to be in breach of rules against predatory pricing, and therefore is not anticompetitive, consistency requires that the same firm face no risk of liability for a possible margin squeeze. Imposing the threat of liability for a margin squeeze in such cases risks forcing the firm to increase the downstream price or, in an extreme case, withdraw from providing the downstream service altogether. As section 4 argues, the threat of liability for margin squeeze in such cases prevents the incumbent firm from competing on price in its downstream products, and effectively requires the integrated firm to maintain a "price umbrella" to ensure that downstream rivals are allowed to survive in the market.

Section 5 of this paper addresses the case where the margin squeeze case is handled in a manner equivalent to a predatory pricing case. In this case the question arises whether or not in practice the dominant firm would ever face a threat of liability for predatory pricing on its downstream component alone, taking into account the upstream price the firm implicitly charges itself. Proving such a case could be difficult, as the profitability of the downstream component of the integrated firm depends on the level of the imputed access price – and there is no single right way to carry out that imputation. This paper argues that in the case where an integrated firm faces no threat of liability for predatory pricing on its downstream component, there is a risk that potentially anti-competitive behaviour may not be adequately controlled. In this case – and only in this case, there is an argument for introducing a separate form of abuse of dominance, which might be labelled the abuse through margin squeeze.

Section 6 highlights the main arguments of this paper and concludes.

A number of key points emerge from this paper:

- Economically-equivalent actions or economically-equivalent market structures merit equivalent treatment under competition law.
- Margin squeeze cases pose a risk of moving away from equivalent treatment.
- Where there is no duty to deal, it is likely that margin squeeze cases are inappropriate.
- Where there is a duty to deal, the cases generally incorporate elements of predation or refusals to deal.
- Principles and standards for margin squeeze cases should generally not differ from those in these other types of cases, unless the margin squeeze cases clearly involve a gap in treatment that would not be covered by other violations.

2. Background

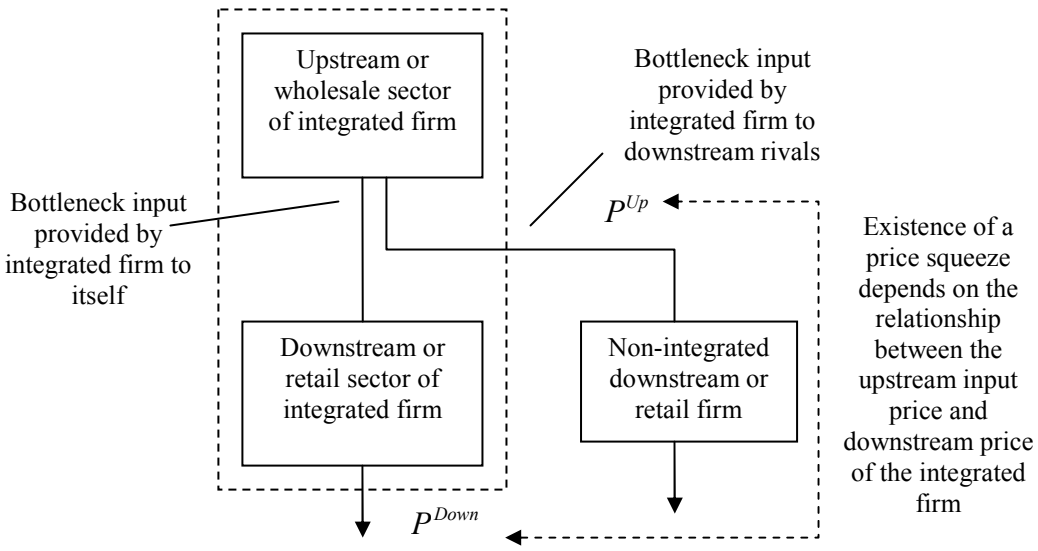
The market structure in which a price or margin squeeze might arise is well established and is set out in virtually every paper and case involving margin squeeze.[5] This market structure is illustrated in the simplified diagram of figure 1 below.

In the classic margin squeeze problem illustrated in figure 1 below, a firm both provides an input to downstream firms and also supplies its own wholly or partially-owned downstream subsidiary which competes in the downstream market with independent rivals. The upstream firm must have at least a dominant position in the supply of the essential input. In many cases something stronger than mere dominance and close to a pure monopoly is required – that is, it must not be possible for the downstream rivals to obtain the essential input from any other source (including by, say, manufacturing the input themselves, or purchasing from foreign suppliers, etc.).[6] The test for the existence of a price or margin squeeze depends (amongst other things) on the relationship between the price at which the integrated firm sells the bottleneck input to the independent rivals and the price at which the integrated firm sells the downstream product or service.

[5] See, for example, O'Donoghue and Padilla (2006), page 305.

[6] Crocioni and Veljanovski (2003), page 38 argue that "dominance for a price squeeze is more akin to super dominance".

Figure 1: Classic market structure in which a margin squeeze might arise



The classic or "textbook" margin squeeze case, as it is usually presented, typically involves a number of simplifying assumptions which are worth setting out in full:

(a) The provider of the essential input is fully vertically integrated downstream (i.e., the provider of the essential input owns 100 per cent of the downstream firm, or vice versa).

(b) The upstream product or service is used in 'fixed proportions'[7] in the downstream process to create the downstream product or service (it is common to assume that one unit of the upstream product is required to produce one unit of the downstream product).

(c) The downstream product of the rival is a perfect substitute for the downstream product of the integrated firm and both are assumed to sell to the same group of consumers.

(d) Although there may be economies of scale upstream, there are no economies of scale or scope in the downstream process.

(e) There is perfect competition in the downstream market, with no switching costs.

(f) No additional costs are incurred by the upstream firm in selling to rivals as compared to selling to its own downstream subsidiary.

(g) Both the upstream and downstream markets have stable, mature technologies and market penetration.

[7] "Fixed proportions" means that there is a fixed ratio between volumes of outputs and specific inputs. For example each minute of a fixed-mobile telephone call requires a minute of fixed network call origination service and a minute of mobile network call termination services, no matter which firms provide the services. In contrast, the amount of, say, hours of labour input per vehicle manufactured may differ from one car manufacturer to the next.

This classic or stereotypical margin squeeze situation is seldom, if ever, found in practice. Instead, the analysis of alleged instances of margin squeeze is, in practice, significantly complicated by a number of factors, such as the possibility that:

(a) the upstream firm is only partially vertically integrated downstream (i.e., only owns a proportion of the downstream firm, or vice versa);

(b) the upstream product or service provided to the non-integrated rival is not identical to the upstream product or service the firm provides to itself;

(c) the downstream product of the non-integrated rivals is not a perfect substitute for the product of the integrated incumbent;

(d) the upstream product or service is not used in fixed proportions by the non-integrated rivals;

(e) the upstream firm incurs additional costs in providing the essential input to rivals compared to when it supplies itself;

(f) there are economies of scale or scope in the downstream production process;

(g) the contractual arrangements between the integrated firm and the downstream rivals are more complicated than a simple linear arms-length price and involves fixed charges, take-or-pay arrangements, or other contractual arrangements;

(h) the downstream product is provided as part of a bundle of services which is purchased as a group, rather than individually;

(i) there is imperfect competition between the incumbent and the other non-integrated downstream firms; Alternatively, there are switching costs in the downstream market;

(j) the upstream or downstream markets are developing rapidly with either changing technologies, or rapid penetration of new products amongst consumers;

(k) either the upstream or downstream prices of the incumbent firm are regulated – either individually or as part of a weighted-average cap on prices, either at the wholesale level, the retail level, both, or as part of a "global price cap" covering both sets of services.

A number of jurisdictions have introduced guidelines or held reviews that include specific mention of margin squeeze or descriptions of conduct often identified as margin squeeze. A selection of these guidelines or reviews are listed in the Appendix.

One particular complicating factor deserves to be further highlighted. In most practical cases there will be substantial sunk, long-lived investment required at the upstream stage, often combined with the presence of substantial economies of scale or scope. It is important to emphasise that in the presence of sunk costs, and/or economies of scale or scope, there is no unique measure of the "cost" of providing the upstream service in a particular period of time.

Both sunk costs and/or economies of scale and scope give rise to a cost allocation problem: The presence of sunk costs gives rise to a problem of allocating costs over time. Economies of scale and scope give rise to fixed costs and joint or common costs, which give rise to a problem of allocating costs across services which share economies of scope at the same point in time. That allocation (whether across

services or over time) is almost always carried out in a manner which is essentially arbitrary, so that there is no economic significance to the resulting estimate of "cost".

Instead of a single measure of cost, in the presence of sunk costs or economies of scale and scope the best we can hope for is a range of measures of cost, such as marginal cost, variable cost, incremental cost, or stand-alone cost. The difference in the magnitude from the smallest to the largest of these cost measures is potentially quite large. Often, for the purposes of clarity of presentation a simple unique cost for the upstream (or downstream) service is simply assumed; in practice, such a simple unique cost almost never exists.

2.1 Margin squeeze and access pricing

The competition law notion of margin squeeze is closely related to, and to an extent is a subset of, the large economic literature on access pricing. To an extent the competition law concerns differ slightly from the traditional concerns of the literature on access pricing. Papers on the economics of access pricing typically seek the level of access prices (and, to an extent, downstream prices) which maximise overall economic welfare. In contrast, competition law focuses on the control of anticompetitive behaviour and the promotion of competition. These concerns are slightly different but there remains substantial overlap.[8]

The economics literature on access pricing yields a number of principles for the efficient setting of access prices. Several of these principles have direct relevance for consideration of margin squeeze cases, particularly those principles which show the conditions under which there should be a clear and definite relationship between the downstream price and the access price, and what that relationship should be.

Box 1 below briefly summarises some key principle of access pricing. As can be seen, economic theory suggests that the relationship between the upstream access price and the downstream final price depends on the degree of substitutability of the downstream products of the integrated firm and its rivals. In the special case when the downstream services of the integrated firm and its rivals are perfect substitutes, theory shows that the upstream or access price can be "backed out" from the downstream or final price using what is known as the efficient component pricing rule, or sometimes as "retail minus" access pricing.

Importantly, it is not necessarily efficient for the upstream or access price to be a simple linear charge. In fact theory shows that any price discrimination that is present in the downstream prices of the integrated firm should be reflected in the access prices.[9] This implies, for example, that if the integrated firm sells downstream using a two-part tariff, the same two-part structure should be reflected in the upstream access charges. Otherwise, the downstream rivals will be prevented from competing for certain downstream customers. For example, suppose that the incumbent sells internet access to rivals at, say, 10 cents per MB downloaded, but charges its own downstream customers a flat fee of $50 per month, the downstream rivals will be unable to compete for the business of the largest users (those users who download more than 500 MB per month in this example).

In exactly the same way, any bulk discounts in the downstream pricing of the integrated firm should also be present in the access prices. For example, using an example from Hovenkamp and Hovenkamp (2009)[10], suppose a firm produces the essential input at a cost of $50 per unit, and sells it to downstream

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8 Economists typically view competition is a means to an end (the promotion of welfare), rather than an end in itself. In principle, if that end can be achieved in other ways, promoting competition may be viewed as unnecessary.

9 This principle is emphasized, for example, in OECD (2004).

10 Hovenkamp and Hovenkamp (2009), page 22.

rivals at a cost of $70 per unit. Suppose it costs $10 per unit to convert this access product into a downstream retail product. The integrated firm sells the downstream product at the price of $80 per unit. At this price the downstream rivals can, in principle, compete. Now suppose that the integrated firm offers a bulk discount of 10 units of the downstream product at a price of $650, or $65 per unit. The integrated firm still makes a profit (of $150) on this bundle, but the downstream rivals can no longer compete in offering this bundle. Again, the general rule is that price discrimination at the retail level should be reflected in price discrimination in the upstream charges – in this case, by also offering a bulk discount at the wholesale level, reducing the access price to $55 per unit for sales of ten or more to the same downstream customer.

It is important to note that for this form of price discrimination to operate at the access level the integrated firm must be able to identify the characteristics of the downstream final customer to which the final product (that uses the access input) is sold. This may not be possible.

Box 1. Summary of Access Pricing Principles

There is a large literature in the economics of regulation on the efficient determination of access prices. Importantly, this theory provides guidance as to when there should be a relationship between the downstream or retail price and the upstream access or wholesale price, and if so, what that relationship should be. Some of the key results of that literature are as follows:

- First, a distinction is made between "one-way" and "two-way" access problems. "Two-way" access problems (where each firm provides essential inputs to the other) are quite different in nature from the classic or "one-way" access problem and should be handled separately.

- The pricing of "one way" access problems is very similar in principle to the classic problem of efficient pricing of the output of a monopoly. The principles that have been developed for efficient monopoly pricing also apply to access pricing. These principles include, amongst other things, the relevance of marginal cost as a starting point, the possible efficiency benefits of using two-part tariffs and other forms of price discrimination, and the possible use of "Ramsey-Boiteux" tariffs to efficiently allocate joint and common costs across different services.

- Importantly, where the access product is used by rivals to produce a downstream product that is a substitute for the downstream product sold by the incumbent firm, the extent of that substitution should be taken into account when setting the access price. At one extreme, when the rival's downstream product is only a poor substitute for the incumbent's downstream product in the eyes of consumers, the access price can be set largely independent of the incumbent's downstream price. In this case, the access price is usually set on the basis of so-called "cost-based" factors (such as marginal cost, or incremental cost, with or without a share of the joint and common costs).

- At the other extreme, when the rivals' downstream product is a perfect substitute for the incumbent's downstream product in the eyes of consumers, the access price must be set so as to allow an appropriate margin between the incumbent's downstream price and the access price. In this case (under certain specific further assumptions) it is possible to show that the efficient access price is given by the well-known "efficient component pricing rule", which states that the access price should be set equal to the incumbent's downstream price less the marginal cost (or, sometimes, the incremental cost) of the incumbent in transforming the upstream product into the downstream product.[11] In some instances regulators seek to directly link the access price to the incumbent's downstream price through what is known as "retail minus" pricing, in which the access price is set directly on the basis of the downstream price, less a margin to account for the cost of transforming the upstream product into a downstream

[11] See, for example, Polo (2007).

product. More generally, the efficient (welfare maximising) access price will depend on factors such as the degree of substitution between the downstream products and the level of competition in the downstream market.

- Where the access price is tightly regulated and the downstream price lightly regulated or not regulated at all, the integrated firm retains strong incentives to deny access by delaying or degrading the quality of access. Preventing this behaviour is time and resource intensive. On the other hand, where the downstream price of the integrated firm is tightly regulated and the upstream price only lightly regulated the integrated firm may choose to withdraw from provision of the downstream service. One tool that has been proposed to ensure the correct "balance" between the regulation of access prices and final prices is the so-called "global price cap" which imposes a cap on a basket of prices including both access and final prices. The regulated firm is given discretion to alter both access and final prices provided a cap on the weighted average of both access and final prices is not violated. A cap of this kind, although having certain desirable theoretical properties, has not yet been adopted in practice.

- Where the rivals' downstream product is a close substitute for the downstream product of the incumbent, any price discrimination that is present in downstream prices of the incumbent should be reflected in the access prices. For example, if the incumbent uses a two-part tariff at the downstream level, this should be reflected at the access level. If the incumbent discriminates on price across different groups of customers or geographic areas at the downstream level, this should be reflected at the access level. If the incumbent offers bulk discounts at the downstream level, the same discounts should be reflected at the access level. This approach assumes that the access price can be set differently depending on the characteristics of the final downstream customer to which the final product is sold.

3. Margin squeeze and Refusals to Deal

As noted at the outset, this paper maintains that competition law should treat economically-equivalent actions in an identical manner. Since, as noted earlier, an outright refusal to deal is economically equivalent to only offering to deal at a high price (or a low quality), offering to sell an essential input at a high price relative to the downstream price (i.e., a margin squeeze) is economically equivalent to refusing to deal. Therefore, by the consistency principle, a margin squeeze case must, at one level, be handled in the same manner as an antitrust case of refusal to deal. [12]

This need for consistency between the competition law treatment of an outright refusal to deal, and an offer to deal at a high access price (relative to the downstream price) has often been emphasised in both the legal and the economics literature on margin squeeze. Many legal and economic commentators have argued that it makes no sense to impose a risk of liability under a margin squeeze doctrine when the dominant firm offers to sell the essential input to rivals, when the firm would face no threat of liability for refusing to deal in the essential input at all. Doing so would merely force the integrated firm to withdraw the essential input from sale, to the detriment of downstream users and consumers.[13] For example, Spector (2008) writes:

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12 This need to treat economically-equivalent actions equivalently under competition law was emphasised by Prof Bloom at an OECD Roundtable in 2007. Prof Bloom noted that in some jurisdictions, the legal standards to demonstrate a margin squeeze are lower than the legal standard necessary to demonstrate refusal to deal or predatory pricing, raising a risk of "abuse shopping". OECD (2008), page 95. Spector (2008), page 6, also warns against the risk of "treating economically equivalent practices in a heterogenous way depending on formal differences devoid of substantial meaning".

13 The decision by an integrated firm to refuse-to-deal rather than face liability for a margin squeeze will, in certain circumstances, reduce overall economic efficiency. If the downstream rivals are more efficient than the incumbent, or if their products are only partial substitutes for the incumbent's, or if they also sell other

> *"The consistency requirement is ... obvious when comparing margin squeezes with refusals to supply. A refusal to supply can be seen as a decision to set a prohibitively high price. As a consequence it would be absurd for a firm's behaviour to be labelled as an abusive margin squeeze in a situation where it would have the right to refuse to supply the defendant. Put differently, in situations in which a vertically integrated firm has the right not to supply a downstream competitor, it should a fortiori have the right to supply it under the terms of its choosing".*[14]

Similarly, in the U.S. *Covad* case, Judge Ginsburg writes:

> *"it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal".*[15]

The most broadly discussed recent margin squeeze case to focus on the situation in which there is no pre-existing duty to deal is the U.S.'s *linkLine*[16] case. This case will be a large focus of this section. Most European cases, for example, involve a duty to deal; select European cases will treated in later sections that focus on the situation in which there is a duty to deal.

The *linkLine* case involved a monopoly seller of unbundled local loops (Pacific Bell) that provided these local loops to downstream internet service providers who used them to provide high-speed DSL internet access to their own downstream customers. Pacific Bell also competed in the provision of internet access services. The plaintiffs claimed that Pacific Bell was "setting a high wholesale price for DSL transport and a low retail price for DSL Internet service". In other words, they alleged a price squeeze in violation of section 2 of the Sherman Act.

In February 2009 the Supreme Court, relying on its *Trinko* decision, determined that since there was no "antitrust duty" on the part of Pacific Bell to deal with its competitors[17], and no support for the claim that Pacific Bell's retail prices were predatory, Pacific Bell could not be found liable for monopolization under section 2. Specifically, the Court concluded:

> *"Trinko holds that a defendant with no antitrust duty to deal with its rivals has no duty to deal under the terms and conditions preferred by those rivals. Brooke Group holds that low prices are only actionable under the Sherman Act when the prices are below cost and there is a dangerous probability that the predator will be able to recoup the profits it loses from the low prices. In this case, plaintiffs have not stated a duty-to-deal claim under Trinko and have not stated a predatory pricing claim under Brooke Group. They have nonetheless tried to join a wholesale claim that cannot succeed with a retail claim that cannot succeed, and alchemize them into a new form of*

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products which are desired by consumers which also rely on the bottleneck input, the decision of the integrated firm to withdraw from sales of the essential input will reduce overall consumer welfare.

14 Spector (2008), paragraph 9. See also Carlton (2008), page 6.

15 *Covad Communications Co. v. Bell Atlantic Corp.,* 398 F.3d 666 (D.C. Cir. 2005). See also O'Donoghue and Padilla (2006), page 326: "… there are strong reasons to suggest that a margin squeeze can only be illegal if there is a duty to supply the input in question".

16 *Pacific Bell Telephone Co. DBA AT&T California, et al v. Linkline Communications Inc., et al.*, 555 U.S._(2009)

17 Even though, in this case, Pacific Bell was not subject to an antitrust duty to deal, it was subject to a regulatory duty to deal – in this case to sell its wholesale DSL services at a price not greater than its retail price for DSL services.

> *antitrust liability never before recognized by this Court. We decline the invitation to recognize such claims. Two wrong claims do not make one that is right."*[18]

The central argument of the Supreme Court can be seen as a consistency argument – if a firm has no antitrust duty to deal it should not be found liable for offering to deal at a high upstream price relative to its retail price. At the same time, if no evidence is presented that the firm's downstream prices are not predatory, it should not be found liable for setting a low retail price relative to its upstream price. An important element of the case is its distinction between an antitrust duty to deal and a regulatory duty to deal, a distinction that is not universally supported particularly to the extent that regulatory duties to deal are based on the same competition policy considerations as antitrust duties to deal.[19]

Consistency between treatment of margin squeeze cases and refusal-to-deal cases might also be restored by inferring or imposing a duty to deal precisely in those circumstances where an integrated firm sells an upstream essential input at a high price relative to the price at which it sells a downstream service. But does it make sense to impose a duty to deal in these circumstances?

In 2004, the U.S. Supreme Court in the *Trinko* case limited the grounds on which a firm can be found to have an antitrust duty to deal to only exceptional or rare cases. The Court noted that the Sherman Act "does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal"[20].

The *Trinko* case has proven controversial. Many economists argue that nearly all firms should be free, under most conditions, to choose with whom they deal. Fairly strict conditions need to be satisfied before imposing a duty to deal with rivals, for the following reasons:

- Imposing a duty to deal effectively limits the property rights of the dominant firm, thereby restricting its incentives to innovate and take risks to acquire the dominant position in the first place. This economic harm might be larger than the potential gains from innovation and competition in the related downstream sectors that might arise when access is mandated. In its guidance on enforcement priorities for exclusionary abuses under Article 82, the European Commission notes that intervention on competition law grounds "requires careful consideration where the application of Article 82 would lead to the imposition of an obligation to supply". Referring to both refusal-to-supply and margin squeeze cases, the Commission notes that:

  > *"The existence [of an obligation to supply] – even for fair remuneration – may undermine undertakings' incentives to invest and innovate and, thereby, possibly harm consumers. The knowledge that they may have a duty to supply against their will may lead dominant undertakings – or undertakings who anticipate they may become dominant – not to invest, or to invest less, in the activity in question. Also, competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interest of consumers".*[21]

  Carlton (2008) notes:

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18 *linkLine* 555 U.S._(2009), page 17.

19 See Alexiadis and Shortall (2009), page 5.

20 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 at 407-08 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

21 EC (2009), page 23.

> *"a duty to deal reduces property rights and as such reduces the fundamental incentives of capitalist system to reward those who create products that consumers want. Any reduction in this incentive will generally harm consumers, especially when one realizes how important new products have been in raising living standards"*[22]

- Imposing a duty to deal effectively places the competition authority and/or the courts in the role of the price regulator. This task is usually (although not always) time-consuming, resource-intensive, and on-going.

This latter argument was expanded on by a number of well-known antitrust scholars in their brief to the Supreme Court in the *linkLine* case:

> *"In the American setting, the requisite analysis more resembles the work of a public utilities commission than that of a federal judge presiding over an antitrust case. By definition, the judge's job as de facto rate regulator never ends because external forces will compel wholesale and retail prices to change over time, such that a given profit margin may shrink and jeopardize the survival of competitors. The perverse outcome is that price-squeeze litigation becomes a kind of enduring cost-of-service regulation that taxes the resources of a single district judge".*[23]

> *"Properly understood, a price squeeze is a regulatory issue, which makes sense only as a rule of price regulation in an industry already subject to duties to deal and to control by institutionally competent regulators. Attempting to implement regulatory policy through section 2 of the Sherman Act is ill-advised, both because it makes no sense for courts to re-regulate deregulated or lightly regulated industries, and because courts lack the institutional competence to implement regulation".*[24]

It is difficult to reconcile the court's effort to distance judges from "enduring cost-of-service regulation" when, if that regulation is performed by a regulator, it is often subject to judicial review that is repeated over time and can involve frequent reversals and remands of regulatory decisions.

O'Donoghue and Padilla (2006) emphasise that the criteria for a finding of liability under a margin squeeze case should parallel those for a refusal to deal, which include:

> *"there must be scope for meaningful added-value competition on the downstream market before a duty to deal (or to deal on specific terms) can be imposed; and any duty to deal should encourage more competition than it discourages, i.e., the ex post benefits of the duty to deal to consumers must outweigh any harms to firm's ex ante incentives to develop products".*[25]

The OECD (2008) roundtable on refusals to deal revealed there is a broad consensus amongst OECD competition authorities that a competition law duty to deal should only be imposed under special circumstances. The consistency principle therefore implies that the circumstances under which a firm could be found liable for a margin squeeze (in the absence of any regulatory duty to deal) must also be limited to the same special circumstances.

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22 Carlton (2008), page 7.

23 Brief of *Amici Curiae* Professors and Scholars in Law and Economics in Support of the Petitioners, Pacific Bell Telephone Co. v. linkLine Communications Inv., Supreme Court of the United States, No. 07-512 (filed Nov. 16, 2007), page 8.

24 Ibid, page 3.

25 O'Donoghue and Padilla (2006), page 326-327.

In short, a firm should only face the threat of liability for a margin squeeze where it faces a pre-existing duty to deal. If margin squeeze is maintained as a stand-alone form of abuse, it should not be used to strengthen (or weaken) the existing obligations to deal under competition law. Precisely the same standards and processes as required for a refusal-to-deal case should apply.

But what if the integrated firm already has a pre-existing duty to deal, perhaps as a result of a regulatory obligation? What light does the consistency principle shed in this case?

4. Margin squeeze in the case of a partially-integrated firm

Consider now the case where a firm has a pre-existing duty to deal – either as a result of competition law or as a result of a regulatory obligation. Consider first the case where an upstream firm is either not vertically-integrated at all, or only holds a small stake in a downstream firm. In this case (provided there are no other contractual arrangements between the firms), the arms-length price at which the upstream firm sells the essential input to its downstream subsidiary is, in principle, observable and potentially economically meaningful.

In these circumstances the level of the price for the upstream essential input, either on its own, or relative to the level of the price for the downstream service, might give rise to three possible courses of action under competition law (illustrated in figure 2 below):

- If it is revealed that the access price is above some relevant measure of cost, the upstream firm might be held to be liable for *excessive pricing* (in those jurisdictions where excessive pricing is a potential abuse of dominance).[26]

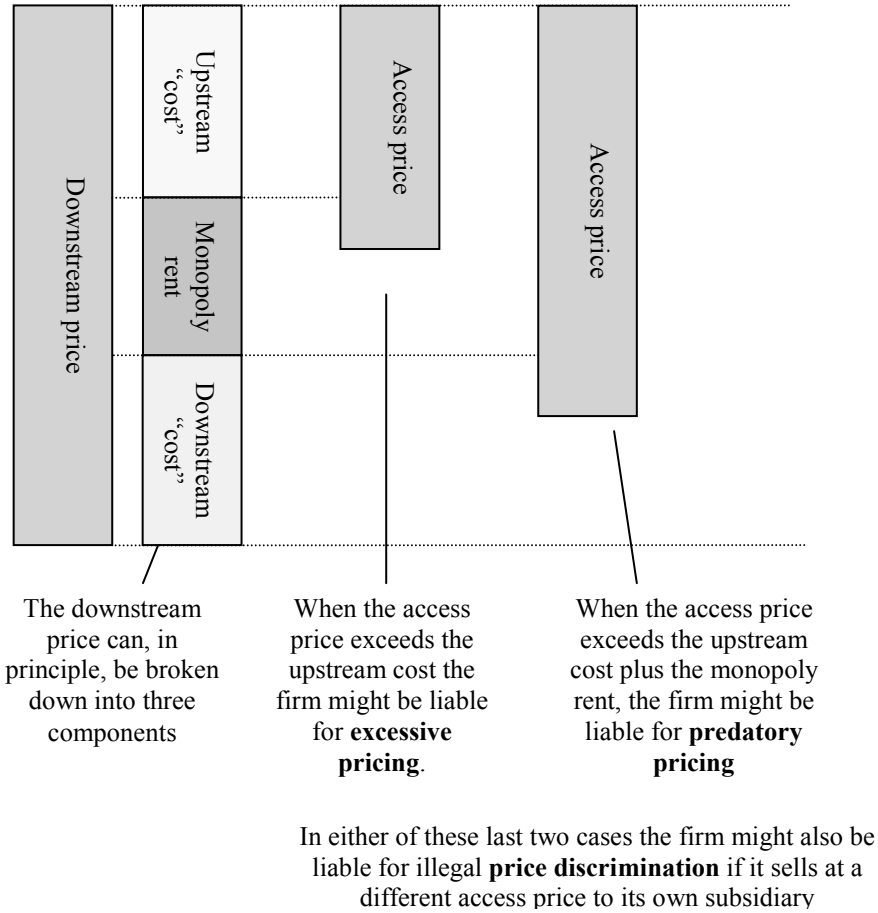
- Alternatively, if it is revealed that the upstream price at which the firm sells to its own subsidiary is different to the price at which the firm sells the essential input to its downstream rivals, the upstream firm might be found liable for illegal *price discrimination*.

- Alternatively, where the downstream subsidiary sells the downstream product at a price at which it is incurring a loss (taking into account the price it is paying for the essential input), the downstream subsidiary might be found liable for *predatory pricing*.

These three possible courses of action are illustrated in the following diagram:

[26] O'Donoghue and Padilla (2006), page 322, seek to distinguish the "exclusionary abuse" of margin squeeze from the "exploitative abuse" of excessive pricing. They argue that treating a situation of margin squeeze as a case of excessive pricing "does not appear to add anything useful".

Figure 2: Margin squeeze and other forms of antitrust liability



For example, suppose that the cost of the upstream service is $10 per unit, the cost of the downstream service is $40 per unit, and the downstream price is $65 per unit, so that the "monopoly rent" is $15 per unit. In practice, as emphasised earlier, in the presence of sunk costs and economies of scale and scope it is typically not possible to unambiguously measure costs in this way, but for the moment put this concern to one side.

If the access price were set at say, $20 per unit, the partially-integrated firm might face the threat of liability for "excessive pricing" upstream, since the access price of $20 per unit is larger than the upstream cost of $10 per unit.

Alternatively, if the access price were set at $30 per unit, the partially-integrated or unintegrated firm might face the threat of liability for predatory pricing downstream. In this case the claim would be that the downstream price of $65 per unit is "too low" relative to the downstream firm's total costs, which consist of the access price of $30 per unit plus the downstream costs of $40 per unit, amounting to $70 per unit.

If the provider of the essential input were partially vertically integrated downstream this latter behaviour might also be characterised as a "margin squeeze". An unintegrated firm cannot be found liable for a margin squeeze – it could only be prosecuted for predatory pricing. But consistency of treatment between a partially integrated and an unintegrated firm requires that these two forms of abuse be treated consistently.

In particular, the consistency principle requires that a margin squeeze case arising in this context of partial vertical integration, be treated identically to a case of predatory pricing on the downstream sector – taking into account the access price paid to the upstream firm. This implies that the same competition law policies and practices that apply to predatory pricing should apply to margin squeeze cases (and vice versa) – including, for example, the need to show pricing below some relevant measure of cost and the possibility of subsequent recoupment.

O'Donoghue and Padilla (2006) note:

> *"Many of the principles relevant to the analysis of 'pure' predation can inform the analysis of margin squeeze abuses. These include the need for a credible strategy of predation, evidence of exclusionary intent, issues of recoupment, and adverse effects on consumers".*[27]

This need for consistency is clear. Suppose first that the standards for testing for a margin squeeze were weaker than the standards for finding predatory pricing. In this case a situation might arise where the level of the downstream price relative to the upstream price would be found to be predatory if the downstream firm were unintegrated, but would be perfectly lawful (under the margin squeeze doctrine) if the firm were integrated. In this case the downstream firm could avoid the threat of a predatory pricing action under competition law by taking a small stake in an upstream firm (or by selling a small stake to an upstream firm).

Perhaps more likely, if certain pricing behaviour would fall foul of a rule against margin squeeze if the firm were integrated, but would not face any risk of liability for predatory pricing when it is vertically separated, the producer of the essential input has an incentive to divest itself of any downstream firms. In either case, in the attempt to avoid antitrust liability, any economic benefits from allowing the firm to choose the optimal vertical structure are lost.

The same arguments apply to the evidentiary standards and the legal tests to be applied. Consistency requires that a margin squeeze case involving a partially integrated firm should apply the same rules and processes as a predatory pricing case involving a vertically-separated firm, including, as noted above, the need to demonstrate pricing below cost and some probability of recoupment. This point is made, for example, by Spector (2008) who argues that:

> *"Consistency in the enforcement of Article 82 … requires competition authorities to ensure that the treatment of economically-equivalent practices be equivalent. In other terms, this means that the prohibition criteria, standards of proof, and allocation of the burden of proof, should not vary significantly according to whether a squeeze test or a predation test is conducted".*[28]

This overlap (and therefore the need for consistency) in the handling of price squeeze and predatory pricing cases can be seen in the EC's *Wanadoo* case. In 2003, the European Commission determined that Wanadoo (a subsidiary of France Telecom, around 70 per cent owned by France Telecom) had engaged in predatory conduct by setting the prices of its retail services below its average variable costs, taking into account the wholesale charges it paid to France Telecom.[29]

But this case could equally have been characterised as a "margin squeeze" case. In fact, interestingly, the remedy imposed in this case was more consistent with the case being a classic "margin squeeze" case.

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27 O'Donoghue and Padilla (2006), page 322-323.

28 Spector (2008), paragraph 8.

29 COMP/38.233 *Wanadoo Interactive*, Commission decision of 16 July 2003.

The remedy required was not targeted at Wanadoo (as would be consistent with treating this as a standard predatory pricing case) but at France Telecom – requiring France Telecom to lower its wholesale charges.

5. Margin squeeze and the fully-integrated firm

In principle, as we have seen, the actions of a partially-integrated firm should be handled the same way under competition law as identical actions by a non-integrated firm. But what about the case of a fully-integrated firm? The case of full vertical integration is more difficult because, when a firm is fully vertically-integrated, the "price" at which the firm sells the bottleneck input to its own downstream arm is not typically observable. Even if it were nominally observable (say, because the upstream part and downstream part of the integrated firm are in separate accounting entities) the price would have no economic meaning. Transactions or transfer prices between jointly owned firms only serve to shift apparent profits around within the components of such firms.[30]

In this case, since the price at which the integrated firm sells the bottleneck input to itself cannot be directly observed, it must be *inferred* or *imputed*. There are three possible methodologies for inferring or imputing a price at which the integrated firm sells the essential input to itself (the "internal" access price), corresponding broadly to the three possible courses of action noted above:

- The first approach assumes that the integrated firm sells the essential input to itself at a price that allows its upstream subsidiary to only make a normal return (essentially taking any monopoly profit downstream). This implies that the imputed access price is equal to the integrated firm's cost of the upstream process. This approach essentially assumes that the integrated firm is not engaging in *excessive pricing* upstream.

- The second approach assumes that integrated firm sells the essential input to itself at the same price (the 'internal' access price) that it sells the essential input to its downstream rivals (the 'external' access price). This approach essentially assumes that the integrated firm does not *price discriminate* in the price at which it sells the essential input – even though the downstream rivals might be providing different downstream services, or servicing different customers groups than the integrated firm.[31]

- The third approach assumes that the integrated firm sells the essential input to itself at a price that allows its downstream subsidiary to earn a normal return (essentially taking any monopoly profit upstream). This implies that the imputed access price is equal to the integrated firm's downstream price less the integrated firm's "cost" of the downstream process. In effect, this approach assumes that the integrated firm is not engaged in *predatory pricing* downstream.

These three approaches are illustrated in figure 3 below.

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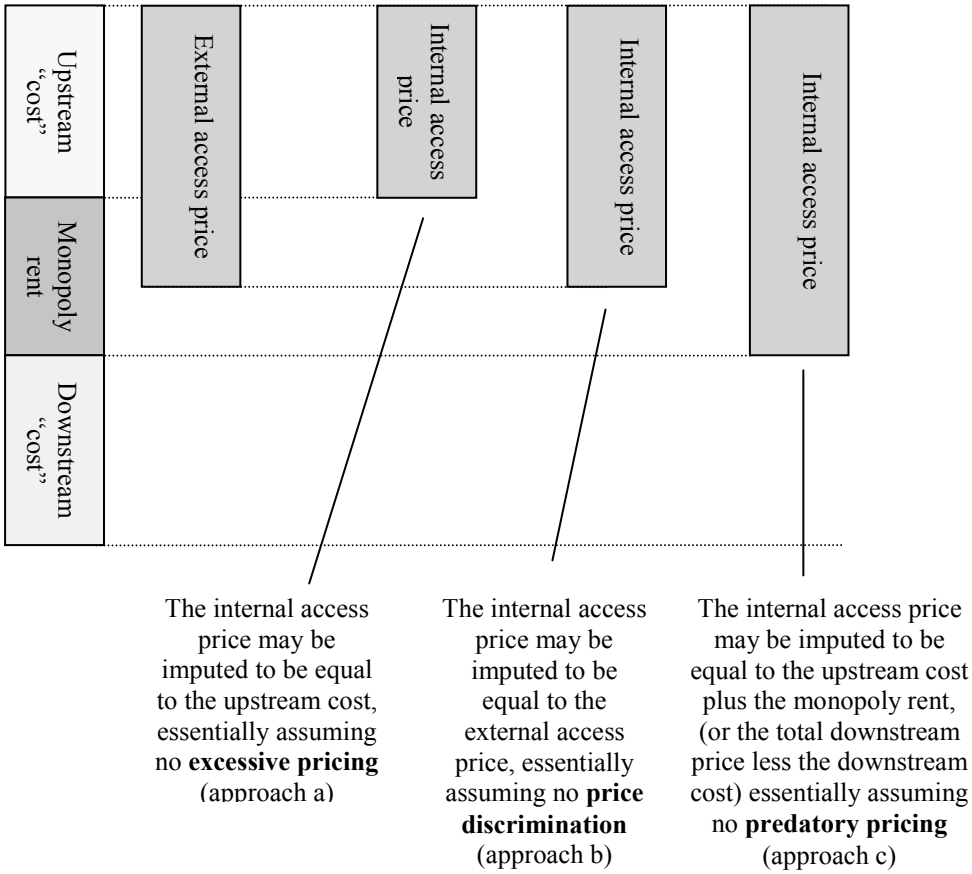
30 Even where the downstream firm is only partially owned by the upstream firm, the price at which the upstream firm sells to the downstream firm can be economically meaningless if there are side-payments or other transfers between the downstream firm and the upstream firm.

31 It is perhaps worth emphasising that although the application of a "no price discrimination" principle often appears the most "natural" in many contexts, it is not always benign. In the presence of joint or common costs upstream, efficient recovery of common costs will typically require some form of price discrimination at the upstream level. If that price discrimination cannot be reflected in access prices some products or services may not be provided at all. See O'Donoghue and Padilla (2006), page 328 and Grout (2003), page 81.

Figure 3: Different approaches for imputing the internal access price



For example, suppose that the upstream cost is $10 per unit, the downstream cost is $40 per unit, and the downstream price is $65 per unit, leaving $15 per unit in monopoly rent. Also suppose that the fully-integrated firm sells the essential input to its downstream rivals at a price of $20 per unit. In this case, the internal access price (the price at which the integrated firm sells to itself) could be imputed to be equal to:

- the upstream cost ($10 per unit, as in approach (a));
- the price at which it sells to others ($20 per unit, as in approach (b)); or
- the upstream cost plus monopoly rent (or, equivalently, the downstream price less the downstream cost), ($25 per unit, as in approach (c)).

Importantly, once the internal access price is imputed using one of these three methodologies, that price can then be tested for compliance with the competition law rules using one of the *other* methodologies. For example, once the internal access price has been imputed – either on the basis of the price at which the firm sells to its rivals (approach b) or on the basis of the downstream price less the downstream cost (approach c), that imputed price could be tested against the "cost" of the upstream process to determine if it satisfies the conditions for the abuse of "excessive pricing" (approach a).

Alternatively, if the internal access price were imputed using the principle of no upstream rent (approach a) or the principle of no downstream monopoly rent (approach c), that price could be compared with the external access price (approach b) to determine if it constitutes illegal price discrimination.

A recent case in France illustrates this possibility. In this case, approach (c) was used to impute the internal access price, which was then compared to the external access price (approach (b)), resulting in a finding of illegal price discrimination. Spector (2008) reports:

> *"... in a recent case in France, a water producer enjoying monopoly power over the production of water in a given region and its transportation up to the entry point into a given town, but facing potential competition on the downstream market of local distribution services from the entry point to final consumers ... was fined for abusing its dominant position by granting a bundled rebate conditional on the town council choosing to purchase local distribution from it in addition to the supply of water up to the entry point. The disputed practice was described as bundling, but also as discrimination. This was because if one took the view that (i) non-integrated downstream competitors would have purchased the upstream good before reselling the final product to the town, and (ii) the integrated firm's 'upstream part' charged the 'downstream part' (even though these separate entities had little existence outside of legal reasoning) a non-predatory upstream price, then these two prices ... would have been different. In the end however, although the practice under scrutiny was labelled both bundling and discrimination, the case was arguably a margin squeeze case, since the question was (or should have been) whether the combination of the upstream price quoted to downstream competitors and the downstream price charged to the final client left enough room for non-integrated downstream firms to effectively compete".*[32]

Importantly, if the internal access price were imputed on the basis of the price at which the firm sells to external rivals (approach b), or on the basis of the upstream cost (approach a), the downstream price could be tested to determine if the downstream sector is capable of earning a normal return (approach c) – that is, to determine if the integrated firm is in breach of rules against predatory pricing. This approach, which is by far the most common, is discussed in more detail below.

5.1 Select cases with margin squeeze allegations against fully integrated firms

An important precedent for European case law relating to fully integrated firms is Industrie des Poudres Sphériques[33] that established margin squeezes could occur when vertically integrated dominant firms supply inputs to rivals at prices "at such a level that those who purchase it do not have sufficient profit margin on the processing to remain competitive on the market for the processed product". The Court of First Instance (CFI) suggested this could occur (1) when prices for the upstream product were abusive or (2) when prices for the downstream product were predatory. In practice, the Court applied a single test for the abuse by stating the upstream price would be abusive or the downstream price predatory if the efficient competitor could not compete on the basis of the pricing by the dominant firm.

Two of the most recently discussed cases of margin squeezes by fully integrated firms are the Deutsche Telekom case and the Telefónica case[34]. Both cases involved firms deemed dominant in the provision of wholesale services. Deutsche Telekom was deemed dominant for the provision of local network access and Telefónica was considered dominant for provision of wholesale broadband access at the regional level and wholesale broadband access at the national level.

The European Commission decision in the Deutsche Telekom case found that from 1998-2001, Deutsche Telekom charged its competitors higher fees for wholesale, local loop access than the price it

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32 Spector (2008), paragraph 11.

33 Case T-5/97.

34 See Case T-271/03 and Decision COMP/37.451 and Case T-336/07 and Decision COMP/38.784.

charged its own customers for fixed line access. It further found that from 2002, the charge for wholesale access was lower than for retail fixed line access, but the difference between wholesale and retail price was insufficient to cover Deutsche Telekom's own costs for the supply of the retail addition to the local loop. Deutsche Telekom argued that the charges were imposed and overseen by the regulatory authority. The CFI found that Deutsche Telekom could adjust its retail prices for ADSL after obtaining prior authorisation from the regulator. Dominant companies under Article 82 must use discretion available to them, including the ability to request different prices, even their existing prices have been approved ex ante. The price-squeeze claim was thus recognised by the CFI as a standalone claim despite the existence of regulatory oversight for the services in which Deutsche Telekom was deemed dominant.[35]

In the Telefónica case, pending before the CFI at the time of writing, the European Commission found that Telefónica, the incumbent telecommunications provider in Spain, engaged in a margin squeeze from 2001 to 2006. The margin between Telefónica's retail prices and the price for wholesale access at the regional level and the margin between the retail prices and the price for wholesale access at the national level was insufficient to cover the costs that an operator as efficient as Telefónica would have to incur to provide retail broadband access. Consequently, an equally efficient competitor providing broadband was faced with the choice of either exiting the market or incurring losses. Furthermore, despite the existence of regulation and a regulator, Telefónica was under no regulatory obligation preventing it from ending the margin squeeze by lowering its wholesale prices. The Commission notes the Spanish consumers pay about 20% more than EU-15 average for broadband access and that broadband penetration is about 20% below the EU-15 average, suggesting that the impact of a margin squeeze on consumers can be harmful.

5.2 Margin squeeze and predatory pricing

As we noted earlier, consistency of treatment requires that the fully-integrated firm be treated in the same manner as a partially-integrated firm. Otherwise, as we have seen, the firm would have an incentive to inefficiently alter its structure to merely avoid antitrust liability, anti-competitive actions would go unpunished, or pro-competitive actions deterred. Amongst other things, this implies that the fully-integrated firm should face a risk of liability for margin squeeze if and only a partially-integrated firm would face a risk of liability for predatory pricing, with the access price imputed using approach (a) or approach (b), above.

The difference between imputing the access price using approach (a) or approach (b) amounts to the distinction between applying the predatory pricing test at the level of the entire integrated firm or just the downstream component.

When the access price is imputed using approach (a) above, in effect the predatory pricing test is applied to *the entire integrated firm* – by comparing the downstream price to the sum of the cost of both the upstream and the downstream processes. On the other hand, if the access price is imputed using approach (b) above (assuming the firm sells to its rival at the same price it sells to itself), the predatory pricing test is applied just to t*he downstream process* – comparing the downstream price to the cost of the downstream process (taking into account the imputed access price as the cost of the essential input).

In any case, this analysis suggests that the competition law treatment of a margin squeeze case for a fully-integrated firm should be identical to the competition law treatment of a predatory pricing case – either a predatory pricing case for the firm as a whole, or for the downstream process alone, taking the input price for the downstream process to be the same price at which the firm sells the essential input to rivals. The same principles that apply in an assessment of predatory pricing should apply to a competition

[35] At the time of writing, this case is under appeal to the European Court of Justice. (Case C-280/08)

law assessment of a margin squeeze – in particular, the need to show pricing below a relevant measure of cost, and the possibility of recoupment.

In fact, several authors have argued that a firm should not face a risk of liability for an illegal margin squeeze when it would not face a risk of being found in breach of rules against predatory pricing – either for the firm as a whole, or for the downstream component. Price discounting is at the heart of the competitive process, and is both a stimulus for efficiency and a means of encouraging the movement of resources to more productive firms. Prohibiting a firm from discounting prevents effective competition by creating an umbrella over potentially inefficient rivals, promoting the welfare of competitors at the expense of the welfare of consumers. Carlton (2008) notes that:

> *"The threat of antitrust liability from a price squeeze could lead to consumer harm through a price umbrella for [the rival]. In such a case there would be no benefit and only harm from a price squeeze theory of antitrust liability".*[36]

> *"Any rule of price-squeeze liability that threatens liability based on the claim that the difference between a firm's upstream and downstream prices leaves downstream rivals an insufficient profit margin substitutes a rule of competitor welfare for consumer welfare".*[37]

At the same time, however, some forms of price discounting can be anticompetitive and should be prevented. Some controls on discounting can, paradoxically, serve to promote competition. For example, in many industries, downstream firms must make a significant sunk specialised investment in order to compete. This sunk investment is constantly under threat by the risk that the integrated firm will raise the price of the essential input, reduce the price of the downstream product or both. As Hovenkamp and Hovenkamp (2009) note:

> *"A dominant firm might have ... induced the smaller firm to make a significant specialized investment in the dominant firm's technology. This investment would be based on the dominant firm's promise to provide an essential but specialized input. Later on, when the dominant firm's own production capacity increased it might decide to starve out the smaller firm by reducing its margin to an amount sufficient to cover variable costs but insufficient to pay off fixed costs. In this scenario the dominant firm might effectively 'rob' the smaller firm's shareholders and creditors of the smaller firm's fixed cost assets. It would ordinarily do this by raising the price of the input being supplied to the rival".*[38]

In an unregulated industry, in the absence of a duty to deal, the downstream rivals would seek to protect this investment through, for example, long-term contractual arrangements which lock-in the access price, or fix the margin between the downstream price and the access price. In regulated industries long-term contracts are not common – instead the regulator plays the role of the contractual arbitrator, recreating the terms of the long-term contract that the parties would have negotiated, if they had the opportunity, at the outset. This long-term contract would include protection for the sunk investment of the downstream rivals, either by fixing the access price or fixing the margin between the downstream price and the access price. In the absence of some assurance of that protection, downstream firms will not enter the market.

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36 Carlton (2008), page 7.

37 Carlton (2008), page 13. Hovenkamp and Hovenkamp (2009), page 28 similarly argue: "Antitrust rules that give small firms guaranteed margins are sure to be counterproductive".

38 Hovenkamp and Hovenkamp (2009), page 7.

Consumers will then be forced to forego potential benefits from an increased range of products or enhanced innovation downstream.[39]

The key point here is that in some circumstances, some prevention of discounting by the integrated firm is essential to achieve entry at the downstream level, and any consumer benefits that that entry provides. Paradoxically, preventing some forms of price discounting can in some circumstances enhance consumer welfare.

5.3 Is there a fundamental difference between a margin squeeze and predatory pricing?

Some authors[40] argue that a margin squeeze should be treated differently from predatory pricing, because predatory pricing implies unsustainable pricing below cost whereas a margin squeeze is potentially sustainable indefinitely. Hovenkamp and Hovenkamp (2009) use the following example:

> *"Suppose the cost of ingot is $10 per unit and rolling costs are $3 per unit, yielding a minimum cost price for rolled sheet of $13. Alcoa might charge customers of rolled sheet a price of $14 and charge a rival $12 for the raw ingot. In that case both the downstream price for the sheet and the upstream price for the ingot are above Alcoa's costs, but the $2 margin between them is too small to permit the independent sheet roller to survive.*
>
> *A guiding principle of predatory pricing law is that a price below either marginal cost or average variable cost is highly suspicious and requires an explanation, given that such prices are unprofitable in the short run as well as the long run. By contrast, there is nothing inherently suspicious about a firm's charging a high price to an unintegrated rival for an input."*[41]

In fact, as several authors have argued[42], this argument is incorrect. The firm in the example above is able to sell raw ingot at a price of $12 to its rivals, but it only receives $14-$3=$11 when it converts ingots into rolled sheets itself. It therefore foregoes $1 on every unit it chooses to sell to itself. There is therefore an opportunity cost to this pricing behaviour. Presumably that opportunity cost would only be incurred if there were some opportunity to recoup those foregone revenues later.

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39 In addition, the downstream firms are also a key source of potential entry into the upstream market, breaking down the upstream monopoly. Hovenkamp and Hovenkamp (2009), page 7 write: "Suppose that after supplying a smaller rival for some time the dominant firm realizes that the smaller rival is developing the capability to integrate into upstream competition with the dominant firm. … To prevent this, the integrated firm may impose a squeeze calculated to rob the smaller firm of the resources needed to develop independence in the upstream market. Such a scenario would injure consumers in the long run, as they would be denied the benefits of a more competitive overall market structure".

40 See, for example, NERA (2003) who argue that "in contrast to predation a company can undertake a vertical price squeeze while still recovering its costs if the wholesale price is higher than its marginal cost of production". However, in a footnote they observe that: "When … the sacrificed profits the price-squeezing firm would forego are recognised as an opportunity cost, the distinction between the predation and imputation tests effectively vanishes". O'Donoghue and Padilla (2006) argue that "in a margin squeeze case the dominant company is not necessarily losing money overall … It follows that the question of recoupment does not necessarily arise as often as it does in predation cases. Or, more precisely, the fact that, in a margin squeeze case, the dominant firm remains profitable upstream can make recoupment more or less simultaneous". However, they seem to retract this statement somewhat in the next paragraph where they say that although "margin squeeze does not imply a direct loss on each unit sold as in the case of predation", "there is an opportunity cost on each unit not sold to the downstream competitor".

41 Hovenkamp and Hovenkamp (2009), page 22.

42 See, for example, Padilla (2004).

O'Donoghue and Padilla (2006) argue that margin squeeze also differs from predatory pricing in the incentive to engage in exclusionary behaviour. An unintegrated downstream firm will always benefit, to some extent, from the elimination of a downstream rival. However the same cannot be said for an integrated firm. The elimination of a downstream rival may hurt upstream sales and profits by more than it benefits the downstream arm of the firm, particularly when the downstream rivals are selling products that are differentiated in some way from the downstream products of the integrated firm. O'Donoghue and Padilla (2006) argue that "the analytical tests for a margin squeeze should therefore include an analysis of whether market conditions are such that a company has any incentive to exclude".

5.4 Does an integrated firm face liability for predatory pricing on its downstream component alone?

As noted above, a margin squeeze case could be characterised as either a case of predatory pricing on the integrated firm as a whole, or as a case of predatory pricing on just the downstream component.

A key question that arises here is whether or not the downstream component of a fully integrated firm, which sells to its own downstream subsidiary at a price that cannot be directly observed, would be found liable for predatory pricing under existing competition law rules. If the internal access price cannot be directly observed (as it cannot in the case of an integrated firm) can the firm be found liable for predatory pricing on its downstream component alone? Spector (2008) suggests that the answer is no:

> *"The problem is that the approach through predatory pricing is possible only if the vertically integrated firm is not 'too integrated', in that the upstream good is formally sold to the downstream division at the market price – i.e., at the same price as that charged to non-integrated downstream competitors. This allows the competition authorities to reframe the squeeze test as a standard price-cost test, treating the upstream price as a cost incurred by the downstream branch of the integrated firm. In contrast, if such transactions do not exist, the relevant cost for a predatory pricing test would be the real production cost".*[43]

If a fully integrated firm essentially faces no risk of breaching predatory pricing rules on its downstream component, then a case can be made that the concept of "margin squeeze" should be a distinct stand-alone form of abuse that prevents a form of anti-competitive behaviour that otherwise might arise.

This additional form of abuse could be a regulatory rather than a competition law control on pricing. Many countries, in fact, have some form of explicit prohibition against certain forms of pricing in telecommunications, which is often known as an "imputation test".[44]

An alternative perspective is to argue that existing rules against predatory pricing should be extended – to apply to just the downstream component of a fully integrated firm, with the internal access price imputed as being equal to the external access price.[45] If the rules on predatory pricing were extended in this way, a separate abuse of margin squeeze would be unnecessary.

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43 Spector (2008), paragraph 8.

44 See, for example, ACCC (2005). The same test has been applied by the New Zealand Commerce Commission. In the simplest cases, this test amounts to an application of the efficient component pricing rule.

45 In certain circumstances, this assumption of an absence of price discrimination between sales to rivals and sales to the integrated firm's downstream arm may not be appropriate. For example, the downstream rivals might serve different markets with a different elasticity of demand compared to the integrated firm. In this case a predatory pricing test for abuse would not be appropriate. Instead, an alternative approach would be

6. Conclusion

This paper has emphasised the importance of equivalent treatment under competition law for economically-equivalent actions or market structures. The behaviour which might be said to constitute a margin squeeze may also be characterised as any one of a number of other forms of exclusionary abuses of dominance. Is there anything to be gained by isolating "margin squeeze" as a separate and distinct form of abuse?

As noted earlier several economists have argued that the concept of margin squeeze adds nothing to the overall control of anticompetitive behaviour:

> *"The question arises whether the price-squeeze concept aids or hinders coherent analysis under section 2 of the Sherman Act. If the monopolist's retail price is predatory or it its wholesale price is so high as to constitute a refusal to deal in a situation in which the monopolist has a duty to do so, then the monopolist's conduct can be challenged under existing precedents governing either predatory pricing or refusals to deal. ...*
>
> *[I]s [margin squeeze] analysis superfluous and unnecessary, or does it add value by extending section 2 condemnation to conduct that might otherwise escape condemnation under existing precedents relating to retail pricing and duties to deal? After the Supreme Court's 2004 decision in Trinko, it should go without saying that a 'squeeze' that neither causes nor threatens the monopolization of an identifiable market cannot pass muster under section 2. ... The price squeeze theory of antitrust liability should be abolished in American antitrust law. The theory is incompatible with contemporary antitrust jurisprudence, and on economic grounds the threat of such liability discourages investment, retail price competition, and the voluntary provision of inputs on negotiated terms by vertically integrated monopolists to current and potential rivals otherwise unable to obtain or self-provide them".*[46]

This paper accepts that this argument is largely correct, with one minor exception. There is one possible circumstance in which the doctrine of margin squeeze might condemn conduct "that might otherwise escape condemnation under existing precedents relating to retail pricing and duties to deal". This one possible exception relates to the case where a fully integrated firm faces a duty to sell an essential input to rivals.

Might a fully-integrated firm forced to sell access to downstream rivals be found liable for predatory pricing on its downstream component alone under existing competition law rules? If the answer is yes, margin squeeze adds nothing new to existing rules. Most potential anti-competitive harms that might arise in a vertically-integrated industry structure are already addressed under existing competition law rules. Introducing a new form of abuse with lower legal thresholds for a finding of liability risks deterring some pro-competitive behaviour and inefficiently distorting behaviour and market structures in an attempt to avoid antitrust liability.

On the other hand, if the downstream component of a fully-integrated firm is essentially immune from a claim of predatory pricing (on the basis that the cost of the downstream component cannot be effectively separately isolated), then some form of additional control on the behaviour of the integrated firm is required. This additional control could take the form of a competition law prohibition on margin squeeze or

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to impute the internal access price using an assumption of no predatory pricing (approach c) and compare that to the integrated firm's costs to determine if there is an abuse of excessive pricing (where such an abuse exists).

46 Sidak (2008), page 281-282.

a regulatory control in the form of an imputation test. Either way, the obligation should be prosecuted in the same manner as a predatory pricing case, with the internal access price imputed as equal to the external access price.

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APPENDIX: SELECTED GUIDELINES AND REVIEWS

Economy	*Body*	*Guidelines and Reviews*
Australia	ACCC	Resolution of Telecommunications Access Disputes, March 2004 http://www.accc.gov.au/content/index.phtml/itemId/753591
Belgium	BIPT	BIPT Price Squeeze Guidelines http://www.ibpt.be/en/624/ShowDoc/3057/Retail_price_control/Decision_of_8_April_2009_regarding_the_price_squee.aspx Currently not available in English
Cananda	CRTC	Review of regulatory framework for wholesale services and definition of essential service http://www.crtc.gc.ca/ENG/publications/reports/osborne07.htm
EU	EC	Notice on the application of competition rules to access agreements in the telecommunications sector – Framework, Relevant Markets and Principles, OJ C265, 22 August 1998. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:265:0002:0028:EN:PDF Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 9 February 2009. http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf
France	ARCEP	Notice du test d'effet de ciseaux tarifaires « téléphonie fixe », March 2006 http://www.arcep.fr/fileadmin/reprise/dossiers/tarifs/notice-squeeze-fixe0306.pdf
Germany	Bundesnetzagentur	Notes on margin squeezes as defined by section 28(2) para 2 TKG (The Telecommunications Act) http://www.bundesnetzagentur.de/enid/Telecoms_Regulation/Consistency_Requirement_/_Margin_Squeeze_4o5.html
Hong Kong	OFTA	Draft Competition Guidelines on sections 7K, 7L and 7N of the Telecommunications Ordinance http://www.ofta.gov.hk/en/report-paper-guide/paper/consultation/20070507.pdf Although the consultation period is over, the final guidelines do not appear on the OFTA website
Netherlands	OPTA & Nma	OPTA & NMa, *Price Squeeze Guidelines*, 28 February 2001 http://www.anacom.pt/streaming/pricesqueeze_280201.pdf?categoryId=1755&contentId=117617&field=ATTACHED_FILE
UK	Ofcom	The Application of the Competition Act 1998 in the Telecommunications Sector, OFT 417 http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft417.pdf

NOTE DE RÉFÉRENCE[1]

1. Introduction

On entend par « étranglement de marge » un abus de position dominante visant à évincer un concurrent du marché lorsqu'une entreprise monopolistique verticalement intégrée vend un intrant d'amont indispensable à des sociétés qui vendent un produit sur un marché d'aval où elles sont donc aussi en concurrence avec elle.[2] L'étranglement de marge se produit quand la marge entre le prix auquel l'entreprise jouissant du monopole vend le produit d'aval et le prix auquel elle vend le produit d'amont indispensable à ses concurrents est « trop étroite » pour qu'un concurrent efficient situé dans l'aval de la filière soit en mesure de la concurrencer efficacement.[3]

Le présent document part de l'observation suivante : les actions ou structures de marché équivalentes du point de vue économique doivent être traitées de la même manière par le droit de la concurrence. Dans le cas où il n'en va pas ainsi, c'est-à-dire où des comportements ou structures de marché différents mais équivalents sur le plan économique ne sont pas traités de la même manière par le droit de la concurrence, il existe un risque que les entreprises dominantes soient incitées à réagencer leurs activités ou leurs structures dans le seul but de réduire le risque d'infraction au droit de la concurrence, sans que l'économie en retire un quelconque bénéfice. En outre, certaines entreprises peuvent être tentées de se dérober totalement ou partiellement à leurs responsabilités dans le cas où elles se livreraient à des activités anticoncurrentielles, tandis que d'autres peuvent être contraintes de limiter des activités qui sont de nature à stimuler la concurrence.

La remarque a souvent été faite que, du point de vue économique, un comportement que l'on pourrait qualifier d'étranglement de marge est équivalent et pourrait être assimilé à d'autres formes d'abus de position dominante telles que le refus de vente, la fixation de prix de vente d'éviction et la pratique de prix discriminatoires ou excessifs. C'est pourquoi il y a lieu de se demander si l'étranglement de marge doit être une forme distincte et à part entière de l'abus de position dominante. Le comportement que le grief d'étranglement de marge vise à contrôler l'est-il efficacement et de manière adéquate par les autres formes connues d'abus de position dominante ? Ou la notion d'étranglement de marge a-t-elle un caractère plus général de telle sorte qu'elle s'applique à des comportements ou structures qui ne sont pas appréhendés et réprimés efficacement par les normes établies du droit de la concurrence ?

Pour stimuler le débat, on fera valoir que, peut-être à une exception près, presque tous les comportements que l'on peut qualifier d'étranglement de marge relèvent de l'abus de position dominante sous une forme ou sous une autre. Cette observation suggère que, si l'étranglement de marge est reconnu comme un type d'abus spécifique, les principes et les normes qui sont appliqués pour les poursuites contre les entreprises qui s'y livrent doivent être identiques à ceux qui seraient appliqués si le grief retenu était la forme d'abus de position dominante équivalente. Par exemple, si l'étranglement de marge pouvait aussi

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1 La note de référence ci-jointe a été rédigée par le Prof. Darryl Biggar, Économiste Senior à l'ACCC et Consultant auprès du Secrétariat de l'OCDE.

2 Egalement appelé « ciseau tarifaire ».

3 Au cours de la dernière décennie, le nombre d'affaires d'entraves à la concurrence dans lesquelles un étranglement de marge avait été allégué a fortement augmenté, en particulier dans le secteur des télécommunications. Les affaires de ciseau tarifaire récentes sont évoquées notamment par Alexiadis et Shortall (2009), Palmigiano (2009), Spector (2008) et Geradin et O'Donoghue (2005).

être qualifié, par exemple, de refus de vente ou de fixation de prix de vente d'éviction, les poursuites pour étranglement de marge devraient reprendre les principes et règles de preuve qui sont respectivement appliqués dans ces deux types d'affaires.[4]

Il se peut que la notion d'étranglement de marge recouvre certains comportements anticoncurrentiels qui ne sont pas appréhendés comme il convient par les formes d'abus de position dominante déjà reconnues. Ce peut être le cas si l'entreprise présente en amont est intégrée verticalement et couvre la totalité du cycle de production et si elle a l'obligation de vendre. Une question juridique se pose, à savoir que le fait de fixer un prix d'aval faible par rapport à celui d'amont ou au prix d'accès pourrait justifier des poursuites pour fixation de prix de vente d'éviction en se fondant exclusivement sur les activités d'aval. Il faudrait alors déterminer ou imputer le prix d'accès auquel la société intégrée vend l'intrant d'amont à ses propres filiales en aval.

Dans les pays où un tel comportement pourrait donner lieu à des poursuites couronnées de succès pour fixation de prix de vente d'éviction sur la composante aval uniquement, le concept d'étranglement de marge semble en grande partie superfétatoire. Dans ceux où il est peu probable qu'une telle action en justice soit intentée ou aboutisse, il semblerait que la notion d'étranglement de marge vise les comportements anticoncurrentiels tendant à exclure un concurrent du marché qui ne sont pas efficacement sanctionnés par ailleurs par le droit de la concurrence.

On remarquera qu'un grand nombre de procès pour étranglement de marge sont en cours dans les différents pays. Le présent document n'a pas pour finalité de donner un aperçu général de ces affaires. Il se bornera à traiter de certaines affaires à grand retentissement qui sont essentielles pour le débat.

Le plan de ce document de réflexion est le suivant. La section qui suit présente l'économie de l'étranglement de marge et présente notamment la structure de marché dans laquelle il se produit, le lien entre l'étranglement de marge et les ouvrages d'économie traitant de la fixation des prix d'accès ainsi que quelques facteurs engendrant une complexité accrue qui, en pratique, font que l'analyse des affaires d'étranglement de marge est plutôt ardue.

La section 3 porte sur les affaires dans lesquelles l'entreprise dominante n'est pas soumise à une obligation légale de vente. Puisque, du point de vue économique, proposer de vendre l'intrant d'amont à ses rivaux à un prix « élevé » équivaut à un refus pur et simple de le vendre, le principe de cohérence veut qu'une entreprise ne se voie pas reprocher un étranglement de marge si elle propose de vendre l'intrant d'amont alors qu'elle a le droit de refuser purement et simplement de vendre cet intrant à ses concurrents. En exposant une entreprise à un risque de poursuite pour étranglement de marge alors qu'elle n'est soumise à aucune obligation de vente, on risquerait de l'amener à s'abstenir purement et simplement de vendre volontairement l'intrant d'amont indispensable à ses concurrents (c'est-à-dire qu'elle leur opposerait systématiquement un refus de vente). Si des concurrents produisent le service d'aval plus efficacement ou fabriquent une gamme de produits d'aval différente de celle de la société intégrée, inciter cette dernière à ne plus vendre l'intrant d'amont à ses rivales aurait pour effet de faire monter le prix ou resserrer la gamme des produits d'aval mis à la disposition des consommateurs et, par là, à réduire leur bien-être.

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[4] On remarquera que, si les principes et normes auxquels fait appel la notion équivalente d'abus de position dominante s'écartent de ceux qui seraient préférés sous l'angle des politiques publiques, il pourrait être nécessaire de demander que ces principes et normes soient modifiés. Si la jurisprudence rend une telle modification délicate, l'application de ces normes à l'étranglement de marge pourrait simplement avoir pour effet d'élargir le champ d'application de principes et normes problématiques.

A défaut, on pourrait rétablir la cohérence en imposant une obligation de vente à toute société intégrée qui produit un intrant rare ou essentiel qu'elle pourrait mettre à la disposition de ses concurrents. Ces dernières années, les tribunaux de plusieurs pays de l'OCDE (en particulier aux États-Unis) se sont montrés réticents, en dehors de circonstances exceptionnelles, à imposer une obligation de vente aux entreprises. Dans d'autres pays, notamment en Europe, le fait qu'une société soit considérée comme « dominante » pour un produit donné a été invoqué pour la soumettre à une obligation de vente. La décision d'imposer à une société qui n'y est pas déjà soumise une obligation de vente au motif d'un prétendu « étranglement de marge » risque de porter atteinte au droit de propriété de la société dominante et, éventuellement, de la dissuader de se lancer dans les innovations ou prises de risque grâce auxquelles elle pourrait acquérir une position dominante.

La section 4 de ce document porte sur le cas où les entreprises sont déjà soumises à une obligation de vente. Elle est elle-même divisée en deux sous-sections traitant, la première, des entreprises dominantes qui ne sont intégrées en aval que partiellement et, la seconde, de celles qui sont totalement intégrées en aval. Si l'entreprise dominante n'est intégrée en aval que partiellement, le prix auquel elle se vend à elle-même le produit d'amont peut en principe être observé et a une signification économique. Dans ce cas, le comportement appelé étranglement de marge pourrait tout aussi bien relever de qualifications diverses telles que pratique de prix excessifs (c'est-à-dire la fixation du prix de l'intrant à un niveau « trop élevé » si un tel abus existe), la discrimination par les prix (c'est-à-dire la vente de l'intrant à sa propre filiale d'aval à un prix différent de celui auquel elle le vend à ses concurrents) ou, éventuellement, la fixation de prix de vente d'éviction.

Comme auparavant, dès lors qu'un étranglement de marge doit être reconnu comme une forme d'abus indépendante, la cohérence exige que les mêmes principes et pratiques que ceux qui régissent les poursuites contre les autres formes d'abus soient appliqués à l'étranglement de marge. Par exemple, si la qualification de prix de vente d'éviction pouvait également être retenue pour une affaire d'étranglement de marge, la seconde devrait comporter les mêmes éléments que la première, notamment la démonstration de prix inférieurs aux coûts, quelle que soit la manière dont ceux-ci sont mesurés, et la possibilité que la différence soit récupérée par la suite.

Dans la deuxième partie de la section 4, nous nous penchons sur le cas d'une entreprise dominante intégrée verticalement qui couvre la totalité du cycle de production. Dans ce cas, le prix auquel la société intégrée se vend l'intrant rare à elle-même ne peut être observé directement sur le marché et doit donc être calculé ou imputé. Trois méthodes correspondant à chacune des trois possibilités d'abus mentionnées ci-dessus permettent de calculer le prix de l'intrant d'amont : ce sont respectivement la pratique de prix excessif, la discrimination par les prix et les prix de vente d'éviction. Une fois que l'on a calculé le prix d'amont au moyen de l'une de ces trois méthodes, on peut s'en servir pour vérifier s'il y a bien abus de position dominante en utilisant l'une des deux autres méthodes.

Là encore, le principe de cohérence veut qu'une affaire d'étranglement de marge soit traitée de la même manière que l'abus de position dominante équivalent. Par exemple, si une entreprise est soumise à une obligation de vente, on pourrait imputer un prix d'amont selon le principe de non-discrimination. On pourrait alors examiner le prix d'aval pour apprécier la possibilité d'une violation des règles sur les prix d'éviction par la division de la société qui vend le composant en aval. Si le prix pratiqué en aval par la société ne peut être tenu pour contraire aux règles sur les prix de vente d'éviction et donc pour anticoncurrentiel, la logique requiert que cette entreprise ne puisse se voir reprocher un éventuel étranglement de marge. Menacer une entreprise de poursuites pour étranglement de marge dans ce cas, c'est prendre le risque de la forcer à relever son prix d'aval, voire, à la limite, à cesser purement et simplement de fournir le service en aval. La section 4 fait valoir que, dans un tel cas, la menace de poursuites pour étranglement de marge empêche la société en place de proposer des prix compétitifs sur

ses produits d'aval et, en fait, elle l'oblige à ouvrir le « parapluie tarifaire » pour s'assurer que ses concurrents situés en amont peuvent survivre sur le marché.

La section 5 de ce document aborde le cas où un étranglement de marge est traité selon des modalités équivalentes à celles des prix de vente d'éviction. Il convient alors de se demander si, en pratique, l'entreprise dominante serait jamais confrontée à la menace de poursuites pour fixation de prix de vente d'éviction sur le seul composant d'aval compte tenu du prix d'amont qu'elle se facture implicitement à elle-même. Il pourrait s'avérer délicat de prouver de telles pratiques parce que la rentabilité du composant d'aval produit par la société intégrée dépend du niveau auquel est fixé le prix d'accès imputé ; or, il n'existe pas une seule, mais plusieurs manières de procéder à cette imputation. Les auteurs font observer que, si une entreprise intégrée n'a aucun risque d'être attaquée pour fixation de prix d'éviction sur son composant d'aval, la possibilité est réelle qu'un comportement susceptible de nuire à la concurrence ne puisse être contrôlé adéquatement. Dans ce cas, et dans ce cas uniquement, il ne serait pas illogique d'instaurer une forme distincte d'abus de position dominante, que l'on pourrait appeler abus par étranglement de marge.

Après avoir récapitulé les principaux arguments avancés dans ce rapport, la section 6 en livre la conclusion.

Plusieurs considérations importantes ressortent de ce document :

- Des actions ou structures de marché équivalentes du point de vue économique méritent un traitement équivalent au regard du droit de la concurrence.
- Le risque qu'un traitement équivalent ne soit pas appliqué à l'étranglement de marge n'est pas négligeable.
- Il est vraisemblable que les poursuites pour étranglement de marge soient inappropriées si une entreprise n'est pas soumise à une obligation de vente.
- Si une telle obligation existe, les griefs incluent généralement des éléments permettant de conclure à la fixation de prix de vente d'éviction ou à un refus de vente.
- En général, les principes et normes applicables à l'étranglement de marge ne devraient pas être différents de ceux qui régissent les autres griefs, sauf si un étranglement de marge implique manifestement une différence de traitement qui ne relève pas d'une autre incrimination.

2. Contexte

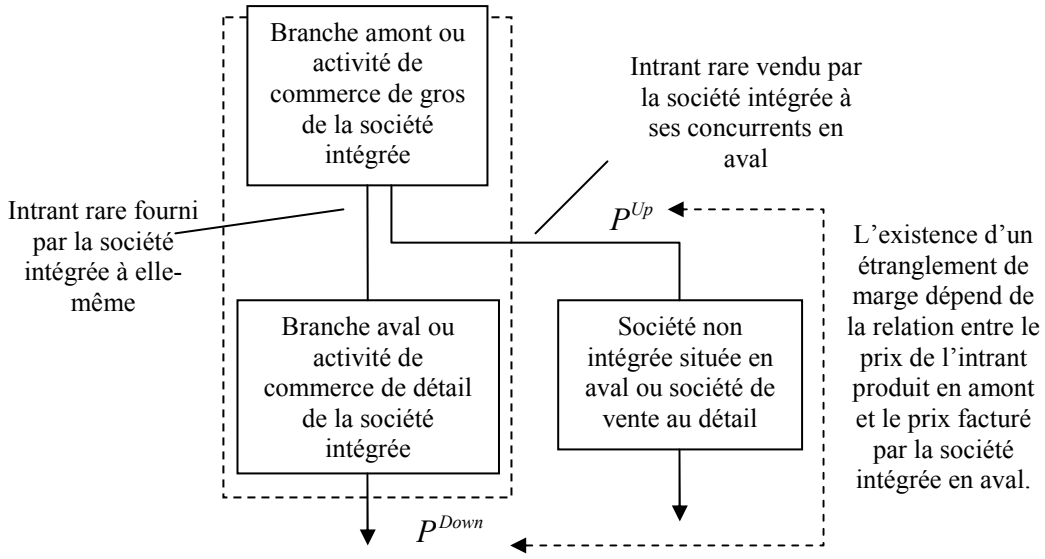
La structure du marché sur lequel un étranglement de marge pourrait se produire, qui est bien connue, est décrite dans la quasi-totalité des ouvrages et des procès portant sur cette pratique.[5] Cette structure de marché est illustrée dans le diagramme simplifié présenté dans le graphique 1 ci-dessous.

Dans le cas classique d'étranglement de marge qui est illustré par le graphique 1 ci-dessous, une entreprise fournit un intrant à d'autres entreprises intervenant en aval tout en le fournissant à sa propre filiale opérant dans l'aval, dont elle détient la totalité ou une partie seulement du capital et qui concurrence les entreprises indépendantes sur le marché en aval. La société présente dans l'amont doit au moins jouir d'une position dominante pour la fourniture de l'intrant indispensable. Très souvent, une position dominante ne suffit pas et il faut une configuration proche d'un monopole pur pour se permettre de telles

[5] Voir par exemple O'Donoghue and Padilla (2006), page 305.

pratiques ; c'est-à-dire que les concurrents situés en aval ne doivent pas avoir la possibilité de se procurer l'intrant indispensable auprès d'aucune autre source (y compris, par exemple, en le fabriquant eux-mêmes, en l'achetant à l'étranger, etc.).[6] L'existence d'un étranglement de marge ou d'un ciseau tarifaire dépend, entre autres, de la relation entre le prix auquel la société intégrée vend l'intrant rare à ses concurrents indépendants et celui auquel elle vend le produit ou service d'aval.

Graphique 1 : Structure de marché classique dans laquelle un étranglement de marge est susceptible de se produire



Tel qu'il est généralement présenté, l'exemple type d'un étranglement de marge repose le plus souvent sur un certain nombre d'hypothèses simplificatrices qu'il n'est pas inutile de rappeler in extenso :

(a) Le fournisseur de l'intrant indispensable est intégré verticalement sur tout l'aval (c'est-à-dire qu'il détient 100 % de la société d'aval ou inversement).

(b) Le produit ou service d'amont est utilisé dans des « proportions invariantes »[7] dans le processus d'aval afin de créer le produit ou service d'aval (on suppose généralement qu'une unité du produit d'amont est nécessaire pour obtenir une unité du produit d'aval).

(c) Le produit fabriqué en aval par le concurrent se substitue parfaitement à celui qui est fabriqué en aval par la société intégrée et l'on suppose que tous deux s'adressent à la même population de consommateurs.

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6 Crocioni et Veljanovski (2003) (page 38) soutiennent que « la domination dans le cas d'un étranglement de marge s'apparente plutôt à une super-domination ».

7 Les « proportions invariantes » signifient qu'il existe un ratio invariant entre le volume des extrants et celui de certains intrants. Par exemple, chaque minute de communication entre deux téléphones, l'un fixe et l'autre mobile, nécessite une minute d'émission d'appels du réseau de téléphone fixe et une minute de terminaison d'appels du réseau de téléphone mobile indépendamment de l'identité des sociétés qui fournissent ces services. Au contraire, le nombre d'heures de main-d'œuvre nécessaires pour fabriquer un véhicule peut varier d'un constructeur automobile à un autre.

(d) Bien que des économies d'échelle soient possibles en amont, il n'existe ni économies d'échelle ni économies de gamme en aval.

(e) Il existe une concurrence parfaite sur le marché d'aval, les coûts d'arbitrage étant nuls.

(f) La société opérant dans l'amont ne supporte aucun coût supplémentaire lorsqu'elle vend à ses concurrents plutôt qu'à sa propre filiale d'aval.

(g) Les technologies employées sur les marchés de l'amont comme de l'aval sont stables et matures et le taux de pénétration y est identique.

Cet exemple classique, pour ne pas dire stéréotypé, de configuration dans laquelle un étranglement de marge est possible est rare, voire inexistant en pratique. C'est pourquoi, en pratique, l'analyse des affaires d'étranglement de marge est sensiblement compliquée par un certain nombre de facteurs, notamment la possibilité :

(a) que la société opérant dans l'amont ne soit intégrée verticalement dans l'aval qu'en partie (c'est-à-dire qu'elle ne détient qu'une partie du capital de la société opérant dans l'aval ou inversement) ;

(b) que le produit ou service d'aval qui est fourni à une entreprise concurrente non intégrée ne soit pas identique au produit ou service d'amont que la société se fournit à elle-même ;

(c) que le produit d'aval des concurrents non intégrés ne soit pas parfaitement substituable à celui de l'entreprise intégrée bien établie ;

(d) que le produit ou service d'amont ne soit pas utilisé dans des proportions fixes par les concurrents non intégrés ;

(e) que la société opérant dans l'amont supporte des frais plus élevés lorsqu'elle vend l'intrant indispensable à des concurrents que lorsqu'elle se les fournit à elle-même ;

(f) que des économies d'échelle ou de gamme puissent être réalisées dans le processus de production en aval ;

(g) que les arrangements contractuels entre la société intégrée et ses concurrents dans l'aval soient plus complexes qu'un contrat stipulant simplement un prix évoluant de façon linéaire et fixé dans le cadre d'une relation sans lien de dépendance et qu'ils incluent des frais fixes, des engagements d'achats ferme ou d'autres dispositions contractuelles ;

(h) que le produit d'aval soit fourni en tant que partie d'un ensemble de services achetés en bloc et pas individuellement ;

(i) qu'une concurrence imparfaite s'exerce entre la société bien établie et les autres sociétés non intégrées qui opèrent dans l'aval ; à défaut, qu'il existe des coûts d'arbitrage sur le marché d'aval ;

(j) que les marchés d'amont ou d'aval se développent rapidement à la faveur soit d'un progrès technologique rapide, soit de la diffusion rapide de nouveaux produits parmi les consommateurs ;

(k) que les prix de la société bien établie soient réglementés, soit en amont, soit en aval, et ce soit individuellement, soit dans le cadre d'un plafonnement des prix en fonction d'une moyenne

pondérée au stade soit du commerce de gros, soit du commerce de détail, voire à ces deux niveaux en même temps, ou dans le cadre d'un plafonnement global des prix couvrant les services tant d'amont que d'aval.

Plusieurs pays se sont dotés de lignes directrices ou ont procédé à des examens portant spécifiquement sur l'étranglement de marge ou des descriptions de comportements fréquemment qualifiés d'étranglement de marge. Plusieurs de ces examens et lignes directrices sont cités dans l'annexe.

Un facteur, qui complique particulièrement les choses, mérite d'être souligné. Le plus souvent, il s'avère en pratique que des investissements substantiels de longue durée doivent être réalisés à fonds perdus au stade de l'amont et ils sont souvent associés à la présence d'économies d'échelle ou de gamme non négligeables. Il importe de souligner que, en présence de coûts irrécupérables et/ou d'économies d'échelle ou de gamme, il n'existe pas d'indicateur unique mesurant le « coût » de la fourniture du service au stade de l'amont au cours d'une période donnée.

Les coûts irrécupérables et/ou les économies d'échelle et de gamme engendrent un problème de répartition des coûts : la présence des coûts irrécupérables rend délicate l'affectation des coûts dans la durée. Les économies d'échelle et de gamme engendrent des coûts fixes et des coûts joints ou communs, ce qui rend problématique la répartition des coûts entre les services partageant les économies de gamme à une date donnée. La répartition (qu'elle soit effectuée entre les différents services ou dans le temps) est presque toujours effectuée selon des modalités arbitraires, si bien que l'estimation du « coût » qui en résulte n'a pas de signification économique.

Au lieu d'une mesure unique du coût, le mieux que l'on puisse espérer en présence de coûts irrécupérables ou d'économies d'échelle et de gamme est un ensemble de mesures du coût telles que les coûts marginal, variable, différentiel ou séparé. La différence de proportions entre le plus petit et le plus grand de ces indicateurs de coût peut être considérable. Souvent, pour simplifier l'exposé, on part de l'hypothèse fort simple d'un coût unique pour le service d'amont (ou d'aval) ; en pratique, un tel coût unique n'existe presque jamais.

2.1 Étranglement de marge et tarification de l'accès

Le concept d'étranglement de marge utilisé en droit de la concurrence est étroitement lié à la vaste littérature économique sur les prix d'accès dont, dans une certaine mesure, il est un sous-ensemble. Le droit de la concurrence s'écarte légèrement des préoccupations classiques des ouvrages sur les prix d'accès. Les auteurs qui se penchent sur l'économie de la tarification de l'accès cherchent le plus souvent à déterminer le niveau des prix d'accès (et, dans une certaine mesure, des prix d'aval) qui permet de maximiser le bien-être économique. Au contraire, le droit de la concurrence s'intéresse avant tout au contrôle des comportements anticoncurrentiels et à la promotion de la concurrence. Ces préoccupations, légèrement différentes, se recouvrent toutefois en grande partie.[8]

Les ouvrages d'économie traitant de la tarification de l'accès énoncent plusieurs principes de fixation efficiente des prix d'accès. Plusieurs de ces principes concernent directement les affaires d'étranglement de marge, en particulier ceux qui décrivent les conditions dans lesquelles il doit exister un lien clair et bien défini entre le prix d'aval et la tarification de l'accès et quel doit être ce lien.

[8] Le plus souvent, les économistes regardent la concurrence comme un moyen de parvenir à une fin (favoriser le bien-être) plutôt que comme une fin en soi. En principe, s'il est possible de parvenir à cette fin par d'autres moyens, la promotion de la concurrence peut être considérée comme inutile.

L'encadré 1 décrit succinctement plusieurs principes clefs qui régissent la tarification de l'accès. Comme on le voit, la théorie économique suggère que le lien entre le prix d'accès en amont et le prix final au stade de l'aval est fonction du caractère plus ou moins substituable des produits fabriqués en aval par la société intégrée et ses concurrents. Dans le cas particulier où les prix d'aval de la société intégrée et de ses rivaux sont parfaitement substituables, la théorie enseigne que le prix d'amont ou d'accès peut être « calculé à rebours » à partir du prix d'aval ou du prix final en appliquant ce qu'on appelle la règle de la tarification efficiente des composantes ou, parfois, la tarification de l'accès selon la technique du prix au détail moins une réduction.

Il importe de remarquer que fixer le prix d'amont ou d'accès selon une simple fonction linéaire n'est pas nécessairement efficient. En fait, la théorie montre que toute discrimination par les prix présente dans les prix d'aval de la société intégrée devrait apparaître dans les prix d'accès.[9] Cela implique par exemple que, si la société intégrée vend en aval en appliquant un tarif binôme, cette structure tarifaire duale doit apparaître dans les prix d'accès facturés en amont. Sinon, les autres entreprises présentes dans l'aval ne pourront pas la concurrencer pour certains clients en aval. Par exemple, supposons que l'opérateur historique vend l'accès à Internet à ses concurrents à un prix fixé, par exemple, à 10 cents par Mo téléchargé mais qu'il facture à ses propres clients en aval un prix forfaitaire de 50 USD par mois ; dans ce cas, ses concurrents opérant dans l'aval ne pourront pas le concurrencer sur le segment des plus gros utilisateurs (c'est-à-dire ceux qui téléchargent plus de 500 Mo par mois dans cet exemple).

De la même manière, tout rabais de quantité inclus dans les prix d'aval de la société intégrée devrait aussi apparaître dans les prix d'accès. A titre d'illustration, nous supposerons, en reprenant un exemple de Hovenkamp et Hovenkamp (2009)[10], qu'une société produit un intrant indispensable à un coût de 50 USD par unité et le vend 70 USD à ses concurrents dans l'aval. Supposons que le coût de la transformation de ce produit d'accès en un produit de détail vendu en aval soit de 10 USD. La société intégrée vend le produit d'aval à un prix de 80 USD par unité. A ce prix, les concurrents opérant dans l'aval sont, en principe, aptes à la concurrencer. A présent, supposons que la société intégrée offre un rabais de quantité fixé à 10 unités du produit d'aval au prix de 650 USD, soit 65 USD par unité. La société intégrée reste bénéficiaire sur cette offre, mais ses concurrents en aval sont incapables de la suivre en proposant la même offre. Là encore, la règle générale veut que la pratique de prix discriminatoires apparaisse à travers les prix discriminatoires pratiqués dans l'amont ; dans le cas qui nous occupe, l'offre d'un rabais de quantité au stade du gros fait tomber le prix d'accès à 55 USD par unité dès lors qu'un même client d'aval achète au moins dix unités du produit.

Il convient de noter que, pour que cette forme de discrimination par les prix fonctionne au niveau de l'accès, il faut que la société intégrée soit à même d'identifier, en aval, les caractéristiques du client final auquel est vendu le produit final (c'est-à-dire celui qui utilise l'intrant d'accès). Cela n'est pas toujours possible.

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9 Ce principe a été souligné notamment dans l'OCDE (2004).

10 Hovenkamp et Hovenkamp (2009), page 22.

Encadré 1. Résumé des principes régissant la tarification de l'accès

Dans l'économie de la régulation, il existe une vaste littérature sur la détermination efficiente des prix d'accès. L'un des grands avantages de cette théorie est qu'elle énonce des lignes directrices sur l'existence d'un lien entre le prix d'aval ou de détail et le prix d'accès ou prix de gros et, dans l'affirmative, sur la nature de ce lien. Plusieurs enseignements importants de cette littérature sont énoncés ci-après :

- Premièrement, il convient de distinguer entre les questions d'accès mono- et bidirectionnel. La question de l'accès bidirectionnel (dans lequel chaque société fournit des intrants indispensables aux autres) a une nature très différente de celle de l'accès unidirectionnel et doit être abordée séparément.

- La tarification de l'accès monodirectionnel est en principe très proche du problème classique de la tarification efficiente de la production d'un monopole. Les principes qui ont été conçus pour la tarification efficiente des monopoles s'appliquent aussi à la tarification de l'accès. Ces principes sont, entre autres, la pertinence du coût marginal comme point de départ, les gains d'efficience éventuels résultant de l'emploi d'un tarif binôme et d'autres formes de discrimination par les prix et l'utilisation éventuelle de tarifs « Ramsey-Boiteux » pour une affectation efficiente des coûts joints et communs entre différents services.

- On notera que, si le produit d'accès est utilisé par les concurrents pour fabriquer un produit d'aval qui peut se substituer au produit d'aval vendu par la société bien établie, la mesure dans laquelle il s'y substitue doit être prise en compte dans la fixation du prix d'accès. D'un côté, si, aux yeux des consommateurs, le produit d'aval des concurrents n'est qu'un substitut médiocre de celui de la société bien établie, le prix d'accès peut être fixé en ne tenant pratiquement pas compte du prix d'aval de cette société. Dans ce cas, le prix d'accès est habituellement fixé en fonction de paramètres fondés sur des coûts (coût marginal ou différentiel incorporant ou non une quote-part des coûts joints et communs).

- Inversement, si le produit d'aval des concurrents se substitue parfaitement à celui de la société bien établie aux yeux des consommateurs, la tarification de l'accès doit être déterminée de manière à laisser une marge appropriée entre le prix d'aval et le prix d'accès de cette société. Dans ce cas, (sous réserve de quelques hypothèses spécifiques supplémentaires), il est possible de démontrer qu'une tarification efficiente de l'accès est obtenue au moyen de la règle bien connue dite de la tarification efficiente des composantes, qui veut que le prix d'accès soit fixé à un niveau égal à celui du prix d'aval moins le coût marginal (ou, parfois, le coût différentiel) de la société bien établie qui est encouru lors de la transformation du produit d'amont en produit d'aval.[11] Dans certains cas, les autorités de régulation cherchent à instaurer un lien direct entre la tarification de l'accès et le prix d'aval de la société bien établie au moyen de ce qu'on appelle la méthode de prix de détail moins une réduction (ou méthode d'évaluation à partir du prix de détail), dans laquelle le prix d'accès est fixé directement à partir du prix d'aval, dont on retranche une marge pour couvrir le coût de la transformation du produit d'amont en produit d'aval. D'une manière plus générale, la tarification efficiente de l'accès (c'est-à-dire celle qui maximise le bien-être) dépend de paramètres tels que le degré auquel les produits d'aval sont substituables et l'intensité de la concurrence sur le marché d'aval.

- Si le prix d'accès est strictement réglementé alors que le prix d'aval l'est très peu voire pas du tout, la société intégrée est puissamment incitée à interdire l'accès en le retardant ou en en dégradant la qualité. Empêcher un tel comportement est un travail de longue haleine et exige beaucoup de moyens. En revanche, si le prix d'aval de la société intégrée est strictement réglementé alors que celui d'amont l'est peu, elle sera tentée de cesser purement et simplement de fournir le service d'aval. L'un des outils qui ont été proposés pour assurer un juste « équilibre » entre la régulation des prix d'accès et des prix finaux est le « plafonnement global des prix », qui soumet à un plafond un panier de prix incluant à la fois les prix finaux et ceux d'accès. La société réglementée est libre de modifier ses prix tant finaux que d'accès à condition de ne pas franchir la limite maximale constituée de la moyenne pondérée de ces deux prix. Bien

[11] Voir, par exemple, Polo (2007).

qu'en théorie un tel plafonnement possède des caractéristiques désirables, il n'a pas été adopté en pratique.

- Si les produits d'aval des concurrents sont de proches substituts du produit de la société en place, toute discrimination par les prix affectant les prix d'aval de cette société apparaîtra dans ses prix d'accès. Par exemple, si la société en place applique une tarification binôme au stade de l'aval, cela apparaitra dans les prix d'accès. Si elle applique des prix discriminatoires à différentes catégories de clientèle ou zones géographiques en aval, cela apparaîtra au stade de l'accès. Si la société en place offre des rabais de quantité en aval, les mêmes remises devront apparaître au niveau de l'accès. Cette approche suppose que le prix d'accès peut être fixé différemment selon les caractéristiques du client final situé en aval auquel le produit final est vendu.

3. Étranglement de marge et refus de vente

Comme on l'a vu au début du texte, les auteurs de ce rapport font valoir que le droit de la concurrence doit traiter de la même manière des actions qui sont équivalentes du point de vue économique. Étant donné que, comme on l'a déjà observé, un refus de vente pur et simple est, sous l'angle économique, équivalent à une offre de vente à un prix élevé (ou à la vente d'un produit de faible qualité), proposer de vendre un intrant indispensable à un prix dissuasif au regard de celui qui est pratiqué en aval (c'est-à-dire qu'on procède à un étranglement de marge) est, du point de vue économique, équivalent à un refus de vente. En conséquence, en vertu du principe de cohérence, une affaire d'étranglement de marge doit être traitée de la même manière qu'un refus de vente. [12]

Cet impératif de cohérence entre le traitement par le droit de la concurrence d'un refus de vente pur et simple et d'une offre de vente à un prix d'accès élevé (par rapport au prix d'aval) a souvent été souligné dans les ouvrages de droit et d'économie traitant de l'étranglement de marge. De nombreux juristes et économistes ont fait valoir qu'il n'est pas logique de faire peser sur une entreprise dominante qui propose de vendre un intrant indispensable à ses concurrents la menace d'un procès en vertu de la doctrine sur l'étranglement de marge alors qu'elle ne pourrait aucunement être mise en cause si elle refusait purement et simplement de vendre cet intrant indispensable. Une telle attitude aurait simplement pour effet d'obliger l'entreprise intégrée à retirer l'intrant indispensable de la vente, ce qui nuirait aux consommateurs et utilisateurs en aval.[13] Par exemple, Spector (2008) écrit :

> *« l'impératif de cohérence est ... évident dès lors que l'on compare l'étranglement de marge avec le refus de vente. La décision de fixer un prix si élevé qu'il en est prohibitif peut être considérée*

[12] La nécessité, pour le droit de la concurrence, de traiter de manière équivalente les actions équivalentes du point de vue économique a été soulignée par le Professeur Bloom lors d'une table ronde de l'OCDE en 2007. Le Professeur Bloom a fait observer que, dans certains pays, les normes légales de preuve d'un étranglement de marge sont moins sévères que celles qui régissent la preuve d'un refus de vente ou de la fixation de prix de vente d'éviction, ce qui créé un risque de « chalandage de qualification de l'abus ». OCDE (2008), paragraphe 95. Spector (2008), page 6, met aussi en garde contre le risque de « traiter de façon hétérogène des pratiques qui, du point de vue économique, sont équivalentes sur la base de différences de forme qui, en substance, sont dénuées de tout fondement ».

[13] Le choix d'une société intégrée qui refuserait de vendre plutôt que de prêter le flanc aux accusations d'étranglement de marge entraînera, dans certaines circonstances, une perte d'efficience de l'économie dans son ensemble. Si les concurrents opérant en aval sont plus efficients que l'entreprise en place, ou si leurs produits ne se substituent qu'imparfaitement à ceux de cette société, ou encore s'ils vendent aussi d'autres produits désirés par les consommateurs mais qui sont aussi tributaires de l'intrant rare, la décision de l'entreprise intégrée de cesser de vendre l'intrant indispensable aboutira à une diminution du bien-être des consommateurs dans leur ensemble.

comme un refus de vente. En conséquence, il serait absurde de qualifier le comportement d'une entreprise d'étranglement de marge abusif dans le cas où elle aurait le droit de refuser de vendre. Autrement dit, dans le cas où une entreprise verticalement intégrée a le droit de ne pas approvisionner un concurrent opérant en aval, elle doit a fortiori avoir celui de l'approvisionner aux conditions qu'elle décidera ».[14]

De même, dans l'affaire *Covad* aux États-Unis, le juge Ginsburg a écrit :

« il est illogique d'interdire un étranglement de marge à caractère prédateur dans le cas où la société intégrée qui jouit d'un monopole est libre de refuser de vendre ».[15]

Parmi les affaires récentes d'étranglement de marge dans lesquelles il n'y avait pas d'obligation préexistante de vendre, celle qui a été la plus largement débattue est l'affaire *linkLine*[16] aux États-Unis. Elle tiendra une grande place dans la présente section. Par exemple, la plupart des procès intentés en Europe concernaient une obligation de vente ; nous aborderons plus loin une sélection d'affaires européennes dans lesquelles il y avait obligation de vente.

L'affaire *linkLine* opposait un vendeur de boucles locales dégroupées jouissant d'un monopole (Pacific Bell) qui les mettait, en aval, à la disposition de fournisseurs d'accès Internet qui s'en servaient pour fournir un accès Internet à haut débit à leurs propres clients en aval grâce à la technologie DSL. Pacific Bell les concurrençait aussi dans les services d'accès à Internet. Les demandeurs faisaient valoir que Pacific Bell « fixait un prix de gros élevé pour l'acheminement par DSL, mais un prix de détail bas pour le service d'accès à Internet par DSL ». Autrement dit, ils alléguaient un étranglement de marge contraire à l'article 2 de la loi Sherman.

En février 2009 la Cour Suprême, se fondant sur l'arrêt *Trinko* qu'elle avait rendu auparavant, a jugé que, comme la législation de la concurrence ne soumettait Pacific Bell à aucune obligation de vendre à ses concurrentes[17], et que rien ne prouvait que les prix de détail pratiqués étaient prédateurs, Pacific Bell ne pouvait être considérée comme coupable de pratiques monopolistiques en vertu de l'article 2. Plus précisément, la Cour a conclu que :

« Trinko considère qu'un défendeur auquel la législation antitrust ne fait pas obligation de vendre à ses concurrents n'est nullement tenu de vendre aux conditions que préféreraient ces derniers. Le Groupe Brooke affirme que la fixation de prix bas ne peut donner matière à une action en justice en vertu de la loi Sherman que si les prix sont inférieurs au coût de revient et qu'il existe un réel danger que le prédateur soit en mesure de compenser le manque à gagner résultant de ces prix bas. Dans ce cas, les requérants n'ont pas invoqué une quelconque obligation de vente à l'encontre de Trinko et ils n'ont pas prétendu que le Groupe Brooke pratiquait des prix de vente d'éviction. Cela ne les a néanmoins pas empêchés de joindre un moyen tiré des prix de gros qui ne saurait prospérer à un moyen tiré des prix de détail auquel il

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14 Spector (2008), paragraphe 9. Voir également Carlton (2008), page 6.

15 *Covad Communications Co. v. Bell Atlantic Corp.,* 398 F.3d 666 (D.C. Cir. 2005). Voir aussi O'Donoghue et Padilla (2006), page 326 : « ...il y a de bonnes raisons de penser qu'un étranglement de marge doit être qualifié d'illégal s'il existe une obligation de fournir l'intrant en question ».

16 *Pacific Bell Telephone Co. DBA AT&T California et autres contre Linkline Communications Inc. et autres*, 555 U.S._(2009)

17 Bien que, en l'espèce, Pacific Bell ne soit soumis à aucune obligation de vente par la législation antitrust, la réglementation lui faisait obligation de vendre et, en l'occurrence, de vendre ses services DSL au stade du gros à un prix qui ne dépasse pas le prix qu'il facturait au stade du détail pour ses services DSL.

ne peut non plus être fait droit et de les amalgamer en une nouvelle forme de violation du droit de la concurrence qui n'a jamais été reconnue auparavant par la Cour. Nous déclinons cette invitation à faire droit à ces prétentions. Deux moyens infondés n'en font pas un bon ».[18]

L'argument central de la Cour Suprême peut être considéré comme un argument de logique : si la législation antitrust ne fait pas obligation de vendre à une entreprise, celle-ci ne doit pas pouvoir être inquiétée dans le cas où elle propose de vendre en amont à un prix élevé par rapport à celui qu'elle facture au détail. De même, s'il n'est apporté aucune preuve que les prix pratiqués en aval par l'entreprise ne sont pas des prix d'éviction, elle ne doit pas se voir reprocher de fixer un prix de détail bas par rapport à son prix d'amont. L'une des caractéristiques importantes de cette affaire est qu'elle distingue entre l'obligation de vente découlant de la législation antitrust et celle résultant de la réglementation ; cette distinction n'est pas universellement acceptée, en particulier dans la mesure où l'obligation de vente imposée par la réglementation est motivée par les mêmes considérations de politique de la concurrence que celle qui découle de la législation antitrust.[19]

La cohérence entre le traitement de l'étranglement de marge et celui du refus de vente pourrait aussi être restaurée en inférant ou en imposant une obligation de vente s'appliquant précisément dans le cas où une entreprise intégrée vend un intrant indispensable en amont à un prix élevé au regard de celui auquel elle vend un service en aval. Mais serait-il logique d'imposer une obligation de vente dans un tel cas de figure ?

En 2004, la Cour Suprême des Etats-Unis, statuant dans l'affaire *Trinko,* a limité à quelques cas rares ou exceptionnels les motifs pour lesquels il peut être conclu à une obligation de vente en vertu de la législation antitrust. La Cour a noté que la loi Sherman « ne restreint pas le droit reconnu de longue date à un commerçant ou fabricant exerçant une activité entièrement privée de faire usage en toute indépendance de son propre jugement quant aux parties avec lesquelles il traite ».[20].

L'arrêt *Trinko* est controversé. De nombreux économistes soutiennent que presque toutes les entreprises doivent être libres, dans la plupart des cas, de choisir à qui vendre. Des conditions assez strictes doivent être remplies pour que l'obligation de vendre aux concurrents soit imposée à une entreprise, et ce pour les raisons ci-après :

- Imposer une obligation de vente limite le droit de propriété de l'entreprise dominante et, pour elle, réduit ainsi l'incitation à innover et prendre des risques pour acquérir la position dominante qu'elle s'est assurée. Ce préjudice économique pourrait être plus grand que les gains susceptibles de résulter de l'innovation et de la concurrence dans les secteurs d'aval concernés que l'on pourrait éventuellement espérer d'un accès obligatoire. Dans ses lignes directrices sur les priorités pour l'application de l'article 82 aux abus visant à exclure un concurrent, la Commission européenne observe qu'une intervention fondée sur le droit de la concurrence « doit être soigneusement pesée lorsque l'application de l'article 82 risque de déboucher sur l'imposition d'une obligation de fourniture ». Faisant référence à la fois au refus de vente et à l'étranglement de marge, la Commission remarque que :

  « L'existence d'une telle obligation – même en contrepartie d'une rémunération équitable – peut dissuader les entreprises d'investir et d'innover et, partant, léser les

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18 *linkLine* 555 U.S._(2009), page 17.

19 Voir Alexiadis et Shortall (2009), page 5.

20 *Verizon Communications Inc. contre Law Offices of Curtis contre Trinko*, 540 U.S. 398 à 407-08 (citant *United States contre Colgate & Co.*, 250 U.S. 300, 307 (1919)).

consommateurs. Le fait de savoir qu'une obligation de fourniture peut leur être imposée contre leur gré pourrait conduire des entreprises dominantes – ou des entreprises escomptant le devenir – à ne pas investir ou à moins investir dans l'activité en question. De même, des concurrents pourraient être tentés de profiter indûment des investissements réalisés par l'entreprise dominante au lieu d'investir eux-mêmes. Aucune de ces conséquences ne serait, à long terme, dans l'intérêt des consommateurs".[21]

Carlton (2008) remarque :

« l'obligation de vente porte atteinte au droit de propriété et, par là, réduit l'incitation, qui est à la base du système capitaliste, à récompenser ceux qui créent des produits que veulent les consommateurs. Émousser cette incitation est généralement préjudiciable aux consommateurs, surtout quand on se rappelle la part essentielle que les nouveaux produits ont prise dans l'élévation des niveaux de vie ».[22]

- Instaurer une obligation de vente revient à ériger l'autorité de la concurrence et/ou les tribunaux en régulateurs des prix. En général (quoique pas toujours), cette tâche exige beaucoup de temps et de moyens et doit être menée en permanence.

Ce dernier argument a été développé par plusieurs spécialistes réputés du droit de la concurrence dans leur mémoire devant la Cour suprême dans l'affaire *linkLine* :

« Dans le contexte américain, l'analyse nécessaire s'apparente davantage au travail d'une commission de tutelle des services publics qu'à celui d'un juge fédéral ayant à statuer sur une affaire d'entrave à la concurrence. Par définition, le travail du juge en tant que régulateur de facto des tarifs n'a jamais de fin parce que des forces extérieures obligeront les prix de gros comme de détail à évoluer au fil du temps, de telle sorte qu'une marge bénéficiaire donnée peut se resserrer et compromettre la survie de concurrents. Le résultat pervers de cet exercice est que les procès pour étranglement de marge deviennent une sorte de régulation durable du coût de prestations qui mobilise une forte proportion des moyens dont dispose un juge de district ».[23]

« Un étranglement de marge est par nature un problème réglementaire qui n'a de sens qu'en tant que règle de régulation tarifaire dans une branche déjà soumise à l'obligation de vente et au contrôle d'autorités de tutelle. Il est déconseillé d'essayer de mettre en œuvre une politique réglementaire au moyen de l'article 2 de la loi Sherman, à la fois parce que les tribunaux n'ont pas vocation à reréglementer les branches déréglementées ou faiblement réglementées et parce qu'ils ne possèdent pas les compétences institutionnelles nécessaires pour appliquer la réglementation ».[24]

Il est difficile de concilier l'effort de la Cour pour éloigner les juges d'une « régulation durable du coût des prestations » quand, dans le cas où la régulation est confiée à une autorité de réglementation, elle est fréquemment soumise à un contrôle des tribunaux qui se reproduit au fil du temps et peut souvent aboutir à des décisions infirmant ou ajournant des décisions de l'autorité de réglementation.

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21 CE (2009), page 24.

22 Carlton (2008), page 7.

23 Mémoire de professeurs de droit et d'économie en tant qu'*Amici Curiae,* produit à l'appui de la thèse du requérant, Pacific Bell Telephone Co., contre linkLine Communications Inv., devant la Cour Suprême des États-Unis, No. 07-512 (déposé le 16 novembre 2007), page 8.

24 Ibid, page 3.

O'Donoghue et Padilla (2006) soulignent que les critères en vertu desquels une entreprise peut être jugée coupable d'étranglement de marge doivent être identiques à ceux qui sont retenus pour le refus de vente, à savoir :

> *« il doit y avoir place pour une concurrence significativement créatrice de valeur sur le marché d'aval pour que l'obligation de vente (ou l'obligation de vendre à des conditions données) puisse être imposée ; et toute obligation de vente doit favoriser la concurrence plus qu'elle ne la décourage (c'est-à-dire que les bénéfices ex post de l'instauration d'une obligation de vendre aux consommateurs doivent l'emporter sur la réduction ex ante de l'incitation de l'entreprise à mettre au point des produits ».*[25]

La table ronde de l'OCDE sur le refus de vente (2008) a mis en évidence l'existence entre les autorités de la concurrence des pays de l'OCDE d'un large consensus selon lequel le droit de la concurrence ne doit instituer une obligation de vente que dans des circonstances particulières. Le principe de cohérence implique donc que les circonstances dans lesquelles une société pourrait être jugée coupable d'étranglement de marge (en l'absence de toute obligation de vente imposée par la réglementation) doivent aussi être circonscrites à ces mêmes circonstances particulières.

Autrement dit, une entreprise ne doit pouvoir être attaquée pour étranglement de marge que si elle est déjà soumise à une obligation de vente. Si l'étranglement de marge est maintenu en tant que forme d'abus autonome, il ne doit pas servir à renforcer (ou affaiblir) les obligations de vente existant déjà en vertu du droit de la concurrence. Ce sont exactement les mêmes normes et procédures que celles qui s'appliquent au refus de vente qui doivent s'appliquer.

Mais que se passe-t-il si une entreprise intégrée est déjà soumise à une obligation de vente, éventuellement du fait d'une obligation réglementaire ? Que nous dit le principe de cohérence dans ce cas ?

4. L'étranglement de marge dans le cas d'une entreprise partiellement intégrée

Considérons à présent le cas où une entreprise est d'ores et déjà soumise à une obligation de vente du fait soit du droit de la concurrence, soit d'une obligation instituée par la réglementation. Considérons tout d'abord le cas où une entreprise présente dans l'amont n'est pas intégrée verticalement ou ne détient qu'une petite participation dans une entreprise opérant dans l'aval. Dans ce cas (et sous réserve qu'il n'y ait pas d'autres arrangements contractuels entre ces deux entreprises), le prix de pleine concurrence auquel l'entreprise présente en amont vend l'intrant indispensable à sa filiale en aval est, en principe, une donnée qui est observable et qui, économiquement, est susceptible d'avoir du sens.

Dans ce cas, le niveau auquel est fixé le prix de l'intrant indispensable en amont, considéré soit isolément, soit par comparaison avec celui auquel le service d'aval est vendu, pourrait susciter à trois lignes de conduite différentes (illustrées dans le graphique 2 ci-dessous) dans le cadre du droit de la concurrence :

- S'il s'avère que le prix d'accès est supérieur au coût mesuré par un indicateur pertinent, l'entreprise opérant en amont pourrait être jugée coupable de *prix excessifs* (dans les pays où une telle pratique peut être considérée comme un abus de position dominante).[26]

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25 O'Donoghue et Padilla (2006), page 326-327.

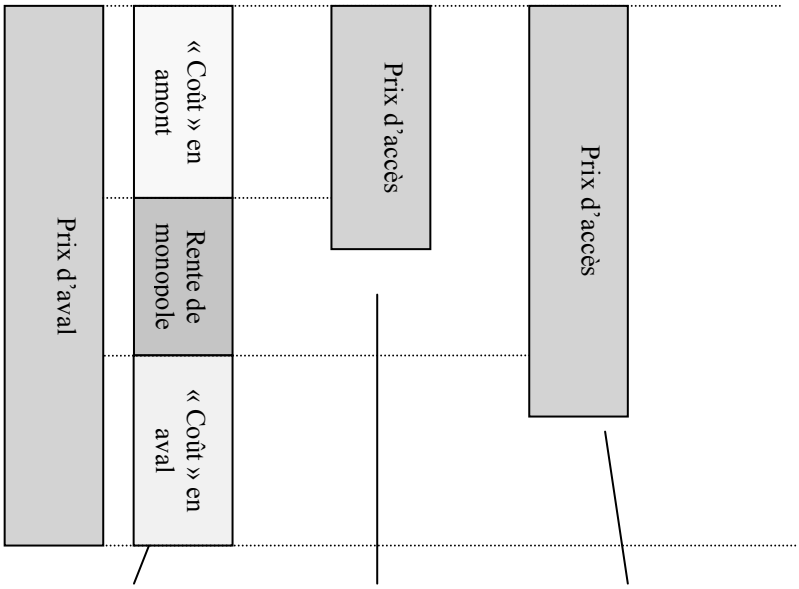
26 O'Donoghue et Padilla (2006), page 322, cherchent à établir une distinction entre « l'abus visant à exclure un concurrent » au moyen d'un étranglement de marge de « l'abus visant à exploiter un

- A défaut, s'il s'avère que le prix d'amont auquel l'entreprise vend à sa propre filiale est différent du prix auquel elle vend l'intrant indispensable à ses concurrents en aval, l'entreprise présente en amont peut être jugée coupable de *discrimination par les prix* illégale.

- Il se peut aussi, dans le cas où la filiale d'aval vend à perte le produit d'aval (compte tenu du prix auquel elle achète l'intrant indispensable), que cette filiale soit jugée coupable de fixation de *prix de vente d'éviction.*

Ces trois lignes de conduite sont illustrées dans le graphique ci-dessous :

Graphique 2 : Étranglement de marge et autres types de pratiques anticoncurrentielles



Le prix d'aval peut, en principe, être ventilé entre trois composantes.

Si le prix d'accès est supérieur au coût en amont, l'entreprise peut être coupable de **prix excessifs**.

Si le prix d'accès est supérieur au coût en amont majoré de la rente de monopole, l'entreprise peut être coupable de **fixation de prix de vente d'éviction**.

Dans ces deux derniers cas, l'entreprise pourrait aussi être coupable de **discrimination par les prix** illégale si elle applique un prix d'accès différent à sa propre filiale.

Supposons par exemple que le coût du service d'amont soit de 10 USD par unité, le coût du service d'aval de 40 USD par unité et le prix d'aval de 65 USD par unité, si bien que la « rente de monopole » est de 15 USD par unité. En pratique, comme on l'a montré plus tôt, il est le plus souvent impossible, en présence de coûts irrécupérables et d'économies d'échelle et de gamme, de mesurer les coûts avec précision de cette manière, mais pour l'instant nous mettrons cette restriction entre parenthèses.

client » au moyen de prix excessifs. Ils font valoir que traiter un étranglement de marge comme un cas de fixation de prix excessifs « ne semble avoir aucune utilité »

Si le prix d'accès était fixé, par exemple, à 20 USD par unité, l'entreprise partiellement intégrée pourrait être attaquée pour fixation de « prix excessifs » en amont puisque le prix d'accès de 20 USD par unité est plus élevé que le coût en amont, qui est de 10 USD par unité.

Ou bien, si le prix d'accès était fixé à 30 USD par unité, l'entreprise société non intégrée ou partiellement intégrée pourrait être attaquée pour fixation de prix de vente d'éviction en aval. Dans ce cas, il serait allégué que le prix de 65 USD par unité qui est appliqué en aval est « trop bas » par rapport au montant total des coûts supportés par l'entreprise en aval, lesquels se composent du prix d'accès (30 USD par unité) plus les coûts en aval (40 USD par unité), ce qui donne 70 USD par unité.

Si le fournisseur de l'intrant indispensable couvrait une partie de l'aval par le jeu d'une intégration verticale, ce dernier comportement pourrait aussi être qualifié d'étranglement de marge. Une entreprise non intégrée ne peut être condamnée pour étranglement de marge ; elle ne pourrait être poursuivie que pour fixation de prix de vente d'éviction. Mais la logique du traitement appliqué à une entreprise partiellement intégrée et à une entreprise qui ne l'est pas du tout exige que ces deux formes d'abus soient traitées de manière cohérente.

Le principe de cohérence exige en particulier qu'un étranglement de marge se produisant dans le contexte d'une entreprise dont l'intégration verticale n'est que partielle soit traité de la même manière que la fixation de prix de vente d'éviction en aval compte tenu du prix d'accès payé à l'entreprise présente dans l'amont. Cela implique que les politiques et pratiques du droit de la concurrence qui s'appliquent à la fixation de prix de vente d'éviction soient identiques à celles qui régissent l'étranglement de marge (et vice versa) et incluent par exemple l'obligation de prouver que le prix est inférieur au coût mesuré par un indicateur pertinent et que le manque à gagner en résultant pourra être récupéré par la suite.

O'Donoghue et Padilla (2006) relèvent que :

> *« Beaucoup de principes pertinents pour l'analyse de la prédation « pure » peuvent être utiles pour l'analyse des abus ressortissant à l'étranglement de marge. Ce sont notamment la nécessité d'une stratégie de prédation crédible, la preuve de la volonté d'exclure un concurrent, la question de la récupération du manque à gagner et les effets préjudiciables aux consommateurs ».*[27]

La nécessité de faire preuve de cohérence ne fait aucun doute. Supposons tout d'abord que les conditions à remplir pour prouver un étranglement de marge soient moins strictes que celles qui régissent la fixation de prix de vente d'éviction. On pourrait alors se trouver confronté à une situation dans laquelle la comparaison avec le prix d'amont permet de conclure que le prix d'aval est fixé à un niveau tel qu'il constitue un prix d'éviction si l'entreprise opérant en aval n'était pas intégrée alors qu'il serait parfaitement légal (en vertu de la doctrine concernant l'étranglement de marge) si elle était intégrée. Dans ce cas, l'entreprise opérant en aval pourrait échapper à la menace d'une action pour prix d'éviction en vertu du droit de la concurrence en prenant une petite participation dans une société située en amont (ou en vendant une petite participation dans une société présente en amont).

Il est peut-être plus vraisemblable que, si un certain comportement tarifaire tombait sous le coup d'une règle contre l'étranglement de marge dans le cas où l'entreprise est intégrée alors qu'elle ne courrait aucun risque d'être poursuivie pour fixation de prix de vente d'éviction si elle n'était pas verticalement intégrée, le producteur de l'intrant indispensable soit poussé à vendre toutes ses participations dans des sociétés opérant en aval. Dans un cas comme dans l'autre, la tentative d'échapper à des poursuites pour

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27 O'Donoghue et Padilla (2006), page 322-323.

pratiques anticoncurrentielles ferait perdre tous les avantages économiques découlant du libre choix, par l'entreprise, du schéma d'intégration verticale optimal.

Les mêmes arguments s'appliquent aux règles de preuve et aux critères juridiques à employer. La cohérence veut que, dans une affaire d'étranglement de marge à laquelle est mêlée une entreprise partiellement intégrée, on applique les mêmes règles et procédures que dans une affaire de fixation de prix de vente d'éviction impliquant une entreprise qui n'est pas verticalement intégrée, et notamment, comme on l'a vu plus haut, que l'on démontre que le prix est fixé en dessous du coût de revient et qu'une récupération du manque à gagner en résultant est probable. Ce point de vue est défendu par Spector (2008), qui fait valoir que :

> *« la cohérence dans l'application de l'article 82 ... impose aux autorités de la concurrence de veiller à ce que des pratiques équivalentes sur le plan économique soient soumises à un traitement équivalent. En d'autres termes, cela signifie que les critères d'interdiction, les règles de preuve et l'attribution de la charge de la preuve ne varient pas sensiblement selon que l'on cherche à prouver un étranglement de marge ou des prix de vente d'éviction ».*[28]

Ce recoupement (et donc l'impératif de cohérence) dans le traitement de l'étranglement de marge et de la fixation de prix de vente d'éviction est patent dans l'affaire CE contre *Wanadoo*. En 2003, la Commission européenne a déterminé que Wanadoo, une filiale de France Telecom dans laquelle ce dernier détenait une participation d'environ 70 %, avait pratiqué des prix de vente d'éviction en fixant le prix des services vendus au détail à un niveau inférieur à ses coûts variables moyens compte tenu des sommes qu'il payait à France Telecom au titre de ses achats en gros.[29]

Mais ces pratiques auraient tout aussi bien pu être qualifiées d'étranglement de marge. De fait, il n'est pas indifférent que la sanction imposée dans cette affaire s'apparente davantage à celles qui sont appliquées dans les affaires classiques d'étranglement de marge. La réparation demandée ne visait pas Wanadoo (comme on aurait pu s'y attendre dans une affaire classique de fixation de prix d'éviction), mais France Telecom, auquel il était enjoint d'abaisser ses tarifs de gros.

5. Étranglement de marge et entreprise totalement intégrée

En principe, comme nous l'avons vu, le droit de la concurrence devrait traiter les pratiques d'une entreprise partiellement intégrée de la même manière que les pratiques identiques d'une entreprise non intégrée. Mais qu'en est-il pour une entreprise totalement intégrée ? Elle pose un problème plus délicat parce que, dès lors qu'une entreprise est totalement intégrée, le « prix » auquel elle vend l'intrant rare à ses propres filiales d'aval n'est généralement pas observable. Même si, apparemment, il était véritablement observable (par exemple, parce que les divisions amont et aval de l'entreprise intégrée tiennent une comptabilité séparée), ce prix n'aurait aucune signification économique. La seule finalité des transactions effectuées entre des entreprises à actionnariat conjoint et des prix de cession interne auxquels elles sont conclues est de déplacer les bénéfices apparents entre les diverses composantes de ces entreprises.[30]

Dans ce cas, puisque le prix auquel la société intégrée se vend l'intrant rare à elle-même ne peut être observé directement, il doit être *calculé* ou *imputé*. Trois méthodes, qui correspondent grossièrement aux

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28 Spector (2008), paragraphe 8.

29 COMP/38.233 Wanadoo Interactive, Décision du 16 Juillet 2003.

30 Même si l'entreprise opérant en aval est détenue à moins de 100 % par celle qui est présente en amont, le prix auquel la seconde vend à la première peut être dénué de signification économique si des paiements latéraux ou d'autres transferts sont effectués entre les deux sociétés.

trois lignes de conduite mentionnées plus haut, peuvent être employées pour calculer ou imputer le prix auquel la société intégrée se vend à elle-même l'intrant indispensable (le prix d'accès « interne ») :

- La première suppose que la société intégrée se vend à elle-même l'intrant indispensable à un prix qui ne laisse à sa filiale d'amont qu'un bénéfice normal (c'est-à-dire qu'elle fait migrer vers l'aval toute rente de monopole). Cela implique que le prix d'accès imputé est égal au coût du processus amont de l'entreprise intégrée. Ce raisonnement suppose fondamentalement que l'entreprise intégrée ne pratique pas de *prix excessifs* en amont.

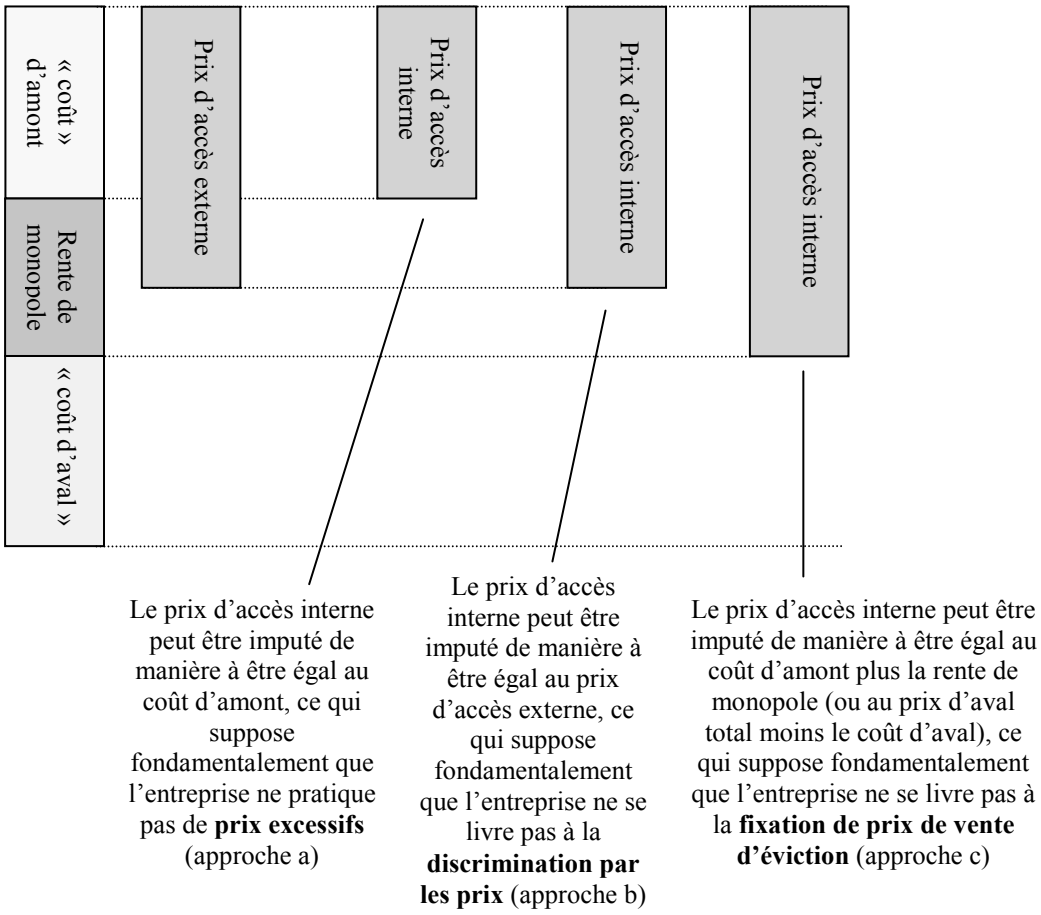
- La deuxième approche suppose que l'entreprise intégrée se vend l'intrant indispensable à elle-même au même prix (prix d'accès « interne ») que celui auquel il est vendu à ses concurrents dans l'aval (prix d'accès « externe »). Elle suppose fondamentalement que l'entreprise intégrée ne vend pas l'intrant indispensable à un *prix discriminatoire*, et ce bien que ses concurrentes en aval puissent fournir des services ou servir des catégories de clientèle différents de ceux de l'entreprise intégrée.[31]

- La troisième approche suppose que l'entreprise intégrée se vend à elle-même l'intrant indispensable à un prix qui laisse à sa filiale d'amont un bénéfice normal (c'est-à-dire qu'elle fait migrer vers l'amont toute rente de monopole). Cela implique que le prix d'accès imputé est égal au prix d'aval moins le « coût » du cycle aval de l'entreprise intégrée. En fait, ce raisonnement suppose que l'entreprise intégrée ne pratique de pas de *prix de vente d'éviction* en aval.

Ces trois approches sont illustrées par le graphique 3 ci-dessous.

[31] Il n'est peut-être pas inutile de rappeler que, bien que l'application du principe « d'absence de discrimination par les prix » semble souvent être la plus « naturelle » dans de nombreux cas, son innocuité n'est pas toujours garantie. En présence de coûts joints ou communs dans l'amont, une récupération efficace des coûts communs nécessite le plus souvent de pratiquer des prix discriminatoires, sous une forme ou sous une autre, au stade de l'amont. Si cette discrimination par les prix ne peut être reflétée dans les prix d'accès, la fourniture de certains produits ou services risque d'être abandonnée purement et simplement. Voir O'Donoghue et Padilla (2006), page 328 et Grout (2003), page 81.

Graphique 3 : Les différentes méthodes d'imputation du prix d'accès interne



Supposons, par exemple, que le coût d'amont soit de 10 USD par unité, le coût d'aval de 40 USD par unité et le prix d'aval de 65 USD par unité, ce qui laisse une rente de monopole de 15 USD par unité. Supposons en outre que l'entreprise totalement intégrée vende l'intrant indispensable à ses concurrents en aval au prix de 20 USD par unité. Dans ce cas, on pourrait obtenir par imputation un prix d'accès interne (c'est-à-dire le prix auquel l'entreprise intégrée se vend cet intrant à elle-même) égal :

- au coût d'amont (10 USD par unité comme dans l'approche (a)) ;
- au prix auquel elle vend l'intrant aux tiers (20 USD par unité comme dans l'approche (b)) ;
- ou au coût d'amont majoré de la rente de monopole (ou, ce qui revient au même, au prix d'aval moins le coût d'aval), soit 25 USD par unité comme dans l'approche (c)).

On notera qu'une fois que le prix d'accès interne a été imputé au moyen de l'une de ces trois méthodes, il est possible de s'assurer qu'il est compatible avec les règles du droit de la concurrence au moyen de l'une des *autres* méthodes. Par exemple, une fois que le prix d'accès interne a été imputé sur la base soit du prix auquel l'entreprise vend à ses concurrents (approche b), soit du prix d'aval dont on a déduit le coût d'aval (approche c), il est possible de vérifier si ce prix imputé remplit les conditions pour que l'abus de « prix excessif » soit établi (approche a) en le comparant au « coût » du processus amont.

A défaut, si le prix d'accès interne était imputé selon le principe de l'absence de rente en amont (approche a) ou de l'absence de rente de monopole en aval (approche c), ce prix pourrait être comparé au prix d'accès externe (approche b) pour déterminer s'il constitue une discrimination par les prix illégale.

Une affaire récemment jugée en France illustre cette possibilité. En l'occurrence, l'approche (c) a été employée pour imputer le prix d'accès interne, lequel a ensuite été comparé au prix d'accès externe (approche (b)), et le tribunal a conclu à la pratique illégale de prix discriminatoires. Spector (2008) rapporte que :

> *« ...dans une affaire récemment jugée en France, un producteur d'eau qui jouissait d'un pouvoir monopolistique sur la production d'eau dans une région donnée et son acheminement jusqu'au point d'entrée [du réseau] dans une ville donnée, mais qui risquait d'être concurrencé en aval sur le marché des services de distribution locale entre le point d'entrée et le consommateur final ... s'est vu infliger une amende pour abus de position dominante parce qu'il avait accordé une remise conditionnée par la décision du conseil municipal de lui acheter le service de distribution locale en sus de la fourniture d'eau jusqu'au point d'entrée. La pratique incriminée a été qualifiée de vente liée, mais également jugée discriminatoire. En effet, si l'on partait du principe (i) que les concurrents de l'aval qui n'étaient pas intégrés auraient acheté l'intrant d'amont avant de revendre le produit final à la ville et (ii) que la « division amont » de la société intégrée facturait à sa « branche aval » (bien que ces entités séparées n'existent que dans le raisonnement juridique) un prix d'amont ne constituant pas un prix d'éviction, alors ces deux prix ... auraient été différents. Cependant, au bout du compte, quoique la pratique examinée ait été qualifiée à la fois de vente liée et de discrimination, on peut soutenir que cette affaire concerne un étranglement de marge parce que la question posée (ou qui aurait dû l'être) était de savoir si la différence entre le prix d'amont facturé aux concurrents en aval et le prix d'aval facturé au client final laissait aux entreprises non intégrées opérant en aval une marge suffisante pour pouvoir livrer une concurrence efficace ».*[32]

On notera que, si le prix d'accès interne était imputé sur la base du prix auquel la société vend à ses concurrents (approche b) ou du coût d'amont (approche a), le prix d'aval pourrait être testé pour déterminer si le secteur de l'aval est en mesure d'obtenir une rentabilité normale (approche c), c'est-à-dire si l'entreprise intégrée viole les règles prohibant la fixation de prix de vente d'éviction. Cette approche, qui est de loin la plus fréquemment employée, est décrite ci-dessous de façon plus détaillée.

5.1 Sélection d'affaires dans lesquelles des entreprises totalement intégrées ont été accusées d'étranglement de marge

L'affaire Industrie des Poudres Sphériques,[33] une société qui a prouvé qu'un étranglement de marge pouvait se produire si une société dominante verticalement intégrée vend un intrant à ses concurrents à des prix fixés « à un niveau tel que ceux qui l'achètent ne dégagent pas une marge suffisante sur les opérations de transformation pour rester compétitifs sur le marché du produit transformé », a fait date dans la jurisprudence européenne concernant les entreprises totalement intégrées. Le Tribunal de première instance (TPI) a suggéré que l'étranglement de marge pouvait se produire (1) si les prix du produit d'amont étaient abusifs ou (2) si le produit d'aval était vendu à des prix d'éviction. En pratique, il a utilisé à un seul critère pour établir l'abus en considérant que le prix d'amont serait abusif ou le prix d'aval serait un prix d'éviction si un concurrent efficace ne pouvait pas livrer concurrence en raison des prix fixés par l'entreprise dominante.

Deux affaires d'étranglement de marge ont été évoquées très récemment à propos d'entreprises totalement intégrées : Deutsche Telekom et Telefónica[34]. Dans un cas comme dans l'autre, ces sociétés ont

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32 Spector (2008), paragraphe 11.

33 Affaire T-5/97.

34 Voir Affaire T-271/03 et Décision COMP/37.451 et Affaire T-336/07 et Décision COMP/38.784.

été considérées comme dominantes dans la fourniture de services de gros. Deutsche Telekom a été considérée comme dominante dans la fourniture d'accès au réseau local et Telefónica dans celle de l'accès de gros au réseau haut débit à l'échelon tant régional que national.

En ce qui concerne Deutsche Telekom, la Commission européenne a conclu que, à partir de 1998-2001, Deutsche Telekom appliquait à ses concurrents des tarifs d'accès de gros à la boucle locale qui étaient plus élevés que ceux qu'il appliquait à ses propres clients dans l'accès filaire. Elle a en outre constaté qu'à partir de 2002, le montant facturé pour l'accès sur le marché de gros était plus faible que pour l'accès des particuliers au réseau filaire, mais l'écart entre les prix de gros et de détail était trop faible pour que Deutsche Telekom couvre ses propres frais pour l'ajout de la fourniture de services à la clientèle de détail au stade de la boucle locale. Deutsche Telekom a objecté que ces tarifs avaient été contrôlés et imposés par l'autorité de régulation. Le Tribunal de première instance a conclu que Deutsche Telekom pouvait ajuster ses tarifs pour la fourniture d'accès ADSL à la clientèle de détail après avoir obtenu l'accord préalable de l'autorité de régulation. Les entreprises qui occupent une position dominante au regard de l'article 82 doivent faire usage de leur liberté, notamment en demandant des modifications tarifaires, et ce même si leurs tarifs actuels ont été approuvés au préalable. En conséquence, le Tribunal de première instance a admis le grief de ciseau tarifaire comme grief à part entière bien que les services pour lesquels Deutsche Telekom était réputé dominant aient été soumis à la surveillance de l'autorité de régulation.[35]

Dans l'affaire Telefónica, qui était en cours devant le Tribunal de première instance à la date du présent rapport, la Commission européenne a conclu que Telefónica, l'opérateur de télécommunications historique en Espagne, s'est livré à un étranglement de marge entre 2001 et 2006. La marge entre les prix de détail de Telefónica et ceux qu'il facturait pour l'accès de gros à l'échelon régional et national était insuffisante pour couvrir les coûts qu'un opérateur aussi efficient que Telefónica devrait supporter pour fournir un accès au réseau haut débit à la clientèle de détail. Par conséquent, un concurrent tout aussi efficient souhaitant fournir un accès au réseau haut débit avait le choix entre se retirer du marché ou subir des pertes. De plus, bien qu'il existe une réglementation et une autorité de tutelle, la réglementation ne faisait nullement obligation à Telefónica de mettre fin à l'étranglement de marge en abaissant ses tarifs de gros. La Commission relève que les consommateurs espagnols paient l'accès au réseau à haut débit à un prix supérieur d'environ 20 % à la moyenne de l'UE à 15 et que le taux de pénétration du haut débit est inférieur de près de 20 % à cette même moyenne, ce qui tendrait à prouver qu'un étranglement de marge peut être préjudiciable aux consommateurs.

5.2 Étranglement de marge et fixation de prix d'éviction

Nous avons remarqué plus haut que le principe de cohérence exige qu'une société totalement intégrée soit traitée de la même manière qu'une société qui ne l'est que partiellement. Sinon, comme nous l'avons vu, l'entreprise serait incitée à modifier sa structure, quitte à perdre en efficacité, dans le seul but de se soustraire aux poursuites antitrust, des comportements anticoncurrentiels resteraient impunis ou des actions favorisant la concurrence seraient découragées. Cela implique, entre autres, que l'entreprise totalement intégrée ne puisse être poursuivie pour étranglement de marge que si, et seulement si, une entreprise qui ne l'est que partiellement pourrait l'être pour fixation de prix de vente d'éviction, le prix d'accès étant imputé selon les approches (a) ou (b) décrites ci-dessus.

Choisir entre l'imputation du prix d'accès selon l'approche (a) ou (b) revient à décider s'il y a lieu d'appliquer le critère du prix de vente d'éviction au niveau de l'ensemble de la société intégrée ou de sa seule division aval.

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35 Au moment où nous écrivons ces commentaires, l'affaire fait l'objet d'un appel devant la Cour de justice européenne (Affaire C-280/08).

Si l'on impute le prix d'accès selon l'approche (a) décrite plus haut, cela signifie qu'en fait le critère du prix de vente d'éviction est appliqué à *l'ensemble de la société intégrée* en comparant le prix d'aval avec la somme des coûts des deux processus, amont et aval. En revanche, si l'on impute le prix d'accès selon l'approche (b) ci-dessus (en supposant que l'entreprise applique le même prix de vente à ses concurrentes que celui qu'elle s'applique elle-même), le critère du prix de vente d'éviction n'est appliqué qu'au *processus aval* en comparant le prix d'aval avec le coût du processus aval (compte tenu du prix d'accès imputé en tant que coût de l'intrant indispensable).

De toute manière, il ressort de cette analyse que le droit de la concurrence doit traiter un étranglement de marge de la part d'une entreprise totalement intégrée de la même manière que la fixation de prix de vente d'éviction, c'est-à-dire comme une affaire de fixation de prix de vente d'éviction pour la totalité de l'entreprise ou pour son processus aval seulement, le prix de l'intrant servant au processus aval étant supposé identique à celui auquel l'entreprise vend l'intrant indispensable à ses concurrents. Les principes appliqués pour l'examen de la fixation de prix de vente d'éviction doivent aussi s'appliquer à l'examen d'un étranglement de marge dans le cadre du droit de la concurrence, et il faut en particulier prouver que les prix sont inférieurs aux coûts mesurés par un indicateur pertinent et que le manque à gagner en résultant pourra être récupéré.

En fait, plusieurs auteurs soutiennent qu'une entreprise ne devrait pas pouvoir être poursuivie pour étranglement de prix illégal dès lors qu'elle ne risque pas d'être jugée coupable d'infraction aux règles sur la fixation de prix de vente d'éviction, soit pour l'ensemble de la société, soit pour sa composante aval. Les rabais sont au cœur du processus concurrentiel et ils stimulent l'efficience tout en favorisant les transferts de ressources au profit des entreprises les plus productives. Interdire à une entreprise d'accorder des rabais empêche une concurrence efficace en abritant les concurrents potentiellement inefficients et en assurant le bien-être des fournisseurs au détriment de celui des consommateurs. Carlton (2008) remarque que :

> *« La menace de poursuite pour étranglement de marge au titre de la législation antitrust pourrait nuire aux consommateurs en offrant une protection tarifaire [aux concurrents]. Dans ce cas, la théorie antitrust sur l'étranglement de marge, loin d'engendrer un quelconque bénéfice, n'apporterait que des inconvénients ».*[36]

> *« Toute règle d'incrimination de l'étranglement de marge ouvrant la possibilité de faire valoir que la différence entre les prix d'amont et d'aval d'une entreprise laisse à ses concurrentes de l'aval une marge bénéficiaire insuffisante substitue à l'objectif du bien-être des consommateurs une règle favorisant le bien-être des producteurs ».*[37]

Certaines formes de remises sur les prix peuvent être néanmoins anticoncurrentielles et il faut les empêcher. Paradoxalement, certaines formes de contrôle des rabais favorisent la concurrence. Par exemple, dans de nombreuses branches, les entreprises opérant dans l'aval doivent consentir à fonds perdus un investissement spécialisé d'un montant notable pour être à même de livrer concurrence. Cet investissement à fonds perdus est constamment soumis à la menace que l'entreprise intégrée relève le prix de l'intrant indispensable et/ou abaisse celui du produit d'aval. Comme le font remarquer Hovenkamp et Hovenkamp (2009) :

> *« Une entreprise dominante ... pourrait avoir amené une entreprise plus petite à réaliser un investissement spécialisé d'un montant significatif dans la technologie de l'entreprise dominante.*

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36 Carlton (2008), page 7.

37 Carlton (2008), page 13. De même, Hovenkamp et Hovenkamp (2009), page 28, considèrent que « les règles antitrust qui offrent aux petites entreprises des marges garanties ne peuvent être que contre-productives ».

Cet investissement reposerait sur la promesse de cette dernière qu'elle fournira un intrant indispensable mais spécialisé. Par la suite, quand l'entreprise dominante augmente ses propres capacités de production, elle pourrait décider de faire mourir à petit feu l'entreprise plus petite en réduisant sa marge au point qu'elle serait suffisante pour couvrir ses coûts variables, mais pas ses frais fixes. Dans ce scénario, l'entreprise dominante pourrait, en pratique, « voler » aux actionnaires et aux créanciers de l'entreprise plus petite ses actifs engendrant des coûts fixes. En général, elle peut y parvenir en relevant le prix de l'intrant qu'elle fournit à son concurrent ».[38]

Dans un secteur non réglementé et en l'absence d'obligation de vente, les concurrents situés en aval chercheront à protéger leur investissement, par exemple, en concluant des contrats à long terme permettant de verrouiller le prix d'accès ou de fixer la marge entre les prix d'aval et d'accès. Les contrats à long terme ne sont pas fréquents dans les secteurs réglementés ; en effet, c'est l'autorité de réglementation qui joue le rôle d'arbitre contractuel et recrée les conditions du contrat à long terme que les parties auraient négociées dès le départ si elles en avaient eu l'occasion. Ce contrat à long terme comporterait des clauses protégeant l'investissement à fonds perdus des concurrents opérant dans l'aval en fixant soit le prix d'accès, soit la marge entre les prix d'aval et d'accès. Faute de cette protection, les entreprises situées dans l'aval n'entreront pas dans le marché. Les consommateurs seront alors forcés de renoncer aux avantages qu'auraient apportés un élargissement de la gamme des produits mis à leur disposition ou un effort d'innovation accru en aval.[39]

Ce qui importe ici, c'est que, dans certaines circonstances, il est indispensable d'empêcher, dans une certaine mesure, une entreprise intégrée d'abaisser ses prix afin que des concurrents puissent pénétrer dans le marché d'aval et que les consommateurs puissent profiter des avantages en résultant. Paradoxalement, empêcher certaines formes de rabais peut, dans certains cas, améliorer le bien-être des consommateurs.

5.3 Y-a-t-il une différence fondamentale entre un étranglement de marge et la fixation de prix de vente d'éviction ?

Plusieurs auteurs [40] considèrent qu'un étranglement de marge doit être traité différemment de la fixation de prix de vente d'éviction parce que cette dernière implique la fixation des prix à un niveau

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38 Hovenkamp et Hovenkamp (2009), page 7.

39 En outre, les entreprises opérant dans l'aval sont susceptibles d'entrer dans le marché de l'amont, de telle sorte qu'elles mettraient fin au monopole de celle qui s'y trouve déjà. Hovenkamp et Hovenkamp (2009) (page 7) écrivent : « supposons que, après avoir approvisionné un rival d'assez petite taille pendant un certain temps, l'entreprise dominante découvre que celui-ci est en train de remonter vers l'amont de manière à l'y concurrencer ... Pour l'en empêcher, l'entreprise dominante pourra riposter par un étranglement de marge conçu pour priver ce concurrent des moyens de devenir indépendant dans l'amont. Dans un tel cas de figure, les consommateurs seraient lésés à long terme parce qu'ils perdraient les avantages découlant d'une organisation du marché globalement plus concurrentielle ».

40 Voir, par exemple, NERA (2003), qui fait valoir que, « contrairement à ce qui se passe dans la fixation de prix de vente d'éviction, une société peut étrangler les marges des entreprises situées en aval tout en couvrant ses coûts dès lors que son prix de gros est supérieur à son coût de production marginal ». Il observe cependant dans une note en bas de page que « Si l'on considère ... les bénéfices auxquels la société pratiquant l'étranglement de marge a renoncé comme un coût d'opportunité, la distinction entre les critères d'imputation et ceux de la fixation de prix de vente d'éviction disparaît ». O'Donoghue et Padilla (2006) considèrent que « dans un étranglement de marge, l'entreprise dominante ne perd pas forcément de l'argent ... Il s'ensuit que la question de la récupération ne se pose pas obligatoirement aussi souvent que dans le cas des prix de vente d'éviction. Ou, plus précisément, le fait que, dans un étranglement de marge, l'entreprise dominante demeure bénéficiaire en amont peut lui permettre de compenser à peu près instantanément son manque à gagner ». Il semble toutefois que cette affirmation soit nuancée dans le paragraphe suivant : quoique « l'étranglement de marge n'implique pas une perte directe sur chaque unité

inférieur aux coûts, qui n'est pas tenable à la longue, alors que l'étranglement de marge peut être pratiqué indéfiniment. Hovenkamp et Hovenkamp (2009) illustrent leur propos par l'exemple suivant :

> *« Supposons que le coût d'un lingot soit de 10 USD par unité et que le laminage coûte 3 USD par unité, ce qui donne un coût de revient minimum de 13 USD par feuille laminée. Alcoa pourrait facturer aux acheteurs de feuilles laminées un prix de 14 USD et vendre les lingots bruts à ses concurrents au prix de 12 USD l'unité. Dans ce cas, le prix d'aval des feuilles et le prix d'amont des lingots sont supérieurs au coût de revient d'Alcoa, mais la marge de 2 USD qu'il réalise est trop faible pour que les lamineurs indépendants puissent survivre.*
>
> *La législation sur les prix de vente d'éviction doit être guidée par le principe selon lequel un prix inférieur soit au coût marginal, soit au coût variable moyen est hautement suspect et doit être motivé parce qu'un tel prix ne permet pas d'être rentable à court comme à long terme. En revanche, le fait qu'une société vende un intrant à un prix élevé à un concurrent non intégré n'est pas suspect en soi ».*[41]

En fait, comme l'ont souligné plusieurs auteurs,[42], cet argument est incorrect. L'entreprise citée dans l'exemple ci-dessus est à même de vendre chaque lingot brut à ses concurrents au prix de 12 USD, mais elle ne reçoit que 14 USD - 3 USD = 11 USD quand elle transforme elle-même les lingots en feuilles laminées. Elle renonce par conséquence à gagner 1 USD sur chaque unité qu'elle décide de se vendre à elle-même. Ce comportement tarifaire engendre donc un coût d'opportunité. On est en droit de penser que ce coût d'opportunité ne serait accepté que s'il était possible de récupérer ultérieurement le chiffre d'affaires auquel l'entreprise a renoncé.

O'Donoghue et Padilla (2006) fait valoir que l'étranglement de marge se distingue aussi de la fixation de prix de vente d'éviction en ce qu'il incite l'entreprise qui s'y livre à adopter un comportement d'exclusion. Une entreprise non intégrée opérant dans l'aval profitera toujours, jusqu'à un certain point, de l'élimination d'une autre entreprise présente dans l'aval. Il n'en va toutefois pas de même pour une entreprise intégrée. La disparition d'un concurrent dans l'aval peut réduire les ventes en amont et les bénéfices d'un montant supérieur à l'avantage retiré par la division aval de cette entreprise, en particulier si les concurrents opérant dans l'aval vendent des produits qui, d'une manière ou d'une autre, se différencient de ceux que propose l'entreprise intégrée. O'Donoghue et Padilla (2006) sont d'avis que « les critères analytiques d'un étranglement de marge doivent donc inclure une analyse des conditions de marché pour apprécier si elles incitent une entreprise à exclure des concurrents ».

5.4 Une entreprise intégrée peut-elle être poursuivie pour fixation de prix de vente d'éviction dans sa seule division aval ?

Comme on l'a vu plus haut, un étranglement de marge peut être caractérisé comme la fixation de prix de vente d'éviction soit par la société intégrée dans son ensemble, soit par sa seule division aval.

Se pose alors la question de savoir si la branche aval d'une société totalement intégrée qui vend à sa propre filiale dans l'aval à un prix qui ne peut être observé directement serait jugée coupable de fixation de prix de vente d'éviction dans le cadre des règles actuelles du droit de la concurrence. Si le prix interne ne peut être observé directement (et, de fait, il ne peut l'être dans le cas d'une entreprise intégrée), l'entreprise

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vendue comme c'est le cas dans la fixation de prix de vente d'éviction », chaque unité qui n'est pas vendue aux concurrents situés en aval entraîne un coût d'opportunité ».

41 Hovenkamp et Hovenkamp (2009), page 22.

42 Voir, par exemple, Padilla (2004).

société peut-elle être jugée coupable de fixation de prix de vente d'éviction par sa seule division aval ? Spector (2008) suggère que la réponse est non :

> *« Le problème est que l'approche par les prix de vente d'éviction n'est possible que si la société verticalement intégrée n'est pas « trop intégrée » en ce que le produit d'amont est officiellement vendu au prix du marché à la division aval, c'est-à-dire au même prix que celui qui est facturé aux concurrents situés en aval qui ne sont pas intégrés. Cela permet aux autorités de la concurrence de redéfinir le critère de l'étranglement de marge comme un critère standard de comparaison entre prix et coût en traitant le prix d'amont comme un coût encouru par la branche aval de la société intégrée. Au contraire, s'il n'existe pas de telles transactions, le coût pertinent pour prouver la fixation de prix de vente d'éviction sera le coût de production réel ».*[43]

Si, fondamentalement, une entreprise totalement intégrée n'a aucun risque de violer les règles sur la fixation de prix de vente d'éviction dans sa division aval, on peut faire valoir que la notion d'étranglement de marge doit être considérée comme une forme d'abus distincte et autonome qui empêche une forme de comportement anticoncurrentiel qui pourrait se produire autrement.

Cette forme d'abus supplémentaire pourrait être un moyen de contrôle réglementaire de la tarification plutôt qu'un contrôle relevant du droit de la concurrence. De fait, de nombreux pays prohibent explicitement, d'une manière ou d'une autre, certaines formes de tarification dans les télécommunications dans le cadre de ce que l'on a souvent coutume d'appeler un « critère d'imputation ».[44]

En se plaçant d'un autre point de vue, on peut considérer que les règles existantes sur la fixation de prix de vente d'éviction doivent être élargies de manière à s'appliquer à la seule composante aval d'une entreprise totalement intégrée, le prix d'accès interne étant imputé en considérant qu'il est égal au prix d'accès externe.[45] Si les règles de fixation de prix de vente d'éviction étaient étendues de cette manière, il ne serait pas nécessaire de qualifier séparément l'abus d'étranglement de marge.

6. Conclusion

Ce document souligne la nécessité pour le droit de la concurrence de traiter de la même manière des actions ou structures de marché qui, du point de vue économique, sont équivalentes. Un comportement dont on pourrait considérer qu'il constitue un étranglement de marge peut aussi relever de toute autre qualification se référant aux autres formes d'abus de position dominante visant à exclure un concurrent. Est-il vraiment pertinent d'isoler l'étranglement de marge en le distinguant des autres types d'abus ?

Comme on l'a noté plus haut, plusieurs économistes sont d'avis que la notion d'étranglement de marge n'ajoute rien au contrôle des comportements anticoncurrentiels :

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43 Spector (2008), paragraphe 8.

44 Voir, par exemple, ACCC (2005). Le même critère a été employé par la New Zealand Commerce Commission. Dans les cas les plus simples, il revient à appliquer la règle de la tarification efficiente des composantes.

45 Dans certaines circonstances, cette hypothèse de l'absence de discrimination par les prix entre les ventes aux concurrents et celles au pôle aval d'une entreprise intégrée n'est pas appropriée. Par exemple, les concurrents situés dans l'aval pourraient servir des marchés différents sur lesquels la demande a un taux d'élasticité différent de celui où l'entreprise intégrée est présente. Dans ce cas, employer le critère de la fixation de prix de vente d'éviction pour démontrer un abus ne serait pas approprié. On pourrait recourir à une autre approche consistant à imputer le prix d'accès interne dans l'hypothèse de l'absence de prix d'éviction (approche c) et à comparer le résultat avec les coûts de l'entreprise pour déterminer si un abus a été commis pour prix excessifs (à supposer qu'un tel abus soit sanctionné).

« La question se pose de savoir si la notion d'étranglement de marge concourt à une analyse cohérente dans le cadre de l'article 2 de la loi Sherman ou si elle y fait obstacle. Si le prix de vente au détail d'une entreprise jouissant d'un monopole est un prix d'éviction ou si son prix de gros est si élevé qu'il équivaut à un refus de vente alors qu'elle a l'obligation de vendre, alors sa conduite peut être attaquée en se fondant sur la jurisprudence de la fixation de prix de vente d'éviction ou du refus de vente. …

L'analyse [de l'étranglement de marge] est-elle superflue ou inutile ou apporte-t-elle un plus en étendant l'interdiction de l'article 2 à des comportements qui, autrement, échapperaient à toute condamnation au regard de la jurisprudence sur la fixation des prix de détail et l'obligation de vente ? Après l'arrêt Trinko de la Cour Suprême, il devrait aller sans dire qu'une action pour d'« étranglement de marge » qui n'entraîne ni ne menace d'entraîner l'apparition d'un monopole sur un marché identifiable doit être rejetée au titre de l'article 2. … La théorie de l'incrimination pour ciseau tarifaire en vertu de la législation antitrust doit être expurgée du droit américain de la concurrence. Cette théorie est incompatible avec la jurisprudence antitrust contemporaine et, du point de vue économique, la menace de telles poursuites décourage l'investissement, la concurrence sur les prix de détail et la fourniture volontaire d'intrants à des conditions négociées par les entreprises intégrées qui jouissent d'un monopole à leurs concurrents actuels et potentiels qui, autrement, seraient incapables de les obtenir ou de les produire eux-mêmes ».[46]

On considère dans le présent document que cet argument est en grande partie fondé, à une réserve près, dont l'importance est mineure. Il y a une circonstance dans laquelle la doctrine de l'étranglement de marge pourrait condamner un comportement qui « autrement, pourrait échapper à toute condamnation si l'on se réfère à la jurisprudence sur la fixation des prix de détail et l'obligation de vente ». Cette exception possible concerne le cas où une entreprise totalement intégrée a l'obligation de vendre un intrant indispensable à ses concurrents.

Une entreprise totalement intégrée qui est forcée de vendre l'accès à ses concurrents de l'aval pourrait-elle, en vertu des règles actuelles du droit de la concurrence, être jugée coupable de fixation de prix de vente d'éviction dans sa seule branche aval ? Si la réponse est oui, l'étranglement de marge n'ajoute rien de nouveau aux règles existantes. La majeure partie des dommages que pourrait causer un comportement anticoncurrentiel dans une branche verticalement intégrée est déjà couverte par les règles actuelles du droit de la concurrence. Instaurer une nouvelle forme d'abus pour laquelle le seuil légal à partir duquel il peut être conclu à la responsabilité d'une entreprise serait abaissé risquerait de décourager certains comportements favorisant la concurrence et de fausser la structure du marché et le comportement de ses acteurs de manière inefficace parce que les entreprises chercheraient à éviter que leur responsabilité soit engagée au regard de la législation antitrust.

Cependant, si la composante d'aval d'une entreprise totalement intégrée est quasiment à l'abri de poursuites pour fixation de prix de vente d'éviction (au motif que le coût de la composante d'aval ne peut être isolé efficacement), il est nécessaire de renforcer, d'une manière ou d'une autre, le contrôle du comportement des entreprises intégrées. Ce contrôle renforcé pourrait prendre la forme de l'interdiction de l'étranglement de marge par le droit de la concurrence ou d'un contrôle réglementaire consistant en un test d'imputation. Quelle que soit l'approche retenue, les poursuites pour étranglement de marge se feraient selon les mêmes modalités que pour la fixation de prix de vente d'éviction, le prix d'accès interne étant imputé et considéré comme égal au prix d'accès externe.

[46] Sidak (2008), page 281-282.

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ANNEXE : SÉLECTION DE LIGNES DIRECTRICES ET ÉTUDES

Économie	*Organisme*	*Lignes directrices et études*
Australie	ACCC	Resolution of Telecommunications Access Disputes, mars 2004 http://www.accc.gov.au/content/index.phtml/itemId/753591
Belgique	IBPT	Lignes directrices du IBPT relatives à l'évaluation des effets de ciseaux http://www.ibpt.be/en/624/ShowDoc/3057/Retail_price_control/Decision_of_8_April_2009_regarding_the_price_squee.aspx Actuellement non disponible en anglais
Canada	CRTC	Examen du cadre de réglementation concernant les services de gros et la définition de service essentiel http://www.crtc.gc.ca/fra/publications/reports/osborne07.htm
UE	CE	Communication de la Commission relative à l'application des règles de concurrence aux accords d'accès dans le secteur des télécommunications Cadre général, Marchés en cause et Principes, OJ C265, 22 août 1998. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:265:0002:0028:FR:PDF Orientations sur les priorités retenues par la Commission pour l'application de l'article 82 du traité CE aux pratiques d'éviction abusives des entreprises dominantes, 9 février 2009. http://ec.europa.eu/competition/antitrust/art82/guidance_fr.pdf
France	ARCEP	Notice du test d'effet de ciseaux tarifaires « téléphonie fixe », mars 2006 *http://www.arcep.fr/fileadmin/reprise/dossiers/tarifs/notice-squeeze-fixe0306.pdf*
Allemagne	Bundesnetzagentur	Notes on margin squeezes as defined by section 28(2) para 2 TKG (The Telecommunications Act) http://www.bundesnetzagentur.de/enid/Telecoms_Regulation/Consistency_Requirement_/_Margin_Squeeze_4o5.html
Hong Kong	OFTA	Draft Competition Guidelines on sections 7K, 7L and 7N of the Telecommunications Ordinance http://www.ofta.gov.hk/en/report-paper-guide/paper/consultation/20070507.pdf Bien que la phase de consultation soit terminée, les directives finales n'apparaissent pas sur le site Internet de l'OFTA.
Pays-Bas	OPTA & Nma	OPTA & NMa, *Price Squeeze Guidelines*, 28 février 2001 http://www.anacom.pt/streaming/pricesqueeze_280201.pdf?categoryId=1755&contentId=117617&field=ATTACHED_FILE
Royaume-Uni	Ofcom	The Application of the Competition Act 1998 in the Telecommunications Sector, OFT 417 http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft417.pdf

CANADA

1. Introduction

A price or margin "squeeze" may occur in circumstances where a vertically integrated firm sells an input to unintegrated rivals who also compete with the vertically integrated firm in a downstream market. Specifically, a claim of margin squeezing is an allegation that the integrated firm is "squeezing" a rival between a high wholesale price for the input and its own low price in the downstream market, thereby preventing entry or forcing existing downstream firms to exit. In Canada, an integrated firm pricing in this way might be subject to a remedy under the abuse of dominance provision, section 79 of the *Competition Act*[1] (the "Act").

While margin squeezing has been alleged frequently in recent years in the US and Europe, such allegations have thus far been rare in Canada. Nevertheless, the Competition Bureau (the "Bureau") has investigated three allegations of margin squeezing under section 79 of the Act — one in the Internet industry and the two others in the gasoline industry. While these cases were discontinued because there was insufficient evidence to demonstrate an abuse of dominance pursuant to section 79 of the Act, they are illustrative of the analytical approach taken by the Bureau when examining margin squeezing.

This submission provides a brief overview of the anti-competitive practice of margin squeezing, with a focus on: (1) the framework for addressing abuse of dominance under the Act; (2) margin squeezing as an anti-competitive practice; and, (3) the relationship between margin squeezing and predatory pricing for the purposes of section 79. This submission also discusses the three aforementioned cases as examples of the Bureau's analytical approach to dealing with allegations of margin squeezing.

2. Abuse of dominance under the Act

In Canada, margin squeezing is addressed as a form of abuse of dominance pursuant to section 79 of the Act. Abuse of a dominant position occurs when a dominant firm or firms in a market engage in conduct that is intended to have an exclusionary, predatory or disciplinary effect[2] on existing competitors or potential entrants, with the result that competition is prevented or lessened substantially. Where such anti-competitive behaviour is found, the Competition Tribunal (the "Tribunal")[3] may issue certain remedies, such as an order requiring the party to discontinue the anti-competitive conduct and/or an order requiring the firm that was found to have abused its dominant position to pay an administrative monetary penalty.

Subsection 79(1) sets out three essential elements, all of which must be established in order for the Tribunal to grant an order:

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1 *Competition Act*, R.S., 1985, c. C-34.

2 Competition Bureau of Canada, *Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*, Draft for Public Consultation, January 2009 ("draft Updated Abuse of Dominance Guidelines") at 6. The draft guidelines are available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02942.html.

3 The Competition Tribunal is a specialized tribunal that combines expertise in economics and business with legal expertise. It is the body responsible for adjudicating non-criminal cases that arise under the Act. The Tribunal should not be confused with the Competition Bureau, which is the agency responsible for investigating complaints and deciding whether to file an application with the Tribunal.

- one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;
- that person or these persons have engaged in or are engaging in a practice of anti-competitive acts; and
- the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

Each of these elements is discussed briefly below.[4]

2.1 Substantially or completely control, throughout Canada or any area thereof, a class or species of business

For the purposes of section 79, the Tribunal has interpreted "a class or species of business" as being equivalent to the relevant product market and "throughout Canada or any area thereof" as being equivalent to the relevant geographic market. In defining relevant markets, the Bureau employs a standard economic approach that takes into account a variety of factors, the most important of which are the availability of close substitutes, transportation costs and customer switching costs.

The Bureau considers "substantially or completely control" to be synonymous with market power. The most straightforward indication of the existence of market power is the ability to profitably raise prices above competitive levels for a considerable period of time. It is sometimes difficult to measure market power directly. Consequently, the Bureau collects evidence and assesses a number of qualitative and quantitative factors, including technological change, recent entry or exit from the market, industry supply capacity, and countervailing market power on the part of buyers and distributors. However, the Bureau places the greatest emphasis on the key factors of market share and barriers to entry. A market share of less than 35% for unilateral conduct will generally not give rise to concerns of market power or dominance.

2.2 Practice of anti-competitive acts

Having established market power in the relevant markets, the Tribunal must be satisfied that the firm or firms have engaged in a "practice of anti-competitive acts". The word "practice" normally denotes more than an isolated act. The Tribunal has held that a "practice" can encompass one occurrence that is sustained or systematic over a period of time, or a number of different acts taken together that have the effect of substantially preventing or lessening competition.[5]

Section 78 provides a non-exhaustive list of anti-competitive acts. The Tribunal has accepted that practices not included in section 78 may constitute anti-competitive acts that can be addressed under section 79. An anti-competitive act is defined as an act whose purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.[6] Both margin squeezing and predatory pricing are separately listed as anti-competitive acts under section 78.

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4 For a more complete discussion of the Bureau's approach to the enforcement of section 79 of the Act, please consult the Bureau's draft Updated Abuse of Dominance Guidelines*, supra* note 4.

5 *Canada (Director of Investigation and Research) v. NutraSweet Co.*, Reasons and Order dated October 4 1990, Competition Tribunal CT-1989-002 at para. 59.

6 2006 FCA 233 at para. 64.

Jurisprudence interpreting section 79 has held that the element of anti-competitive intent or purpose can be established either with direct evidence or by inference, based on the likely effect of a practice on competition in the particular circumstances of the case.

2.3 Preventing or lessening competition substantially

The requirement of "preventing or lessening competition substantially in a market" focuses the inquiry on the impact on competition rather than on competitors. The question is whether the anti-competitive acts engaged in by a firm or firms serve to preserve, entrench or enhance their market power. In *Canada (Commissioner of Competition) v. Canada Pipe Company Ltd.*, the Federal Court of Appeal stated that, to determine whether there has been a substantial prevention or lessening of competition, the issue is whether the relevant markets would be substantially more competitive but for the impugned practice of anti-competitive acts.[7]

If it can be demonstrated that, but for the practice of anti-competitive acts, an effective competitor or group of competitors would likely emerge within a reasonable period of time or would remain in the market to challenge the dominance of the firm(s), the Bureau would likely conclude that the practice in question results in a substantial lessening or prevention of competition. The Bureau will also examine factors such as whether or not consumer prices might be substantially lower; product quality, innovation, or choice might be substantially greater; or consumer switching between products or suppliers might be substantially more frequent in the absence of the practice.

Subsection 79(4) states that, when considering whether a practice has the effect of preventing or lessening competition substantially, the Tribunal must consider whether the practice is a result of superior competitive performance. Superior performance is only a factor to be considered in determining the cause of the lessening of competition, and not as a justifiable goal for engaging in an anti-competitive act. Having lower costs, better distribution or production techniques, or a broader array of product offerings can put a firm at a competitive advantage that, when exploited, will lessen competition by leading to the elimination of inferior competitors.

3. Margin squeezing as abuse of dominance under the Act

Canadian competition law specifically recognizes the concept of "margin squeezing" as an anti-competitive act where it is engaged in by a dominant firm for the purpose of acquiring, enhancing or entrenching market power. Margin squeezing is treated as a civil matter, as are all acts reviewable under the abuse of dominance provisions.

Paragraph 78(1)(a) defines the practice of margin squeezing as follows:

> *squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;*[8]

The practice of margin squeezing applies to sales by an upstream supplier to a downstream customer with whom that supplier is in competition. A price squeezing strategy may generally take two forms: upward and downward squeezing. Upward squeezing occurs when the supplier raises the wholesale price relative to the retail price, thus squeezing the competitor's margin between the acquisition and retail prices.

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7 *Ibid.* at paras. 37-38.

8 *Supra* note 1, subsection 78(1)(a).

Downward squeezing occurs when the wholesale price remains unchanged but the supplier lowers the retail price, forcing the competitor to follow suit.

Generally, the Bureau will examine the extent to which the allegedly squeezing firm can exclude rivals by raising their costs when alleged margin squeezing involves raising wholesale prices. Where margin squeezing involves lowering retail pricing only, the Bureau will examine it under a predatory standard.[9]

In its enforcement approach, the Bureau exercises care to distinguish between the concept of price squeezing and the notion of profit margin erosion, which may result from the pressures of vigorous competition, lack of demand or changing buying patterns. The Act is aimed at preventing anti-competitive forms of squeezing by a dominant firm or a group of firms that engage in this practice for the purpose of excluding or predating competitors from the market, or disciplining competitors in the market who pose a competitive threat. Thus, an anti-competitive price squeeze must be shown to have the purpose of deterring or preventing entry into the downstream market, confining downstream firms to small niches of the market or otherwise limiting their competitive effectiveness, or driving downstream competitors out of the market.[10]

Where the supplier raises the wholesale price relative to the retail price (upward margin squeezing), the Bureau relies on a number of analytical tools to help distinguish between legitimate and reviewable conduct. In particular, the following conditions must be present: the upstream firm engaged in the alleged squeezing has market power in the downstream market; the conduct is engaged in for the purpose of excluding competitors from entering or expanding in the downstream market or otherwise negatively affecting their ability to compete; and the conduct has had, is having or is likely to have the effect of substantially lessening or preventing competition in the downstream market. Also, the ability and incentive of the allegedly dominant firm to exercise market power in the downstream market will depend in part on the extent of upstream market power. If the downstream competitor has a choice of alternative suppliers for the input in question, it is unlikely that margin squeezing will adversely affect that competitor, so it is unlikely there will be any harm to competition in the downstream market. An assessment of downstream market power will also depend on the willingness and ability of ultimate consumers to obtain the product or service from alternative downstream providers that do not rely on the input in question. The Bureau will aim to establish whether an exclusionary margin squeeze has occurred and whether it has been sufficiently sustained and systematic to constitute a practice. Finally, upon establishing that the firm(s) in question has control of the relevant market and has engaged in a practice of margin squeezing, the Bureau will analyze whether the disciplinary, predatory or exclusionary effects of the alleged margin squeezing have resulted in a substantial lessening or prevention of competition.

4. Relationship between margin squeezing and predatory pricing

Predatory pricing is another form of anti-competitive practice that may be the subject of a Tribunal order pursuant to section 79. Paragraph 78(1)(i) of the Act defines predatory pricing as "selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor".[11]

Predatory conduct involves a firm offering a product or products at prices below some measure of cost in an attempt to harm rivals. The Bureau considers predatory pricing to be a firm deliberately setting

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9 Competition Bureau, draft Updated Abuse of Dominance Guidelines*, supra* note 4 at 21.

10 Competition Bureau of Canada, *Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*, July 2001 at 33.

11 *Supra* note 1, subsection 78(1)(i).

prices to incur losses for a sufficiently lengthy period of time to eliminate, discipline, or deter entry by a competitor, on the expectation that the firm will subsequently be able to recoup its losses by charging prices above the level that would have prevailed in the absence of the impugned conduct, with the effect that competition would be substantially lessened or prevented.

Once the Bureau has established that a firm is dominant in the relevant market, it will consider whether the firm is pricing below some measure of its costs. In conducting such price-cost comparisons, the Bureau's view is that average avoidable cost is the most appropriate cost standard to use when determining if prices are predatory. Avoidable costs refer to the costs that a firm could have avoided had it chosen not to sell the product(s) in question during the period of time the practice of low pricing was in place.[12] If a complaint involved allegations that a dominant firm lowered its retail price to the point where it was predatory, the Bureau would examine whether the price charged by the dominant firm was sufficient to cover the dominant firm's additional costs from the associated increase in its output. In addition to examining whether the dominant firm is pricing below its average avoidable cost, the Bureau will also examine whether the alleged victim's business in the relevant market is, or is likely to become, unprofitable as a result of the alleged predatory conduct.

Both downward margin squeezing and predatory pricing involve a firm that deliberately lowers the price of its products in order to discipline or evict its competitor from the market. However, unlike margin squeezing, predatory pricing does not require the firm to be a vertically integrated supplier that is lowering its retail prices. In turn, since margin squeezing does not require a firm to be pricing below cost, a firm that lowers its prices in order to squeeze the profit margin of its unintegrated rivals, but nevertheless is still pricing at or above its avoidable costs, may potentially be engaged in downward margin squeezing but not predatory pricing.

Owing to the similarities between downward margin squeezing and predatory pricing, where price squeezing involves lowering retail pricing only, the Bureau generally examines the conduct under a predatory standard.

5. Margin squeezing investigations in Canada

While many countries in recent years have dealt with cases involving allegations of margin squeezing,[13] such cases have been rare in Canada. However, three notable instances where allegations of margin squeeze were made illustrate the Bureau's approach to such cases. The first involved a complaint in 1998 by residential Internet services customers that margin squeezing was occurring in the retail supply of Internet services to residential subscribers (the Internet Inquiry).[14] A more recent case, which started in 2004, involved allegations by independent retailers of gasoline of margin squeezing by suppliers (the Gasoline Inquiry).[15] This inquiry was similar to a previous case brought forward in 1999. These investigations are discussed in more detail below.

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12 The Competition Tribunal has defined avoidable costs as "all costs that can be avoided by not producing the good or service in question. In general, the avoidable cost of offering a service will consist of the variable costs and the product-specific fixed costs that are not sunk." *Canada (Commissioner of Competition) v. Air Canada* (2003), 26 C.P.R. (4th) 476 (Comp.Trib.) at para. 76.

13 See, for example, the recent EC decisions in Napier Brown/British Sugar and Deutsche Telekom.

14 Competition Bureau of Canada, "Competition Bureau Reaches Decision in Internet Inquiry" (March 1999), available: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00810.html.

15 Competition Bureau of Canada, "Competition Bureau Concludes Examination Into Predatory Pricing Complaints In The Gasoline Industry" (March 2006), available: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02048.html.

5.1 Internet inquiry

In the late 1990s, Canadian Internet service providers ("ISPs") required access to incumbent local exchange carrier Bell Canada's network connections and facilities in order to offer high-speed residential Internet services. In August of 1998, the Bureau received a request to initiate an inquiry based on allegations that subsidiaries of Bell, including Bell Global Solutions, were selling "asymmetric digital subscriber line" (ADSL) high-speed Internet services to residential customers at retail prices which were below the tariff rates that Bell was charging the ISPs for access to the network facilities. The complaint alleged that this practice of "below cost selling" or "margin squeezing" constituted an abuse of a dominant position pursuant to section 79 of the Act, and requested that the Bureau seek an order of the Competition Tribunal prohibiting Bell from selling ADSL Internet service below its facility costs.

As part of its investigation, the Bureau considered the three essential elements of section 79 of the Act: (1) whether Bell, and in particular its subsidiary, Bell Global Solutions, substantially or completely controlled the retail Internet market in Canada; (2) whether Bell had engaged in a practice of anti-competitive acts with the purpose of having a predatory, exclusionary or disciplinary effect on the ISPs; and (3) whether competition had been, or was likely to be, prevented or lessened substantially as a result of the alleged practice of anti-competitive acts. In this case, the Bureau examined whether Bell held significant market power that would be entrenched or increased as a result of its retail pricing policy.

Although evidence obtained by the Bureau established that Bell's retail prices for ADSL were below cost, it found that the other elements of section 79 were not met. Bell's share of the retail Internet market was below the 35% level, which the Bureau generally regards as the minimum required to establish a position of market dominance. Furthermore, the retail Internet market was found to be highly competitive and characterized by low barriers to entry, making it unlikely that Bell's pricing policy could substantially lessen or prevent competition in the market. Bell's low pricing reflected its need to match its rivals' prices and would allow it to develop its long-term strategic interest in deploying its ADSL technology.

The Internet Inquiry was discontinued given the factors outlined above, including Bell's insufficient level of market power to meet the elements of section 79. Accordingly, the Bureau did not specify whether it would have pursued the case as a margin squeeze or as predatory conduct. However, the focus of the allegations on below-cost prices and the prevalence of cost-oriented evidence suggests that the case could have been pursued under either provision of the Act. If the case were to arise today, the Bureau would expect to examine it under a predatory standard.

5.2 Gasoline industry

In 2004, the Bureau received complaints from independent gasoline retailers of predatory pricing and margin squeezing in Canada's gasoline industry in the provinces of Ontario and New Brunswick. The Bureau's examination addressed allegations that refinery-owned retailers and large, independent retailers had dropped gasoline prices below their costs during certain periods in order to eliminate independent retailers. It also examined complaints that refinery-owned retailers had charged higher wholesale prices to independent retailers who competed with their outlets at retail.

The Bureau examined these issues under the abuse of dominance provisions of the Act, which addressed both predatory pricing and margin squeezing. It further noted that the Canadian gasoline industry involves many players that operate in either or both of the wholesale and retail markets. Retail pricing is influenced by both the prevailing wholesale price and the level of competition in local markets.

After a thorough investigation, the Bureau concluded that, in the geographic regions of Ontario and New Brunswick, neither the refinery-owned gasoline retailers nor the large independent retailers were dominant at either the wholesale or retail levels.

There was also insufficient evidence to demonstrate a practice of either predatory pricing or margin squeezing. While there were short periods during which gasoline was sold below wholesale costs, these pricings resulted from short-term local price wars, and were followed by price restoration to levels consistent with the prevailing wholesale market. Furthermore, the Bureau found that gasoline stations increasingly earned more of their retail profits from sales of higher-grade gasoline (which was not included in the allegations) and ancillary services, such as convenience stores and car washes.

The case bore some similarities to an earlier complaint alleging anti-competitive behaviour in the Chatham, Ontario gasoline market.[16] In 1999, an independent gasoline retailer in Chatham complained that Sunoco was charging wholesale prices that were higher than the retail prices charged by Pioneer, which is partly owned and was partly supplied by Sunoco. The independent gasoline retailer also complained that Pioneer was selling gasoline below its acquisition costs. The Bureau examined the allegation as margin squeezing pursuant to section 79 of the Act.

The Bureau examined market share information and reviewed pricing data and determined that there was insufficient evidence to demonstrate that Sunoco/Pioneer had engaged in squeezing under the Act. In such circumstances, the Bureau discontinued the investigation.

6. Conclusion

The approach taken by the Bureau in gasoline cases indicates that where alleged anti-competitive conduct involves a vertically integrated supplier raising wholesale prices in an effort to discipline or exclude competitors in the downstream market, the Bureau will investigate the allegations under the framework for margin squeezing. Where the allegations involve only a lowering of retail prices with no rise in wholesale prices, then, in accordance with the draft Abuse of Dominance guidelines, the Bureau will generally investigate the impugned conduct as predatory pricing.

[16] Competition Bureau of Canada, "Competition Bureau Finds No Evidence to Support Allegations of Anti-Competitive Behaviour in Chatham Ontario Gasoline Market" (December 1999), available: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00767.html.

CZECH REPUBLIC

1. Introduction

The Office for the Protection of Competition ("the Office") in its jurisdiction regards margin squeeze or price squeeze practices ("MS") as a form of exclusionary abuse of dominant position. As the Office is the sole competition regulator, it deals with MS in every sector.

For a long time, MS and the rationality of its application by a dominant undertaking has been a subject of discussion, in particular economic discussion in relation to the impact on the level of competition. The purpose of this paper is in particular to draw attention to the criteria which must be satisfied before a given MS practice is found anticompetitive on the part of the Office, and also to clarify how these criteria are analyzed in practice. In addition, this paper analyzes the opinion of the Office on the assessment of MS itself, and the relation between this practice and other exclusionary abuses, such as predatory pricing, bundling and refusal to supply.

2. Procedure of the Office in MS analysis

The Office conducts analysis of MS in these basic steps:

- Analysis of structural and economic conditions of MS in affected markets
- Application of cost tests
- Analysis of potential efficiencies and objective justifications

2.1 Analysis of structural and economic conditions of MS in affected markets

On the basis of available theory in the area of MS, the experience of other competition regulators and available best practices, in the first step the Office analyses general conditions in the market in which MS occurs, and when it results in the exclusion of competitors from the market.

A key factor in MS analysis is the assessment of the competition level in relevant *upstream* and *downstream* markets. For a MS practice to be found anticompetitive, the following structural and economic conditions must be met in respective relevant markets:

- **Existence of vertical integration**. A dominant undertaking in the *upstream* (input) market supplies this input to its competitors in the *downstream* market in which it is also active. A prerequisite for the occurrence of MS is the undertaking's clear awareness of the conditions under which its rivals obtain inputs in the *downstream* market.

- **Existence of dominant position of a vertically integrated undertaking in the *upstream* input market**. The higher the market power of a dominant undertaking in the upstream market, the more likely is the motivation to, and application of, MS. It is most likely in cases where the dominant undertaking in the upstream market occupies the position approaching a monopoly.

- **Downstream market not effectively competitive**. This is the case when there is a prospect of supra-competitive profits since particularly in this situation, a vertically integrated dominant undertaking has a rational incentive to engage in MS. The fact that the downstream market is not competitive does not necessarily mean that the vertically integrated undertaking needs to be dominant (have significant market power) in this market. The decisive factor is the existence of a well-founded concern about competitors' exclusion from the market and subsequent price increases (or prevention from price decreases). The existence of significant market power of a vertically integrated undertaking or its dominance in the downstream market, increases the rationality of engagement in MS. In this situation, the dominant undertaking is able to exercise effective price control in the retail market, thus in the downstream market, such that its respective competitors are not able to pass on input price increases to their customers. In the case of dominance in a downstream market, successful engagement in MS is more likely.

- **Entry into the upstream market essential to the presence of competitors in the downstream market**. A pre-condition for the application of MS is that the input provided by a dominant undertaking cannot be effectively replicated. In such a case, either no inputs - close substitutes – exist or there is a technically alternative solution, which is, however, very costly and requires lengthy implementation. Additionally it is a pre-condition that without this input, it is impossible to compete effectively in the downstream market and competitors are in fact dependent upon the supply of this input from their rival – the undertaking dominant in the upstream market - or upon its infrastructure.

- **No substitutes in the downstream market** which do not require for their production, input supplied by the vertically integrated undertaking.

- **Input price constitutes a significant share of production costs and costs of downstream product application in the market**.

- Individual **products** supplied by competitors **in the downstream market are close_** (perfect) **substitutes**. In cases where the product supply is differentiated in the downstream market, for example if particular solutions for individual customers, including several different services, are supplied, the Office does not consider MS likely.

- **There are no objective justifications for, or efficiencies** of, the dominant undertaking's conduct.

Given that a dominant position exists in the upstream market and the downstream market can be assessed as not effectively competitive, then, as a result of the occurrence of MS practices, efficient competitors are forced to exit the market, and thus competitive pressure, which would otherwise lead to lower prices and wider choice of services for consumers, is eliminated. Under these conditions, MS causes detriment to final consumers. A key starting point for the assessment of the legality of a dominant undertaking's conduct is a proper definition of the relevant upstream and downstream markets and the assessment of the competition level in these markets. Without taking this step, the next phases of the assessment of an undertaking's conduct cannot be initiated, not even possible implementation of cost tests establishing the elimination of efficient competitors from the market, is able to prove the fulfillment of the facts of the case, consisting of abuse of dominant position.

2.2 Application of Cost Tests

If the above mentioned structural and economic conditions are fulfilled, the Office proceeds to the application of cost tests. The application of cost tests is, in general, quite intensive in terms of input data.

According to the particular selected type of test, the data are to be obtained from the dominant undertaking which is the subject of investigation, or from its competitors harmed by the practice. The difficulty of obtaining the required quality of data is caused by the fact that the individual undertakings watch their cost items with varying levels of detail and sometimes also apply different calculation methods to identical situations. A typical example is the margin which, in practice, may be perceived differently by each undertaking, and differently calculated and reported. When requesting information, the Office strives to specify the requested data in the most detailed way and cooperates with the undertakings in their transmission so that the information produced is relevant and usable.

The first cost test to be applied is the so-called *As Efficient Competitor Test*. *The Reasonably Efficient Competitor Test* is launched with respect to the circumstances of each case. Tests are implemented in a manner which encourages efficient entry into the market and the protection of efficient competitors in the market.[1] Hence the lowest costs are applied in the calculation relating to the transformation of input into supplied product (costs in the downstream market). The lower of either the dominant undertaking's costs or the costs of an entering competitor, is used in the tests. In performing the tests, it is necessary to take account of economies of scale and scope that often make the dominant undertaking more efficient. Without doing so, it is not possible to correctly assess the margin squeeze.[2] When including costs into the tests, the influence of product differentiation is considered by the Office, as in case of differentiated products the transformation costs are not directly comparable.

In order to ensure comparability, it is necessary to determine a calculation unit by which costs are calculated; a unit that is identical for both the dominant undertaking and its competitors. In determining the suitable calculation unit in regulated sectors, the Office cooperates with the relevant regulatory authority in order to determine whether, for the purposes of sectoral regulation, it is compulsory to use a defined form of cost structure. The Office also takes into account the method of calculation of prices and costs used by the undertakings.

For the purposes of the test, the lowest available input price quoted in the upstream market is considered as a wholesale (*upstream*) price. Usually, but not necessarily always, the dominant undertaking's price represents such a price. This price is compared with the dominant undertaking's own price (i.e. the price at which the dominant undertaking supplies the input to itself) to determine whether a non-discriminatory or discriminatory MS exists, or the extent of any discriminatory occurrence. Where competitors clearly require an input with specific features so the dominant undertaking's price to itself is less that the price charged to the competitors, the dominant undertaking's own price[3] is used in the test. In the assessment of unregulated prices charged in the *upstream* market the adequacy of the prices is analyzed; that is, whether a margin squeeze occurs when excessive wholesale prices are charged to the competitors. Where prices are regulated in the *upstream* market, the Office works closely with the

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1 The Imputation Test (imputation of wholesale price and retail transformation costs) should promote efficient entry to the market and is designed to protect competition by protecting efficient competitors. This purpose is clearly fulfilled in case of the Equally Efficient Operator Test. The Reasonably Efficient Operator Test is used especially when i) the Equally Efficient Operator Test cannot be implemented (unreliable bookkeeping of the dominant, the dominant undertaking's actual costs cannot be determined), ii) an important role is played by economies of scale/scope (or the customer structure) and also entry is possible on a small, albeit less effective, scale.

2 Economies of scale/scope that make it possible for the dominant undertaking to realize lower unit costs for the supplied products or services (particularly marketing, advertising and other fixed costs) and thus higher profits while setting the same prices as competitors, are a factor in favor of the existence of significant market power.

3 If competitors demand an input with specific characteristics and, as a result of this fact, the *downstream* market product is differentiated, MS is not likely to occur.

respective independent sectoral regulatory authority, primarily for the purpose of identification of mandatory information on cost structures and individual cost items which are submitted by the dominant undertaking to the regulatory authority.[4]

For the purposes of the test the price quoted and charged by the dominant undertaking is used as a retail (*downstream*) price. Where the competitors charge a lower price, this fact does not affect the assessment of the dominant undertaking's practice. When prices are non-linear at the wholesale and retail level (tariffs, non-recurrent charges etc.), price indices are compiled for the purpose of imputation tests.[5]

In determining the appropriate profit margin (reasonable profit margin/rate), the indicator of profitability and the appropriate benchmark are defined with respect to the circumstances of the specific case. In case that the 'weighted average cost of capital' (WACC) profitability indicator is used, the reduced risk of the capital provider due to vertical integration, which leads to lower capital costs of the dominant compared to its competitors, is taken into account. In the event that the *downstream* market exhibits minimum fixed costs, the 'return on turnover' (ROT) profitability indicator, or alternative indicators e.g. – 'return on assets' (ROA) or 'return on equity' (ROE) – are used.

2.3 Analysis of potential efficiencies and objective justifications

In this step, the Office analyses whether there is an objective justification for the dominant undertanding's conduct concerning the margin squeeze practice and whether this conduct consequently brings benefits to final consumers. In this part of the analysis, the burden of proof lies on the part of the dominant undertaking, which gives it the opportunity to demonstrate that its strategy is rational and promotes the growth of economic benefit, reflected in benefits to consumers (e.g. introduction of new services, lower prices etc.). The dominant undertaking must also prove that it does not intend to eliminate competition in the downstream market through its conduct. The proof depends on the specifics of the case. However the Office always considers the justifications presented by an undertaking against any proven negative impact on competition.

In evaluating MS and possible justifications, the Office proceeds as with the investigation of other elements of anti-competitive behavior. In order to justify the dominant undertaking's conduct in relation to the margin squeeze practice, the following conditions must all be satisfied:

- greater effectiveness must be achieved as a direct result of the reviewed conduct
- the conduct is necessary to achieve greater efficiency
- consumers benefit from increased efficiency
- competition has not been eliminated in a substantial part of the market.

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4 The regulatory authority has at its disposal its own market data, such as the data contained in mandatory statistics which are submitted by individual undertakings. If the price is regulated, the dominant undertaking must also present detailed data on costs and cost items.

5 Very frequently, market prices are non-linear. The price often depends on the number of purchased products, various discount and rebate schemes which may be applied, or *take or pay* contracts and two-part tariffs (which include a fixed charge, and the price per unit of purchased quantity). Due to non-linear prices, price needs to be imputed into the test.

3. MS and other practices

Experience has shown that in many cases, MS is accompanied by other anti-competitive practices that may further intensify the negative impact of MS on competition. In other cases, these practices are part of the MS. Most often, MS contains an element of predation, the Office shall proceed in analysis of this as in the assessment of 'standard', i.e. discrete predation.

Both in the analysis of predatory pricing and in the analysis of MS the Office, on the basis of the cost tests, determines whether the dominant undertaking is able to profitably 'withstand' its own pricing policy, and whether equally efficient competitors are forced to exit the market. In the analysis of predatory pricing, however, the relationship of prices to all relevant costs of the dominant is assessed. These costs are classified into fixed and variable costs for the purpose of the cost tests. By contrast, in assessing the MS the input price charged by the dominant to its competitors (in case they do not demand an input with specific characteristics) is considered as the input price. In this case, only its relationship to costs and to a reasonable margin in the downstream market is assessed. Therefore in the case of MS the assessment examines whether a competitor which is as efficient as the dominant undertaking would be able to achieve normal profits in the *downstream* market. Then the existence of the additional incumbent's capacity is considered as a condition of determining predatory pricing and the MS. In case of both practices, the factors justifying the application of lower, possibly sub-cost prices (for example declines in demand due to economic recession) are taken into account in the same way.

As with predatory pricing, the duration of the occurrence of the MS practice is considered and analyzed from the perspective of the market impact, in terms of whether the conduct could have harmed competitors and consumers. A (clear and) uniform time limit for when the MS is or is not likely to have negative effects on competition cannot be established in advance; it is necessary to proceed on a case by case basis. However, it is clear that the longer the MS is practiced, the greater the likelihood of negative effects on competition. In a short term margin squeeze, the analysis should focus on whether or not a deterrent margin squeeze occurs, aimed at preventing market entry, and therefore having an exclusionary effect. Such a margin squeeze, though short term, may be considered an abuse of dominant position. Where marketing operations run by the dominant are concerned, it is necessary to focus on their duration and frequency and on the real potential of competitors to respond to these operations (e.g. by adjusting wholesale supply in advance). If within the framework of long term (e.g. two year) or repeated and successive marketing operations low prices are applied, MS with a negative impact on competition is more likely.

MS may be also accompanied by bundling and tying practices. In the case of the existence of several *upstream* markets for essential inputs – i.e. inputs that are crucial in providing more services at the same time in the *downstream* market (*bundled downstream services*) – MS analysis cannot be applied to only one product, but all the services offered by the dominant need to be analyzed. In these cases, the Office in defining the relevant market determines at first the extent to which the bundling is important in the market and whether the given bundle is replicable, or whether there is a wholesale supply of the bundled product.

In the case of a vertically integrated dominant undertaking and a refusal to supply, the Office focuses in its analysis on whether there is a refusal on the part of the dominant undertaking in the form of offering unreasonably high (excessive) price for the input (constructive refusal to supply).

4. The Office's practice

To this point in the Office's practice, the MS issue has been addressed only in the telecommunication sector, in which MS is currently analyzed in the relevant market for broadband access in electronic communications networks.

In response to an application for investigation submitted by an alternative operator, the Office has been dealing with possible anti-competitive conduct of a former monopoly telecommunications operator, consisting of prohibited margin squeeze, or the so-called bundling of services. The application refers to the factual inability to replicate the bundles consisting of the provision of fixed line voice telephony and Internet access based on ADSL. This is a sector where prices are regulated in the *upstream* market and the dominant telecommunications operator has to set uniform prices in the *downstream* market; under the rules of the regulation, the operator is not entitled to implement price discrimination according to a location.

In the first phase of the investigation, the Office determines whether the structural and economic conditions for the occurrence of a margin squeeze practice are fulfilled. In the *upstream* market, the investigated telecom operator has a de facto monopoly position as i) no wholesale access through other platforms exists; ii) the wholesale ADSL supply is provided by only a limited number of alternative operators aside from the dominant telecom operator, and only to a minor extent; and iii) the network of the dominant telecommunications operator is extended to almost all households. Therefore the dominant operator undoubtedly has market power in relation to fixed alternative operators who are entirely dependent on its wholesale supply. The analysis is thus focused mainly on defining the relevant *downstream* market, on the determination of the market power of the vertically integrated operator in the market, and on whether the retail market is effectively competitive. In the Czech Republic, there are three main technology platforms through which retail broadband Internet access is provided: ADSL, cable distribution and Wi-Fi. In order to properly define the relevant retail market – that is to answer the question of whether all three platforms are mutually substitutable from the consumer perspective – the Office intends to carry out economic analysis based on an extensive data collection[6] and to conduct a consumer survey.[7]

If the economic and structural conditions for the rational implementation of the margin squeeze practice were satisfied in a given case, the Office would focus on the application of imputation MS tests in the next phase. To conduct the imputation tests, it would be necessary to thoroughly examine the cost conditions of the individual operators. To this end, the Office would collect accurate data on all costs that have to be incurred by the dominant telecommunications operator on the one hand, and alternative operators on the other hand, if they intend to provide specific services to end customers. In formulating the data request, the Office would first define – on the basis of the information provided by the sector regulator – the relevant cost items, which would make it possible to divide the price of every service into costs and margin. The collected cost data would be crucial for assessing whether, and under what conditions those efficient alternative operators can supply services and produce bundles that are able to compete with the bundles of the dominant telecommunications operator.

5. Conclusions

In its decision-making practice, the Office has dealt with the incentives to implement MS practices only rarely so far, and only in the telecommunications sector. In the current case, a detailed economic analysis of MS is conducted for the first time in relation to the relevant market for broadband access in electronic communication networks. In this case, the Office is cooperating with an external consulting firm, the sector regulator and the Czech Statistical Office. Recently however, the Office, in line with its strategy to focus on the exclusionary forms of abuse of dominance in the future, is concentrating more on

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6 On the basis of the data request defined by the Office, the data are acquired at the required individual level, in particular according to individual entities, products, customers (households, firms) and locations (ZIP, city, street). In order to acquire the necessary data, approximately 150 entities that represent particular platforms are contacted.

7 In formulating the content of the consumer survey, the Office cooperates with an external consulting company; in defining the representative sample, the Office cooperates with the Czech Statistical Office.

the MS practice detection in other sectors. Currently for example, the situation in the electricity market is being examined from this perspective.

Overall current experience indicates that, in contrast to the analysis conducted in cases of refusal to supply, the analysis and proof of MS is more demanding, especially with regard to the need to obtain appropriate and sufficient data and to carry out the necessary economic analysis.

Given that margin squeeze occurs most often in cases where the *upstream* (wholesale) prices are regulated and the *downstream* (retail) prices are unregulated, and where most of the income/profits are derived from the *downstream* market, the Office intends to focus on these sectors and on the analysis of the respective economic and structural conditions for exclusionary conduct, in the upcoming sector inquiries. The assessment criteria of margin squeeze are no different in regulated and unregulated sectors. Although the Office is competent to protect competition in all sectors, in the assessment of MS in regulated sectors, the Office may benefit from the possibility of increased cooperation with the respective independent sector regulators, particularly in addressing technical issues.

FRANCE

1. Introduction

L'Autorité de la concurrence, qui a succédé au Conseil de la concurrence le 2 mars 2009, et la Commission européenne ont, dans plusieurs affaires récentes, examiné la structure des prix pratiqués par des opérateurs verticalement intégrés en position dominante sur des marchés de biens intermédiaires. Lorsqu'un bien intermédiaire est nécessaire à l'exercice de la concurrence sur des marchés en aval, les autorités veillent à ce que l'opérateur dominant ne profite pas de sa position en amont pour augmenter les coûts des concurrents non intégrés et les empêcher d'entrer ou de se développer en aval. Elles vérifient qu'une entreprise active uniquement sur les marchés aval, et aussi efficace que l'opérateur intégré sur ces marchés, peut répliquer les prix de détail de ce dernier sans subir de perte. Ces tests, dits de ciseau tarifaire, ne portent pas sur le niveau absolu des prix de l'entreprise dominante, mais sur l'écart entre les prix amont et aval qu'elle pratique : cet écart doit laisser un espace économique suffisant pour permettre à des concurrents efficaces d'opérer de manière viable en aval.

Historiquement, le premier cas de ciseau tarifaire ayant donné lieu à une condamnation par la Commission européenne a porté sur un marché de matières premières[1]. Les dossiers récents ont concerné le secteur des télécommunications. Dans l'affaire *Deutsche Telekom*[2], la Commission a examiné les pratiques tarifaires de l'opérateur historique en Allemagne, d'une part sur le marché amont des prestations intermédiaires d'accès à la boucle locale fournies aux opérateurs alternatifs, d'autre part sur le marché aval des abonnements vendus aux consommateurs finaux pour les lignes analogiques et ADSL. La décision *Telefónica*[3] a visé les prestations intermédiaires proposées par l'opérateur historique espagnol aux opérateurs alternatifs : accès dégroupé à la boucle locale et accès haut débit livré au niveau régional ou au niveau national. Ces prestations intermédiaires étaient utilisées par les concurrents en aval pour proposer aux consommateurs finaux des connexions à haut débit.

C'est dans ce même secteur que le Conseil de la concurrence a pour la première fois, en 2001, sanctionné une entreprise en position dominante pour une pratique de ciseau[4]. Cette première affaire française concernait les tarifs de téléphonie fixe proposés à Renault par France Télécom dans le cadre d'une offre sur mesure. Le Conseil a constaté que les tarifs de téléphonie fixe de l'opérateur historique pour les appels à destination de son réseau mobile étaient inférieurs à la charge qu'il facturait aux autres opérateurs pour terminer les appels sur ce même réseau. Le Conseil a considéré que l'effet de ciseau ainsi créé empêchait les concurrents de proposer une offre équivalente et que France Télécom érigeait de cette manière une barrière artificielle à l'entrée sur le marché des communications fixes vers mobiles. Trois ans

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1 Le produit visé était le sucre cristallisé, vendu en gros sur le marché amont, et conditionné en sachet pour la vente au détail. Décision de la Commission 88/518/CEE du 18 juillet 1988 (IV/30.178 - Napier Brown – British Sugar). J.O. L 284 du 19/10/1988, p. 41-59.

2 Décision de la Commission 2003/707/CE du 21 mai 2003 (COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG), J.O. L 263 du 14/10/2003, p. 9-41. Arrêt du Tribunal de première instance, affaire T-271/03, 10 avril 2008.

3 Décision de la Commission du 4 juillet 2007 (COMP/38.784 – Wanadoo España vs. Telefónica).

4 Décision 01-D-46 du 23 juillet 2001 relative à des pratiques mises en œuvre par la société France Télécom à l'occasion d'une offre sur mesure conclue en 1999.

plus tard, dans l'affaire *Tenor*[5], le Conseil a sanctionné France Télécom et Cegetel pour des ciseaux tarifaires de même nature, entre tarifs fixes vers mobiles et charges de terminaison d'appels.

Dans l'affaire *Connect ATM*, le Conseil a examiné les prix de France Télécom dans le secteur de l'accès à Internet[6]. A l'époque des faits, l'accès dégroupé à la boucle locale n'était pas encore techniquement possible, et les opérateurs de réseau dépendaient d'une prestation intermédiaire spécifique pour pouvoir concurrencer les offres de France Télécom aux fournisseurs d'accès à Internet. Le Conseil a condamné France Télécom pour avoir, dans un premier temps, refusé de fournir la prestation spécifique en question puis, dans un second temps, maintenu un effet de ciseau entre le prix facturé pour cette prestation et ses offres de détail aux fournisseurs d'accès à Internet.

Le Conseil est aussi intervenu dans le secteur de l'électricité au moment de son ouverture totale à la concurrence. Pour pouvoir proposer des contrats de fourniture d'électricité attractifs par rapport aux offres de l'opérateur historique, les opérateurs alternatifs doivent avoir accès à l'électricité de base d'origine nucléaire produite par EDF. Dans le cadre de mesures conservatoires[7], le Conseil n'a pas exclu l'existence d'un ciseau entre certaines offres de détail d'EDF et les conditions d'accès à l'électricité de base faites à l'un des fournisseurs alternatifs. Il a enjoint à EDF de proposer des conditions d'approvisionnement en électricité en gros qui permettent « *aux fournisseurs alternatifs de concurrencer effectivement, sans subir de ciseau tarifaire, les offres de détail faites par EDF aux consommateurs d'électricité sur le marché libre* ».

Ces différentes affaires interviennent dans des environnements spécifiques et donnent lieu à des calculs de ciseau parfois complexes. La présente étude expose, sans entrer dans le détail des cas, les principes économiques et juridiques qui guident l'intervention des autorités de concurrence lorsqu'un opérateur verticalement intégré dispose d'un accès privilégié à un facteur de production nécessaire à l'exercice de la concurrence sur des marchés en aval.

La première partie de l'étude présente la définition des tests de ciseau et évoque certaines questions méthodologiques liées à leur mise en œuvre. Elle rappelle qu'un test de ciseau fait, en principe, référence à la seule situation de l'opérateur intégré, la logique sous-jacente étant celle du « test de l'opérateur aussi efficace ». Les trois éléments constitutifs d'un test sont les recettes et les coûts liés à l'activité de l'entreprise intégrée sur le marché aval et le prix du bien intermédiaire facturé par la branche amont. La jurisprudence récente a posé les principes utiles pour déterminer dans chaque cas le périmètre pertinent et la méthode d'évaluation de ces trois éléments. Pour des raisons de précision, les calculs doivent parfois être menés sur des segments fins de marché ; néanmoins, lorsque l'équilibre économique des contrats permet des compensations entre les différents segments, le résultat du test doit être évalué au niveau agrégé, sur la base de l'ensemble de la clientèle de l'opérateur dominant.

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5 Décision 04-D-48 du 14 octobre 2004 relative à des pratiques mises en œuvre par France Télécom, SFR Cegetel et Bouygues Telecom. Arrêts de la cour d'appel de Paris du 12 avril 2005 et du 2 avril 2008. Arrêts de la cour de cassation du 10 mai 2006 et du 3 mars 2009.

6 Décision 00-MC-01 du 18 février 2000 relative à une demande de mesures conservatoires présentée par la société 9 Telecom Réseau, confirmée par l'arrêt de la cour d'appel de Paris du 30 mars 2000. Décision 04-D-18 du 13 mai 2004 concernant l'exécution de la décision 00-MC-01, confirmée par l'arrêt de la cour d'appel de Paris du 11 janvier 2005 et l'arrêt de la cour de cassation du 14 mars 2006. Décision 05-D-59 du 7 novembre 2005 relative à des pratiques mises en œuvre par la société France Télécom dans le secteur de l'Internet haut débit, confirmée par l'arrêt de la cour d'appel de Paris du 4 juillet 2006, et par l'arrêt de la cour de cassation du 23 octobre 2007.

7 Décision 07-MC-04 du 28 juin 2007 relative à une demande de mesures conservatoires de la société Direct Energie. Décision 07-D-43 du 10 décembre 2007 relative à des pratiques mises en œuvre par Electricité de France.

La deuxième partie est consacrée à l'examen des effets de ciseau tarifaire au regard du droit de la concurrence. Le seul constat de la présence d'un effet de ciseau ne suffit pas à caractériser une infraction ; plusieurs conditions doivent être satisfaites pour qu'une pratique de ciseau constitue un abus de position dominante. En premier lieu, l'opérateur intégré doit disposer d'un fort pouvoir de marché en amont. En deuxième lieu, le bien intermédiaire doit être objectivement nécessaire pour l'exercice de la concurrence en aval. En troisième lieu, un ciseau tarifaire étant, par essence, une pratique de groupe, il doit exister un degré suffisant de coordination entre les branches amont et aval de l'opérateur dominant. En quatrième lieu, lorsque des lois ou des réglementations contraignent sa politique tarifaire, l'opérateur intégré doit disposer d'une marge de manœuvre suffisante pour être en mesure de supprimer l'effet de ciseau. Lorsque toutes ces conditions sont vérifiées, l'effet potentiel d'exclusion est présumé et l'autorité de la concurrence n'a pas la charge de prouver l'existence d'effets réels. La pratique est alors considérée comme abusive, sauf si l'entreprise mise en cause peut démontrer qu'elle permet des gains d'efficacité qui compensent l'atteinte portée à la concurrence.

La dernière partie de l'étude replace le traitement des ciseaux tarifaires dans la perspective plus large des objectifs de la politique de la concurrence. Elle commence par présenter quelques éléments sur l'analyse stratégique des pratiques de ciseau tarifaire. La dimension temporelle apparaît centrale pour comprendre les incitations des opérateurs intégrés à mettre en œuvre des effets de ciseau. Les opérateurs historiques peuvent craindre que l'entrée de concurrents sur les marchés aval ne leur permette de s'élever le long de « l'échelle des investissements », et, à terme, de menacer leur position sur les marchés amont ; cette crainte peut les pousser à ériger des barrières artificielles à l'entrée sur les marchés en aval, par exemple sous la forme de ciseaux tarifaires. Le Conseil de la concurrence a rencontré à plusieurs reprises des situations de ce type dans le cadre de la libéralisation de secteurs régulés. Son intervention a visé à permettre l'exercice d'une concurrence effective sur les marchés aval, tout en préservant les incitations à l'investissement des différents opérateurs concernés.

2. Définition et mise en oeuvre des tests de ciseau tarifaire

L'objet d'un test de ciseau est d'apprécier les effets d'éviction causés par la politique tarifaire d'un opérateur verticalement intégré. Concrètement, on vérifie si la branche aval d'un tel opérateur serait profitable si elle devait payer le prix intermédiaire facturé à ses concurrents par la branche amont. Cette définition ne fait intervenir que la situation de l'entreprise intégrée ; la logique sous-jacente est celle du « test de l'opérateur aussi efficace » (1.1). La mise en œuvre pratique d'un test de ciseau demande de spécifier le périmètre pertinent des coûts et de recettes à considérer (1.2). Pour des raisons de précision, le test doit parfois être effectué sur des segments fins de marché, mais le résultat s'apprécie au niveau agrégé, de manière à permettre des compensations entre les divers segments de clientèle considérés (1.3). Dans certaines affaires, il a pu être envisagé de mettre en œuvre le test sur une période longue, en sommant les recettes et les coûts de chaque année. Cette méthode présente toutefois des difficultés, tant pratiques que d'interprétation, et la jurisprudence retient en général une approche période par période (1.4).

2.1 La référence à la situation de l'opérateur intégré

Les effets de ciseau tarifaire sont engendrés par la structure des prix des opérateurs intégrés, non par leur niveau absolu. Dans la décision *Deutsche Telekom*, la Commission a ainsi indiqué qu'« *on peut conclure à l'existence d'un effet de ciseau abusif lorsque la différence entre les prix de détail d'une entreprise qui domine le marché et le tarif des prestations intermédiaires pour des prestations comparables à ses concurrents est soit négative soit insuffisante pour couvrir les coûts spécifiques des produits de l'opérateur dominant pour la prestation de ses propres services aux abonnés sur le marché aval.* » Cette conception a été reprise par le Tribunal de première instance dans l'arrêt confirmant la décision de la Commission. Le TPI a indiqué qu'un test de ciseau tarifaire doit être basé sur les coûts de l'entreprise dominante verticalement intégrée : « *Ensuite, force est de constater que, même si, jusqu'à*

présent, le juge communautaire ne s'est pas encore prononcé explicitement sur la méthode à appliquer aux fins de déterminer l'existence d'un effet de ciseaux tarifaire, il ressort néanmoins clairement de la jurisprudence que le caractère abusif des pratiques tarifaires d'une entreprise dominante est en principe déterminé par référence à sa propre situation et, partant, par référence à ses propres tarifs et coûts, et non par référence à la situation des concurrents actuels ou potentiels. » Un ciseau tarifaire est donc une caractéristique de la politique tarifaire de l'opérateur intégré, qui s'apprécie en fonction de sa situation spécifique, notamment de ses tarifs, de ses coûts et de la structure de sa clientèle.

La référence aux coûts de l'opérateur dominant, par opposition à ceux de ses concurrents, repose sur deux types de justifications. En premier lieu, il découle de la jurisprudence communautaire que l'existence ou non d'un effet de ciseau tarifaire ne peut être mesuré à l'aune des coûts des concurrents de l'opérateur dominant dans la mesure où ceux-ci sont susceptibles d'être moins efficaces. Ainsi, dans l'arrêt Industries de poudres sphériques, la TPI a relevé que *« le fait que la requérante ne puisse pas, vraisemblablement du fait de ses coûts de transformation plus élevés, rester concurrentielle dans la vente du produit dérivé ne saurait justifier la qualification des pratiques de prix de [l'opérateur dominant] d'abusives. À cet égard, il convient de souligner qu'un producteur, même en position dominante, n'est pas obligé de vendre ses produits au-dessous de ses coûts de production »*[8]. En effet, dans ce type de circonstances, le juge communautaire relève que *« le fait que les clients d'IPS ne soient pas prêts à supporter le supplément de prix provenant des coûts de transformations plus élevés d'IPS découle soit de ce que son produit étant équivalent à celui de ses concurrents, il est trop cher pour le marché et elle n'est donc pas suffisamment efficace dans sa production pour survivre sur le marché, soit de ce que, son produit étant meilleur que celui de ses concurrents et fabriqué efficacement, il n'est toutefois pas suffisamment apprécié par les clients pour justifier son offre sur le marché »*[9].

De manière parallèle, dans sa décision *Tenor*, le Conseil de la concurrence a également adopté l'approche de l'opérateur aussi efficace, en rejetant la référence aux coûts d'opérateurs plus efficaces que l'opérateur dominant pour mesurer l'existence d'un effet de ciseau dans les termes suivants : « *L'interdiction de pratiques ayant pour effet l'exclusion de concurrents sur un marché ne peut être limitée aux pratiques qui n'excluraient que des concurrents plus efficaces que l'entreprise en position dominante qui les met en œuvre. Elle doit s'étendre à celles qui ont pour effet d'exclure des concurrents au moins aussi efficaces que lui car les tarifs de détail qui, compte tenu [du prix amont], ne permettent pas à un concurrent ayant les mêmes coûts que France Télécom de faire des offres compétitives, l'accès au marché étant donc réservé à des concurrents plus efficaces, élèvent des barrières à l'entrée […].* » La Cour de cassation, dans son arrêt le plus récent sur cette affaire[10], a validé cette approche, jugeant qu' « *une pratique de "ciseau tarifaire" a un effet anticoncurrentiel si un concurrent potentiel aussi efficace que l'entreprise dominante verticalement intégrée auteur de la pratique ne peut entrer sur le marché aval qu'en subissant des pertes.* »

Enfin, le TPI a relevé dans l'arrêt *Deutsche Telekom* que la référence aux coûts de l'opérateur dominant permet d'assurer que celui-ci a en sa possession tous les éléments nécessaires pour vérifier la légalité de son comportement : « *Il y a lieu d'ajouter que toute autre approche risquerait de violer le principe général de sécurité juridique. En effet, si la légalité des pratiques tarifaires d'une entreprise dominante dépendait de la situation spécifique des entreprises concurrentes, notamment par la structure des coûts de celles-ci, qui sont des données qui ne sont généralement pas connues de l'entreprise dominante, cette dernière ne serait pas à même d'apprécier la légalité de ses propres comportements.* »

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8 Arrêt du TPICE du 30 novembre 2000, affaire T-5/97, *Industrie des poudres sphériques* (Rec. 2000, p. II-3755), §175.

9 *Id.*, §185.

10 Arrêt de la cour de cassation du 3 mars 2009.

Il en découle que lorsque la structure tarifaire adoptée par un opérateur dominant engendre un effet de ciseau tarifaire au sens du droit de la concurrence, la branche aval de l'opérateur intégré, si elle devait acquérir le bien intermédiaire au prix facturé par la branche amont, réaliserait des pertes en vendant le bien final. Il s'ensuit qu'une entreprise non intégrée qui aurait les mêmes coûts sur le marché aval et qui devrait se fournir auprès de la branche amont de l'opérateur intégré pour la prestation intermédiaire, ne pourrait pas opérer de manière viable : « *Une marge insuffisante entre les prix des prestations intermédiaires et les prix de détail d'un opérateur verticalement intégré occupant une position dominante constitue plus particulièrement un comportement anticoncurrentiel, dès lors que d'autres opérateurs se trouvent écartés de la concurrence sur le marché en aval, même s'ils sont au moins aussi efficaces que l'opérateur historique.* » (arrêt *Deutsche Telekom*). Le test du « concurrent aussi efficace » ne se réfère donc pas à un concurrent réel, mais à un concurrent hypothétique qui aurait les mêmes coûts et la même structure de clientèle sur le marché aval que l'opérateur verticalement intégré. Le test consiste à vérifier qu'un tel concurrent pourrait profitablement répliquer les tarifs de détail de l'opérateur intégré.

Le choix d'un concept de coût détermine l'espace économique qui doit être laissé aux concurrents non intégrés sur le marché aval, cet espace étant mesuré par la différence des tarifs amont et aval de l'opérateur intégré. Imposer un espace économique large favorise l'entrée sur ce marché, mais peut se traduire par des prix de détail plus élevés : plus on retient un coût élevé sur le marché aval, plus le prix de détail de l'opérateur intégré doit être élevé, à niveau donné du tarif de la prestation intermédiaire, pour satisfaire le test de ciseau. La décision *Telefónica*[11] et la Communication sur l'application de l'article 82 du traité CE publiée en 2008 par la Commission[12] indiquent que la mesure de coût pertinente pour cet examen est le coût moyen incrémental de long terme (CMILT). Celui-ci comprend tous les coûts associés à la production du volume total d'un produit donné[13] ; il s'obtient comme la différence entre les coûts totaux effectivement supportés pour la production de l'ensemble des biens et services commercialisés en aval et les coûts qui seraient engagés si le produit considéré n'était plus fabriqué, la production demeurant inchangée pour les autres produits. Ce coût comprend non seulement les coûts directs associés au produit considéré, qu'ils soient fixes ou variables en fonction des quantités, mais aussi la part des coûts communs imputables à l'activité en question.

Le Conseil de la concurrence a également adopté ce concept de coût dans l'affaire Tenor : « Le coût moyen encouru par un opérateur aussi efficace que France Télécom pour la fourniture de ces services a été limité au seul coût incrémental : il s'agit donc d'une évaluation basse. Ainsi, l'opérateur disposant d'un réseau longue distance en propre et acheminant diverses catégories de trafic téléphonique ne supporte pas de coût incrémental d'acheminement pour le trafic fixe vers mobile.[…]. Le coût incrémental est donc limité : à la contribution au service universel ; à la Charge de terminaison d'appel de [France Telecom Mobiles] (tarif amont) ; aux coûts non techniques (impayés et frais commerciaux). » Le critère du coût incrémental permet aux consommateurs de bénéficier des économies de gamme réalisées par l'opérateur dominant entre ses différentes activités en aval. Si le bien final considéré est produit en utilisant une infrastructure existante qui sert également pour d'autres activités, seuls les coûts attribuables au bien final concerné sont pris en compte. Il peut ainsi arriver que le coût incrémental se réduise aux seuls coûts commerciaux de l'opérateur intégré. L'efficacité propre à la structure de coût d'un opérateur historique

11 Paragraphe 318.

12 Communication de la Commission européenne, « Orientations sur les priorités retenues par la Commission pour l'application de l'article 82 du traité CE aux pratiques d'éviction abusives des entreprises dominantes » (2009).

13 à la différence du coût marginal, qui ne considère que la dernière unité produite.

peut ainsi être transmise aux consommateurs et les entreprises concurrentes sont incitées à investir pour entrer sur les marchés en aval[14].

2.2 Le périmètre pertinent des coûts et des recettes

Pour apprécier l'effet d'exclusion de la tarification d'un opérateur intégré, un test de ciseau compare les coûts et les recettes d'une entreprise efficace qui souhaite répliquer les offres de l'opérateur intégré. Les recettes doivent donc, en principe, comprendre l'ensemble des sources de revenu accessibles à un concurrent potentiel d'efficacité égale sur le marché aval. Elles proviennent de la vente du ou des produit(s) susceptible(s) d'intéresser les consommateurs : le périmètre précis des produits concernés est donc déterminé par la demande exprimée par les consommateurs ; il est lié à la délimitation du marché de produit en aval.

Ainsi, dans l'affaire *Telefónica*, le test de ciseau a été effectué sur une base agrégée, en tenant compte d'une combinaison de différents services commercialisés par Telefónica sur le marché de détail. Cette approche est fondée sur le principe selon lequel les concurrents sur le marché aval doivent être en mesure de répliquer profitablement les offres de détail de l'entreprise intégrée. Les revenus pour cette dernière sur le marché aval provenaient de trois sources : les frais fixes d'installation payés par les usagers lors de l'activation de la ligne, les frais initiaux afférents à l'équipement (modem), et les abonnements mensuels, composés d'une partie fixe et d'une partie variable fonction de la quantité de services effectivement demandés par ces usagers, notamment les appels téléphoniques.

En revanche, dans l'affaire *Deutsche Telekom*, la Commission, suivie en cela par le TPI, a exclu du périmètre des recettes à prendre en compte les revenus tirés des appels passés par les abonnés. Elle a justifié ce choix en s'appuyant sur la réglementation en vigueur. Historiquement, les revenus tirés des communications (notamment longue distance) compensaient le niveau faible des abonnements. Les directives communautaires du « paquet télécom » préconisaient un rééquilibrage tarifaire (hausse des abonnements et baisse du prix des communications longue distance) pour réduire les subventions croisées entre les deux types de services et permettre ainsi l'entrée de concurrents sur le marché de l'accès. La Commission et le TPI ont ainsi pu considérer qu'autoriser des compensations entre prix des appels et prix des abonnements ne serait pas cohérent avec les principes qui sous-tendent la libéralisation du secteur.

Dans l'affaire *Tenor*, le Conseil reprochait aux groupes France Télécom et Cegetel d'avoir proposé aux entreprises moyennes et aux « grands comptes », entre 1999 et 2001, via leur branche de téléphonie fixe (respectivement France Télécom et Cegetel), des offres de détail *fixes vers mobiles* à des tarifs qui ne couvraient pas les coûts variables encourus pour la fourniture de ces prestations, parmi lesquels la charge de terminaison d'appel (CTA) facturée par leur branche de téléphonie mobile (respectivement FTM, devenue Orange, et SFR). Le Conseil a considéré que, par cette pratique, chacune des deux entreprises abusait de la position dominante qu'elle détenait sur le marché amont de la terminaison des appels sur son réseau mobile. Comme dans l'affaire *Deutsche Telekom* précédemment citée, l'une des entreprises mises en cause soutenait que le périmètre des recettes pris en compte dans le test devait être plus large, ce qui réduisait d'autant la probabilité de conclure à un effet de ciseau. En l'espèce, Cegetel faisait valoir que les offres incriminées s'inscrivaient dans le cadre d'offres globales, dont la téléphonie fixe vers mobile, et, a fortiori, les communications fixes vers SFR, ne représentaient qu'un élément ; pour Cegetel, la rentabilité globale de ses offres ne faisait pas de doute. Le Conseil a admis que la demande de communications *fixes vers mobiles* porte, a priori, sur les trois réseaux destinataires des appels puisque l'appelant n'a pas le choix du réseau mobile de son interlocuteur. Mais il a également relevé qu'en ce qui concerne les entreprises, le même décideur choisit le prestataire pour les communications fixes et le réseau de la flotte de mobiles de

[14] Pour plus de détails sur cette question, voir la section 3.2 sur l'équilibre entre ouverture progressive à la concurrence et incitations à l'investissement.

l'entreprise, les communications fixes vers les mobiles de la flotte constituant une part importante de l'ensemble des communications fixes vers mobiles de l'entreprise. Le tarif des communications fixes vers les mobiles du réseau de la flotte constitue donc un critère important dans la sélection du prestataire pour l'ensemble des services de téléphonie fixe. Il a donc rejeté l'analyse de Cegetel : « *Les entreprises clientes (surtout de taille moyenne) retiennent fréquemment le même fournisseur pour l'ensemble du trafic téléphonique, en portant une attention particulière aux tarifs pratiqués sur le trafic fixe vers mobile, de sorte que chaque opérateur intégré peut s'appuyer sur des tarifs attractifs sur le trafic fixe vers mobile destiné à son réseau GSM pour remporter, par effet de levier, des clients sur l'ensemble du trafic fixe vers mobile voire sur l'ensemble du trafic de téléphonie fixe.* » Dès lors, un ciseau tarifaire entre les tarifs des communications fixes vers les mobiles d'un réseau donné et la CTA de ce réseau est susceptible d'évincer les offres des concurrents ; il est donc justifié d'apprécier l'effet de ciseau sur le périmètre des tarifs offerts par France Télécom et SFR-Cegetel pour les communications fixes vers mobiles à destination de leur propre réseau.

2.3 Niveau de segmentation et d'agrégation

Les trois composantes d'un test de ciseau (recettes amont, recettes aval, coût incrémental en aval) peuvent dépendre de manière complexe des quantités produites ou consommées. Lorsque les recettes ou les coûts varient de manière non linéaire avec les quantités, il n'est pas possible de déterminer le niveau unitaire des recettes ou des coûts en divisant simplement les recettes ou les coûts totaux par les quantités. Une segmentation, parfois fine, de la clientèle de l'opérateur intégré peut être nécessaire pour évaluer les recettes et les coûts. Les trois composantes du test sont alors évaluées sur des profils de clients : on calcule les coûts et les recettes pour chaque profil, mais le test s'apprécie et s'interprète en moyenne, de manière agrégée, sur l'ensemble de la clientèle de l'opérateur intégré.

Cette approche autorise des compensations entre groupes de clients, lesquelles reflètent l'équilibre économique des contrats de l'opérateur intégré. Dans l'affaire *Tenor*, le Conseil a effectué le test pour dix-neuf profils de consommation, en considérant, pour chacun d'entre eux, l'offre la plus avantageuse de l'opérateur intégré : « *La segmentation opérée entre 9 profils de consommation pour les entreprises moyennes et 10 profils pour les « grands comptes » n'a pas pour objet d'identifier un effet de ciseau pour chacun de ces profils mais de mesurer cet effet de ciseau en fonction d'un calcul aussi précis que possible des revenus des offres mises en cause et de leurs coûts, ceux-ci étant fonction des profils de consommation des entreprises. Cette précision n'a pas pour effet d'accroître artificiellement la probabilité de trouver un effet de ciseau dans la mesure où celui-ci est apprécié en moyenne, sur l'ensemble des profils.* » Dans ce cas d'espèce, il s'avérait que, pour la quasi-totalité des profils examinés, la marge était négative ; la marge moyenne qu'un opérateur aussi efficace pouvait réaliser était donc négative.

Une logique similaire est à l'œuvre dans la notion de « concurrence effective » utilisée par le Conseil dans la décision de mesure conservatoire 00-MC-01 du 18 février 2000, par laquelle il a enjoint à France Télécom « *de proposer aux opérateurs tiers, dans un délai maximum de huit semaines à compter de la notification de la présente décision, une offre technique et commerciale d'accès au circuit virtuel permanent pour la fourniture d'accès à Internet à haut débit par la technologie ADSL ou toute autre solution technique et économique équivalente permettant aux opérateurs tiers l'exercice d'une concurrence effective, tant par les prix que par la nature des prestations offertes* ». Saisi pour non-respect d'injonction, le Conseil a examiné, sous de nombreuses hypothèses, la présence d'un effet de ciseau entre la prestation intermédiaire proposée par France Télécom (« option 3 ») et les offres aux fournisseurs d'accès à Internet (« option 5 »). Il a constaté que « *seul un opérateur ayant adressé son offre aux FAI spécialisés dans la clientèle professionnelle, ou ayant circonscrit son offre à une partie limitée du territoire national, ou ayant eu comme client un FAI ayant conquis plus d'abonnés ADSL que Wanadoo, aurait réalisé une marge positive sur le tarif ADSL Connect ATM, tel que proposé par France Télécom le 1er décembre 2000, augmenté de ses coûts propres.* » Un opérateur aussi efficace ne pouvait donc

concurrencer les offres de France Télécom que sur certains segments de marché particulièrement profitables ; un tel opérateur ne pouvait pas répliquer la politique tarifaire et la structure de clientèle de l'opérateur historique. Le Conseil en a conclu que France Télécom n'avait pas respecté l'injonction prononcée dans la décision 00-MC-01.

La cour d'appel de Paris, dans son arrêt du 11 janvier 2005, a confirmé l'approche du Conseil : c'est au niveau agrégé que s'apprécie la notion de « concurrence effective ». Il ne suffit pas que les opérateurs tiers efficaces puissent conquérir certaines « niches » de marché : « *Eu égard à l'exigence de concurrence effective, formulée dans l'injonction de manière générale et sans réserve ou restriction particulière concernant une zone géographique délimitée, la requérante [France Télécom] n'est pas fondée à revendiquer le bénéfice d'une exception qui n'a pas été prévue par le Conseil ».* Le résultat d'un test de ciseau doit donc être présenté pour l'ensemble du marché, sur la base de la structure globale de clientèle de l'opérateur intégré.

Le juge communautaire reconnaît également qu'il convient de réaliser un test de ciseau sur la seule base du portefeuille de clientèle de l'opérateur dominant. Ainsi, le TPI a considéré que *« l'argument (...) selon lequel [l]es concurrents [de l'opérateur dominant] ne cherchent pas à reproduire sa propre structure de clientèle (...) est inopérant »* (*Deutsche Telekom*, §194).

L'affaire *Direct Energie* offre une autre illustration de la problématique de la segmentation et de l'agrégation de la demande finale. Dans ce cas, le produit intermédiaire était l'énergie de base d'origine nucléaire et le bien final la fourniture de l'électricité aux petits clients professionnels ayant exercé leur éligibilité[15]. Le Conseil, dans la décision de mesures conservatoires 07-MC-04 ainsi que dans la décision 07-D-43 acceptant les engagements proposés par EDF, a effectué des tests de ciseau tarifaire pour vérifier qu'un fournisseur alternatif s'approvisionnant auprès d'EDF en électricité de base pouvait concurrencer les offres de détail de l'opérateur historique sur le marché libre. Il a, une nouvelle fois, précisé que le ciseau ne s'apprécie pas sur des sous-populations particulières, mais sur le portefeuille complet des clients de l'opérateur intégré : « *Sur un marché de détail où le portefeuille de clients finals de l'opérateur en cause est caractérisé par des coûts différents en fonction de la consommation des clients concernés, le calcul du coût du ruban pris en compte pour l'analyse de la pratique de ciseau tarifaire doit être fait à partir des consommations effectives de l'ensemble des clients du portefeuille. Ce calcul ne saurait, en effet, se limiter aux seuls coûts de certains clients particuliers, dans la mesure où l'économie générale de l'activité de fournisseur au détail repose sur la compensation qui peut s'opérer entre la consommation des clients les plus importants et de ceux qui le sont moins.* » Telle était également l'approche adoptée en l'espèce par la Commission de régulation de l'énergie (CRE) dans les calculs de ciseau versés au dossier : « *Ces calculs révèlent en effet que, partant d'un certain prix de gros payé pour couvrir le ruban annuel, les marges positives générées par les ventes à certains clients finals au prix de détail d'EDF peuvent, dans certains cas, compenser les marges négatives générées par d'autres clients et suffire à assurer en moyenne une activité bénéficiaire sur la totalité du portefeuille.* » Un test de ciseau tarifaire n'impose pas que la marge d'un fournisseur alternatif efficace en aval soit positive sur chaque type de client, mais seulement qu'elle soit positive, en moyenne, sur l'ensemble de la clientèle de l'opérateur dominant.

2.4 Test période par période et valeur nette actualisée

Le Conseil de la concurrence a toujours effectué le test de ciseau période par période. La Commission européenne a présenté dans l'affaire *Telefónica*, outre cette méthode statique, une méthode dynamique prenant en compte les évolutions du secteur concerné. La méthode période par période consiste à comparer, pour chaque mois ou pour chaque année, les revenus et coûts observés, extraits des comptes de l'entreprise, dans lesquels les investissements sont amortis suivant des règles comptables. La méthode de la

[15] Ces clients sont ceux qui ont choisi des offres de fourniture d'électricité à des tarifs non réglementés.

valeur nette actualisée évalue quant à elle la profitabilité globale de l'activité de l'entreprise sur une période de plusieurs années, en tenant compte de la croissance escomptée de l'activité. Elle somme et actualise les flux de revenus et de coûts futurs, le taux d'actualisation utilisé étant le coût moyen pondéré du capital de l'opérateur dominant. Elle obtient ainsi un indicateur unique de profitabilité : la valeur nette actualisée (VNA).

La méthode de la VNA, par essence dynamique, peut être plus appropriée qu'une approche statique pour les marchés naissants ou en forte croissance. En effet, dans ce cas, il est raisonnable de considérer que l'opérateur dominant, lorsqu'il construit sa politique de prix, anticipe des baisses futures de coûts, résultant d'économies d'échelle à venir, de phénomènes d'apprentissage ou d'innovations technologiques. De plus, cette méthode, qui agrège les flux de recettes et de coûts sur une longue période, ne spécifie pas la manière dont les recettes doivent couvrir les coûts au cours du temps : elle est donc moins sujette à d'éventuelles distorsions comptables que l'approche période par période. Cette dernière demande en effet d'imputer les coûts à chaque mois ou à chaque année, ce qui, en pratique, repose sur des règles comptables d'amortissement, lesquelles ne reflètent pas nécessairement la réalité technique et économique.

Cependant, la méthode de la VNA présente des difficultés pratiques et d'interprétation. En premier lieu, elle nécessite de s'entendre sur l'évolution prévisible *ex ante* des recettes et des coûts de l'opérateur dominant. En second lieu, une VNA positive peut résulter de la hausse anticipée au cours du temps des revenus et des profits de l'opérateur intégré. Mais il est difficile de savoir si une telle hausse résulte de l'évolution normale du marché ou, au contraire, d'une stratégie d'exclusion réussie. Lorsque l'entrée sur le marché amont est possible, la méthode période par période a l'avantage de tenir compte du caractère graduel de l'entrée : *à un instant donné*, les concurrents doivent pouvoir prendre pied sur le marché aval, afin de pouvoir, ensuite, envisager d'investir en amont dans des infrastructures qui les affranchiront de leur dépendance vis-à-vis de l'entreprise dominante.

Ces deux approches peuvent également être appliquées pour construire un test de prédation[16]. Dans son arrêt confirmant la décision *Wanadoo*[17], le TPI a indiqué que la Commission dispose d'une marge d'appréciation dans le choix de la méthode de calcul et que c'est à l'opérateur en cause de démontrer que la méthode retenue par la Commission est illégale.

Dans l'affaire *Telefónica*, la Commission a effectué deux tests de ciseau, l'un basé sur l'approche période par période, l'autre sur la méthode de la valeur nette actualisée. Dans ce cas particulier, les deux méthodes conduisaient à la même conclusion.

D'une manière générale, l'appréciation d'un effet de ciseau demande parfois d'adopter certaines hypothèses ou de faire certains choix méthodologiques[18]. Lorsque différents choix ou différentes hypothèses apparaissent également réalistes, plusieurs variantes du test doivent être effectuées : la robustesse du résultat est alors un élément d'appréciation essentiel.

3. L'examen des effets de ciseau au regard du droit de la concurrence

L'article L.420-2 du code de commerce mentionne des exemples de pratiques susceptibles de constituer des abus de position dominante. La liste indicative comprend notamment la discrimination et le

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16 Un test de prédation diffère d'un test de ciseau, en ce qu'il considère les coûts réels supportés en amont par l'opérateur intégré, en lieu et place du tarif de gros facturé aux entreprises tierces, cf. section 3.1.

17 Décision de la Commission du 16 juillet 2003 (COMP/38.233 – Wanadoo Interactive), confirmée par l'arrêt du TPI du 30 janvier 2007, affaire T – 340/03.

18 C'est le cas par exemple dans l'affaire *Connect ATM*.

refus de vente, qui ne sont pas sans lien avec les pratiques de ciseau tarifaire[19] ; mais celles-ci ne sont pas explicitement mentionnées. En droit communautaire, le fondement juridique du grief de ciseau est l'article 82 a) du Traité CE : « *Ces pratiques abusives peuvent notamment consister à : a) imposer de façon directe ou indirecte des prix d'achat ou de vente ou d'autres conditions de transaction non équitables.* » Ainsi, dans la décision *Deutsche Telekom*, confirmée par le TPI, la Commission a constaté que « *Deutsche Telekom abuse de sa position dominante sur les marchés en cause pour l'accès direct à son réseau de téléphonie fixe. Cet abus réside dans la fixation de prix non équitables pour l'accès des concurrents aux prestations intermédiaires et pour l'accès à la boucle locale, et il répond donc aux conditions définies à l'article 82, point a), du traité.* » De même, la Commission a conclu, dans la décision *Telefónica,* que l'opérateur historique espagnol avait enfreint l'article 82 du traité CE en imposant des prix « non équitables » qui se traduisaient par un écart insuffisant entre ses prix de gros et de détail pour l'accès à une connexion haut débit.

Pour qu'une pratique de ciseau tarifaire soit contraire au droit de la concurrence, il ne suffit pas que le test donne, de manière robuste, un résultat négatif. Il faut encore que plusieurs conditions relatives à l'entreprise mise en cause et la structure des marchés soient vérifiées. L'entreprise concernée doit disposer d'une position dominante sur le marché amont ; dans les affaires récentes, l'entreprise intégrée visée par les griefs possédait un pouvoir de marché très important en amont, voire une position de monopole non contestable (2.1). Le bien intermédiaire doit être objectivement nécessaire aux opérateurs tiers pour qu'ils exercent une concurrence effective sur ce marché aval (2.2). L'entreprise dominante doit être intégrée verticalement (2.3) et, lorsque les marchés sont soumis à régulation, elle doit jouir d'un degré suffisant d'autonomie dans sa politique tarifaire (2.4). Lorsque toutes ces conditions sont vérifiées, l'effet potentiel d'exclusion est présumé et l'autorité de la concurrence n'a pas la charge de prouver l'existence d'effets réels (2.5). La pratique est alors considérée comme abusive, sauf si l'entreprise mise en cause peut démontrer qu'elle est objectivement justifiée (2.6).

3.1 La position de l'opérateur intégré sur les différents marchés

La source du pouvoir de marché sur lequel s'appuie l'effet anticoncurrentiel d'une pratique de ciseau se situe en amont. Les autorités de concurrence doivent donc établir que l'entreprise intégrée détient une position dominante sur le marché de la prestation intermédiaire.

Dans l'affaire *Napier-Brown*, l'opérateur intégré, British Sugar, détenait environ 60 % du marché de gros de sucre cristallisé, mais ce chiffre ne reflétait pas l'ampleur réelle de son pouvoir de marché. Celui-ci était renforcé par des raisons propres à la structure de l'industrie[20]. Dans les affaires concernant le secteur des télécommunications qui ont suivi, la position dominante de l'opérateur intégré sur le ou les marché(s) amont n'était pas contestée, qu'il s'agisse de celle de Telefónica sur les marchés de gros de l'accès au niveau régional ou national ou de celle de Deutsche Telekom sur le marché des prestations intermédiaires d'accès à la boucle locale. Dans les deux cas, le dégroupage débutait à peine, les parts de marché de l'opérateur historique étaient supérieures à 80 % en amont et les barrières à l'entrée restaient très élevées.

De même, dans tous les dossiers de ciseau traités par le Conseil, l'entreprise intégrée détenait une position dominante, voire quasi-monopolistique, sur le marché amont. Dans l'affaire *Connect ATM*, la position dominante de France Télécom sur la boucle locale (et son prolongement sur jusqu'au Broadband Access Server exclu) ne faisait pas discussion. La même remarque vaut dans l'affaire *Tenor* s'agissant du

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19 Cf. section 3.1, *infra.*

20 Les possibilités d'importations étaient limitées à cause des coûts de transports ; British Sugar détenait la totalité des quotas de production attribués à la Grande-Bretagne par la CEE, créant un obstacle majeur à l'entrée de nouveaux opérateurs ; son principal concurrent supportait des coûts de raffinage plus élevés que les siens.

monopole des opérateurs mobiles pour terminer les appels sur leur réseau. De même, dans l'affaire *Direct Energie*, le Conseil a relevé qu'EDF disposait de 87 % des capacités de production d'électricité en France, qu'elle avait généré 88 % de la production totale en 2006, dont 100 % de la production nucléaire. Il a ainsi pu considérer, au stade des mesures conservatoires, qu'EDF était susceptible de détenir une position dominante sur le marché de la production d'électricité ainsi que sur le marché de la vente d'électricité en gros.

En revanche, la jurisprudence n'impose pas, pour qu'une pratique de ciseau soit contraire au droit de la concurrence, que l'opérateur intégré soit en position dominante sur le marché aval. Ainsi, dans la décision *Tenor*, le Conseil a pu sanctionner le groupe Cegetel-SFR alors que Cegetel n'était pas en position dominante sur le marché aval des appels fixes vers mobiles : « *L'abus de position dominante que constitue une pratique de ciseau tarifaire trouve sa source, en l'espèce, à l'amont, dans la position monopoliste de SFR quant à la terminaison des appels destinés à son réseau lorsque les solutions de contournement ne sont pas significativement disponibles. L'abus dû au ciseau a lieu, à l'aval, au détriment des concurrents de Cegetel ne disposant pas d'un réseau intégré. La position minoritaire de Cegetel sur le marché aval ne change en rien l'objet de la pratique mais, éventuellement, l'importance de son effet.* »

De même, la Commission a rappelé dans la décision *Telefónica* (§284) que la dominance en aval n'est pas nécessaire pour caractériser un abus sur la base d'un ciseau tarifaire. Conformément à l'arrêt *Tetra Pak II* de la Cour de justice[21], le fait que le comportement abusif d'une entreprise dominante ait ses effets sur un marché distinct de celui qu'elle domine ne l'exonère pas de l'applicabilité de l'article 82 du traité CE. Ce raisonnement s'applique pleinement dans le cas des pratiques de ciseau, qui trouvent leur source en amont et leurs effets en aval. Le lien de causalité entre la pratique et l'effet d'éviction en aval provient de l'intégration verticale de l'opérateur dominant et de la nécessité du bien intermédiaire pour construire des offres de détail attractives.

3.2 La nécessité de la prestation intermédiaire pour l'exercice de la concurrence en aval

La jurisprudence française et communautaire en matière de ciseau tarifaire[22] ne fait pas allusion au concept de facilité essentielle. Pour établir qu'une pratique de ciseau est contraire au droit de la concurrence, les autorités n'ont pas la charge de démontrer le caractère « strictement nécessaire » de la prestation intermédiaire pour produire le bien final. Elles doivent seulement établir que les concurrents opérant en aval ont besoin de cette prestation pour exercer une pression concurrentielle sur l'opérateur intégré. Ainsi, l'arrêt *Deutsche Telekom* du TPI indique : « *Eu égard au fait que les prestations intermédiaires de la requérante sont ainsi indispensables pour permettre à un de ses concurrents d'entrer en concurrence avec elle sur le marché en aval des services d'accès pour les abonnés, un effet de ciseaux entre les tarifs des prestations intermédiaires et les tarifs de détail de la requérante entravera en principe le développement de la concurrence sur les marchés en aval.* » Le TPI vise expressément la capacité des entreprises non intégrées à animer la concurrence sur le marché aval. De même, la Cour de cassation, dans son arrêt du 3 mars 2009 relatif à l'affaire Tenor, indique qu' « *une pratique de "ciseau tarifaire" a un effet anticoncurrentiel si un concurrent potentiel aussi efficace que l'entreprise dominante verticalement intégrée auteur de la pratique ne peut entrer sur le marché aval qu'en subissant des pertes ; qu'un tel effet peut être présumé seulement lorsque les prestations fournies à ses concurrents par l'entreprise auteur du "ciseau tarifaire" leur sont indispensables pour la concurrencer sur le marché aval.* » Comme le TPI, la Cour de cassation met l'accent sur la capacité des opérateurs aussi efficaces que l'entreprise intégrée à concurrencer cette dernière.

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21 Arrêt de la CJCE du 14 novembre 1996, affaire C – 333/94.

22 Affaires *Napier Brown*, *Deutsche Telekom*, *Telefónica*, *Tenor*.

Si la prestation intermédiaire est strictement nécessaire pour opérer en aval, elle est, *a fortiori*, nécessaire pour concurrencer l'opérateur intégré. En pratique, il peut exister des sources d'approvisionnement alternatives qui, si elles permettent de produire le bien final, ne permettent pas de construire des offres de détail assez attractives pour concurrencer effectivement celles de l'opérateur intégré. La qualification d'infrastructure essentielle est donc une condition *suffisante*, mais non nécessaire, pour établir la nécessité objective de la prestation intermédiaire pour l'exercice de la concurrence en aval.

Dans les affaires concernant les offres d'accès à Internet, les opérateurs alternatifs ne pouvaient pas éviter de s'adresser à l'opérateur historique détenteur de la boucle locale. Ainsi, dans sa décision *Telefónica*, la Commission a souligné toutes les raisons économiques et techniques pour lesquelles les autres réseaux permettant de fournir des accès haut débit sur le territoire espagnol (câble et boucles radio) ne pouvaient pas constituer des solutions alternatives au réseau de l'opérateur historique. La Commission a conclu : « *La duplication d'un réseau d'accès local d'étendue nationale n'étant pas économiquement viable, un opérateur souhaitant fournir des services de détail d'accès à Internet à large bande sur tout le territoire espagnol n'a pas d'autre choix que d'avoir recours aux offres ADSL de gros qui s'appuient toutes sur le réseau d'accès à la boucle locale de Telefónica*. »[23] Dans cette affaire, l'opérateur historique soutenait que le ciseau tarifaire qui lui était reproché équivalait à un refus de vente et, en conséquence, que la jurisprudence sur les facilités essentielles, notamment l'arrêt *Oscar Bronner* de la CJCE[24], devait s'appliquer. La Commission a répondu que l'argument était sans objet, la question de l'accès obligatoire au réseau étant déjà tranchée par la loi en vigueur. Lors de l'adoption de ces dispositions, les pouvoirs publics avaient procédé au nécessaire arbitrage entre incitations à l'investissement et bénéfices de l'ouverture des marchés aval (cf. section 3.2, infra) : « *Cette obligation lui a été imposée dans le but de favoriser la concurrence et les intérêts des consommateurs. Les considérations qui constituent le fondement de la législation espagnole en conformité avec la réglementation communautaire indiquent clairement que l'obligation imposée à Telefónica de fournir les prestations intermédiaires pertinentes est le résultat de la mise en balance, par les pouvoirs publics, des facteurs incitant Telefónica et ses concurrents à investir et à innover. En l'espèce, la nécessité de stimuler la concurrence en aval sur le long terme en imposant l'accès aux infrastructures de Telefónica l'emporte sur le besoin de préserver ses incitations ex ante à investir et exploiter pour son bénéfice les infrastructures en question.* »[25]

Dans l'affaire Connect ATM, le ciseau tarifaire avait succédé à un refus de vente : « La pratique reprochée à France Télécom a consisté à refuser l'accès de ses concurrents au point de branchement de l'option 3 (entre DSLAM et Broadband Access Server), en s'abstenant d'ouvrir le service de l'option 3 du 9 novembre 1999 au 1er décembre 2000, puis, une fois le service ouvert, en maintenant l'effet de ciseau tarifaire entre le coût de ce service et celui de l'option 5. » Dans cette affaire, le Conseil a établi l'existence du refus de vente en vérifiant que le plaignant avait demandé l'accès à l'opérateur intégré et que celui-ci n'avait pas donné suite à cette demande. Le Conseil a également établi que le refus de vente de France Télécom portait sur une infrastructure essentielle, en vérifiant que les conditions suivantes étaient

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23 Traduction libre du §74: « *An undertaking wishing to provide broadband access to the end-users throughout the Spanish territory has no other option, save the economically not viable roll-out of an alternative nation-wide access network, but to contract one of the wholesale ADSL services available on the market, which are all built on [Telefónica]'s access network consisting of ADSL enabled local loops.* »

24 Arrêt de la Cour du 26 novembre 1998 dans l'affaire C-7/97 *Bronner* (Rec.1998, p.I-7791).

25 Traduction libre du §303 : « *This duty has been established with a view to promoting competition and the consumer interest. It is clear from the considerations underlying both the EC and Spanish law and regulation that Telefónica's duty to supply the relevant upstream products results from a balancing by the public authorities of the incentives of Telefónica and its competitors to invest and innovate. This is because the need to promote downstream competition in the long term by imposing access to Telefónica's upstream inputs exceeds the need to preserve Telefónica's ex ante incentives to invest in and exploit the upstream infrastructure in question for its own benefit.* »

vérifiées : (i) L'infrastructure est possédée par une entreprise qui détient un monopole (ou une position dominante) ; (ii) L'accès à l'infrastructure est strictement nécessaire (ou indispensable) pour exercer une activité concurrente sur un marché amont, aval ou complémentaire de celui sur lequel le détenteur de l'infrastructure détient un monopole (ou une position dominante) ; (iii) L'infrastructure ne peut être reproduite dans des conditions économiques raisonnables par les concurrents de l'entreprise qui la gère ; (iv) L'accès à l'infrastructure est possible. Dans l'affaire Connect ATM, la qualification d'infrastructure essentielle étant acquise, la nécessité objective de la prestation pour l'exercice de la concurrence en aval l'était a fortiori.

Dans l'affaire *Tenor*, la prestation intermédiaire consistait en la terminaison d'appel sur les réseaux mobiles de SFR et France Télécom. Durant certaines périodes, les entreprises non intégrées ont pu contourner l'interconnexion directe de deux manières : en envoyant le trafic collecté vers l'étranger (« reroutage international »[26]) ; en transformant les appels *fixes vers mobiles* en appels *mobile vers mobile* à l'aide de « mobile boxes » ou « hérissons »[27]. Ces solutions permettaient de faire aboutir l'appel sur le réseau mobile destinataire sans devoir acquitter la charge de terminaison correspondante. Le Conseil a observé que « *le reroutage a cessé de constituer une solution alternative effective à [l'interconnexion directe] à partir d'avril 1999 et que les mobile box n'ont constitué une solution alternative effective à l'interconnexion directe qu'à partir du début de 2002.* » Le Conseil a exclu du grief les périodes pendant lesquelles des possibilités de contournement existaient : « *Le test de ciseau tarifaire est pertinent sur la période avril 1999 à fin 2001 car, durant cette période, les opérateurs alternatifs sur le fixe ne disposaient pas de moyens permettant de significativement échapper à l'obligation d'acquitter la CTA imposée par les opérateurs GSM du fait de leur position dominante.* » Cette approche a ensuite été validée par la Cour de cassation dans un arrêt du 10 mai 2006, censurant un premier arrêt de la Cour d'appel de Paris dans laquelle celle-ci avait considéré qu'il incombait au Conseil de démontrer que les opérateurs alternatifs étaient contraints de recourir à la prestation en cause[28]. Selon la Cour de cassation : *« il appartenait [à la cour d'appel] de rechercher, non si le Conseil avait établi que les nouveaux opérateurs de téléphonie fixe ne disposaient plus d'aucun moyen permettant d'éviter l'effet de ciseau subi en cas d'interconnexion directe, mais si les pratiques de 'ciseau tarifaire' [mises en œuvre] avaient pour objet ou pouvaient avoir pour effet, notamment après la signature par France Télécom d'accords de surcharge tarifaire vers mobiles avec les principaux pays au travers desquels le trafic était 'rerouté', de restreindre ou de fausser le jeu de la concurrence sur le marché de la téléphonie fixe vers mobile des entreprises, la Cour d'appel a méconnu les disposition [des articles L. 420-2 du code de commerce et 82 CE] »*[29] Dans un deuxième arrêt sur cette affaire[30], la Cour d'appel de Paris, confirmant cette fois la décision du Conseil, a qualifié le reroutage international de solution de contournement « *techniquement aberrante* » et a considéré que cette observation « *suffi[sait] à établir qu'il n'y avait lieu d'y recourir que pour contourner un obstacle lui-même paradoxal* ». La Cour d'appel a par ailleurs estimé que les efforts de France Telecom tendant à limiter l'usage de ce contournement[31] « *éclairaient sa pratique de prix en montrant son intérêt à préserver l'efficacité de sa pratique de ciseau tarifaire* ». La Cour de cassation, dans son arrêt précité du 3 mars 2009, a cassé ce deuxième arrêt de la Cour d'appel, estimant que cette

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26 Les conventions passées avec certains opérateurs à l'étranger prévoyaient des reversements peu élevés (environ huit fois moindres que pour les appels nationaux) pour la terminaison des appels internationaux sur les réseaux mobiles de France Télécom.

27 Cette transformation était profitable, car les opérateurs GSM pratiquaient des tarifs de détail inférieurs au prix des appels *fixes vers mobiles*.

28 Arrêt de la Cour d'appel de Paris du 12 avril 2005.

29 Arrêt de la Cour de cassation, ch. com., du 10 mai 2006.

30 Arrêt de la Cour d'appel de Paris du 2 avril 2008.

31 Ces efforts avaient consisté à négocier des surcharges tarifaires avec les opérateurs étrangers.

dernière n'avait pas établi que « *les pratiques de la société France Télécom avaient eu pour résultat de rendre indispensable, pour les opérateurs de téléphonie fixe souhaitant présenter à leurs clientèles des prestations relatives aux appels fixes vers mobiles, l'interconnexion directe aux réseaux de téléphonie mobile des sociétés France Télécom et SFR ou, dans le cas où des possibilités de reroutage continuaient d'exister, que les pratiques de "ciseau tarifaire" des sociétés France Télécom et SFR avaient eu ou pu avoir pour effet d'entraîner des pertes pour des concurrents aussi efficaces qu'elles sur le marché des appels fixes vers mobiles* ». Ce dernier développement ne marque pas de changement notable au plan des principes : comme indiqué au début de cette section, la Cour de cassation n'a modifié ni la définition du test de ciseau, ni le standard de preuve correspondant (la nécessité de la prestation intermédiaire pour l'exercice de la concurrence en aval).

L'affaire *Connect ATM* illustre la proximité des pratiques de ciseau tarifaire et refus de vente, en termes d'effet de verrouillage notamment. Toutefois, ces deux pratiques ne sauraient être confondues, une pratique de ciseau pouvant prendre place indépendamment de tout refus de vente. Ainsi, dans le cas *Direct Energie*, l'effet de ciseau survenait alors qu'aucune réglementation ne contraignait l'opérateur intégré à donner accès au bien intermédiaire : EDF avait signé un contrat d'approvisionnement avec un fournisseur alternatif, alors qu'elle n'était soumise à aucune obligation réglementaire de vendre sa production d'électricité à des opérateurs alternatifs et qu'elle disposait d'une entière liberté commerciale dans la détermination de ses offres d'approvisionnement d'électricité en gros. Le Conseil a considéré que si elle avait « *librement contracté avec Direct Energie, c'est donc qu'EDF avait un intérêt économique à offrir [un tel contrat]* », et, dès lors, qu'il était « *légitime de rechercher si le prix de gros consenti peut être à l'origine d'un effet de ciseau tarifaire subi par le cocontractant.* » Dans cette affaire, le Conseil a apprécié, conformément aux principes jurisprudentiels, si les sources alternatives d'approvisionnement en électricité de base étaient « *suffisamment significatives* » pour permettre aux fournisseurs alternatifs de proposer des offres de détail compétitives en se passant de l'énergie nucléaire produite par EDF. Les sources alternatives sont les suivantes : *virtual power plants* (VPP, droit de tirage sur un montant de capacité réservé) ; importations ; contrats bilatéraux et achats sur Powernext ; investissement dans des moyens de productions propres. Le Conseil a conclu qu'il n'apparaissait pas, à ce stade de l'instruction, que « *les produits offerts en gros et la constitution de capacités de production propres constituent des solutions alternatives effectives à l'approvisionnement d'électricité de base auprès d'EDF* ».

Au total, la pertinence d'un test de ciseau tarifaire ne peut être exclue, même en présence de sources alternatives d'approvisionnement, dès lors que le caractère insuffisamment significatif de ces sources ne permet pas aux opérateurs non intégrés d'animer la concurrence en aval sans recourir à la prestation ou au bien en cause.

3.3 La coordination entre les branches amont et aval de l'opérateur intégré

Les pratiques de ciseau sont, par essence, des pratiques de groupes intégrés. Elles traduisent une stratégie globale et nécessitent la coordination des décisions des branches amont et aval en matière de politique tarifaire. En conséquence, l'examen des pratiques au regard du droit de la concurrence demande d'apprécier l'unité économique de l'entreprise dominante et son degré d'intégration verticale ; la forme juridique précise des sociétés en cause est secondaire.

Dans la plupart des affaires de ciseau, l'intégration verticale est évidente, car c'est la même entité qui fournit la prestation intermédiaire aux opérateurs tiers et le service aux consommateurs. C'était le cas par exemple dans l'affaire *Deutsche Telekom.* Dans l'affaire *Telefónica*, des filiales distinctes intervenaient aux différents niveaux de la chaîne verticale, mais il n'était pas contesté qu'elles formaient une seule et même entité économique. De même, dans l'affaire *Direct Energie*, EDF expliquait que la gestion des activités de production et de commercialisation du groupe était totalement intégrée au sein d'une seule et même entité juridique et comptable.

Dans l'affaire *Tenor*, les situations des groupes Cegetel et France Télécom étaient moins évidentes. L'opérateur de téléphonie fixe Cegetel et l'opérateur de téléphonie mobile SFR étaient détenus à 80 % par la holding Cegetel Groupe. Autrement dit, les branches amont et aval appartenaient au même groupe, sans que l'une ne soit filiale de l'autre. Le groupe Cegetel mettait en avant la présence d'actionnaires minoritaires au capital de chacune des deux sociétés ; on ne pouvait donc pas considérer qu'elles agissaient comme un seul opérateur économique. Le Conseil a cependant relevé que les offres de Cegetel proposaient systématiquement un tarif *fixes vers SFR* moins élevé que le tarif *fixe vers Orange France* alors que les charges de terminaison d'appel de Orange France et de SFR étaient équivalentes. Le Conseil a conclu : « *Le fait que Cegetel fixe son tarif « fixe vers Orange France » en fonction de ses propres coûts, notamment de la CTA de Orange France, tandis qu'elle ne tient pas compte de la CTA de SFR pour le trafic « fixe vers SFR » est bien la preuve que la politique du groupe est coordonnée, au sens où l'une des branches de l'opérateur (la branche de téléphonie fixe) met en œuvre une politique tarifaire qui prend son sens lorsque les intérêts de l'autre branche sont également pris en compte. La coordination nécessaire à cette stratégie peut prendre place entre deux filiales du même groupe sans que l'une soit filiale de l'autre.* »

S'agissant de France Télécom, le Conseil a distingué deux périodes : durant la première, les activités de téléphonie mobile étaient exercées au sein de France Télécom sous la marque *Itinéris*, dans une division dépourvue de toute personnalité morale ; durant la seconde, ces activités étaient exercées au sein de la filiale Orange France. Le Conseil a reconnu que la filiale avait pu acquérir une certaine autonomie vis-à-vis de la maison mère, mais il a relevé que la coordination des tarifs s'était poursuivie après la filialisation. Il a conclu : « *Enfin, en estimant l'autonomie d'Orange France dans les circonstances de l'espèce, le Conseil n'entend pas juger de l'autonomie ou de la non autonomie d'Orange France au regard de la totalité de ses pratiques possibles. Toute entreprise filiale possède généralement une marge d'autonomie vis-à-vis de sa maison mère. Mais s'agissant, comme en l'espèce, d'une pratique de ciseau, à objet anticoncurrentiel, entre le prix de services fournis par la mère et celui de ceux fournis par la fille, la coordination des deux prix est nécessaire ce qui ne peut être le fait que de la mère. Supposer que la mère et sa fille ont fixé, indépendamment l'une de l'autre, chacune ses prix reviendrait à admettre que l'effet de ciseau ne résulte que du hasard, ce que France Télécom ne soutient pas.* »

3.4 L'autonomie des entreprises vis-à-vis des lois et réglementations en vigueur

Selon une jurisprudence bien établie, la mise en oeuvre de politiques publiques par des entreprises n'est soumise au droit de la concurrence que si les entreprises disposent d'une marge d'autonomie suffisante. Un comportement n'est pas autonome au sens des dispositions du droit de la concurrence lorsqu'il est imposé aux entreprises par la législation nationale ou lorsque celle-ci a éliminé toute possibilité de comportement concurrentiel de leur part. Dans le cas inverse, le droit de la concurrence s'applique, comme le rappelle la décision *Deutsche Telekom* : « *L'applicabilité des règles de concurrence n'est pas exclue, dès lors que les dispositions sectorielles concernées laissent aux entreprises qui y sont soumises la possibilité d'un comportement autonome susceptible d'empêcher, de restreindre ou de fausser la concurrence*. »

L'autorité de concurrence doit apprécier dans quelle mesure la marge de manœuvre de l'opérateur intégré dans la fixation de ses tarifs de gros et de détail lui permet d'éviter de maintenir un effet de ciseau tarifaire. Dans plusieurs affaires, le marché de la prestation intermédiaire était soumis à régulation, mais celle-ci n'allait pas jusqu'à prescrire le niveau du prix amont : la régulation imposait seulement un prix plafond. L'opérateur intégré restait libre de réduire le niveau en deçà du plafond, et de supprimer ainsi l'effet de ciseau tarifaire. Il pouvait donc en être tenu pour responsable au regard du droit de la concurrence.

Ainsi, dans l'affaire *Tenor*, France Télécom contestait son autonomie de comportement en faisant valoir que ses activités étaient l'objet de contrôles réglementaires contraignants, qui portaient notamment sur « le respect des règles de concurrence en matière tarifaire ». Mais le Conseil a rappelé que « *l'approbation par le ministre compétent de l'offre tarifaire de France Télécom n'a pas pour effet de lui conférer le caractère d'un acte administratif* ». En outre, constatant les baisses successives des charges de terminaison d'appels par les opérateurs intégrés entre les années 1998 et 2002, le Conseil a considéré que ces charges n'étaient pas strictement contrôlées par le régulateur sectoriel au moment des faits et qu'il était « *inexact d'affirmer que la CTA des deux opérateurs* [Orange et SFR] *était orientée vers les coûts au moment des faits mis en cause dans la présente affaire.* » Le Conseil a ainsi conclu que « *chacun des trois opérateurs mobiles est en mesure de fixer le niveau de la CTA qu'il facture aux opérateurs de manière indépendante* […] ». Les opérateurs décidant de manière autonome de leur tarif amont étaient donc juridiquement responsables de l'effet de ciseau constaté.

De même, dans l'affaire *Telefónica*, les prix de détail et de gros de l'opérateur historique étaient en partie réglementés pendant la période couverte par les griefs. Mais la Commission a souligné que Telefónica avait conservé toute latitude pour augmenter ses prix de détail ou baisser ses tarifs d'accès. L'opérateur aurait donc pu éviter de maintenir un ciseau tarifaire tout en restant profitable à chaque niveau de la structure verticale.

Dans l'affaire *Deutsche Telekom*, la marge de manœuvre de l'opérateur historique était plus réduite : le prix de gros était orienté vers les coûts et ne pouvait donc pas être abaissé ; les prix de détail étaient soumis à un plafond global. La Commission et le TPI ont néanmoins estimé que cette marge de manœuvre était suffisante pour permettre à l'opérateur de supprimer l'effet de ciseau : « *Ces deux types de prix sont certes soumis à une régulation sectorielle, mais DT dispose néanmoins d'une marge de manœuvre en tant qu'entreprise, qui lui permet finalement de réduire, voire d'annuler, l'effet de ciseau, grâce à des restructurations tarifaires progressives.* »

La même logique a conduit le Conseil de la concurrence, dans l'affaire *Direct Energie,* à limiter l'analyse de l'effet de ciseau aux offres de gros et de détail d'EDF destinées au marché libre. Le Conseil a relevé que : « *Les tarifs réglementés sont d'un niveau significativement inférieur à celui des prix de marché correspondants car ils sont construits selon une logique de couverture des coûts moyens totaux de la production. Ils sont " réglementés " par l'Etat selon une logique propre qui ne relève pas de la maximisation du profit d'EDF, mais dans le but de faire bénéficier la clientèle de masse d'une énergie électrique relativement bon marché, sans perte pour l'entreprise du fait du faible niveau de ses coûts moyens totaux.* » L'action du Conseil était donc fondée sur le comportement adopté par l'opérateur historique sur le seul marché libre, la fourniture d'électricité par EDF aux tarifs réglementés ne revêtant pas un degré d'autonomie suffisant au sens du droit de la concurrence.

3.5 L'impact sur la concurrence

Dès lors que la présence d'un ciseau tarifaire est établie et que les conditions énumérées ci-dessus sont satisfaites, un effet potentiel d'éviction peut être présumé. Ainsi, la décision *Deutsche Telekom*, s'appuyant notamment sur les arrêts *Hoffmann-La Roche* et *Tetra Pak II*[32], indique : « *Avec la démonstration par la Commission de l'existence d'un effet de ciseau, l'abus de position dominante est donc suffisamment démontré.* »

De même, la Cour de cassation, dans son arrêt du 3 mars 2009 relatif à l'affaire Tenor, indique qu' « une pratique de "ciseau tarifaire" a un effet anticoncurrentiel si un concurrent potentiel aussi efficace

[32] Arrêt du 13 février 1979 dans l'affaire 85/76, Hoffmann-La Roche, Rec. 1979, p. 461, point 91 des motifs. Arrêt du 6 octobre 1994 dans l'affaire T-83/91, Tetra Pak II, Rec. 1994, p. II-755, point 114 des motifs.

que l'entreprise dominante verticalement intégrée auteur de la pratique ne peut entrer sur le marché aval qu'en subissant des pertes ; qu'un tel effet peut être présumé seulement lorsque les prestations fournies à ses concurrents par l'entreprise auteur du "ciseau tarifaire" leur sont indispensables pour la concurrencer sur le marché aval. » La Cour de cassation confirme ainsi qu'une pratique de ciseau constitue une barrière artificielle à l'entrée, dont l'effet anticoncurrentiel peut être présumé, dès lors que la prestation intermédiaire est nécessaire à l'exercice de la concurrence en aval (voir section 2.2, supra).

Les autorités de concurrence n'ont donc pas la charge de démontrer les effets réels des pratiques de ciseau. Toutefois, dans plusieurs décisions récentes, la Commission et le Conseil de la concurrence ont pris note des effets observés et ont apprécié, de manière qualitative, l'importance des dommages causés à l'économie et aux consommateurs.

Ainsi, la Commission a examiné l'impact réel de la conduite de Telefónica sur la structure concurrentielle du marché et sur les consommateurs. Elle a observé que Telefónica a profité de la croissance du marché dans des proportions bien supérieures à ses concurrents : sa branche aval a connu un taux de croissance quatre fois supérieur à celui de l'ensemble des concurrents. Même lorsque certains opérateurs tiers ont initié des politiques de prix agressives, Telefónica captait encore plus de 70 % des nouveaux abonnés et parvenait à conserver des parts de marché substantielles en aval. Le comportement de Telefónica a donc contraint la croissance des concurrents. La Commission a aussi relevé des éléments concrets permettant d'établir que les prix de détail en Espagne étaient significativement plus élevés (au moins de 20 %) que la moyenne européenne, ce qui affectait des millions d'utilisateurs. Selon la Commission, aucun des facteurs affectant l'offre ou la demande, avancés par Telefónica, ne pouvait expliquer de manière convaincante le niveau élevé des prix en Espagne. Elle a conclu que la conduite de l'opérateur historique avait porté préjudice aux consommateurs.

En France, l'article L.464-2 du code de commerce dispose que les sanctions pécuniaires prononcées par le Conseil de la concurrence soient « *proportionnées à la gravité des faits reprochés, à l'importance du dommage causé à l'économie, à la situation de l'organisme ou de l'entreprise sanctionné ou du groupe auquel l'entreprise appartient et à l'éventuelle réitération des pratiques prohibées par le présent titre* ». La quantification des dommages causés par des pratiques d'exclusion étant en général impossible, le Conseil apprécie qualitativement leur impact sur la concurrence et les consommateurs.

Ainsi, dans l'affaire *Tenor*, le Conseil a considéré que l'évaluation quantitative du dommage à l'économie, à supposer qu'il eût été possible de collecter les données pertinentes, aurait été rendue impossible par l'évolution conjoncturelle du marché ainsi que par l'existence de solutions alternatives. Toutefois, le Conseil a relevé « *que l'Autorité de régulations des télécommunications avait estimé que le prix de la CTA pratiquée par les deux opérateurs en cause était excessif et leur avait imposé une diminution ; que France Télécom avait bénéficié d'un surprofit du fait du caractère trop élevé de la CTA facturée ».* Le Conseil a également observé qu'aucun opérateur autre qu'Orange ne s'était interconnecté à son réseau avant juillet 2000, sans que cette circonstance pût se justifier par aucune contrainte technique. Il a également retenu que Cegetel avait indiqué avoir été dans l'incapacité de répondre à plusieurs appels d'offres portant sur le trafic fixe vers mobile. Le Conseil en a déduit que l'effet de ciseau tarifaire avait retardé l'entrée de nouveaux opérateurs sur le marché aval des communications fixes vers mobiles, l'effet d'exclusion ayant été d'autant plus important que les solutions de contournement ne permettaient pas, à l'époque des faits, de construire des offres concurrentes compétitives. Le Conseil a également évoqué l'inefficacité propre à ces contournements : « *Le gaspillage de moyens techniques pour un service de qualité inférieure auquel conduisent reroutage et hérissons démontre que la situation créée, quant à la cause de base, par l'incohérence qui s'attache à faire payer de trois prix très différents l'objet identique qu'est la terminaison d'appel, selon que l'appel provient du fixe, du même GSM ou d'un autre, nous place dans un optimum de second rang, c'est à dire une situation dégradée pour le surplus du consommateur.* »

3.6 L'absence de justifications objectives

Lorsque toutes les circonstances évoquées ci-dessus sont réunies, le caractère anticoncurrentiel d'une pratique de ciseau est présumé. L'entreprise mise en cause conserve toutefois la possibilité de renverser la présomption négative en démontrant que son comportement est objectivement justifié ou qu'il permet des gains d'efficacité qui compensent l'atteinte portée à la concurrence. L'article L. 420-4 du Code de commerce prévoit ainsi que ne sont pas prohibées par l'article L. 420-2 les pratiques « *dont les auteurs peuvent justifier qu'elles ont pour effet d'assurer un progrès économique, y compris par la création ou le maintien d'emplois, et qu'elles réservent aux utilisateurs une partie équitable du profit qui en résulte, sans donner aux entreprises intéressées la possibilité d'éliminer la concurrence pour une partie substantielle des produits en cause* ». Le droit communautaire ne prévoit pas d'exemption comparable pour les abus de position dominante. Toutefois, la Commission européenne a annoncé, dans sa Communication précitée sur l'application de l'article 82 du traité CE, qu'elle entendait examiner les éléments avancés par l'entreprise dominante pour justifier son comportement : « *En appliquant l'article 82, la Commission examinera également les arguments avancés par une entreprise dominante pour justifier son comportement. Cette dernière peut à cet effet démontrer soit que son comportement est objectivement nécessaire, soit qu'il produit des gains d'efficacité substantiels qui l'emportent sur les effets anticoncurrentiels produits sur les consommateurs. Dans ce contexte, la Commission examinera si le comportement en cause est indispensable et proportionné à l'objectif prétendument poursuivi par l'entreprise dominante.* »

Dans l'affaire *Telefónica*, l'opérateur dominant soutenait que sa politique tarifaire avait permis un démarrage rapide du marché de masse de l'accès au haut débit et son développement. Son comportement aurait engendré des gains d'efficacité tant du coté de l'offre (économies d'échelle, effet d'apprentissage) que du côté de la demande (stimulation de la demande, incitations au développement de nouveaux réseaux). Ses offres tarifaires auraient été indispensables pour atteindre ces objectifs : des prix de détail plus élevés n'auraient pas permis d'atteindre une taille critique du marché aussi rapidement ; des prix de gros plus faibles auraient réduit sa profitabilité et ses incitations à investir. *Telefónica* estimait que ses prix avaient directement bénéficié aux consommateurs, les économies d'échelle et les effets d'apprentissage lui permettant d'améliorer la qualité de ses services sans augmenter le coût pour les abonnés. L'opérateur considérait que sa stratégie ne lui avait pas donné la possibilité d'éliminer la concurrence, et qu'au contraire, grâce aux gains d'efficacité réalisés, elle avait bénéficié à tous les opérateurs du marché.

La Commission a rejeté ces arguments. En effet, les gains d'efficacité allégués n'avaient pas profité aux consommateurs, les prix de détail en Espagne étant à l'époque des faits nettement plus élevés que dans le reste de l'Europe : « *Surtout, l'argument de Telefónica est infirmé par le fait, déjà démontré, que son comportement lui a permis de maintenir les prix de détail les plus élevés d'Europe, portant ainsi préjudice aux consommateurs et au marché dans son ensemble, avec un taux de pénétration inférieur à la moyenne européenne*. »[33] Les gains allégués n'avaient pas non plus bénéficié aux opérateurs concurrents, puisque les tarifs des prestations intermédiaires n'avaient jamais diminué pendant la période des pratiques. Une réduction des tarifs de gros aurait encouragé l'entrée de nouveaux opérateurs et permis une concurrence qui aurait stimulé la demande.

Telefónica soutenait également qu'il n'avait jamais pris l'initiative de réduire ses tarifs et que c'est la concurrence qui l'avait contraint à aligner ses prix de détail sur ceux de ses rivaux. Mais la Commission a considéré que l'alignement sur les prix des concurrents ne peut pas justifier une pratique de ciseau tarifaire par laquelle une entreprise intégrée inflige des pertes à ses concurrents efficaces sans les supporter elle-

[33] Traduction libre du §648 : « *Above all, Telefónica's argument is invalidated by the fact that, as already established, its conduct allowed it to sustain the highest retail prices in Europe, thereby negatively affecting consumers and the market as a whole, with a below EU average rate of penetration.* »

même : « *L'alignement sur la concurrence ne peut légitimer un comportement ayant pour conséquence d'abuser, par effet de levier, d'une position dominante en amont.* »[34] L'alignement sur la concurrence ne constitue une justification acceptable que s'il est démontré que la réaction de l'entreprise est indispensable et proportionnée et qu'aucune autre réponse économiquement réalisable et aux effets anticoncurrentiels moindres n'était envisageable. En l'espèce, la Commission a considéré que le ciseau tarifaire n'était pas indispensable puisque Telefónica pouvait réduire ses prix de gros et supprimer le ciseau, tout en restant globalement profitable.

L'argument d'alignement sur les prix des concurrents a également été avancé en défense dans l'affaire *Tenor*. Le groupe Cegetel faisait valoir que France Télécom pratiquait, dès avant l'ouverture du secteur à la concurrence, des remises de volume sur le trafic *fixes vers Orange France*, et qu'en tant que nouvel entrant, il devait proposer des offres commercialement plus attractives, au risque de sacrifier des profits. Le Conseil a rejeté cette justification, en considérant que « *Néanmoins, il appartenait à SFR Cegetel, si elle estimait ces remises illicites, d'en saisir les autorités compétentes, comme l'aurait fait tout autre opérateur de téléphonie fixe non intégré, plutôt que d'y répondre par sa propre pratique d'un effet de ciseau sur le trafic fixe vers SFR.* »

4. Les effets de ciseau tarifaire dans le jeu concurrentiel

Les ciseaux tarifaires rendent difficiles l'entrée et le développement de concurrents sur les marchés aval ; ils s'interprètent donc comme des barrières artificielles à l'entrée. Les économistes ont examiné les incitations des opérateurs intégrés à s'opposer à l'ouverture des marchés en aval ; ils ont mis en évidence le rôle central de la perspective dynamique, s'agissant notamment des décisions d'investissement (3.1). La dialectique entre ouverture progressive à la concurrence et incitations à l'investissement est au cœur du processus de libéralisation des secteurs anciennement monopolistiques (3.2). L'expérience française récente dans les secteurs des télécommunications et de l'énergie a mis en évidence les synergies entre l'action des régulateurs sectoriels et l'intervention des autorités de concurrence (3.3).

4.1 Ciseaux tarifaires et comportements stratégiques

En termes stratégiques, la pratique de ciseau tarifaire présente certaines ressemblances avec la discrimination et avec la prédation. Elle possède néanmoins des caractéristiques propres qui nécessitent une analyse spécifique.

Un effet de ciseau peut s'interpréter en terme de discrimination tarifaire, à condition de faire intervenir un prix de transfert interne à la structure intégrée. En présence d'un ciseau, deux cas sont possibles : soit le prix interne est égal au prix facturé aux concurrents en aval, et la branche aval fait des pertes. Soit le prix interne est différent du prix externe, et la branche amont de l'opérateur dominant applique à la branche aval et aux concurrents des conditions distinctes pour des prestations similaires : le ciseau se traduit par une discrimination entre la branche aval de l'opérateur intégré et les concurrents non intégrés. Encore faut-il, pour que cette interprétation ait une portée pratique, qu'un prix de transfert interne existe et qu'il ait un sens économique.

Dans l'affaire *Direct Energie*, le plaignant considérait que le prix de l'approvisionnement d'électricité qui lui était proposé était discriminatoire au regard des conditions de transfert interne qu'EDF réserve à ses propres activités non réglementées en aval. En réponse, l'opérateur historique a expliqué qu'il ne pratiquait pas de prix de cession interne, la gestion des activités de production et de commercialisation du groupe étant totalement intégrée au sein d'une seule et même entité juridique et comptable. Le Conseil a toutefois

[34] Traduction libre du §638 : « *The meeting competition defence may not legitimise a behaviour whose effect is to leverage and abuse an upstream dominance*. »

considéré que « *les transferts internes d'énergie au sein d'EDF sont une réalité qu'il est possible de valoriser, notamment lorsque cette valorisation est nécessaire pour le contrôle du respect des règles de concurrence par un opérateur intégré* », rappelant que la notion de prix de cession interne d'EDF avait été examinée dans son avis 05-A-19 du 20 octobre 2005.

L'analyse stratégique des effets de ciseau a également certains points communs avec celle de la prédation. En présence d'un effet de ciseau, l'entreprise intégrée augmenterait son profit total en vendant la prestation intermédiaire à ses concurrents au lieu de vendre directement le bien final aux consommateurs : ce faisant, elle perdrait certes une partie de ses recettes sur le marché de détail, mais elle accroîtrait ses revenus en amont pour l'accès au bien intermédiaire et ferait l'économie des coûts incrémentaux en aval. Par définition de l'effet de ciseau, ces deux gains seraient supérieurs à la perte des recettes aval. Il s'ensuit qu'en maintenant un effet de ciseau, l'opérateur intégré fait un sacrifice par rapport à son profit optimal de court terme. Toutefois, ce sacrifice ne va pas nécessairement jusqu'à causer de pertes globales pour la structure intégrée : le maintien d'un effet de ciseau tarifaire n'empêche pas la structure intégrée d'être globalement profitable.

La pratique de ciseau se distingue de celle de la prédation par bien des aspects. Un ciseau tarifaire fait intervenir deux variables stratégiques : le prix amont et le prix aval de l'entreprise intégrée. La source du pouvoir de marché qui permet la pratique se situe en amont : la position dominante en amont et le caractère nécessaire du bien intermédiaire pour l'exercice de la concurrence en aval fournissent à l'opérateur intégré un levier d'action direct sur les coûts des concurrents. Les pratiques de ciseaux tarifaires se rattachent donc à la catégorie générale des stratégies visant à accroître les coûts des rivaux : « *En mettant en œuvre un effet de ciseau, l'entreprise dominante accroît les coûts de ses concurrents en aval et leur impose des contraintes d'efficacité supplémentaires qu'elle-même ne doit pas supporter pour construire ses offres de détail : en effet, alors qu'un ciseau tarifaire ne conduit pas nécessairement l'entreprise intégrée à consentir de pertes, les concurrents aussi efficaces en aval sont eux obligés d'essuyer des pertes. Une telle pratique est susceptible d'entraver le maintien du niveau de concurrence demeurant sur le marché aval, ou le développement de cette concurrence.* »[35] Le mécanisme d'accroissement des coûts des concurrents, qui repose sur l'utilisation combinée de deux leviers stratégiques, est absent dans les pratiques habituellement désignées sous le terme de prédation. Ces pratiques consistent à utiliser les prix de détail pour dégrader la situation financière des entreprises « proies » ou, en présence d'asymétries d'information, pour manipuler leurs croyances sur l'état de la demande, les coûts ou les comportements de l'opérateur dominant[36]. Contrairement à l'opérateur intégré qui maintient un ciseau tarifaire, le prédateur ne dispose pas de levier d'action direct sur les coûts de ses concurrents.

D'une manière plus générale, les économistes ont examiné les incitations des opérateurs intégrés à mettre en œuvre des effets de ciseau. Selon l'argument de l'Ecole de Chicago, un opérateur intégré n'a pas intérêt à gêner l'entrée et le développement en aval de concurrents plus efficaces que lui. En effet, la meilleure efficacité des entrants contribue à accroître la demande des consommateurs et le surplus économique total que les différents acteurs peuvent se partager. Or l'opérateur intégré est en mesure de

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35 Traduction libre du §284 *:* « *By engaging in margin squeeze, the dominant undertaking raises its downstream rivals' costs and imposes on the latter additional efficiency constraints that it does not have to incur for the provision of its own downstream services: indeed, while margin squeeze needs not involve a loss for the vertically integrated firm on an end-to-end basis, similarly efficient downstream competitors are obliged to incur losses. Such a conduct is likely to hinder the maintenance of the degree of competition still existing on the downstream market or the growth of that competition.* »

36 Par exemple, le dominant peut chercher à acquérir une réputation d'agressivité sur un marché pour dissuader l'entrée sur d'autres marchés. Voir Motta M., *Competition policy. Theory and Practice*. Cambridge University Press (2004).

s'approprier tout ou partie du surplus ainsi créé en fixant un prix élevé pour le bien intermédiaire. L'entrée et le développement des concurrents efficaces sur le marché aval lui seraient donc favorables.

Toutefois, cette analyse se place dans une perspective exclusivement statique et repose sur plusieurs hypothèses restrictives : concurrence pure et parfaite entre produits homogènes sur le marché aval, absence de coûts d'entrée, d'économies d'échelle ou d'effets de réseau.

En pratique, il se peut que le marché aval ne soit pas parfaitement concurrentiel, par exemple parce que les biens proposés sont différenciés. Dans ce cas, les entreprises en aval bénéficient d'un certain pouvoir de marché, qui leur permet de réaliser des profits positifs ; ainsi, l'opérateur intégré ne peut pas s'approprier l'intégralité du surplus et peut donc avoir intérêt à bloquer l'entrée[37].

Plus fondamentalement, dans une perspective dynamique, l'opérateur intégré peut craindre que ses rivaux, s'ils prennent pied sur le marché aval, finissent par menacer sa position sur le marché amont. Lorsqu'une telle menace existe, il peut être incité à s'opposer à leur entrée en aval, dans le but de protéger sa position sur le marché amont. Choi et Stefanadis (2001)[38] et Carlton et Waldman (2002)[39] ont développé des scénarii anticoncurrentiels de ce type dans un contexte voisin, celui où une entreprise lie un bien sur lequel elle est en monopole avec un bien complémentaire sur lequel elle est confrontée à la concurrence de nouveaux acteurs. Lorsque les entrants potentiels doivent supporter des coûts fixes irrécupérables pour pénétrer sur les différents marchés, que la réussite de l'entrée est incertaine et que ces investissements sont risqués, il peut leur être nécessaire de procéder de manière graduelle, c'est-à-dire d'entrer sur un premier marché avant d'investir pour entrer sur le second. L'effet direct du ciseau tarifaire est de rendre plus difficile ou de retarder la pénétration du marché aval par les nouveaux entrants, mais son objet ultime, pour l'opérateur en place, est la protection de la position dominante en amont. Des mécanismes analogues jouent en présence d'effets de réseau, lorsque l'utilité que les consommateurs retirent d'un service augmente avec le nombre d'utilisateurs de ce service.

4.2 Ouverture des marchés et dynamique des investissements

Lors de la libéralisation des secteurs anciennement monopolistiques, les nouveaux opérateurs entrent généralement de manière graduelle sur les différents marchés, de manière à limiter leur prise de risque. Les entrants s'élèvent ensuite le long de « l'échelle des investissements », qu'ils gravissent « barreau par barreau ». Le groupe des régulateurs européens de télécommunication décrivait ainsi ce processus en 2005 : « *This regulatory model which was developed among others by Prof. Martin Cave assumes that investments are made in a step by step way by new entrants. In order to allow new entrants to gradually (incrementally) invest in their own infrastructure they need a chain of (complementary) access products to acquire a customer base by offering their own services to end users based on (mandated) wholesale access. Once they have gained a critical mass generating revenues to finance the investment, they will deploy their own infrastructure taking them progressively closer to the customer and increasingly able to differentiate their service from that of the incumbent, also making them less dependent of the incumbent's infrastructure. This involves migration from one access product (or access point) to another (moving to the next rung). Thus the entrant passes progressively through several stages of infrastructure competition, as it ascends a "ladder of infrastructure", the initial phase being service competition, which can therefore be*

[37] Flochel L. (1999), « Interconnexion de réseaux et charge d'accès : une analyse stratégique », Annales d'Economie et de Statistique.

[38] Choi, J.P. et C. Stefanadis, 2001 : « Tying, Investment, and the dynamic leverage theory. » The RAND Journal of Economics, vol. 32, n°1.

[39] Carlton, D.W. et M. Waldman, 2002 : « The strategic use of tying to preserve and create market power in evolving industries. » The RAND Journal of Economics, vol. 33, n°2.

seen as a vehicle to infrastructure competition, which is the ultimate aim as it ensures sustainable competition in the long run. Once the process gets started and provided the right regulatory measures are taken, the process will get its own dynamic and with the different elements reinforcing each other will become self-propelling. »[40] Ce processus séquentiel renvoie à la distinction classique entre concurrence par les services et concurrence par les infrastructures. Les premiers barreaux de l'échelle relèvent de la concurrence par les services : les entrants, à ce stade, dépendent de l'opérateur historique pour l'accès à l'infrastructure. C'est seulement une fois qu'ils ont acquis une base de clientèle et une notoriété suffisantes qu'ils peuvent investir dans l'infrastructure à un niveau supérieur de capillarité et s'affranchir finalement de leur dépendance vis-à-vis de l'opérateur historique.

Dans la phase initiale du processus, il convient de s'assurer que les entrants efficaces ont la capacité d'être actifs en aval compte tenu des prix de gros et de détail pratiqués par l'opérateur historique : « *In order to kick-off the process as well as to ensure that it does not stop and new entrants keep on moving to the next rung, […] pricing of access products must be consistent, i.e. the relative prices must reflect the difference in cost between the products. In other words: the price difference or margin must satisfy the margin squeeze test of covering the incremental cost of providing the 'wider' product.* »[41] Pour que les entrants puissent s'élever le long de l'échelle des investissements, il est essentiel de garantir l'absence d'effet de ciseau entre les différents barreaux : les prix pratiqués par l'opérateur en place pour l'accès d'une part, pour les services vendus au détail d'autre part, doivent laisser aux opérateurs alternatifs une marge suffisante pour qu'ils puissent couvrir leurs coûts incrémentaux ; c'est à cette condition qu'ils pourront se développer et atteindre la taille critique qui leur permettra d'engager de nouveaux investissements.

Dans le même temps, il importe de veiller à ce que l'ouverture des marchés ne réduise pas les incitations de l'opérateur historique à investir dans le réseau. Symétriquement, faciliter l'accès au réseau ou à l'infrastructure en place ne doit pas dissuader les entrants de s'engager, à un rythme économiquement raisonnable, dans le développement de leur propre infrastructure.

Même si le pilotage dynamique des investissements relève au premier chef de la compétence des autorités de régulation et la répression des pratiques de verrouillage de celle des autorités de concurrence, les deux sujets ne peuvent pas, en pratique, être traités de manière séparée. Ainsi les autorités de concurrence accordent toujours une importance particulière à la problématique des investissements. A titre d'exemple, dans l'affaire *Direct Energie*, le Conseil a examiné les besoins en moyens de production supplémentaires, tels qu'ils ont été identifiés par les opérateurs et les pouvoirs publics, ainsi que la dynamique prévisible des investissements dans le cadre de l'ouverture à la concurrence : « *Il ressort des éléments produits au dossier qu'il convient de distinguer deux tendances à l'investissement dans le cadre du marché libéralisé, à savoir d'une part l'investissement dans des moyens de production en semi-base et en pointe et, d'autre part, l'investissement dans des moyens de base. En ce qui concerne les moyens de semi-base et de pointe, la majorité des fournisseurs alternatifs interrogés ont déclaré disposer de tels moyens ou envisager d'investir dans leur construction. Tel est notamment le cas de la saisissante, qui a démontré, outre ses investissements dans le domaine de l'électricité d'origine éolienne et hydraulique, projeter la construction d'une centrale à cycle combiné au gaz et d'une ou plusieurs centrales à turbine à combustion*. » Le Conseil a donc vérifié que les nouveaux entrants supportaient ou étaient prêts à supporter les efforts d'investissement nécessaires. Il a également relevé qu'« *à ce stade de l'instruction, seule une participation aux investissements nucléaires d'EDF semble envisageable pour la plupart des opérateurs en vue d'obtenir un accès de long terme à l'électricité de base d'origine nucléaire* » et que cette possibilité

[40] European Regulators Group (ERG), 2003 : « Broadband market competition report », ERG (05) 23.

[41] *Id*.

avait effectivement été mise en œuvre par l'un des opérateurs alternatifs. Ces derniers étaient donc bien engagés dans une logique ascendante du point de vue des investissements.

De même, dans l'affaire *Telefónica*, l'opérateur historique faisait valoir qu'une baisse du prix d'accès au réseau réduirait les incitations des opérateurs alternatifs à investir dans leur propre infrastructure. La Commission a rejeté cet argument en rappelant l'analyse des autorités nationales de régulation de l'Union européenne selon laquelle les entrants ne peuvent s'élever sur l'échelle des investissements qu'en l'absence d'effet de ciseau tarifaire entre les barreaux. La Commission a démontré que, dans les faits, le comportement de Telefónica avait considérablement retardé le développement des infrastructures alternatives.

La question, symétrique, des incitations à investir de l'opérateur historique, mérite aussi attention. Imposer une obligation d'accès ou corriger un effet de ciseau pourrait réduire ces incitations. En particulier, l'obligation d'accès contrevient au principe général de la liberté de contracter, dont il est généralement présumé qu'elle est, à long terme, favorable à l'investissement.

Toutefois, comme le note la Commission, au paragraphe 81 de sa Communication précitée sur l'article 82 du traité CE, il existe des situations où imposer une obligation de vente ou corriger un effet de ciseau ne peut manifestement pas avoir d'effets négatifs sur les incitations à investir de l'opérateur intégré, que ce soit *ex ante* ou *ex post*. C'est notamment le cas lorsque la réglementation impose déjà une obligation d'accès ou de vente à l'entreprise dominante et que les autorités publiques ont déjà pris en compte l'équilibre entre cette obligation et les incitations à investir. C'est également le cas lorsque la position sur le marché de l'entreprise dominante s'est développée sous la protection de droits spéciaux ou exclusifs ou a été financée par des ressources publiques.

Ainsi, dans l'affaire *Telefónica*, l'opérateur historique soutenait que son comportement était justifié par la nécessité de garantir un retour sur les investissements entrepris dans l'infrastructure. La Commission a rejeté cet argument en relevant que l'infrastructure en question avait été, dans une large mesure, installée pour le réseau téléphonique traditionnel, les travaux de génie civil représentant la part la plus importante des coûts. Ces investissements, qui sont donc sans rapport avec les services d'accès à Internet haut débit concernés en l'espèce, avaient été financés par des rentes issues du monopole légal : « *En particulier, le comportement de Telefónica n'était pas nécessaire pour protéger ses investissements d'infrastructure. Les infrastructures amont de Telefónica sont dans une large mesure le fruit d'investissements entrepris pour des raisons qui ne sont pas liées à la fourniture de services d'accès à large bande, mais plutôt à des services traditionnels de téléphonie fixe, dans un contexte où l'opérateur bénéficiait de droits spéciaux ou exclusifs qui le protégeaient de toute concurrence. En effet, le réseau d'accès local ainsi que les réseaux d'accès au niveau régional et national de Telefónica ont été financés par les recettes provenant des rentes de monopole dans les périodes où il était protégé par des droits exclusifs.* »[42] Dans ces conditions, l'opérateur historique ne pouvait pas invoquer la préservation de ses incitations ex ante à investir pour justifier une pratique de ciseau tarifaire.

[42] Traduction libre du §632 : « *In particular, Telefónica's conduct was not necessary for securing its infrastructure investments. Telefónica's upstream infrastructure is to a large extent the fruit of investments undertaken for reasons not related to the provision of broadband services but rather the provision of traditional fixed telephony services in a context where the company was benefiting from special or exclusive rights that shielded it from competition. Indeed, Telefónica's local access network and regional and national backhaul were funded by monopoly rents during periods of time protected by exclusive rights.* »

4.3 Les synergies entre droit de la concurrence et régulation sectorielle

D'une manière générale, l'existence d'un cadre réglementaire spécifique assurant la régulation de l'ouverture à la concurrence du secteur ne place pas celui-ci en dehors du champ d'application des dispositions du livre IV du code de commerce[43]. Les affaires *Connect ATM* et *Direct Energie* illustrent les synergies possibles entre les actions des autorités de concurrence et de régulation sectorielle pour libéraliser des secteurs anciennement monopolistiques. Dans ces affaires, le régulateur sectoriel avait constaté une situation de blocage et émis des recommandations pour y mettre fin ; mais il disposait de peu d'instruments capables de contraindre effectivement l'opérateur historique à ouvrir les marchés. Le Conseil s'est appuyé sur l'expertise technique des régulateurs et a mis en œuvre les instruments juridiques à sa disposition pour accélérer le déverrouillage des marchés.

Au moment du démarrage de la technologie ADSL pour l'accès à l'Internet haut débit, l'Autorité de régulation des télécommunications (ART) avait examiné les offres de France Télécom aux fournisseurs d'accès à Internet. Elle avait estimé indispensable, au regard des règles du droit des télécommunications et du droit de la concurrence, et afin de répondre aux besoins des utilisateurs, que les opérateurs alternatifs de télécommunication bénéficient d'une offre leur permettant de proposer des services de même nature, *« en étant maîtres des éléments techniques et commerciaux essentiels de ces services »*[44]. A cette époque, l'ART avait mené une consultation publique sur les différentes options envisageables pour la mise en œuvre du dégroupage de la boucle locale. Au terme de cette consultation, les différents acteurs avaient privilégié deux options : l'accès à la paire de cuivre (« option 1 »), et l'accès au circuit virtuel permanent (« option 3 »), qui consistait « *en la fourniture de transport de données à haut débit entre l'abonné et un point de présence de l'opérateur, un circuit virtuel étant dédié à chaque raccordement à haut débit* ». Durant l'automne 1999, un opérateur tiers, 9 Télécom, a demandé à France Télécom d'avoir accès au circuit virtuel permanent pour pouvoir proposer des offres concurrentes à celles de l'opérateur historique. Ce dernier n'a pas répondu à la demande précise faite par 9 Télécom, sans apporter aucune justification technique ou financière à ce refus. Pour cette raison, 9 Télécom a saisi le Conseil de la concurrence.

Considérant que l'attitude dilatoire de France Télécom était susceptible d'empêcher le développement de la concurrence sur les services, le Conseil a enjoint à France Télécom, dans la décision de mesures conservatoires 00-MC-01 du 18 février 2000, « *de proposer aux opérateurs tiers, dans un délai maximum de huit semaines à compter de la notification de la présente décision, une offre technique et commerciale d'accès au circuit virtuel permanent pour la fourniture d'accès à Internet à haut débit par la technologie ADSL ou toute autre solution technique et économique équivalente permettant aux opérateurs tiers l'exercice d'une concurrence effective, tant par les prix que par la nature des prestations offertes* ».

Le Conseil a néanmoins constaté, dans sa décision 04-D-18 du 13 mai 2004, qu'un ciseau tarifaire entre la prestation intermédiaire proposée aux opérateurs tiers (« option 3 ») et les offres de détail de l'opérateur historique aux fournisseurs d'accès à Internet (« option 5 ») avait perduré jusqu'en septembre 2002. En conséquence, il a infligé à France Télécom une sanction financière de 20 millions d'euros pour le non respect de l'injonction prononcée en 2000. Il est notable que la cour d'appel de Paris ait multiplié par deux le montant de la sanction, la portant ainsi à 40 millions d'euros. Dans sa décision au fond[45], le Conseil a rappelé l'historique de l'affaire : « *Ainsi, en dépit du contrôle des équilibres concurrentiels sur le marché de gros de l'accès haut débit ADSL, exercé par l'Autorité de régulation sectorielle, les instruments réglementaires mis à la disposition de cette Autorité ne lui ont pas permis de mettre fin aux conditions*

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43 Voir notamment l'avis du Conseil 04-A-17 daté du 14 octobre 2004, relatif à une demande d'avis présentée par l'Autorité de régulation des télécommunications.

44 Avis n° 99-582 de l'Autorité de régulation des télécommunications en date du 7 juillet 1999.

45 Décision 05-D-59 du 7 novembre 2005.

restrictives injustifiées imposées par France Télécom à Neuf Télécom, et aux autres opérateurs. De même, l'injonction adressée par le Conseil dans sa décision de mesures conservatoires 00-MC-01 n'a pu mettre fin à la pratique du fait du non respect de cette injonction par France Télécom, non respect sanctionné par le Conseil dans sa décision 04-D-18, puis sanctionné plus sévèrement par la cour d'appel de Paris dans son arrêt du 11 janvier 2005. » Au total, France Télécom s'est vu infliger une amende globale de 120 millions d'euros pour avoir retardé l'ouverture de ce secteur à la concurrence.

Plus récemment, le Conseil de la concurrence est intervenu dans le secteur de l'électricité à une étape clé du processus de libéralisation du secteur. La production d'électricité en France était ouverte à la concurrence depuis l'entrée en vigueur de la loi du 10 février 2000. La fourniture d'électricité aux clients finals a été ouverte à la concurrence au 1er juillet 2004 pour la clientèle professionnelle, au 1er juillet 2007 pour les clients résidentiels. La mesure conservatoire 07-MC-04 prononcée dans l'affaire *Direct Energie* date du 28 juin 2007.

Quelques mois avant l'échéance de 2007, la Commission de régulation de l'énergie avait souligné l'entrave au développement de la concurrence sur le marché de la fourniture de détail que constituait l'écart croissant entre les tarifs réglementés et les prix de marché. Le régulateur avait ainsi constaté, dans son rapport annuel de 2006, que « *les fournisseurs ne disposant pas de moyens de production de base aussi compétitifs que le nucléaire [étaient] victimes d'un effet de ciseau car les prix d'approvisionnement sur le marché [étaient] plus élevés que les tarifs réglementés dont le niveau n'évoluait pas.* » La CRE avait également publié le 16 mars 2006 une *« communication sur les VPP mis en œuvre par EDF et leur évolution vers un programme régulé de mise à disposition d'électricité sur le marché de gros* ». Selon la CRE, si les ressources de production des opérateurs alternatifs leur permettaient de couvrir leurs engagements actuels vis-à-vis de leurs clients, elles ne leur suffisaient pas à assurer la croissance attendue de leurs activités. Le régulateur s'était donc dit favorable, à défaut de mesure structurelle, à l'existence d'un programme de mise à disposition d'électricité pour accroître la liquidité du marché de gros pour les produits à terme. Dans ce cadre, la CRE préconisait de doubler les capacités mises à disposition par EDF, selon des modalités analogues aux VPP, afin d'accompagner l'ouverture du marché avant le 1er juillet 2007. La CRE recommandait également la création d'offres de produits pouvant aller jusqu'à 15 ans, simulant l'économie des centrales nucléaires.

L'intervention du Conseil en 2007 a permis d'aborder cette problématique. Saisi par un opérateur alternatif, le Conseil a considéré qu'EDF était susceptible d'avoir mis en œuvre une pratique de ciseau tarifaire entre les conditions d'approvisionnement en électricité de base proposées à cet opérateur et ses propres offres de détail sur le marché libre. L'action du Conseil était donc fondée sur le comportement adopté par l'opérateur historique sur le seul marché libre, la fourniture d'électricité par EDF aux tarifs réglementés ne revêtant pas un degré d'autonomie suffisant au sens du droit de la concurrence (cf. *supra,* section 2.4). Ainsi, dans la décision 07-MC-04 précitée, il a enjoint à EDF de transmettre « *une proposition de fourniture d'électricité en gros ou toute autre solution techniquement et économiquement équivalente permettant aux fournisseurs alternatifs de concurrencer effectivement, sans subir de ciseau tarifaire, les offres de détail faites par EDF aux consommateurs d'électricité sur le marché libre.* » Pour se conformer à cette injonction, EDF a présenté des engagements consistant en la mise à disposition de contrats d'approvisionnement en électricité de base portant sur un volume total de 1500 MW de puissance et proposés pour une durée maximale de quinze ans. Une première version de ces engagements a été rendue publique et discutée avec l'ensemble des acteurs de marché, ce qui a permis des améliorations sensibles sur plusieurs points. Le dispositif permettait de dénouer l'effet de ciseau pour la première année et d'offrir aux nouveaux entrants une visibilité de long terme pour leur approvisionnement en électricité de base. Les modalités précises des contrats ont été conçues pour donner aux entrants de fortes incitations à conquérir des parts de marché et animer la concurrence sur le marché aval de la fourniture d'électricité sur le marché libre. Le Conseil a donc pu, par sa décision 07-D-43 du 10 décembre 2007, accepter les engagements révisés, faisant usage de la procédure prévue à l'article L. 464-2 du code de commerce. Ainsi,

l'intervention du Conseil, notamment la mise en œuvre de la procédure d'engagement a permis de remédier rapidement au ciseau tarifaire qui avait été identifié et de créer « *un nouveau mode d'approvisionnement, spécifiquement dédié aux fournitures au détail par les opérateurs alternatifs sur le marché des consommateurs petits professionnels et résidentiels ayant exercé leur éligibilité*. »

Les affaires citées dans cette étude montrent que les autorités de concurrence participent à la régulation concurrentielle des marchés même lorsqu'un régulateur spécialisé est présent par ailleurs et illustrent la complémentarité entre les deux types d'intervention en France et en Europe. Cette approche est en net contraste avec la situation qui prévaut aux Etats-Unis.

Dans son arrêt *Trinko* du 13 janvier 2004, la Cour suprême américaine a opéré une distinction entre les deux types d'intervention. Elle a considéré que la présence d'un régulateur sectoriel imposant l'accès à la prestation intermédiaire rend superflue, voire inopportune, l'utilisation du droit de la concurrence pour forcer l'accès : "*Respondent believes that the existence of sharing duties under the 1996 [Telecommunication] Act supports its case. We think the opposite. The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access*". La Cour suprême a distingué l'approche finaliste de la régulation sectorielle (éliminer les monopoles) et l'objectif plus modeste du droit de la concurrence (dissuader les tentatives illicites de monopolisation) et a considéré que ces deux objectifs devaient rester distincts. Dans son arrêt *Linkline* du 25 février 2009, elle a fait application de la jurisprudence *Trinko* pour conclure qu'une pratique de ciseau tarifaire ne peut pas constituer une infraction autonome au regard de la section 2 du Sherman Act, indépendamment d'un refus de vente ou d'une stratégie prédatrice[46].

Cette opposition doctrinale à propos du ciseau tarifaire entre l'Europe et les Etats-Unis s'explique sans doute, au moins en partie, par des contextes économiques et institutionnels différents. Sur le plan économique, la problématique de la libéralisation des secteurs anciennement monopolistiques se pose avec moins d'acuité aux Etats-Unis qu'en Europe. Sur le plan institutionnel, les affaires de concurrence sont jugées par des tribunaux non spécialisés, disposant d'une expertise limitée en comparaison des autorités européennes de concurrence. La Cour suprême américaine considère ainsi que les tribunaux sont mal équipés aux Etats-Unis pour traiter de ces questions : "*Courts are ill suited to act as central planners, identifying the proper price, quantity, and other terms of dealing.*"

5. Conclusion

Les tests de ciseau tarifaire sont l'un des outils méthodologiques utilisés pour réguler la concurrence lorsqu'un opérateur verticalement intégré contrôle l'accès à une prestation intermédiaire nécessaire aux concurrents pour construire des offres compétitives sur des marchés situés en aval. Un opérateur intégré met en œuvre un ciseau tarifaire quand la structure de ses prix empêche une entreprise « aussi efficace » d'entrer et de se développer en aval. L'espace économique que doit laisser l'opérateur intégré doit être assez large pour permettre aux concurrents de prendre pied sur les marchés, mais assez faible pour les inciter à procéder aux investissements nécessaires.

L'examen des pratiques de ciseau au regard du droit de la concurrence reflète ces préoccupations. Un effet de ciseau n'est considéré comme abusif que lorsque le pouvoir de marché de l'opérateur intégré en amont est fort et lorsqu'il est établi que la prestation intermédiaire est objectivement nécessaire à l'exercice de la concurrence en aval. Il faut encore que l'opérateur intégré soit suffisamment autonome vis-à-vis des lois en vigueur et que ses branches amont et aval prennent leurs décisions tarifaires de manière coordonnée. Lorsque toutes ces conditions sont satisfaites, l'effet potentiel d'éviction du ciseau tarifaire est

[46] Dans les deux affaires, un régulateur sectoriel (la *Federal Communications Commission*) contraignait l'opérateur intégré à fournir la prestation intermédiaire.

présumé et la pratique est anticoncurrentielle, sauf si son auteur peut démontrer qu'elle est objectivement justifiée, par exemple parce qu'elle permet des gains d'efficacité dont une partie suffisante serait transmise aux consommateurs.

En pratique, les autorités de concurrence ont principalement recouru à cette notion dans le contexte de la libéralisation de secteurs régulés. La dialectique entre ouverture progressive à la concurrence et incitations à l'investissement est au cœur de ce processus. L'application des tests de ciseau et leur examen au regard du droit de la concurrence s'accompagnent donc nécessairement d'une attention portée aux circonstances concrètes de marché et d'une appréciation générale de la dynamique de la concurrence et des investissements dans le secteur concerné. Dans ce domaine, l'expérience française récente a mis en évidence les synergies possibles entre l'action des régulateurs sectoriels et l'intervention des autorités de concurrence.

GERMANY

1. Introduction

For some time, margin squeeze cases have not figured prominently in the enforcement practice of the Bundeskartellamt. Until a few years ago, they rarely entered the enforcement agenda.[1] Recently, though, they have gained increased prominence. Not only did the German legislator in 2007 introduce statutory provisions that – provided that small and medium-sized companies are affected – explicitly deal with margin squeeze scenarios (Section 20 (4) clause 2 number 3 of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, hereinafter: ARC)). In August 2009 the Bundeskartellamt also issued a comprehensive decision (B7 – 11/09 – *Deutsche Telekom/Mehrwertdienste*) that contributed to the clarification of the prerequisites applied to margin squeeze cases.[2] The following submission seeks to contribute to the discussion by providing an overview of the evaluation of margin squeeze cases in Germany. It will, however, not cover sector-specific provisions enforced by regulatory agencies (e.g., Section 28 paragraph 2 number 2 *Telekommunikationsgesetz;* hereinafter: TCA)[3].

2. Statutory provisions

In Germany, abusive practices by dominant undertakings – including margin squeeze scenarios – generally fall under Sections 19, 20 and 21 ARC. Section 19 ARC is similar to Article 82 of the Treaty Establishing the European Community (hereinafter: EC) and constitutes a general prohibition of abuse of market power by dominant companies as a blanket clause. Section 19 (4) ARC – as Article 82 sentence 2 EC – sets out four non-exhaustive examples of anticompetitive behavior. These include impairing the ability to compete, demanding unfavorable or discriminating business terms and the refusal to provide network or infrastructure facility access.

While section 19 ARC addresses only dominant undertakings, Sections 20 and 21 ARC – under certain circumstances – also apply to abusive practices by non-dominant firms.[4] Section 20 ARC provides that an undertaking with "superior market power" (*überlegene Marktmacht*) in relation to other undertakings must not unfairly abuse its position or hinder another undertaking without an objective justification. Section 21 ARC contains a special provision against requests to refuse to supply (so-called boycotts) which applies irrespective of a market power test.

German competition law does not contain general statutory provisions that explicitly address margin squeeze practices. Consequently, these scenarios are principally dealt with under the general provisions on

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1 For an important margin squeeze case see BKartA WuW/E DE-V 289 – *Freie Tankstellen* (2000); OLG Düsseldorf WuW/E DE-R 589 – *Freie Tankstellen* and OLG Düsseldorf WuW DE-R 829 – *Freie Tankstellen*.

2 Decision available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Missbrauchsaufsicht/B7-11-09.pdf?navid=40; in German only; English case summary available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B07-011-09-engl.pdf?navid=31).

3 Regarding Section 28 paragraph 2 number 2 TCA see, for example, *Bundesnetzagentur (Federal Network Agency)*, Hinweise zu Preis-Kosten-Scheren i.S.d. § 28 Abs. 2 Nr. 2 TKG vom 14.11.2007 (available at http://www.bundesnetzagentur.de/media/archive/11895.pdf; in German only).

4 According to Article 3 (2) sentence 2 of Regulation 1/2003, the Member States are not precluded from adopting or applying stricter national laws than the relevant European laws.

abusive practices. However, as has already been pointed out, specific provisions exist, as far as small and medium-sized enterprises are affected (Section 20 (4) sentence 2 number 3 ARC). Against this background, the following contribution begins with an overview of the specific provisions that explicitly address margin squeeze practices (2.1). It will then go on to explain the application of the general provisions in margin squeeze cases (2.2).

2.1 Specific provisions

In December 2007, amendments to the ARC concerning abusive practices entered into force.[5] These mainly introduced specific provisions for the energy and food sectors, but one of them – the newly introduced Section 20 (4) clause 2 number 3 ARC – explicitly deals with margin squeeze practices.[6] The new Section reads as follows:[7]

> *(4) Undertakings with superior market power in relation to small and medium-sized competitors shall not use their market position directly or indirectly to hinder such competitors in an unfair manner. An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking […]*
>
> *3. demands from small or medium-sized undertakings with which it competes on the downstream market in the distribution of goods or commercial services a price for the delivery of such goods and services which is higher than the price it itself offers on such market,*
>
> *unless there is, in each case, an objective justification for this.*

The introduction of this new Section goes back to the competitive situation on the German markets for gasoline stations:[8] The wholesale price that gasoline companies charged to independent gas stations (so-called "*freie Tankstellen"*) was sometimes higher than the retail price they charged to end consumers. The Bundeskartellamt had tried to prosecute the allegedly unlawful conduct based on the existing general statutory provisions,[9] but it had proven quite difficult to demonstrate that the relevant prerequisites were met[10]. Against this background, an important reason for the introduction of the new provision was that it extended the presumption contained in Section 20 (4) clause 2 ARC (cf. quote above: "An unfair hindrance

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5 These provisions were introduced by the "Gesetz zur Bekämpfung von Preismissbrauch im Bereich der Energieversorgung und des Lebensmittelhandels" (*Act on the Prevention of Price Abuse in the Areas of Energy Supply and Food Trade*). Regarding this act, see, for example *Ritter*, Regierungsentwurf zum Gesetz zur Bekämpfung von Preismissbrauch im Bereich der Energieversorgung und des Lebensmittelhandels, in: WuW 2008, page 142.

6 Regarding the new section 20 (4) clause 2 number 3 ARC see, for example *Westermann*, in: Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht (Kartellrecht), München, 2008, Bd. 2, § 20, para 166ff. and *Loewenheim*, in: Loewenheim/Meessen/Riesenkampff, Kartellrecht, München, 2009, § 20, para. 157ff.

7 Please note that the amendments will only remain in force until December 31, 2012; after which date the original versions will be reinstated.

8 See *Ritter* (footnote 5), page 143/144.

9 See BKartA WuW/W DE-V 289 - *Freie Tankstellen* (2000).

10 As a consequence of these difficulties, the above mentioned decision (see footnote 9) was not upheld in court (see OLG Düsseldorf WuW/E DE-R 589 – *Freie Tankstellen* and OLG Düsseldorf WuW/E DE-R 829 – *Freie Tankstellen*).

[…] exists […]") to margin squeeze cases.[11] Consequently, any margin squeeze that falls under Section 20 (4) clause 2 number 3 ARC is now presumed (*Vermutungsregel*) to be an unfair hindrance of competition.

As far as the definition of the relevant behavior is concerned, Section 20 (4) clause 2 number 3 ARC requires a *formal* comparison of the prices charged by the undertaking with superior market power on the upstream market (i.e. wholesale prices charged to small and medium-sized companies with which it competes on the downstream market) and the prices charged on the downstream market (i.e. retail prices charged to individual customers); cost considerations are not taken into account. The prices on the upstream (wholesale) market must not be higher than the prices on the downstream (retail) market.

The elements that have to be established in order to find a margin squeeze scenario anticompetitive under Section 20 (4) clause 2 number 3 ARC include:

- Superior market power;
- unfair hindrance (presumed if a margin squeeze as defined by section 20 (4) clause 2 number 3 ARC is recognized); and
- absence of an objective justification.

The first prerequisite that needs to be fulfilled in order for Section 20 (4) clause 2 number 3 ARC to be applicable is that the relevant undertaking possesses superior market power in relation to its small and medium-sized competitors on the downstream market.[12] As far as the definition of superior market power is concerned, the criteria laid down in Section 19 (2) number 2 ARC can generally be applied. Consequently, factors like financial power, access to supplies and markets, links with other undertakings, legal and factual market entry barriers as well as market shares may be taken into account. Regarding the definition of small and medium-sized enterprises, these terms have to be defined in relation to the size of the undertaking with superior market power. The Bundeskartellamt has emphasized in its Notice no. 124/2003 that companies with a turnover of less than EUR 50 million may – in relation to companies with a turnover of more than EUR 500 million – be considered small and medium-sized.[13]

As has already been shown, another prerequisite that needs to be fulfilled is the absence of an objective justification. This prerequisite requires a comprehensive weighing up of interests and is the central element in the assessment of all abusive practices.[14] As part of the weighing-up process, the competitive interests of small and medium-sized companies have to be weighed up against the interests of the undertakings with superior market power. In this process, the aim that competition between undertakings should – as much as possible – be free of limitations, has to be taken into due consideration at

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11 See „Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Technologie" (*Recommendation and Report of the Parliament's Committe on Economics and Technology*), BT-Drucks. 16/7156, page 10/11.

12 Regarding this prerequisite see, for example *Loewenheim* (footnote 6), § 20, para. 131ff. and the "Bekanntmachung Nr. 124/2003 des Bundeskartellamtes zur Anwendung des § 20 Abs. 4 Satz 2 GWB" (*Notice on the application of § 20 section 4 sentence 2 ARC*) (hereinafter: Notice no. 124/2003; available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/Bekanntmachung_Einstandspreis.pdf; in German only), page 3.

13 See Notice no. 124/2003 (footnote 12), page 3.

14 See, e.g., OECD Roundtable on Refusal to Deal – Note by Germany, Doc. no. DAF/COMP/WD(2007)91, para. 9ff.

all times.[15] As a consequence thereof, the freedom of market participants to set their market prices as they deem appropriate (*Preisbildungsfreiheit*) has to be recognized with particular and distinct gravity.[16]

Aspects that also play an important role in the weighing-up process include, for example, the degree of superior market power on the downstream market, the degree of unfair hindrance, and whether there has previously been a supply relationship between the relevant parties. Particular interests that might be considered on behalf of the undertaking with superior market power include, for example, significant price reductions by competitors or market entry strategies. In this context, it may play a role whether or not the undertaking with superior market power (also) dominates the upstream (wholesale) market.[17] Because if it did not dominate this market, it would also generally not be under a duty to deal with its competitors. This, in turn, could influence the justification to the benefit of the undertaking with superior market power. Furthermore, intent may also play a role in the weighing-up process, as a justification will usually not be recognized if the margin squeeze is used to deliberately squeeze competitors out of the market (*Verdrängungsabsicht*).[18] The burden of proof regarding the existence of a justification rests with the undertakings with superior market power.[19]

2.2 General provisions

Margin squeeze cases that do not fall under the specific statutory provisions of Section 20 (4) clause 2 number 3 ARC can – as mentioned above – principally be dealt with under the general provisions of Sections 19, 20 ARC. The Bundeskartellamt has in the past recognized margin squeeze practices as a separate, stand-alone form of abuse (*eigener Behinderungstatbestand*).[20] These practices are to be distinguished from refusal to deal at the wholesale level as well as from predatory pricing at the retail level, both of which also constitute separate, stand-alone forms of abuse under Sections 19, 20 ARC. In contrast to refusal to deal proceedings, which (may) focus on excessive pricing at wholesale level (so-called constructive refusal to deal), and predatory pricing proceedings, which focus on abusive pricing at retail level, margin squeeze proceedings focus on the relation between the prices on the wholesale and the retail level.

Concerning the definition of the relevant behavior, the Bundeskartellamt has defined margin squeeze as a situation in which the difference between the price charged by a vertically integrated dominant undertaking on the downstream market (i.e. the retail price for consumers) and the price charged on the upstream market (i.e. the wholesale price for competitors) is either negative or not sufficient for the dominant undertaking (or an 'as efficient competitor') to cover its product-specific costs for providing its own retail services on the downstream market.[21] This definition was influenced by the practice of both the European Commission and the European Court of First Instance.[22]

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15 See Notice no. 124/2003 (footnote 12), page 7 and *Loewenheim* (footnote 6), § 20, para. 160.

16 See, for example OLG Düsseldorf WuW/E DE-R 2235 (2240) – *Baumarkt* (2008) and *Henk-Merten*, Die Kosten-Preis-Schere im Kartellrecht, 2004, page 141ff.

17 See, for example, *Bechtold*, Kommentar zum Kartellgesetz, München 2008, § 20, para. 84h; *Westermann* (footnote 6), § 20, para. 167.

18 See Notice no. 124/2003 (footnote 12), page 7.

19 See Notice no. 124/2003 (footnote 12), page 6; *Loewenheim* (footnote 6), § 20, para. 160.

20 See, e.g., BKartA decision B7-11/09 – *Deutsche Telekom/Mehrwertdienste* (footnote 2), para. 49.

21 See BKartA decision B7-11/09 – *Deutsche Telekom/Mehrwertdienste* (footnote 2), para. 49.

22 See BKartA decision B7–11/09 – *Deutsche Telekom/Mehrwertdienste* (footnote 2), para. 49, footnote 8, in which the Bundeskartellamt cites, for example, the Commission Decision of 04.07.2007 Case

The elements that have to be established in order to find a margin squeeze scenario anticompetitive under Sections 19, 20 ARC include:

- Market dominance;
- unfair hindrance; and
- absence of an objective justification.

As a first step, the application of Sections 19, 20 ARC to margin squeeze scenarios requires that the relevant undertaking is dominant on a given market. Recently, the Bundeskartellamt found that it was necessary and sufficient that the relevant undertaking was dominant only on the *upstream* (wholesale) market.[23] Consequently, dominance on the downstream (retail) market is generally not required. Regarding the determination of market dominance and superior market power, the general criteria laid down in Sections 19 (2), (3) ARC and 20 (2) ARC apply.

Hindrance in the sense of Sections 19, 20 ARC is a behavior which has objectively negative effects on the affected firm. However, such a behavior is not abusive solely because of its negative effects. Rather, it has to be determined whether or not the behavior constitutes objectively justified competition on the merits.[24] Similarly, under Article 82 EC an abuse is generally defined as a behavior which, through recourse to methods different from those which condition competition on the merits, has the effect of hindering the maintenance of the degree of existing competition.[25]

For margin squeeze scenarios, the Bundeskartellamt has recently found that a *negative difference* between the prices a dominant undertaking charges on the downstream market (i.e. retail prices for consumers) and the prices it charges on the upstream market (i.e. wholesale prices for companies with which it competes on the downstream market) will generally be taken as an indication of an unfair hindrance in the sense of Sections 19, 20 ARC.[26] Furthermore, it has emphasized that the hindrance effect (*Behinderungswirkung*) was "evident" in these cases.

In contrast, if there is a *positive difference* between the retail price and the wholesale price, the existence of an unfair hindrance in the sense of Sections 19, 20 ARC cannot be recognized without due evaluation.[27] In these cases, it has to be shown that the difference between the retail price and the wholesale price is not sufficient for the dominant undertaking (or an 'as efficient' competitor) to cover its product-specific costs on the downstream market.[28] As a relevant measure of cost, the Bundeskartellamt

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Comp/38.754 – *Wanadoo Espana vs. Telefonica*, para. 278ff. and the Decision of the Court of First Instance of 10.04.2008 Case T-271/03 – *Deutsche Telekom/Kommission*.

23 See BKartA decision B7-11/09 – *Deutsche Telekom/Mehrwertdienste* (footnote 2), para. 51.

24 See BGH WuW/E BGH 1829 (1835ff.) – *VW Ersatzteile II* (1981) and OECD Roundtable on Refusals to Deal – Note by Germany (footnote 14), para. 5.

25 EuGH Slg. 1979 I, 461 – *Hoffmann-LaRoche*, para. 38 and OECD Roundtable on Refusals to Deal – Note by Germany (footnote 14), para. 5.

26 BKartA decision B7-11/09 – *Deutsche Telekom/Mehrwertdienste* (footnote 2), para 53.

27 BKartA decision B7-11/09 – *Deutsche Telekom/Mehrwertdienste* (footnote 2), para 53, 64ff.

28 BKartA decision B7-11/09 – *Deutsche Telekom/Mehrwertdienste* (footnote 2), para. 64.

has – at least for the telecommunications sector – in a recent case used the long run average incremental costs (*langfristige durchschnittliche Zusatzkosten*).[29]

As far as the objective justification of margin squeeze practices is concerned, the criteria described above within the context of Section 20 (4) clause 2 number 3 also apply to Sections 19, 20 ARC. Consequently, a comprehensive weighing up of interests is required. In this process, criteria like the price setting freedom and the market power of the dominant undertaking are taken into account.[30] Furthermore, it may play a role whether the dominant undertaking is dominant not only on the upstream, but also on the downstream market.[31] Furthermore, intent may be of relevance. The Bundeskartellamt will usually not recognize a justification, if the dominant undertaking's price-setting strategy is used to deliberately squeeze competitors out of the market. Should a price setting strategy be pursued in such a way that the wholesale price is *higher* than the dominant firm's own retail price, the Bundeskartellamt will generally take this as an indication of intent and will consequently, as a rule, not recognize a justification.[32]

3. Conclusion

In Germany, margin squeeze practices are covered both by specific and by general statutory provisions. The specific statutory provisions – that were introduced in 2007 into Section 20 (4) sentence 2 number 3 ARC – apply only insofar as small and medium-sized undertakings are affected. Margin squeeze cases that do not fall under these provisions can principally be dealt with under the general provisions of Sections 19, 20 ARC. The Bundeskartellamt recognizes margin squeeze practices as a separate, stand-alone form of abuse that is to be distinguished in particular from refusal to deal at the wholesale level as well as from predatory pricing at the retail level. The relevant prerequisites were influenced by the Bundeskartellamt's enforcement practice, in particular by a recent decision concerning the telecommunications sector.

29 BKartA decision B7-11/09 – *Deutsche Telekom/Mehrwertdienste* (footnote 2), para. 65.

30 BKartA decision B7-11/09 – *Deutsche Telekom/Mehrwertdienste* (footnote 2), para. 52.

31 BKartA decision B7-11/09 – *Deutsche Telekom/Mehrwertdienste* (footnote 2), para. 52.

32 BKartA decision B7-11/09 – *Deutsche Telekom/Mehrwertdienste* (footnote 2), para 52/53.

HUNGARY

1. Introduction

This contribution discusses the Hungarian experience on margin squeeze. It does not follow the structure of the questionnaire to this roundtable, although all issues that were raised by the questionnaire are addressed if the experience of the Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) allows it. After the introductory part it deals with law enforcement, then with regulation, finally it concludes in a summary.

European case law of margin (or price[1]) squeeze obviously determines the GVH's thinking on margin squeeze (even in cases investigated solely under the Hungarian Competition Act), since Hungary is a member state of the EU (from May 2004). According to the European approach, margin squeeze occurs when a vertically integrated firm hinders competition in the downstream market through the spread between upstream and downstream tariffs for comparable services. As to the conditions of margin squeeze, the firm concerned should operate in both of the upstream and downstream markets, and be dominant in the former by controlling a facility or service which is necessary for the production of the end-product (thus for the downstream rivals) and representing a substantial part of production costs. It is not necessary to establish dominant position in the downstream market, but the competition in this market should be limited as well. Last but not least the margin between the upstream and downstream prices should be insufficient for (as) efficient downstream firms to be/remain profitable, for a period long enough to be able to influence market conditions.

Regarding margin squeeze one should examine whether the downstream costs are covered or not by the spread between upstream and downstream prices. The test of margin squeeze consists of two steps: first one should calculate the difference of downstream (in most cases: retail) price and upstream (in most cases: wholesale) price (spread I). After this first step margin squeeze could be establish if spread I ≤ 0, otherwise one should go on and calculate spread II which is the difference of spread I and downstream (retail) cost. After this second step in case of margin squeezing spread II is below zero or it is too low to ensure profitability of the efficient firms' downstream activity (to cover cost of capital).

To establish the breach of the competition law the likely effects (harm) also should be showed. The margin squeeze enables the vertically integrated firm to transfer its upstream dominance on to the otherwise (to a degree) competitive downstream (product- or service-) market, and later to abuse this position to the detriment of consumers (by higher than the competitive downstream prices).

According to the current competition law practice and telecom regulation the margin squeeze is a separate form of abuse in Hungary. The GVH in some cases has used the definition of margin squeeze though the Competition Act itself does not define this behaviour explicitly, the telecom regulation do describe this conduct explicitly but regulatory authority has not applied these rules to date.

[1] As a matter of terminology the GVH considers 'margin squeeze' and 'price squeeze' as convertible terms.

2. Competition law enforcement

Although there is no special rule of margin squeeze in the Hungarian Competition Act[2] (neither in Article 82 of the EC Treaty), the GVH defined the notion of margin squeeze in its decisions treating this behaviour under certain general sub-sections of Article 21.[3] This to some extent shows that the GVH in a sense distinguishes margin squeeze (and its standards) from excessive pricing, refusal to deal, and predation, which all are covered by distinct and explicit sub-sections.[4]

The Hungarian Competition Act – dealing with *predatory pricing* – prohibits setting too low prices which are likely to drive out competitors from the relevant market or to hinder their market entry, if those prices are not based on superior efficiency.

Applying this provision the GVH uses a "but for" logic. The Competition Council argued[5] that the economic rationality of prices resulting in permanent loss is "at least questionable", and usually there can be no other purpose but for predation (unless the dominant firm has clear justification such as the need to sell *perishable goods*). Thus, it is a necessary condition for a price to be predatory that it results in a loss to the firm.[6]

To determine whether the loss for this purpose is present the GVH uses a cost test. Following the practice of the European Commission the GVH applies the Akzo test.[7] In short, prices below average variable costs[8] are predatory, unless the firm proves legitimate business justification. Prices between average variable costs and average total costs are, in principle, not predatory, but they can be regarded as abusive, if further evidence suggests so. (Any other price is not predatory.)

In many cases it is an important issue, how indirect costs should be allocated to several activities and to what proportion they are variable costs. In this relation the Competition Act does not give any guidance, therefore the GVH tends to regard any or any reasonable allocation of indirect costs as acceptable.[9]

The GVH adds to the cost test that conceptually the possibility of the recoupment of losses in the post-predatory period is a necessary condition for prices between average variable costs and average total costs to be predatory.

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2 Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

3 Namely subsections i) and j) which prohibit to hinder, without justification, market entry in any other manner; and to create, without justification, disadvantageous market conditions for competitors).

4 Excessive pricing: 21. § a), refusal to deal 21. § c), predation 21. § h).

5 The Competition Council outlined the approach of GVH towards predatory pricing in its decision in the Vj-88/2007 case against T-Kábel.

6 Loss is not sufficient, however, since it may be a result of the parties being less efficient than their rivals, in which case, loss inducing prices do not lead to the exit of rivals.

7 See the Akzo Chemie BV v Commission (C-62/86.) decision, 3 July 1991 [1991 ECR p. I-3359, para. 71-72., 81., 114-115.].

8 The price applying firm's own costs are used in the calculations, reflecting the consideration that a lower-than-rivals' price resulting from the price applying firm's higher efficiency does not hurt competition, only competitors.

9 In Vj-88/2007 against T-Kábel, for instance, the CC accepted the cost allocation submitted by T-Kábel without comments.

The theory of harm of *margin squeeze* is more or less similar to that of predation. Margin squeeze however can happen without charging low (below-cost) downstream prices. One consequence is that competition law infringement can be found without proving that the company has suffered losses. Another consequence is that the potential harm would not necessarily be a subsequent increase in downstream price (compared to previous levels).

The rest of this section describes how the treatment of margin squeeze has evolved in GVH practice. This more or less can be translated into a sector by sector overview since the first margin squeeze issues emerged in funeral services, later were raised in telecommunications and most recently appeared in the railway sector.

2.1 Funeral Services

In the funeral services decisions of the GVH do not use the expression of margin squeeze, however the GVH investigated issues basically similar to margin squeeze.[10] In this sector cases of refusal to deal and excessive pricing appeared earlier and they were followed by (effectively) margin squeeze cases. The case types and their treatment by the GVH went through three stages of development. Each of them appeared during a more or less distinct time period and a development can be observed towards classic margin squeeze cases.

Before 1996 a number of refusal to deal and excessive pricing cases were investigated. In these cases the subsections of the Competition Act explicitly covering these types of abusive behaviour were applied. The firms concerned were vertically integrated funeral providers[11]. They either did not allow morticians (their downstream rivals) to provide funeral services in the graveyard or determined their upstream prices so that it would be disadvantageous for the downstream rivals. The latter was achieved by setting the prices excessively high, or using a fee structure that replicated price discrimination in favour of its own downstream activity, or determining unjust payment conditions. Three of the cases resulted in establishing infringement, two on the basis of refusal to deal and one on the basis of excessive pricing.

Between 1997 and 2000 the GVH had cases that were margin squeeze in an economic sense, but that were still treated under excessive pricing provisions of the Competition Act. In these cases the allegation was that the funeral provider set its upstream prices excessively high while the retail price remained at the preceding level. The GVH did not find abuse in any of these cases. In the majority of cases upstream prices proved to cover justified costs or they were raised by less then the inflation rate. It is worth to note that the decision in the last one of these cases was dropped in 2000 because the upstream prices were regulated by the municipality. The GVH explained in its decision that it has no authority to revise regulated prices.

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10 In Hungary graveyards and mortuaries are owned by municipalities or parishes, and usually operated by a single firm, which can be a private firm (typically a mortician) as well as a firm owned by the local municipality. The operator of the graveyard has exclusive rights to operate the mortuary and to conduct the final disposition of deceased human bodies (in our context these are the upstream activities) and – in case it is an integrated provider of funeral services – at the same time it competes with other morticians in the market of downstream funeral services (e.g. selling funeral goods, preparing the deceased bodies for the final disposition, arranging the funeral ceremony). Some of the downstream activities (e.g. the funeral ceremony) necessarily take place within the graveyard and/or the graveyard's mortuary, while the rest of the services are conducted in the facilities of the mortician (e.g. the preparation of the deceased bodies). In other words, graveyards are essential facilities of the former group of activities, and integrated providers may have an incentive to abuse their exclusive access rights to the essential facility, thus emerged the cases outlined here.

11 When talking about the funeral services industry we consequently use the term "funeral provider" to identify the integrated provider of upstream and downstream funeral services, and "mortician" for firms that provide only downstream funeral services.

Since then no margin squeeze case concerning regulated prices has been dealt with under excessive pricing provisions of the Competition Act.[12]

Between 2001 and 2004 the GVH initiated three cases of margin squeeze in the funeral industry. Although the term itself was not used, these cases were *de facto* margin squeeze cases in an economic sense and were also treated under the same subsections of the Hungarian Competition Act, which were invoked subsequently in the cases in the telecom industry between 2002 and 2004 in margin squeeze cases. In all three cases the GVH found infringement, and in two of them imposed a fine of considerable amount. In one of these cases the analysis of the pricing behaviour resembled very much the margin squeeze test in the later telecom cases. In this case the funeral provider priced its downstream services lower than the access to the mortuary (the price that downstream competitors had to pay for using the mortuary), that is, effectively spread I was shown to be negative. In both the other two cases some unregulated elements of the upstream price were found to be abusive (excessively high) and either the upstream or the downstream price was established to hinder market entry or create disadvantageous market conditions for competitors.

Since 2004 a few refusal to deal cases have been investigated, but no abuse has been found, since in all of these cases the integrated firm allowed access to the graveyard once the GVH investigation has started.

2.2 Telecommunications

Telecom margin squeeze cases illustrate the GVH's approach to margin squeeze best, since the decisions on them resulted in quite general conclusions on certain issues. The GVH's approach and tests used are basically in accord with that of the European Commission's Deutsche Telekom (2003/707/EC) case (even before Hungary joined the European Union in May 2004). Right after the first steps of market opening in the telecom sector (2002-2004), the GVH launched several cases concerning the telecom markets (broadband internet access (ADSL) and fixed line telephone services markets) in which the GVH introduced the concept of margin squeeze into the Hungarian case law. The GVH found abuse in only one of these cases.

Regarding margin squeeze proceedings concerning regulated sectors (such as telecoms), in order to evaluate the applicability of competition law, it is essential to analyse sector-related regulation from the point of view of whether and to what extent it gives a room to manoeuvre (freedom for action) for the incumbent to freely develop its market practice and make its pricing decisions. In certain cases, the competition authority may come to the conclusion that the restrictive market practice may be derived from regulation, as it restricted the freedom for action of the incumbent to an extent, which did not allow it to avoid margin squeeze within the framework of the regulation. For instance one of the interconnection margin squeeze cases was ceased because the GVH found that squeezing was caused by the regulation itself: both wholesale and retail prices were regulated, but retail prices by price caps, which ensured some elbow-room, thus competition law was applicable in theory. The GVH however found that the dominant firm exhausted almost all its possibilities within the price cap to increase prices, even if this was not sufficient to avoid squeezing.

The way in which the wholesale level of the ADSL service works (due to the single-point access), ensures little choice for the Internet service providers to make their pricing decisions, therefore the suspicion of margin squeeze arose in several occasions. That time the prices of ADSL services were not

[12] The background of the decision is that sector-specific regulation was updated in 2000, which turned municipalities into price regulators of the upstream activities. The effects that the update of the sector-specific regulation had on the treatment of margin squeeze cases is explained in somewhat more detail in chapter 3.

regulated, so the competition law was applicable. The GVH pursued two formal procedures against vertically integrated incumbent telecom operators in 2002 and 2003. The Matáv DSL case[13] was closed because the squeezing could not be proved. In the former Vivendi DSL case[14] the squeezing itself could be established, but the GVH taking into account the contestability of the market and the long-term effects of the conduct terminated the procedure, finding that the Vivendi (currently called 'Invitel') could not in the future be capable of raising and permanently maintaining its retail prices above the competitive price level (so the recoupment stage was unlikely).

In 2002 and 2003 the GVH had two *interconnection margin squeeze cases*: first,[15] related to the business (hereinafter: *Matáv business case*), second,[16] to the residential market (hereinafter: *Matáv residential case*) against the largest fixed line operator, Matáv (currently called 'Magyar Telekom', a subsidiary of the Deutsche Telekom, which owns 39 primary areas in Hungary out of the 54 and provides all retail and wholesale voice services, and mobile, Internet and cable TV services as well). The alleged infringement was – *inter alia* – that the interconnection fees were higher than some retail tariffs of fixed line telephone services.

As to the regulatory environment of this interconnection margin squeeze cases: the first stage of market opening (liberalization) took place from the end of 2001 (with a telecom regulation based on the "old regulatory framework" of the EU). Wholesale interconnection prices became regulated from July 2002 (from the regulatory approval of reference interconnection offer – RIO, and reference unbundling offer – RUO), actually there was a duty to deal, and from July 2002 the conditions and prices of this wholesale deal were also regulated. As it was mentioned the retail prices were under a price cap, which provided a certain amount of freedom for action, which is a prerequisite for the applicability of competition law.

In these cases excessive pricing was excluded because it was very difficult in the telecommunication sector to properly determine costs of individual services. Moreover, under national competition law the GVH had no legal possibility to examine RIO and RUO charges as they were approved by the Communications Authority and therefore had to be considered as cost based prices.

Predatory pricing also was rejected by the GVH. In the business segment, based on the testimony procured from rivals predation was not presumed. Moreover, *Matáv*'s operating revenues were too high to assume that its retail prices were below costs, and actually most of the revenues came from the residential market, so in spite of the delays in tariff rebalancing predatory pricing applied by *Matáv* was not probable. On the other hand, future recoupment of a presumed sacrificed profit was not likely, either.

Recoupment in the form of price increase was unlikely in the margin squeeze framework too, but the potential harmful effect of squeezing could also be that it would maintain higher prices and postpone entries (and at the same time the pressure to decrease prices). So the margin squeeze between wholesale and retail tariffs proved to be the only proper approach.

The GVH followed a market-oriented approach in its price-squeeze tests in these telecom margin squeeze cases (and also in the later railway case). This means that when facing with various retail and/or wholesale offers, or multi-component fee structures, it did not performed its analysis by types of services or by fee components, but it analysed the overall relationship between the services and/or fee components

13 Vj-124/2003.

14 Vj-101/2002.

15 Vj-100/2002.

16 Vj-73/2003.

belonging to - from a competition law perspective - the same downstream market and their counterparts on the upstream market.

At retail level the GVH defined the relevant market as the one for fixed line telephone services offered to business customers comprising access, local and national long distance call services and another one for fixed line telephone services offered to residential customers. Although the GVH admitted that theoretically the different call services and access services created distinct markets, it found that in practice there was no individual demand for these services, costumers took them together in one package.

The GVH first had to identify the wholesale contents of the retail packages' service components, in order to make prices of retail packages comparable with proper bundle of wholesale prices, doing so the GVH created a model in which wholesale (infrastructure-related) costs of the concerned services were built up from RIO and RUO price-elements. The call origination, call termination (and call transit) services (as the wholesale counterparts of retail calls), and LLU (local loop unbundling as the wholesale counterpart of retail access) were the relevant services at upstream (wholesale) level, which were taken into account in the calculation of the costs incurred by *Matáv* due to providing these retail packages.[17]

Other tariffs and fees[18] determined in the commercial contracts or in the RIO were omitted from the calculation because they do not occur if *Matáv* as a vertically integrated operator provides the retail services itself. So the GVH applied in its margin squeeze cases the so called 'as efficient competitor test'. According to the GVH in a margin squeeze test created for competition policy purposes the synergies and cost savings deriving from vertical integration must be taken into account (which is favourable for the incumbent). Regulation can apply more easily tests that reflect the intention to encourage the creation of, and establish the conditions for competition, as opposed to maintain the competitive status quo.

In the margin squeeze test the GVH first compared Matáv's monthly total income stemming from providing retail voice services to business or residential customers (including monthly rental and revenues of local and national long distance call services) to the estimated monthly wholesale costs of these services (including the monthly fee of local loop unbundling and the sum of the various interconnection services, i.e. origination and termination).[19] This difference was named as Spread I.

In Step 2 the GVH calculated the downstream costs of providing retail voice services, which included the costs of marketing, product, sales and active debts managements, billing and customer service. The retail cost data came from the firm's ABC (Activity-Based Costing) accounting system. The difference of Spread I. and these downstream costs resulted in the determination of Spread II.

The GVH in the Matáv residential case used the direct costs allocated to the downstream service submitted by Matáv.

Results of the tests in the interconnection margin squeeze cases (return on revenues):

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17 Matáv's dominant position could be established regarding call origination, call termination and local access services.

18 For example prices charged for collocation or for the interconnection link between the incumbent and the downstream rivals.

19 The notions total income and total cost mean that GVH did not compare the prices and costs of individual services or of an individual customer to each other but it calculated total revenues as the product of call charges and monthly call minutes plus the product of monthly rental and the number of subscribers, while total costs were calculated as the product of estimated wholesale costs of the different call types and monthly call minutes plus the product of monthly LLU fee and the number of subscribers.

SEGMENT	PERIOD	SPREAD I.	SPREAD II.
Business market	February – July 2002	Negative	not applicable
	July 2002 – April 2003	about 10%	not applicable
Residential market	2002	3-7%	less than 1%
	January – September 2003	less than 10%	5-10%

The margin squeeze test showed that revenues from the provision of the retail business packages and offers had not covered the wholesale, infrastructure-related costs occurring due to these services from February 2002 to July 2002. In this period the margin proved to be negative, but afterwards, following the approval of the cost-based RIO tariffs this margin turned slightly positive, for lack of information on product specific or retail costs (in connection with the business segment) the GVH could not assess whether this positive margin had been sufficient in the sense that it could have covered all *Matáv's* relevant costs and expenditures and profit expectations. This calculation however revealed that the former negative margins had been caused by the unduly high wholesale prices in the commercially negotiated contracts which problem was solved by the intervention of the Communications Authority, i.e. by the approval of the RIO and the cost-based prices therein.

In the Matáv business case in spite of the above-mentioned relatively short time period and the efficient intervention of the Communications Authority the GVH established that *Matáv* applied abusive margin squeeze from February to July 2002 and thus infringed competition law, because its behaviour was capable of excluding competitors or hindering them in entering the market (actual exit or harm was not proved).[20] By deciding so the GVH admitted that under its effects based approach, as a rule of thumb to find margin squeeze as an abusive behaviour under competition law it should be exercised over a longer period of time (or a perspective of that should be realistic). At the same time, the GVH held that right after liberalisation even a shorter time period could be crucial for the evolvement of the competition (and could contribute to maintain the positions of the incumbent), so in the market-opening context this strategy of *Matáv* had to be judged more severely.

In this case the GVH established the infringement, and imposed a fine (70 million HUF ≅ 265 thousand EUR), but did not apply any other remedy (since the changes in the regulation from July 2002 solved the problems).

As regards the *Matáv residential case* it was established without further or deeper investigation that in 2002 Spread II. was not sufficient to cover the cost of capital (profit) relating to these services and thus hindered new entry.[21] However, the GVH established no infringement because this situation was mainly caused by regulation (fixed wholesale charges and price caps for retail services). Though price cap regulation does not in itself preclude the applicability of competition law but in this particular case the freedom for action granted by the price cap was(had been) insufficient for the incumbent to put an end to this margin squeeze.

[20] The above mentioned Vivendi DSL case was terminated since the recoupment was not probable, in this interconnection case the GVH held that the consequence of margin squeeze is not necessarily the increase in retail prices, but the exclusion of competition may result in the hindrance of a latter price decrease (that would be forced by the pressure of rivals) as a potential harm.

[21] It is clearly understandable that if return on revenues is less than 1% it could no way come up to the company's profit expectations.

2.3 Railways

Due to the progress in the telecom regulation (detailed in the next section) margin squeeze cases (had) disappeared from the GVH's practice for a while, the phenomenon of margin squeezing re-emerged only in 2008 in connection with an other industry: the railway sector. The GVH pursued proceedings[22] against MÁV Hungarian State Railways and MÁV Cargo,[23] in which the upstream market was the commercial takeover of freight wagons in the Záhony area (in connection with the cross-border traffic at the border of Hungary and Ukraine), and the downstream market rail transport of bulk goods.

In this *railway margin squeeze case* the GVH explicitly tried to apply the avoidable cost concept. In this case the margin squeeze test was quite difficult, since there were no uniform and clear upstream and downstream prices, but lots of individual agreements. So the investigation tried to apply the efficient competitor test, analysed the conditions of these agreements and calculated the average variable cost (as a proper proxy for average avoidable costs[24]) for average tonnes-kilometres (EUR/tone). These cost were considered: Train with cargo – summa of railway infrastructure and traction charges on normal gauge; Train without cargo – summa of railway infrastructure and traction charges on normal gauge. Eventually it was found that the percentage of margin squeeze's occurrences was only approx. 8%, so the procedure was dropped in a relatively early stage.

3. Sector-specific regulation

The discussion of the Hungarian regulatory aspects follows the same sector by sector structure (which again corresponds to sequence in time). Only the telecom sector is discussed in more details, since solely the telecom regulation deals explicitly with the matter of margin squeeze.

Funeral services saw an updated regulation in 2000[25] that was initiated by the GVH and (partly) based on its recommendations. The recommendations of the GVH addressed issues that appeared in its practice during the early '90s, thus primarily related to cross-subsidisation and refusal to deal, and neither the GVH nor the regulation dealt with the issue of margin squeeze explicitly. The new regulation prescribes that integrated funeral providers must book upstream and downstream costs separately, and it includes rules about the range of services that may be provided exclusively by the integrated funeral provider. In relation to margin squeeze (and excessive pricing) the regulation obliges the municipalities to determine upstream prices and grants for them some freedom for action to extend the range of exclusive services that the Funeral Act grants to the funeral provider.

The regulation successfully eliminated refusal to deal cases (no serious case of this type has occurred since the regulation took effect). Regarding margin squeeze cases treated as upstream excessive pricing, after 2000 the possibilities of such a treatment are limited. On the one hand, the Funeral Act prescribes that the municipalities must lay down the prices of the exclusive upstream services in their regulations and the GVH acknowledges that it does not have authority to revise these regulated prices. On the other hand, the Funeral Act grants the municipalities freedom for action to legalize (quasi) any price level in the

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22 Vj-5/2008.

23 Rail freight transportation company, founded by MÁV Hungarian State Railways, acquired by Rail Cargo Austria – EC approved this merger December 2, 2008 - COMP/M.5096 - RCA/ MAV CARGO.

24 See COMMUNICATION FROM THE COMMISSION: Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 3 December 2008., page 11. "In most cases, AAC and the average variable cost (AVC) will be the same, as it is often only variable costs that can be avoided."

25 See Act XLIII of 1999 on Funeral Services (Funeral Act).

regulations and to determine (to some extent) which activities will be exclusive services and thus regulated. In the lack of price regulation skills at the municipalities, in some occasions municipal regulations became a root of margin squeeze behaviour by legalizing excessively high upstream prices or leaving some price elements unregulated. After the update of the regulation, when regulated upstream prices came under investigation the GVH treated margin squeeze under different regulations of the Competition Act. Subsequently, the same provisions were used that were invoked in the cases in the telecom industry between 2002 and 2004 in margin squeeze cases. However, in some post 2000 cases, in which it was possible to treat the particular upstream prices under excessive pricing regulations (because they are unregulated), also excessive pricing regulations were used parallel to margin squeeze regulations to set up infringement.

While the Funeral Act provoked a change in the *legal treatment* of margin squeeze cases in the industry, regarding the *analysis* of allegedly margin squeeze behaviours, it also made it easier for the GVH to analyse the prices of upstream and downstream funeral services.

In Hungary the *telecom regulation* covers the issue of margin squeeze. From 2004 the Hungarian telecom regulation,[26] on the contrary to the competition law, explicitly contains rules on margin squeeze: its definition, the related procedural and other rules etc., however the regulatory authority[27] has not applied these rules to date. This Telecom Act is based on the European telecom regulatory package of 2002 (hereinafter: NRF – new regulatory framework), which is based on competition law principles, but the Hungarian regulation is much more detailed and bearing some peculiarities (which fit in the framework of the NRF nevertheless).

The NRF contains only a few and quite general rules concerning margin squeeze, it merely defines margin squeeze (using the term: "price squeeze") as a potential harmful conduct of operators with significant market power (*"operators with significant market power should avoid a price squeeze whereby the difference between their retail prices and the interconnection prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition"*), and the scope of related regulatory interventions (*"a national regulatory authority […] may impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might […] apply a price squeeze, to the detriment of end-users"*).

As to the specialities of the Hungarian telecom regulation, the Electronic Communications Act explicitly regulates the relationship between the two authorities' proceedings, with regard to margin squeeze. Margin squeeze can be caused by the wholesale price or the retail price-setting, the former is dealt by the Communications Authority, the latter by the GVH.. The Communications Authority controls whether the wholesale prices are cost based or not. If though a margin squeeze exists, the price of the network (upstream) service is adjusted to the costs arising in connection to the provision of that network service, the Communications Authority (the regulator) refers the case, to the GVH that will establish whether or not the price setting for the output subscriber (downstream) service constitutes a violation of the Competition Act. According to Act, in order to safeguard competition and to promote the uniform application of legislation, the Communications Authority and the Competition Authority closely cooperate with one another concerning matters affecting competition on the electronic communications market, in particular *inter alia* in proceedings concerning the development of methodology relating to the examination of margin squeeze and the examination of margin squeeze (and the definition of relevant

[26] Act C of 2003 on Electronic Communications.

[27] National Communications Authority – the Hungarian telecom regulator.

markets of the electronic communications market, the analysis of competition on those markets, the identification of service providers with significant market power and the imposition of duties/obligations on them).

1The regulatory definition of margin squeeze is basically market-oriented (in line with the underlying competition law principles), but it also allows investigating margins in connection with individual service components. Pursuant to the rules related to margin-squeeze the Communications Authority can apply more easily an approach which is more strict towards incumbents and more permissive for competitors, compared to basic competition law enforcement.

As it was mentioned, the Communications Authority has not had to apply these rules in individual procedures, has not even developed the methodology relating to the examination of margin squeeze. In the era of this new regulation (since 2004) not any serious margin squeeze suspicion concerning telecom markets has come up, mainly due to other effective regulatory interventions (regulation of wholesale prices by retail minus method, or benchmarks, or cost-models), which could prevent margin squeeze situations.

As to *the railway sector* there is no regulation which would prevent the application of margin squeeze, or help to control that. Since the railway margin squeeze (detailed above) case highlighted some deficiencies of the sector-specific regulation, the GVH after the termination of this case informed the legislator and the regulator about the identified problems deriving from the situation that the cross-border traffic is controlled by a vertically integrated firm, which enjoys dominant position in the upstream market (the commercial takeover of freight wagons at the border of Hungary and Ukraine) thus it can hamper the downstream competition (in the market of the rail transport).

4. Summary

Dealing with margin squeeze has evolved over time in Hungary. First behaviours resembling margin squeeze emerged among “more traditional” forms of exclusionary practices, like refusal to deal or abusive upstream pricing behaviour, and were treated accordingly in funeral services. Then in the same sector, behaviours which today would be identified as margin squeeze were still dealt with under different labels and different provisions of the competition law, later the same sort of problems were still labelled differently but dealt under the provisions today referred to margin squeeze cases. The term of margin squeeze, and to regard it as a separate kind of infringement was imported from the EU. This approach and analytical framework appeared first in relation to integrated telecom firms in Hungary. The more recent developments are incorporating the concept of margin squeeze into sector-specific regulation which – ideally – would cause a decrease in number of this case type in competition law enforcement. This kind or regulation is present in telecommunications in Hungary.

The experience of the GVH suggests that it may have merit of the views in which margin squeeze could be regarded as an ultimately redundant concept and could be put into existing case boxes like price discrimination, (upstream) excessive pricing / constructive refusal to deal, or their combination. At the same time, as a practical matter, the pattern of margin squeeze is unique and beyond a certain number of cases it is useful to deal with it as a specific behaviour, because this implies more tailor made approach. It clearly makes easier to identify, understand and analyse certain restrictive practices, whatever they are labelled.

Not only the understanding of “more traditional” forms of exclusionary practices and of their borderlines influence whether, and how much margin squeeze is conceptually redundant, but also the other way around. In Hungary, for example the GVH has been limiting the concept of predation to cases where price is below cost – but it is possible that it would have been much more open towards not actually loss making forms of predation if the category of margin squeeze had not been available.

Developments in Hungary point towards the notion that margin squeeze can be dealt in principle by either competition law or regulation, and that regulation may be better placed to do it for two reasons. First, in the kind of analysis margin squeeze allegations price regulation skills can be beneficial. Second, regulation may be asymmetric more easily for the benefit of new entrants than competition law enforcement. It is clear from the Hungarian experience that appropriate upstream price regulation – whether or not explicit margin squeeze regulation is present – may prevent margin squeezing or certain forms of it.

ITALY

1. Introduction

Margin squeeze, defined as the practice where a vertically integrated company provides access to an indispensable input at prices that do not allow a competitor sufficient profits in the downstream market[1], does not constitute a stand alone hypothesis of violation of competition rules under the Italian competition law. In fact there are no statutory provisions dealing expressly with margin squeeze but this practice might fall within the general provision concerning abuse of dominant position[2].

The Italian jurisdiction does not provide for specific criteria for analyzing margin squeeze and since the practice is assessed on a case by case basis, the general criteria of analysis of abuses of dominant position apply. However, some conditions, specific to margin squeeze cases can be identified: there must be a dominant vertically integrated firm; the input the vertically integrated firm supplies to rivals must in some sense be "essential" for competition on the downstream market; if the dominant firm's upstream prices were charged to its downstream activities, they could not be profitable.

The Italian Competition Authority has investigated margin squeeze allegations in very few cases[3]. A reason might be that margin squeeze cases might also be treated, in some instances, as other forms of abuse, such as predatory pricing or price discrimination[4]. This submission is based on the 2004 case against Telecom Italia, where the Authority took the view that Telecom Italia, the incumbent telecom operator, had

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1 See Carlton (2008).

2 Article 3 of Law 287/90 (i.e. the general prohibition of abuse of dominance) states:

"The abuse by one or more undertakings of a dominant position within the domestic market or in a substantial part of it is prohibited. It is also prohibited:

a) directly or indirectly to impose unfair purchase or selling prices or other unfair contractual conditions;

b) to limit or restrict production, market outlets or market access, investment, technical development or technological progress;

c) to apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage;

d) to make 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".

Article 82 of the European Treaty, applicable by the Italian Competition Authority in abuse of dominant position cases, would also be applicable to margin squeeze cases.

3 See, besides the case discussed in this submission, also A280 *Tiscali-Albacom/Telecom Italia*, No. 8482, 13 July 2000, where the Italian Competition Authority fined Telecom Italia for a price squeeze against other fixed telecom operators and, more recently, A376 Aeroporti di Roma/Tariffe aeroportuali, n. 19020, 23 October 2008, in Bull. N. 40/2008 for a margin squeeze case of the airport manager against cargo handlers.

4 For example Geradin (2005) argues that the Telecom Italia case discussed in this submission should be viewed as a price discrimination case.

abused its dominant position in the market for fixed line telecom service through, among other practices, a price squeeze in the procurement for the provision of telecom services to the Public Administration.

2. Abusive practices by Telecom Italia[5]

In November 2004 the Italian Competition Authority concluded an investigation into abusive practices by Telecom Italia regarding the formulation of commercial offers for fixed network telecommunications services for business customers.

The Authority found that in the period 2001-2003, Telecom Italia had adopted an exclusionary strategy against its competitors aimed at maintaining and/or increasing its share of the market for network communication services for business customers. Telecom Italia implemented such exclusionary strategy by two types of conducts, both violating section 3 of the Competition Act (law n. 287/90):

- the use of contractual terms and conditions, such as exclusive clauses and clauses equivalent in terms of their effects to English clauses, which would ensure that a substantial part of the business customers would be bound to Telecom Italia, making it more difficult or impossible for competing telecommunications companies to offer fixed network telecommunications services, and to handle even a small part of the traffic of the customers in question; these clauses were therefore considered to be abusive not because they would discriminate between different end customers, but rather because of their exclusionary effect on competitors;

- the offering of financial and technical conditions to customers which the competitors could replicate only at a loss. In fact, the technical and financial conditions offered to the competitors were less favourable than those offered to its own commercial divisions for the same services. The purpose of this conduct was to hamper access by competitors to the end services market.

In particular, the second allegation concerned the provision of telecom services to the Public Administration through a procurement organized by Consip, an institution that organizes all the procurements for the purchases of the Italian Public Administration's bodies.

In 2003 Consip organized a procurement for the provision of a wide range of telecom services (voice, access and data) to the central and local bodies of the Public Administration. Telecom Italia won the tender with an economic offer that was way below that of Albacom, the other participant. The procurement concerned a wide set of services. The time horizon for the contracts stemming from the tender was of 30 months. These elements required that a participant to the tender should at least cover all the average or long run incremental costs of providing the services to the Public administration according to the procurement.

At the time of the procurement wholesale telecom services where regulated and part of the inputs that Telecom Italia's rivals required to offer the bundle of services had to be made available by Telecom Italia at charges set by the national telecommunications regulator[6].

The Authority concluded that Telecom Italia abused its dominant position by making a bid that could not be replicated by its competitors. This was not due to Telecom Italia's superior technology or efficiency, but because it had charged its internal divisions less than it did to its competitors for the relevant inputs.

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5 Italian Competition Authority, case A351 Comportamenti abusivi di Telecom Italia, decision n. 13752 published in Bulletin n. 47/2004.

6 For a discussion of the relationship between regulation and antitrust enforcement in margin squeeze cases see Heimler (2009).

The reason was that the price paid by rivals to Telecom Italia was regulated, whereas Telecom Italia's internal transfer price was not. Accordingly, the Authority used regulated charges as the benchmark to assess whether competitors could place equivalent bid. To the extent that regulated charges exceeded Telecom Italia's actual costs for the input in question, Telecom Italia's offer was not replicable by competitors. The incumbent operator should have applied the same cost base (in this case the long run incremental costs, rather than historical costs on which the regulatory accounting was based) not only to services provided to its own final customers, but also to wholesale services provided to competitors in order to avoid the price squeeze effect.

The Authority, when assessing whether the offer by Telecom Italia may be matched by the competitor, claimed, contrary to what Telecom advocated, that the test had to be conducted with regard to the single components of the offer and not to the bundle of services. The reason was that, after the Consip's procurement, only Public Administration's central bodies had to adhere to the contracts selected by Consip for all the services while local administrative bodies had the possibility to subscribe contracts for single services[7].

The Authority therefore concluded that pricing a specific service below cost would have foreclosed the competitors from subsequent local procurements and a service by service test was necessary to avoid exclusionary strategies in the secondary tenders using the corresponding bid as the base price in the new procurement[8]. However, also an aggregated imputation test was run.

The application of the test showed that Telecom Italia's offer was not replicable, both at the disaggregate and at the aggregate level. This implied, in the view of the Authority, that Telecom Italia had performed a price squeeze abuse with the effect of excluding as efficient competitors from an important provision and that this would have seriously limited the ability of new entrants to compete with the incumbent, with un ultimate detrimental effect to consumers.

The Competition Authority imposed on Telecom Italia a sanction of 152 million Euros, taking into account, among other things, the long duration of the infringement (3 years)[9]. The decision of the Authority was appealed and confirmed by the upper level Appeal.

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7 For an alternative view see Polo (2007).

8 The rules of the Consip tender required a bid to be submitted covering all the services and specifying the individual prices.

9 The abusive conduct of Telecom Italia did not concern only the margin squeeze in the Consip's procurement but a more general strategy towards competitors in the business customers' sector.

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JAPAN

1. Introduction

There are cases where an undertaking in the upstream market that supplies products that are necessary for carrying out business activities in the downstream market, operates in the downstream market at the same time. In this case, so-called "margin squeeze" is considered a conduct of a company setting the prices of its products supplied to the supply destination in the upstream market at a level higher than the prices of its products in the downstream market, or setting the prices of its products in the upstream market supplied to the supply destination and of its own products in the downstream market so closely that the undertakings of its supply destination are unable to compete by economically reasonable business activities.

This contribution paper mainly introduces the case of private monopolization by Nippon Telegraph and Telephone East Corporation (hereinafter referred to as "NTT East"), which could fall under the conduct of margin squeeze.

2. Outline of the private monopolization case by NTT East

The JFTC had investigated NTT East in accordance with the provisions of the Antimonopoly Act (hereinafter referred to as the "AMA") and issued a recommendation on December 4, 2003, as NTT East was in violation of the provisions of Article 3[1] of the AMA (Prohibition of private monopolization). Because NTT East did not accept the recommendation, the JFTC decided to commence hearing procedures against NTT East on January 15, 2004. The JFTC subsequently instructed the hearing examiners to go through the hearing procedures and issued a hearing decision on March 26, 2007, as described below.

However, NTT East filed suit to rescind the decision. Whether there was any substantial evidence and whether there was any relevancy of the requirement of private monopolization stipulated by Paragraph 5 of Article 2 of the AMA were disputed. The Tokyo High Court thereafter decided to dismiss the appeal on May 29, 2009.

2.1 Outline of the hearing decision (March 26, 2007)

2.1.1 Outline of the violation

NTT East started to provide FTTH service[2] for detached houses called "New Family Type" from June 1, 2002. For the new service, NTT East had received approval of the interconnection charge for the interconnection with optical fiber equipment to provide New Family Type service through the system under which a single optical fiber between a station of NTT East and a user's residence is split by branching devices so that multiple users can share it (hereinafter referred to as "branch system"), and also

[1] Article 3 of the AMA stipulates, "No entrepreneur shall effect private monopolization or unreasonable restraint of trade."

[2] "FTTH service" refers to a service that lays optical fibers from a telecom service provider's station to users' residences and that provides Internet connections that make high-speed, high-volume broadband communications possible.

notified the user fee for the service. But NTT East did not actually use the branch system and provided the service through the system under which a single optical fiber cable is occupied by only one user (hereinafter referred to as "direct cable connection system"). NTT East set the user fee for the service as 5,800 yen per month at first and 4,500 yen per month from April 1, 2003. However, both fees are lower than the interconnection charge that the other telecom service providers pay to NTT East to provide FTTH service by interconnections with optical fiber equipment of NTT East through the direct cable connection system.

NTT East afterwards ceased providing the New Family Type service to its subscribed users by the direct cable connection system from April 2004.

2.1.2 Outline of the main text of the hearing decision (Decision to declare a violation)

- As to the FTTH service by optical fiber equipment, the conduct, committed by NTT East from June 1, 2002, and described in 2.1.1 above, excluded the business activities of the telecom service providers that provided the FTTH service for detached houses through interconnecting with the optical fiber equipment of NTT East, thereby it was causing a substantial restraint of competition in the field of the FTTH service for detached houses in eastern Japan. Such an act falls under the private monopolization stipulated by Paragraph 5 of Article 2 of the AMA, is in violation of the provisions of Article 3 of the AMA, and is recognized as having already ceased.

- No special measure was ordered to NTT East in relation to the violation committed by NTT East described above.[3]

3. Background of this case in relation to margin squeeze

The hearing decision recognized the following facts in relation to margin squeeze.

3.1 Market structure

As far as there were only two companies other than NTT East that provide FTTH service for detached houses, NTT East had an extremely large market share in almost all areas of eastern Japan in terms of the volume of holdings of subscribers' optical fiber lines, which was indispensable for providing optical fiber telecommunications service. In addition, NTT East also had an overwhelmingly large market share in almost all areas of eastern Japan in terms of the number of subscribers' lines for detached houses.

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[3] While the recommendation issued on December 4, 2003, ordered the following measures, the hearing decision did not order any measures as the violation had already ceased.

(1) NTT East should cease and desist from conduct that interferes with the new entry of other telecom service providers that provide the FTTH service using interconnection with subscriber optical fibers of NTT East, into the field of the FTTH service for detached houses, by allowing each user to occupy a single optical fiber cable in providing the New Family Type service, although it sets the interconnection charge and the user fee by way of the branch system.

(2) NTT East should make fair and proper indications on the contents of the New Family Type service based on the actual facility set used for the said service towards general consumers.

(3) NTT East should notify the telecom service providers who provide the FTTH service using interconnection with subscriber optical fiber of NTT East and general consumers of the measures taken in accordance with (1) above, as well as its commitment to the effect that it will refrain from conduct similar to that described above in the future.

(4) NTT East should refrain from similar acts as mentioned in (1) above in the future.

3.2 Interconnection obligation and interconnection charge

- NTT East is obliged under the Telecommunications Business Act to accept requests from other telecom service providers for interconnection with the optical subscriber equipment (Category 1 Designated Telecommunications Facilities)[4] held by it. It shall set the interconnection contract, interconnection charges, etc. and have them approved by the Minister of Internal Affairs and Communications.

- Since other telecom service providers that intend to operate a telecommunications business using Category 1 designated telecommunications facilities set the user fee (fee payable by users) on the basis of the interconnection charge as the minimum necessary cost, the Ministry of Internal Affairs and Communications (hereinafter referred to as the "MIC") has given administrative guidance specifying that NTT East should not set its user fee below the interconnection charge (the contents of this administrative guidance are called the "Imputation Rule").

- It is provided for NTT East that it shall properly classify its assets, costs, and profits related to the telecommunications business into those of Category 1 Designated Facilities Management Division and those of Category 1 Designated Facilities Utilization Division, and that it shall deal with transactions between these divisions by transferring payments of the interconnection charge described in the interconnection contract.

3.3 Structure of fees and costs (Please refer to the attached sheet)

3.3.1 When providing service through the direct cable connection system

When a new telecom service provider provided the FTTH service using the equipment of the direct cable connection system, just as NTT East did, the interconnection charge payable to NTT East was 5,074 yen per optical subscriber line. In addition to this, the new telecom service provider needed to pay the charge for the media converter (MC) installed in the NTT East station and the interconnection charge for the local IP network at least.

Therefore, a new telecom service provider needed to pay NTT East the amount of 5,074 yen + 1,254 yen (charge for connection with the MC installed in the NTT East station) = 6,328 yen per user, as well as the charge for interconnection with the local IP network per port in the station.

However, as NTT East sets the user fee for New Family Type service at 5,800 yen, a new telecom service provider was forced to bear a large amount of deficit to set the user fee to be competitive with that of NTT East while paying the above interconnection charges to NTT East. Therefore, it was impossible for such a new telecom service provider to continue doing business while maintaining competitiveness with NTT East.

3.3.2 When providing service by the branch system

When considering the possibility of entry using the branch system, which was originally presumed for the service of the New Family Type, it was necessary for a new telecom service provider to acquire a sufficient number of users in order to gain a larger income than the interconnection charge of the branch

[4] Telecommunications facilities designated by the Minister of Internal Affairs and Communications as the equipment whose interconnection with telecommunications equipment of other telecom service providers is indispensable for the improved convenience of users as well as the total and rational development of telecommunications.

system (the basic charge was 20,130 yen[5]). While the interconnection charge would have increased in accordance with the increase of the number of users, the interconnection charge per user would have declined vice versa. If all of the 32 split lines for a single cable had users, the interconnection charge per user would be 2,326 yen. (In reality, the cost per user for interconnection with the local IP network, etc. was added to the basic charge.)

On introduction of the New Family Type service, however, even NTT East, which had already started the actual provision of the FTTH service for detached houses, judged that the FTTH service by presuming the branch system would not be profitable unless its demand increased and, therefore, decided not to install the equipment of the branch system for a while. Even more, it was actually impossible for other telecom service providers who intended to newly enter the FTTH service business to acquire an adequate number of users so as to make the business profitable.

3.4 Situation of entry and competition

3.4.1 Customer acquisition for New Family Type service

After NTT East started to receive applications for the New Family Type service in May 2002, the number of applications was about 1,000 per month until August of that year. From September, however, several thousands of applications were made each month. The total number of applications in 10 months until February 2003 was about 33,000. In March 2003, reduction of the user fee for the New Family Type service from April was announced, with the service provision area enlarged and the period until the start of the service reduced. This led to an increase in the number of applications per month with about 7,500 in March 2003, and the number of applications further increased to about 20,000 per month for the period from April to June.

The number of subscribers' lines of the FTTH service rendered by NTT East (other than those for apartment houses) amounted to 193,000 at the end of September 2003, and 324,000 at the end of March 2004.

3.4.2 Entry

In the eastern area of Japan, there were only two companies who noticeably provide the FTTH service for detached houses other than NTT East. This situation had been unchanged until the end of March 2004.

After the introduction of the New Family Type service by NTT East, only one company entered the market of the FTTH service for detached houses using interconnection with the optical subscriber equipment of NTT East.

4. Application of the Law

The AMA prohibits as private monopolization "such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade (Paragraph 5 of Article 2)."

"Exclusion" in this definition is interpreted as making it difficult for other companies to continue their business activities or to enter the market. "Control" is construed as depriving other companies of their

[5] The basic charge has been reduced to 17,145 yen since April 2003. If all of the 32 split lines for a single cable have users, the interconnection charge per user will be 1,746 yen.

freedom to make decisions concerning their business activities and forcing them to obey the controller's intent. Any act, if it causes "substantial restraint of competition" by "exclusion" or "control", is prohibited as private monopolization.

In this case, the conduct by NTT East was judged to fall under the private monopolization stipulated by Paragraph 5 of Article 2 of the AMA and violated the provisions of Article 3 of the same Act, as described in 2.(2).1 above.

4.1 Difference with other anticompetitive conducts

The AMA prohibits "Unfair Trade Practices" (Article 19)[6]. The term "Unfair Trade Practices" means any acts prescribed in each Item of Paragraph 9 of Article 2 of the AMA which tend to impede fair competition and are designated by the JFTC. The designation of "Unfair Trade Practices" is stipulated by Public Notice ("Designation of Unfair Trade Practices" (Fair Trade Commission Public Notice No. 15 of June 18, 1982) (hereinafter referred to as "General Designation").

So-called "margin squeeze" could be prohibited as an Unfair Trade Practice (Refusal to Trade (Paragraph 2 of the General Designation), Discriminatory Treatment (Paragraph 3 of the General Designation), Unjust Low Price Sales (Paragraph 6 of the General Designation), etc.)[7]. However, by reviewing the status of NTT East in the telecommunications market, the volume of optical fiber held by NTT East and the effects of the conduct to a new entry etc., the JFTC judged the conduct of NTT East fell under private monopolization as the conduct by NTT East excluded the business activities of other telecom service providers and caused a substantial restraint of competition.

5. Relation to the regulation by the business law

The hearing decision (March 26, 2007) said "Considering that the MIC as a specialized agency regulating the telecommunications business had studies from the viewpoint to promote competition in the business and to provide profits to users and granted approval after the procedures of inviting public comments and examination at the Information and Communications Council, the level of the charge subject to approval has no problem under the Telecommunications Business Act unless there are special circumstances. However, the application of a certain law itself to an action is not excluded just because such an action does not violate another law, unless there is an express provision for exemption."

Further, the Tokyo High Court said in the judgment of May 29, 2009, that NTT East "provided a service different from the one described in the application for interconnection charge approval by the Minister of Internal Affairs and Communications," and "Even if it is acceptable under the Telecommunications Business Act that its interconnection charge was approved for the service provision using the branch system, this does not lead to understanding that the AMA is naturally inapplicable to the

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6 Article 19 of the AMA stipulates, "No entrepreneur shall employ unfair trade practices."

7 The JFTC and the MIC published "Guidelines for Promotion of Competition in the Telecommunications Business Field" on November 30, 2001. These guidelines stipulate "If telecom service providers with essential facilities reject the competitors' request to connect to their subscriber line networks and to allow collocation, or they offer unfavorable terms to competitors in such transactions compared with those in their own departments or to their affiliates for example, such practices would hamper the new entry of telecom service providers and make their business operation difficult. When those practices are found to substantially restrain competition, they are regarded as "private monopolization" that is prohibited by Article 3 of the AMA. Even if they are not substantially restraining competition in the market, but tending to impede fair competition, they are regarded as "unfair trade practices" that are banned by Article 19 of the AMA. (2.1.1.(2))"

fact that the plaintiff (NTT East) actually uses the direct cable connection system instead of the branch system, and there is no room to understand that it is legal in the application of the AMA unless there are any special reasons." It said, "Even if the Minister of Internal Affairs and Communications has not given any order to change the interconnection charge and user fee, it does not affect the judgment regarding whether the above action by the plaintiff (NTT East) is considered to be violating the AMA or not."

6. Draft Guidelines for Exclusionary Private Monopolization under the AMA

To ensure transparency of the JFTC's law enforcement and enhance predictability by clarifying the requirements that will constitute Exclusionary Private Monopolization to which a surcharge is introduced by the amendment of the AMA approved by the Diet on June 3, 2009, the JFTC prepared "Draft Guidelines for Exclusionary Private Monopolization under the AMA" (hereinafter referred to as the "Guidelines") and asked for public comments on June 19, 2009.

The Guidelines describe the JFTC's investigation policies on cases concerning Exclusionary Private Monopolization, and what conduct may fall under "Exclusionary Conduct" and "substantial restraint of competition in any particular field of trade" as the requirements constituting Exclusionary Private Monopolization.

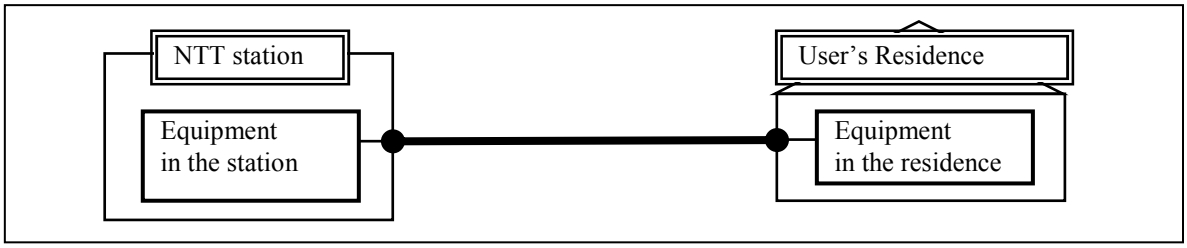
The Guidelines classify typical Exclusionary Conducts, mainly among those that have raised issues under the AMA in the past, into four categories: "Below-cost Pricing", "Exclusive Dealing", "Tying" and "Refusal to Supply and Discriminatory Treatment." Whether so-called "margin squeeze" falls under Exclusionary Conduct or not will be determined from a similar viewpoint as Refusal to Supply and Discriminatory Treatment (that is, an entrepreneur refuses to supply, imposes restrictions on the quantity or contents of products to be supplied, or applies discriminatory treatment to the condition or implementation of supply, beyond a reasonable degree in terms of necessary supplies for those receiving them to operate in the market (downstream market)). Factors for assessment include (1) Entire conditions of the upstream market and the downstream market, (2) Positions of the said entrepreneur and its competitors in the upstream market, (3) Positions of the trading customers and its competitors in the downstream market, (4) Period of the conduct, and (5) Conditions of the conduct.

ANNEX

CONFIGURATION OF EQUIPMENT FOR NEW FAMILY TYPE SERVICE

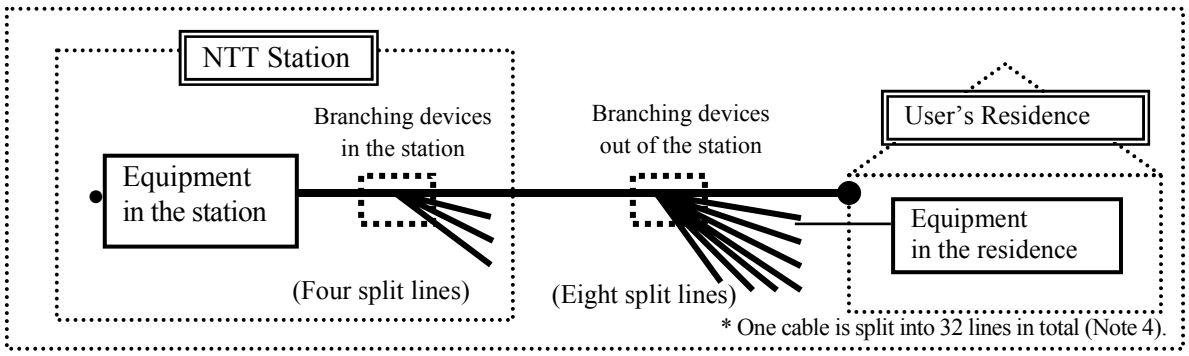
The fee for the New Family Type service was set by presuming the use of the branch system, but it was actually provided to users using the direct cable connection system (until March 2004).

1. <Direct cable connection system> A single cable is used by one user



User Fee for FTTH Service by NTT East	Cost for Other Telecom Service Providers
(Actual) New Family Type [5,800 yen → 4,500 yen] Basic type [9,000 yen]	[6,328 yen (See Note 3)]

2. <Branch system> A single cable is used by up to 32 users



User Fee for FTTH Service by NTT East	Cost for Other Telecom Service Providers
New Family Type [5,800 yen (June 2002 to March 2003) → 4,500 yen (after reduction in April 2003)]	(Note 5) [2,326 to 20,130 yen (Same as left) → 1,746 to 17,145 yen (Same as left)]

3. Notes

(a) Other telecom service providers connect with the section of the equipment owned by NTT with their own equipment at point .

(b) With regard to the equipment in the station and that in the residence, the devices for the direct cable connection system and the branch system are different.

(c) The amount equals the sum of the interconnection charge per cable for the optical subscriber equipment (the section in the figure for point 1 above) (5,074 yen) and the charge for connection with the media converter (MC) installed in the station of NTT East (1,254 yen) (when used by as much as 16 users). In addition, other providers have to pay the interconnection charge for the local IP network.

(d) Other telecom service providers are required to have the connections by one whole unit of equipment accommodating 32 split lines. They cannot use connections by each individual split line.

(e) The amount of 20,130 (or 17,145 after price reduction in April 2003) yen is the basic charge when only one of the 32 split lines has a user. The charge increases according to the use of the equipment. If all of the 32 split lines have users, the interconnection charge per user will be 2,326 (or 1,746) yen (considering the demand in those days, it was practically impossible to have users for all of the 32 split lines). Other telecom service providers also have to pay the interconnection charge for the local IP network.

KOREA

1. Introduction – the notion and significance

1.1 Margin squeeze in general context

A margin squeeze usually arises when a firm which has vertically integrated a production input market (upstream) and a product market (downstream) both sells an input to downstream rivals and compete against those rivals If the concerned input is an essential one and the upstream firm has considerable market power, downstream rivals can hardly source a production input from other firms. In this case, the dominant upstream firm can adjust both upstream and downstream prices to make a significant impact on the profits of its rivals. Likewise, a margin squeeze is said to arise when the upstream firm set the upstream price too high or the downstream price too low for an equally efficient firm to compete downstream, thus unfairly securing competitive edge downstream.

1.2 Margin squeeze by more than one affiliate

As illustrated above, a margin squeeze generally concerns the act of a single firm operating vertically integrated upstream and downstream markets. However, in an economy where large business groups have disproportionately strong economic power like Korea, potential margin squeeze through the affiliates can be a problem. Even in case such affiliates exist as a separate legal entity respectively, they might be affected by the interest of the entire business, behaving like a single firm. Moreover, business groups tend to expand business areas to the relevant market based on the existing market power. Such characteristics lead to high probability of margin squeeze against non-affiliates in the relevant market.

2. Margin squeeze related regulations in Korea

Article 3-2 of the Monopoly Regulation and Fair Trade Act (hereinafter "MRFTA") prohibits certain acts of dominant firms which are specified into various types through Article 5 of its Enforcement Decree. However, there is no precise provision to control over margin squeeze in the strict sense, which requires flexibility in applying the existing provisions. From now on, types of practices of abusing market dominance will be briefly outlined according to order of applicability to margin squeeze.

2.1 Refusal to deal

Where a dominant upstream player firm refuses to deal over an essential input and makes its downstream rivals' business difficult, its act might constitute a 'refusal to deal' under the provisions concerning acts of abusing market dominance. In particular, the MRFTA separately regulates an act of restricting access to an essential input on top of the general refusal-to-deal provision. The concerned provision uses the explicit term of 'refusal' and the more mitigated term of 'restriction' together, thereby leaving some room for handling indirect exclusionary dealing like margin squeeze.

2.2 Price discrimination

Where a dominant upstream firm unfairly discriminates against an efficient rival in price terms by calling for higher upstream access prices, this act might constitute price discrimination. In particular, it is

likely to be applied when a dominant upstream firm unfairly discriminates against non-affiliate downstream firms in favor of its affiliate, thereby restraining competition. In the same manner, in case the vertically integrated firm discriminate the downstream prices to undermine the rival's competitiveness, the provision would be applied.

2.3 Predatory pricing

Where a vertically integrated firm attempts to exclude its rivals through adjusting downstream retail prices, the provision on predatory pricing might apply to the concerned act. In particular, the KFTC does not require the predatory price to be below cost in order to find illegal, but the price lower than 'usual transaction price,' which creates probability of its rivals' exclusion. It opens some possibility to flexible law enforcement on margin squeeze.

3. Special law on telecommunications industry

For most of the major competition authorities, margin squeezes have been notably a hot issue in telecommunications industry, because large economies of scale tend to produce monopoly and oligopoly and many troubles are caused surrounding shared usage of essential facilities. In short, telecommunications industry has many factors which are translated into a high probability of margin squeeze.

However, in Korea, usage of essential facilities and their pricing in this sector are specifically regulated by laws and regulations under the jurisdiction of the Korea Communications Committee (KCC), so there has been no competition law enforcement cases involving margin squeeze in this industry. In the following, provisions concerning margin squeeze under the Telecommunications Business Act will be briefly outlined.

3.1 Obligation to provide essential facilities

The Telecommunications Business Act explicitly states that key telecommunications service providers who satisfy the following conditions shall provide its facilities upon the request of other undertakings.

- a key telecommunications service provider which owns facilities that are essential to businesses of other telecommunications service providers
- a key telecommunications service provider whose relevant turnover of the previous year reaches a certain level and whose share in the relevant market is 50% or more.

3.2 Determination of compensation for providing essential facilities

The Telecommunications Business Act stipulates that terms & conditions, procedure, methods and compensation estimation for provision of essential facilities are to be specifically defined through the KCC Notification. Accordingly, the KCC defines the amount of compensation according to the standard costing system. Then the providing and recipient firms can negotiation based on this amount.

3.3 Telecommunications fee permission or notification system

The KCC also regulates the fee for end-users in the form of permission or notification system. As seen above, the probability of margin squeeze in telecommunications industry has not been high in Korea since the law mandates companies to provide the essential facilities and regulates any prices. However, with deregulation trend in recent years, key telecommunications service providers are trying to regain their power to control over prices. Such movement may invite more margin squeeze cases in this sector.

4. Related cases

The KFTC has yet to accumulate law enforcement cases involving margin squeeze. Yet, the act of excluding rivals by a dominant firm in the vertically integrated sector or by a plural number of affiliates has continued to be a relevant issue. So in the following, a refusal-to-deal case involving essential inputs by telecommunications service providers and a price discrimination case by a plural number of affiliates will be illustrated. Such cases will provide some useful insights for development of regulations as well as law enforcement on margin squeeze issue.

4.1 Margin squeeze by a vertically integrated firm

4.1.1 Major findings

Company P, which accounted for 79.8% of the Korean hot coil market (upstream) and 58.4% of the Korean cold rolled steel sheet market (downstream) at the same time, refused several times without clear reason to supply Company H, a new entrant competing downstream, with hot coil, the raw material for cold rolled steel sheet. As a result, Company H was forced to import hot coil from overseas, which cost a lot and eventually caused considerable difficulty in its management.

4.1.2 Judgment of illegality

The KFTC decided that the practice (refusal to deal) of Company P was illegal and imposed a corrective order and surcharge. In particular, the KFTC noted hot coil was an essential input to produce cold rolled steel sheet, that there were no justifiable reasons for the refusal to deal other than holding its downstream rival in check, and that Company P's act greatly undermined Company H's price competitiveness downstream, Therefore, the KFTC concluded that Company P abused its dominance power in upstream market to restrain competition downstream market.

Yet, the Supreme Court ruled against the KFTC decision, citing lack of evidence of anti-competitive effects. In particular, the Supreme Court held that to prove anti-competitive effects resulting from a refusal to deal, one should prove substantially the potential anti-competitive harm such as price raise, output reduction, deterred innovation, and decreases in the number of rivals and diversity. However, some critics pointed that it is too demanding to meet all of the aforementioned criteria to prove illegality, so antitrust authority's enforcement might be overly constrained. Still, the ruling should send a clear message that when it comes to controlling margin squeeze as a form of a refusal to deal, competition authority should make more vigorous efforts to prove anticompetitive effects.

4.2 Margin squeeze by a plural number of affiliates

4.2.1 Major findings

Company A is a wholesaler who receives LPG from oil refineries to supply retailers within a certain area, and Company B is a LPG retailer established through shareholding by Company A (96.67%) and a representative of Company A (3.33%). In supplying LPG to retailers, Company A discriminated the prices against non-affiliated firms in favor of Company B.

Company A lowered the prices 15% on average and up to 31% for Company B, and even there were some period when Company A supplied at prices 6~14% lower than those it paid to oil refineries. Meanwhile, Company A failed to give reasonable reasons for LPG price discrimination between Company B and other firms.

4.2.2 Judgment of illegality

The KFTC imposed a corrective order on Company A pursuant to the provision of unfair discriminatory treatment. The KFTC saw that there was a notable gap in Company A's wholesale prices between Company B and other firms. This could directly affect price competitiveness in the retail market, and if sustained long enough, it could substantially damage competition in the relevant market. Especially, the KFTC noted that the main objective of Company A's act at the cost of its own profits lied in helping Company B maintain competitive edge compared to its rivals.

Meanwhile, given the fact that other retailers had a LPG distribution channel other than Company A, this case might be inappropriate to be seen as a margin squeeze over an essential input. Yet, considering that Company A is a dominant wholesaler of the concerned area and that procuring LPG from other areas will cost a lot more, Company A's price discrimination is thought to have significantly impeded price competitiveness of non-affiliated firms.

After all, a dominant LPG wholesaler abused its market power to help maintain its affiliate's competitive edge in the LPG retail market, thereby trying to strengthen its dominance in the LPG retail market. Particularly, Company A and B shared considerable part of the decision-making process and interests although they were two separate firms, and Company A sustained a short-term loss to ensure Company B's competitive edge, which suggest that margin squeeze by a plural number of affiliates could create exclusionary effects similar to those by an vertically integrated firm.

5. Conclusion

Margin squeeze is likely to be in a very subtle form hard to pigeonhole into a certain type of act, thus posing an obstacle to antitrust enforcement. The KFTC does not have a separate provision concerning margin squeeze, but other provisions for abuse of dominance are defined flexibly enough to embrace margin squeeze. However, the existing provisions such as refusal to deal, price discrimination and predatory pricing have their limits in regulating margin squeeze effectively as each act's requirements for illegality are getting more specified. To address this problem, the KFTC is planning to improve laws and review criteria that can effectively control new forms of abuse of market dominance, representatively margin squeeze.

At the same time, the KFTC has paid attention to how to handle margin squeeze by a plural number of affiliates. As seen in the illustrated cases, even when affiliates exist as a separate legal entity, they can engage in price squeeze just like a vertically integrated firm. This kind of a margin squeeze by more than one affiliate is expected to serve as a crucial relevant reference for Third World countries in their antitrust enforcement as they are witnessing their large business groups concentrating their economic power amid rapid economic growth.

MEXICO

1. Introduction

In this document, the Federal Competition Commission (CFC or the Commission) presents Mexico's experience in the assessment of the allegations that fit, or could fit, the definition of «*margin (price) squeeze*», as provided by the Secretariat.[1]

Section 1 presents a summary of the legal provisions that set the framework for assessing «margin squeeze» and economically correspondent conducts. Section 2 focuses on the criteria of the competition analysis applicable to conducts that fit the «margin squeeze» definition. Section 3 provides a review of the relevant «margin squeeze» allegations, its analysis and the main arguments that supports the CFC and judiciary decisions. Section 4 offers some concluding remarks on recent developments and future assessment of «margin squeeze» allegations.

2. Legal provisions to address «margin squeeze» allegations

In Mexico, «*margin squeeze*» is not a standalone conduct sanctioned either by the Federal Law of Economic Competition (FLEC),[2] nor sectoral regulations. Nevertheless, the FLEC provides the economic criteria and the legal standard to deal with «*margin squeeze*» allegations under other akin unilateral conducts.

2.1 Provisions of the FLEC and its rulings

In spite of the fact that FLEC and its Rulings (RFLEC) do not explicitly refer to «*margin squeeze*», Article 10 of the FLEC typifies four relative monopolistic practices that encompass enclose the conducts that could be characterized as «margin squeeze».

The assessment of each of these practices has been undertaken following the legal form that the specific conduct takes, either as discriminatory pricing[3] or rising rival's costs[4] at wholesale level; predatory pricing[5] at retail level; or cross subsidization between wholesale and retail pricing[6].

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1 "A «margin squeeze» is an exclusionary abuse of dominance that arises when a vertically integrated monopolist sells an upstream bottleneck input to rival firms that also compete in a downstream market with the monopolist in the provision of a downstream product. A margin squeeze is said to arise when the margin between the price at which the monopolist sells the downstream product and the price at which the monopolist sells the upstream bottleneck product to its rivals is "too small" to allow an efficient downstream rival to effectively compete(…)."

2 The FLEC regulates Article 28 of the Mexican Constitution regarding economic competition, monopolies and free market access.

3 Section X of article 10 of the FLEC: "ARTICLE 10.- (...) relative monopolistic practices are deemed to be those acts, contracts, agreements or combinations, which aim or effect is to improperly displace other agents from the market, substantially hinder their access thereto, or to establish exclusive advantages in favour of one or several entities or individuals, in the following cases: (...) §X. The establishment of

Notwithstanding that the FLEC does not refer to «excessive» or «abusive» (wholesale) prices as a prohibited unilateral conduct, the law does allow the CFC to investigate those allegations under the "rising rival's cost" and "discriminatory pricing" provisions.

The Commission is empowered to know and resolve the relative monopolistic practices in any economic activity within the Mexican territory, whenever those conducts fulfil the specific provisions of article 10 of the FLEC. Thus, the CFC is also empowered to apply the FLEC over essential facilities under specific access regimes imposed by sectoral regulations; and when necessary, to impose access remedies.[7]

The FLEC does not include an «essential facility» definition or doctrine as such. However, in making a market power determination requires the identification and assessment of the existence of substitutes as well as the effects of barriers to entry on competition conditions. Criteria used to identify *essential facilities* in competition cases are:[8]

- Control of the facility by an economic agent with substantial market power and no substitutes.
- A competitor's inability to develop alternative facilities.
- The importance of financial costs or the costs of developing alternative channels, access to financing and the term for recouping the required investment, and determining whether costs are effectively sunk.

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different prices or conditions of sale or purchase for different buyers or sellers situated in equality of conditions (...)"

4 Section XI of article 10 of the FLEC: "ARTICLE 10.- (...)§XI. The action of one or several economic agents that has the object or effect, directly or indirectly, of increase the costs, or hinder the productive process, or reduce the demand of its competitors."

5 Section VII of article 10 of the FLEC: "ARTICLE 10.- (...)§VII. Systematic sales of goods or services at prices below their total average cost or their occasional sale below the variable average cost, when exist the elements to presume that those losses would be recouped through future price increases, in the terms provided in the RFLEC. (...)."

The specifications on recoupment and distribution of costs that the LFCE refers to are set out in article 10 of the revised RLFCE, issued on October 2007, as follows:

"I. Distribution of average total cost and average variable cost amongst sub-products or co-products shall take into account technical features of production, distribution or commercialization processes, as well as the generally accepted accounting principles or financial information standards;

II. Whenever an investigation is initiated upon request, the plaintiff must submit to the Commission the methodology and elements that allow determining the cost distribution upon which the complaint is based, and

III. It will be presumed that an agent may recoup losses whenever, in addition to wielding substantial power, he also has sufficient financial strength or excess capacity or a record of affecting competition or free entry into the markets where it competes."

6 Section IX of article 10 of the FLEC: "ARTICLE 10. - (...) §IX. The use of profits that an economic agent obtains from the sale, commercialization or provision of a good or service to finance losses incurred in the sale, commercialization or provision of another good or service; (...)."

7 Under Article 28 of the Mexican Constitution, the exceptions apply for strategic areas, labor unions, intellectual property rights and certain types of export cooperatives are not considered monopolies by the Constitution.

8 Articles 12(relevant market-substitutes) and 13 (market power-barriers to entry) of the FLEC.

- The existence of normative barriers: exclusive rights over key facilities as barriers to entry.

2.2 Provisions of sector regulations: access conditions and behavioural controls

Regulatory frameworks specifically establish what facilities are subject to statutory third party access under non-discriminatory terms (i.e. mandatory duty to deal). The implementation of sectoral access regimes include dispute settlement mechanisms, which are limited to these issues and do not include the possibility to mandate additional access obligations beyond the law.

In solving access controversies, neither the sectoral regulators nor the judiciary have ordered access over facilities different from those specifically defined through sectoral legislations.

In addition to the mandatory access provision, several sectoral regulations[9] empower the CFC to resolve on the existence of «*effective competition conditions*» or *«a dominant participant in the market»* as a prerequisite for sectoral regulators to impose additional regulations to «essential facilities» holders.[10]

The CFC applies the FLEC criteria in a consistent manner both assessing competition conditions in regulated markets and those alleged relative monopolistic practices involving access controversies over essential facilities subject to the duty to deal.

3. Analysis for examining «margin squeeze» allegations

3.1 Identification of the anticompetitive practices

As mentioned above, the analysis of *«margin squeeze»* allegations is conducted following the criteria of articles 10, 11, 12 and 13 of the FLEC. However, when it comes to enforcement, legal and conceptual criteria require a full review of the evidence available.

All the allegations that fit, or could fit, the «margin squeeze» definition have involved services subject to a *duty to deal* imposed by sectoral regulations. Some alleged conducts, as presented by the plaintiff, may deem to infringe more than one conduct included in Article 10 of the FLEC.

In order to identify the nature of the competition problem, the CFC may initiate an investigation pursuant several sections of article 10 of the FLEC. Once the investigation is developed and the evidence is obtained the CFC shall define the nature of the claim and sanction the conduct.

«*Margin squeeze*» allegations have been presented before the CFC in a number of different ways, including the following:

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9 Examples are: Federal Law of Telecommunications, article 63; Rulings of Satellite Communications, article 23; Rulings of Natural Gas, articles 12 and 81; Regulatory Law of the Railway Service (1995), article 47; Regulation on Railway Service, article 172; Law on Airports, articles 68 and 70; Civil Aviation Law, article 43; Regulations of Federal Road of Transportation and Auxiliary Services, article 64; Navigation Law, article 106; and Law on Ports, article 59 and 62.

10 Those dispositions authorises the regulator to impose price regulation, access controls, and use other regulatory instruments if the CFC issues a finding of an absence of effective competition in the relevant market or, in telecommunications, the CFC's finding would relate to the existence of an economic agent possessing a dominant position in the market. The CFC may also make a subsequent determination to fade away regulatory controls once effective (sufficient) competition is established.

- **Discriminatory (access or wholesale) pricing**.- The vertically integrated firm charges low input (wholesale) prices to its own operations, relative to the input prices charged to its rivals, with no cost justifications. When analysing price discrimination, the identification of price discrimination becomes increasingly tenuous the further we move away from a situation of homogeneous products and equal costs. Because of that situation, mark-ups rather than margins are the CFC's benchmark in order to identify the existence of discriminatory pricing.

- **Predatory pricing** in the provision of the final (downstream) goods and services. – The vertically integrated firm charges a retail price that does not even cover the wholesale rate that it charges to its competitors. Thus, it is incurring in a below cost commercialization of the final (retail) products, thereby forfeiting its profits in order to unduly deter competitors from entering the market.[11]

- **Cross subsidization** between retail and wholesale goods or services. – The vertically integrated firm uses excess revenue generated in the provision of the *essential facility* (i.e. the non-competitive wholesale market) in order to subsidize below-cost prices in the provision of the final goods or services (i.e. the competitive retail market) so as to undercut competing providers.

  The vertically integrated firm raises the price of the wholesale product and lowers the price of the retail product, and without the ability to cross subsidise competitors and new entrants are not able to match the prices of final products and services offered by the vertically integrated firm.

- **Rising rival's costs**.- The integrated firm charges excessive prices in the provision of the *essential facility* (input), at which competitors in the upstream market could no longer stay or grow in the final market, and the prices offered in the upstream market (the *essential facility*) are higher than what could be objectively justified.

  The "excessive terms" are assessed under the same standard as a (downstream) discriminatory pricing, for example when the vertically integrated firm offers to sell the essential input to its rivals at a price higher than the price it charges to its own operations.

Complainants commonly present predatory, discriminatory and cross subsidizing pricing allegations in an alternative manner.

Discriminatory pricing may be alleged when the price of the wholesale product is unknown for complainants and they assume that either the wholesale price is recovering the cost or that they are paying higher wholesale prices. Predatory pricing occurs when the alleged wholesale price is not recovering the cost. A third option could be that the wholesale price they pay is unjustifiably high (i.e. excessive or abusive) and is used to subsidize losses incurred in the below-cost price of retail products.

As mentioned before, «*margin squeeze*» allegations presented before the CFC have fallen within the exclusionary conducts enclosed in Article 10 of the FLEC, and their assessment is handled in the same way that corresponds to the specific conduct.

The investigation will generally be focused on obtaining evidence proving the existence of a substantial market position in the market that corresponds to the *essential* facility; as well as facts constituting an exercise (i.e. abuse) of that position, including: access to the particular facility in question was indeed essential; there was sufficient network capacity available to provide the access requested; there was no objective justification for the price levels in which the *essential facility* and the retail services are

[11] The FLEC provides specific cost benchmarks for predatory pricing. See footnote 5.

commercialized; this conduct has restricted the provision of previously existent service or product market or prevented the emergence of a new service or product market.

Regarding the identification of the conduct corresponds to a specific *«margin squeeze»* claim, the CFC commonly observes the levels and the relationships between the following variables:

- The similarities or differences of the *essential facility* that the vertically integrated firm provides for its own operations and for its competitors.
- The costs and its variations to provide the *essential facility* for its own operations and for its competitors, in order to identify if different input charges may be justified by cost differences and/or the existence of economies.
- The prices and market conditions for the final product or service, whether it is commercialized individually or bundled.
- The similarities or differences among final products or services.

3.2 Cost standards applied to «margin squeeze» allegations

The CFC uses different cost measures when analysing exclusionary pricing conducts (i.e. predatory, discriminatory or cross subsidizing pricing and rising rival's costs). Cost benchmarks are defined in the FLEC only for predatory pricing.[12] The same cost measure is not necessarily applied in all cases. The analysis of the other conducts may use those or other cost measures as benchmarks for comparison, being some of the most common, the long run incremental cost (LRIC).

To define the legal type correspondent to the *«margin squeeze»* allegations, information about the costs to provide the *essential facility* plays a critical role. However, during the investigations conducted by the CFC, the information about costs incurred by the vertically integrated firm has not been available at all, due to successfully judiciary actions of vertically integrated firms' to protect the confidentiality of their information.[13]

Therefore, the cost standard adopted by the CFC was tailored to address that situation into the assessment of exclusionary price conducts. In absence of direct wholesale cost information, the CFC had based the analysis on an *imputation test*. Imputation analysis identifies retail prices of the vertically integrated firm, and the rate it charges to access seekers as a proxy of the wholesale inputted cost.

When analysing *«margin squeeze»* allegations as predatory or cross subsidizing pricing, in general terms, pricing would not seem to be anti-competitive if retail price recovers the inputted costs, plus the direct causal costs of the retail product. In cases of discriminatory pricing, investigation focuses on causes to presume if there are cost variations that justify differences between wholesale prices.

As "rising rival's costs" conduct, the CFC may presume that the pricing policy of the vertically integrated firm may prevent an efficient (not vertically integrated) competitor from earning a profit out of its activity. Unduly market deterrence might occur when the mark-up of the vertical integrated firm's retail

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12 See footnote 5.

13 Vertically integrated firms holding rights over essential facilities also had won amparos (i.e. constitutional protection) to deny sectoral and competition enforcers access to disaggregated cost information established in sectoral regulations.

prices is so low (or even negative)[14] that the equally efficient competitor will be unable to profitably replicate it.

3.3 Harm test for «margin squeeze» allegations

Conducts defined in article 10 of the FLEC are considered relative monopolistic practices (i.e. subject to the rule of reason). Articles 11, 12 and 13 of the FLEC establish the specific conditions that the conduct must fulfil in order to be declared illegal. Article 11 establishes that relative monopolistic practices are only illegal if the economic agent undertaking them has substantial market power in the relevant market where the practice takes place. Articles 12 and 13 establish the criteria to define the relevant market and to assess market power in the relevant market, respectively.

Relative monopolistic practices are illegal only if they demonstrably harm competition in the case at issue. In order to be illegal, the FLEC states that conducts must "*improperly displace other agents from the market, substantially limit their access, or establish exclusive advantages in favour of certain persons*". The last paragraph of Article 10 of the FLEC also provides the right for parties with substantial market power to present efficiency reasons regarding the conduct, as a way of defence.

In particular, there are two main ways in which *«margin squeeze»* allegations can be considered as anti-competitive under the FLEC general *harm* criteria. The first one, and most common, is that the firm is seeking to leverage its dominant position upstream (over the *essential facility*) into the downstream product (*i.e. final services*). The second one is where it is used to protect the firm's dominant position in the wholesale market by restricting the growth of competitors in the retail market. The vertically integrated firm may raise barriers to entry in the wholesale market,[15] so protecting its position in there.

4. Relevant cases

All relevant cases investigated by the CFC have occurred in the telecommunications and rail transport sectors and involve the access to interconnection services (i.e. essential facilities). In those services there is a statutory duty to deal (i.e. mandatory access regime) and none of them are subject to a rate regulation due to successful actions of incumbents by to revoke sectoral regulations attempting to do so. The following cases illustrate how the FLEC criteria are applied in solving access disputes in those sectors subject to specific access regimes.

4.1 Relative monopolistic practices in freight railway transportation[16]

In 1995, the government restructured the Mexican Railway System by dividing it into three regional trunk lines, Northeast Railway (TFM), North-Pacific Railway (Ferromex) and Southern Railway (Ferrosur); and one shared terminal in the Valley of Mexico to interconnect their tracks and handle their services.

Although each firm owns lines that do not overlap, the Mexican Railway System is designed so that the different concession holders can move freight on any route using rights-of-passage and interline traffic. In this way, although the concession holders do not compete directly along most of the routes, the system's

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14 If compared to the price of the wholesale input.

15 Industry characteristics are relevant to measure the effectiveness of pricing practices in rival's capacity to be able to enter and compete in the wholesale market, such as: the existence of scale, scope, density and network economies; financial capital requirements; capital intensiveness; sunk cost (asset specificity), among others.

16 Files DE-57-2001 and RA-50-2003.

configuration seeks to ensure complementarities with other means of transportation to provide users with different options.

In November 2001, TFM filed a complaint against Ferromex, alleging relative monopolistic practices in the interlinear service of freight transport in some of the routes it operated. The alleged conduct consisted in: i) artificially raising (i.e. excessive) tariffs for interlinear traffic and registering them as the Unique Tariff for Express freight (TUCE); and ii) charging car hire services twice to increase TFM's costs and to displace it from the market. The alleged effect of these practices was to leave Ferromex as the sole provider of this service along its exclusive routes.

The CFC defined the relevant market as railway lines given in concession to TFM and Ferromex, which, if integrated, created a network that covered a number of cities that interconnect at the City of Celaya, Guanajuato.

In October 2003, the Commission determined that Ferromex was guilty of relative monopolistic practices in violation of the FLEC. These consisted of cost increases for interconnection and transport in traffic along several interlinear routes where the origin railway was TFM, as well as duplicate charges for car hire services.

Based on these findings, the CFC ordered Ferromex to suppress its practices and implement corrective measures in the relevant market. These measures consisted in setting interlinear traffic service tariffs per kilometre no higher than the minimum tariff charged by Ferromex to its exclusive route customers transporting similar products.

The CFC also ordered Ferromex to charge car hire tariffs in traffic along interlinear routes no higher than the minimum tariff charged to its exclusive route customers. In February 2004, the CFC resolved an appeal by Ferromex, which was considered unfounded. Therefore, the CFC confirmed its resolution.

4.2 The telecommunications sector

The fact that the telecommunications industry is highly regulated does not exempt it from the application of the antitrust rules. The Supreme Court of Justice (2004) emphasized that there was no overlap between the FLEC and the Telecommunications Law:[17]

Therefore, in telecommunications, the relationship between competition and sectoral regulation has turned out to be complementary. The issue of allowing access to the facilities needed to provide services to end users becomes a central concern, both to the sectoral regulator and to the CFC, as both have intervened to control incumbent conducts that hinder competition in the telecommunications markets.

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[17] Extract of pages 22 to 34 of the Supreme Court Sentence. Document available only in Spanish at: http://www.cfc.gob.mx/images/stories/Poder%20judicial%20y%20CFC/ar_480_2004.pdf.

"(...) the Federal Law of Economic Competition is fully applicable to the providers of the public services of telecommunications, without need to give them a differentiated treatment, because the aims of such law (...) are valid regarding the concessions of public services of telecommunications, since these are subject, to an open competition regime."

"(...) additionally, there is no overlap of powers between the Federal Telecommunications Commission and the Federal Competition Commission, because while the first one has powers to verify the rightful provision of the concessioned public services of telecommunications, the second one has powers to eliminate and prevent monopolies, monopolistic practices and other restrictions to the efficient functioning of the markets, which in this case, is the telecommunications market.""

4.2.1 Illustrative case: Excessive charges and discrimination practice in the resale market[18]

A complaint filed by Avantel, Alestra and Marca Tel against Telmex referred to: i) the double charge imposed by Telmex for providing resale services. These charges were implemented through the "Lada Operator Plan (PLO)" offered by Telmex, ii) price discrimination as compared to other commercial clients; ii) restrictions in the provision of resale ports; iii) restrictions in leased links; iv) unjustified failure in such services; and v) the imposition to use 2 Mbps links (which constitutes a tied sale).

The CFC defined the affected relevant markets to be: i) resale of long distance transmission capacity and ii) access or interconnection services, both with a national dimension. As a result of the enquiry the CFC found that:

- Telmex charged twice for the interconnection at the originating location, because the resale rate included both interconnections at the originating and destination cities. Telmex was also applying an additional interconnection charge.

- Long distance operators paid a higher price for long distance services (acquired in the resale market) than retail rates paid by Telmex' customers.

- Telmex unduly delayed the provision of links and interconnection circuits.

- Telmex suspended the provision of links without offering technologically competitive options. The majority of these interruptions occurred in cities recently opened up to competition.

- Some cities' transmission requirements were below 2 Kbps , and therefore carriers were forced to acquire spare capacity. However, Telmex did not allow long distance operators to share 2 Kbps links.

- Microwave and satellite links are not substitutes for the interconnection service provided by Telmex through its wire network, for resale and interconnection services.

- Telmex has substantial power in the relevant markets. The CFC defined the resale market as one of the relevant markets, because the practice was carried out regarding an input used by long distance carriers to provide final long distance services to their customers.

Based on these facts, the CFC determined the existence of anti-competitive practices aimed at impeding the competitive provision of interconnection and resale services, thereby reducing the demand by competitors. The CFC therefore imposed a fine and ordered the following remedies:

- To unbundle the interconnection rate charged at the originating city from the resale rate and to suspend price discrimination regarding resale services. It did allow Telmex to apply uniform discounts on the basis of volume to all customers, and ordered the application of cost -based rates.

- To provide resale ports on time.

- Not to delay or deny the provision of leased links and interconnection circuits, unless technical restrictions are verified.

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[18] Files DE-03-99.

- To eliminate undue service interruptions, and if these ever occur, it must be proved that they are the result of technical conditions. If these interruptions are a consequence of equipment maintenance, this situation shall be forewarned to long distance operators.

- To allow long distance operators to share 2Mbps links and to remove the obligation to purchase these links if the amount of traffic does not justify their purchase.

4.2.2 Illustrative case: Declaration on effective competition conditions - Telmex: dominant carrier in telecommunications markets (1997-2004)[19]

In 1997, the Commission declared that Telmex had substantial power in five basic telecommunications markets: interurban transportation, access, national long distance, international long distance, and basic local telephone systems.

The declaration was issued in compliance with Article 63 of the Federal Law of Telecommunications that establishes that telecommunications regulatory authorities may set up specific obligations for the public telecommunications net concessionaire that has substantial power in the relevant market in accordance to the FLEC.

In September 2000, the sectoral regulator published specific obligations[20] regarding rates, service quality and information aimed to promote competition in the five relevant telephony markets where Telmex had market power, which included:

- The introduction of rates that reduce the operation margin of services provided by the competition is prohibited, unless it constitutes a defensive action to face previous actions undertaken by its competitors;

- The implementation of a process for authorizing rates; and

- Introduce cost-based and non-discriminatory rates for essential facilities.

This declaration was overturned and remanded by a reviewing court.

4.3 Recent «margin squeeze» allegations

Since 2006, the CFC has received several complaints alleging excessive wholesale pricing in (essential) interconnection services for telecommunications, in terms that might formally fit more than one of the legal provisions of article 10 of the FLEC.

Complainants have requested the intervention of the CFC to sanction relative monopolistic practices included in article 10 of the FLEC; and to declare the existence of firms with «dominance (i.e. substantial market power)» in the markets, in order to trigger the imposition of specific rates, and technical and information regulation on fixed and mobile wholesale (interconnection) services.

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19 File AD-41-97.

20 MEXICO (2000), paragraphs 60 to 71.

4.3.1 Illustrative case: Mobile Termination Services[21]

As mentioned above, Cofetel and SCT can regulate interconnection when a firm is declared to be a dominant provider, in accordance with article 63 of the Federal telecommunications Law. The regulated rates should cover long run incremental cost. Currently there is no standing dominant operator determination as the issue has been in litigation since 1997.

The existing calling-party-pays (CPP) regime in Mexico provides incentives for mobile operators to set high interconnection charges (MIRs). MIRs have decreased since 2004, but they are still high compared to other calling-party-pays countries.

In 2008, Mexico registered the fourth highest rate among 22 OECD countries with a calling-party-pays regime. The rate in Mexico was of 15.5 US cents per minute (cpm) while the average in these countries was of 10.5 cpm; and since they are charged by minute, calls with duration of less than one minute are rounded up to the nearest minute, making calls more expensive than in most other countries where services are charged by the second.

The mobile termination rates (MTRs) in Mexico are higher than cost estimates from LRIC Studies based upon results from the models used by sectoral enforcers' and others. Thus, the current MTRs are about 3 times greater than its LRIC costs, showing that there is an obvious need for specific regulatory control on MTRs, as has happened in other jurisdictions.

High MTRs have been commonly used in the on-net/off-net price discrimination among all mobile carriers in Mexico. Discrimination in favour of on-net calls is not considered per se anticompetitive under the FLEC criteria, but a mobile termination rate above costs helps facilitate discrimination as an instrument to raise rivals' costs and create entry barriers. This is especially troubling given the unique opportunity for new entry with the new spectrum assignments that are in the process of being approved. If interconnection conditions are not competitive, it is unlikely that new suppliers will be successful even if the assignment process for the spectrum is procompetitive.

Based on that information, the CFC is currently reviewing the mobile termination services under a two pronged approach: to determine the existence of dominant carriers with dominance (i.e. with substantial market power) in order to trigger the establishment of additional regulations by sectoral enforcers; and to determine if any dominant firms in particular have actually incurred in an abuse of this position in the marketplace..

5. Concluding remarks

In México, «*Margin squeeze*» allegations have been addressed as exclusionary conducts included in article 10 of the FLEC, such as predatory pricing, discriminatory pricing, cross subsidizing pricing and rising rival's cost through abusive or excessive pricing.

In practice, when analyzing *«margin squeeze»* and similar conducts, the CFC relies on the economic analysis of all the facts and evidence available prior to an in-depth investigation into a specific violation to the FLEC. This investigation methodology allows the CFC first to identify the underlying competition concern or problem and then to analyze the correspondent statutory provision or provisions of article 10 of the FLEC.

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[21] Extracted from the Contribution from Mexico to the Session IV: Competition Issues in Telecommunications (September 2009). Document available at: http://www.oecd.org/dataoecd/39/63/43628914.pdf.

So far, in the CFC's experience, *«marging squeeze»* allegations have come up in sectors where the holder of the *essential facilities* is subject to a statutory duty to deal. In particular, in the telecommunications and railroads sectors, the interconnection regime has failed to solve access controversies between operators, who have presented complaints before the CFC.

In order to improve the effectiveness of sectoral access regimes, the CFC intervenes in analyzing market conditions in order to identify whether it is necessary to establish *ex ante* regulations to control anticompetitive abuses by dominant participants.

In the enforcement of both powers granted to the CFC by the FLEC, and to the sectoral regulators, the CFC follows the criteria included in the competition law in order to identify essential facilities, relevant markets, market power, and the effects of the conducts.

Under this approach, the effectiveness of the CFC to give a consistent treatment to conducts that may be akin to a "margin squeeze" depends on the amount and quality of the information gathered during the initial stages of the investigation.

NETHERLANDS

1. Introduction

This paper has been prepared for the OECD Roundtable on margin squeeze. In this paper, we will set out the way the Netherlands Competition Authority (NMa) assesses an abuse of competition by a dominant undertaking in the form of a margin squeeze and discuss several recent Dutch cases that involved a margin squeeze. The paper emphasises the benefits of close cooperation between the Competition Authority and various sector-specific regulators on this issue.

A margin squeeze is said to arise when both upstream and downstream prices are set by a dominant integrated firm in such a way that it "does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis". [1] Such a strategy can help a firm gain more market power downstream or help to protect its upstream market from entry by downstream competitors. In order for a margin squeeze to be a feasible strategy for a firm and for it to be investigated by the NMa, some minimum conditions must be met.

For a margin squeeze to be considered an abuse, the integrated firm must have a dominant position in the upstream market. Secondly, the upstream input must be an objectively necessary input to compete on the downstream market. If this is not the case, the downstream firms are not affected by the upstream prices of the dominant firm and the behaviour may be characterized as predatory pricing. Lastly, the margin squeeze should be likely to lead to a lessening of competition resulting in consumer harm.

To a large degree, as the discussion of recent cases will show, the "Guidance paper on enforcement priorities in applying Article 82 to abusive exclusionary conduct by dominant undertakings"[2] (hereafter: Guidance Paper) published by the European Commission, and the decision of the Court of First Instance (CFI) in the Deutsche Telekom case,[3] are of relevance for the NMa in its assessment of margin squeeze abuses by vertically integrated dominant undertakings.

In the following, we will discuss how the NMa generally assesses a margin squeeze. We will consider a margin squeeze in the context of an abuse of dominance, followed by an assessment of a margin squeeze as a theory of harm in the analysis of a vertical merger. To date, the NMa has received just one formal complaint concerning a margin squeeze as an abuse of dominance. We will present several explanations for this low number of formal complaints. Next, we will discuss margin squeeze issues in the case of merger control and focus on a recent NMa merger case in the field of telecommunications.

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1 Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings. C(2009) 864.

2 See footnote 1.

3 Case T-271/03/Deutsche Telekom, CFI, 10th of April 2008.

2. Abuse of a dominance by a margin squeeze

2.1 Enforcement of margin squeezes in the Netherlands

Section 24 of the Dutch Competition Act prohibits the abuse of a dominant position. Section 24 has a similar reading to Article 82 of the EC Treaty. Hence, the application of Dutch competition law by the NMa is not only influenced by the Dutch case law on section 24, but also by European case law and European Guidelines.[4]

As stated above, the NMa is aware that a margin squeeze may be considered as a separate form of an abuse of dominance; this is in line with the Guidance Paper and the Deutsche Telekom decision. Furthermore, in line with the Deutsche Telekom decision, the NMa considers that it has the jurisdiction to intervene against dominant undertakings that abuse their position, even in cases where they are subject to sector-specific regulation, as long as the undertaking has any (relevant) freedom to influence prices. The NMa is thus at liberty to intervene ex-post in the case of a margin squeeze in regulated markets.

The NMa is conscious that some difficulties may arise when assessing a possible abuse in the form of a margin squeeze. One of the main difficulties involves applying the appropriate test in determining whether a margin squeeze actually exists. In line with the Guidance Paper, the NMa would choose an *as efficient competitor test* as the appropriate test**.** This implies that the NMa needs to determine whether the dominant firm is able to operate profitably on the downstream market, given the upstream price that the dominant firm charges its competitors and given the dominant firm's own downstream prices. The difficulty lies in determining the exact interpretation of an '*as efficiently operating'* competitor. For example, choices have to be made about how efficiencies of scale and synergies, that are inherent to a vertically integrated firm, should be considered and accounted for when applying the *as efficient test.* Deciding on which relevant costs of the dominant undertaking have to be considered, in order to determine a margin squeeze, can be an arduous task. Measuring the actual costs of the integrated firm can also prove to be difficult, especially measuring the correct allocation of fixed costs to the upstream and downstream activities of the integrated firm.

The *option* to intervene in regulated markets on the basis of competition law in the case of a margin squeeze does not necessarily imply that it is always *desirable* to do so*,* as in some cases it may be more prudent for the authorized regulator to intervene. The NMa cooperates intensively with the sector-specific regulators in the Netherlands such as the Dutch Health care Authority (NZa) and the Dutch Independent Post and Telecommunications Authority (OPTA). This cooperation is laid down in the Cooperation protocols[5], in which the principle is laid down that the sector-specific regulator will take the lead in interventions if the specific regulatory regime permits it to do so (precedence of sector-specific regulation above competition law). The Dutch Office of Energy Regulation is an anomaly, in that it is actually part of the NMa, which makes it even more likely that the regulating body would initially intervene. The NMa is furthermore aware that the sector-specific regulators have the specific expertise that is required to prevent or to detect a margin squeeze. This makes it obvious that in some situations it is more appropriate for the regulator to intervene first.

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4 References to the requirement for Dutch competition law to follow closely EC Competition rules are contained within the Dutch Act and the Act's explanatory memorandum. In this respect, the NMa seeks guidance from the case law of the European Commission, the Court of First Instance and the European Court of Justice as well as the above-mentioned European Commission's Guidance Paper.

5 See for example the Cooperation protocol OPTA - NMa (June 2004) http://www2.opta.nl/asp/en/publications/document.asp?id=1366.

Having said that, should it prove necessary to do so, the NMa will not hesitate to intervene in the case of a margin squeeze. By definition, ex-ante regulation attempts to forecast how competition will evolve over time. Regulation can therefore be inadequate when a specific market develops in a way that was not foreseen at the time the regulation was imposed. With ex-post intervention in the case of a margin squeeze abuse, one can test how competition actually has evolved, and see whether an undertaking can be found guilty of abusing its dominant position by having committed a margin squeeze.

As noted above, the potential for margin squeeze abuse mainly exists in regulated sectors. In the event that such an abuse does occur, both the sector-specific regulator and the competition agency may, in principle, intervene. A close cooperation between the competition agency and the specific regulators is therefore advisable whenever a complaint is filed concerning such an abuse.

In the case of margin squeezes in the telecommunications sector it is interesting to note that the NMa and the Dutch Independent Post and Telecommunications Authority (OPTA) issued joint guidelines in 2001 concerning this form of abuse. These guidelines provide information on the way the NMa and OPTA would deal with complaints on margin squeezes from competitors of the incumbent telecom operator KPN. These guidelines were withdrawn in 2007 because of a change in OPTA's regulatory framework. This change resulted in the integration of a margin squeeze test in the regulatory framework, and provides protection against discrimination between downstream competitors and the dominant undertaking's own downstream activities.

2.2 NMa case of margin squeeze: Talkline v KPN

Since the introduction of the Dutch Competition Act in 1998, the NMa has only received one formal complaint of a margin squeeze abuse. The complaint was filed by an independent virtual mobile service provider, Talkline, against the incumbent mobile network operator KPN[6]. Talkline alleged that KPN was granting more favorable conditions to its own mobile service provider, Service Provider Mobiel (SPM)[7], and that it was making use of an unfair price structure.[8]

In its decision the NMa held that the allegations of Talkline against KPN were unfounded.[9] Having analyzed the contracts that KPN had signed with independent mobile providers, the NMa concluded that KPN used the same bonus and rebate structures for all the independent service providers. Furthermore, the NMa concluded that SPM was not receiving more favourable conditions from KPN than the independent mobile service operators were receiving. In fact, the NMa found that SPM received lower bonuses and rebates than the independent mobile service operators did. Finally, the NMa concluded that a reasonably efficient independent operator of mobile telecommunication services would be able to make a profit on this market with the bonuses and rebates KPN was giving at the time.

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6 An independent mobile service operator is a service operator that is not affiliated with a mobile network operator. An independent mobile service operator uses the network of several network operators to offer its services on.

7 SPM is considered a dependent mobile service operator, because it is affiliated with the mobile network operator KPN and only uses the network of KPN.

8 Talkline also filed the above complaint with OPTA. OPTA concluded that it did not have enough powers to take action on the basis of the Dutch Telecommunication Act. The NMa and OPTA therefore concluded on the basis of their cooperative protocol that the NMa would take the lead in handling the Talkline complaint.

9 NMa decision in case 1657/Talkline vs. KPN, March 12th, 2001.

In its rejection of the complaint, the NMa explicitly stated the following: "Vertical integration of a network provider and a service provider, which uses that network, can lead to efficiencies of scale and synergy. Such efficiencies of scale and synergy can be consumer-welfare-enhancing. Making use of such efficiencies of scale and synergy does not per se lead to an abuse of dominance in the sense of Section 24 of the Dutch Competition Act."[10] This statement acknowledges that there can be welfare-enhancing effects due to vertical integration, which should be considered prior to concluding that there is a margin squeeze abuse.

The NMa formally rejected the complaint of Talkline in a decision in 2001. Since then, there have been no other similar formal complaints, and the NMa has not investigated any other cases of margin squeeze abuse.

2.3 The future of margin squeeze in dominance cases

Several reasons can be identified for the low number of cases on margin squeeze abuses filed with the NMa.

First of all, due to the fact that a margin squeeze can only take place when very specific market conditions are met, the probability of one actually occurring is very low. One of these conditions is that the input supplied by the dominant firm constitutes a relatively high, fixed proportion of the downstream costs.[11]

Secondly, if the dominant undertaking's main goal is to exclude downstream competitors it may refuse to supply the necessary input instead of applying a margin squeeze. A margin squeeze is therefore more likely to occur in markets where access to the necessary input by competitors has been imposed by regulation. On the other hand, the presence of regulators may have a preventive effect on the occurrence of margin squeezes, as the regulator tries to avoid a margin squeeze and the access tariffs are controlled by the regulator. This could explain why there is a lack of complaints filed with the NMa concerning such an abuse.

Thirdly, in some circumstances, it may be questionable as to whether a margin squeeze is a feasible strategy for a vertically integrated firm. One must specifically consider that when a vertically integrated firm uses a form of margin squeeze in order to raise its rivals' costs on the downstream market, with the objective to exclude the downstream rivals, the vertically integrated firm is foregoing a profit on the upstream market. By squeezing its downstream rivals, the vertically integrated firm is also losing its upstream customers. After all, the upstream customer is the same as the downstream rival for the vertically integrated firm. This is one reason why the incentive for vertically integrated firms to use margin squeezes may be reduced.[12]

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10 Decision by the Nma in case 1657/Talkline vs. KPN, 12th of march 2001, p.46.

11 See D.Gerardin & R. O'Donoghue, The concurrent application of competition law and regulation: The case of margin squeeze abuses in the telecommunications sector, GCLC Working Paper 04/05, p.6 for other basic conditions under which a margin squeeze may occur.

12 This idea relates to the single monopoly profit theorem by the Chicago school. This theorem considers that a vertically integrated firm has no incentive to foreclose downstream rivals as there is only a single monopoly rent to be earned in the industry. In other words, it is not a rational strategy for the firm to "leverage" its upstream-market power into the downstream segment: the total profit obtainable is the same whether the firm tries to extract it upstream, downstream, or using a combination of both. See R. O'donoghue and J.Padilla The Law and Economics of Article 82, 2006, p.308.

The lack of allegations regarding margin squeeze abuses could also be explained by the fact that complainants do not want to file a complaint with the NMa, perhaps because they would rather not have the administrative burden, or they might be afraid of possible repercussions. After all, the complainant is in a vertical relationship with the defendant, and is therefore dependent on the input of the defendant.

Despite the fact that just one complaint of a margin squeeze has been filed with the NMa over the last 12 years, one could argue that there may be an increase of formal complaints of this sort of abuse in the coming years.

The NMa could expect more formal complaints of margin squeeze abuse, because the liberalization process in certain markets has achieved its goal. This means that as markets reach the desired competitive situation, ex-ante regulation could become less necessary, or even unnecessary. In this case, there might be a larger role for competition authorities for ex-post enforcement in case of margin squeezes, because the regulator no longer intervenes ex-ante.

One recent example concerns the retail market for fixed telephone services. For over a decade, the OPTA regulated the retail tariffs for fixed telephone services. One of the objectives of regulation was to prevent a margin squeeze by the incumbent telecom operator KPN in order to promote competition on the retail market. The margin squeeze was prevented by the regulator, by setting a price floor for the retail tariff and a price ceiling for the wholesale tariff of the incumbent firm. Last year, OPTA decided that regulating the retail tariffs was no longer necessary, because competition on the retail market for fixed telephone services had developed successfully and would continue to do so in the future.[13] Furthermore, OPTA concluded that competition law enforcement (the NMa) provided enough guarantees to tackle margin squeeze issues that could arise in the retail market for fixed telephone services.[14]

In the future it is possible that, in line with the retail market for fixed telephone services, OPTA will consider relaxing regulation in other telecommunications markets. In that case, the role of the NMa in ex-post enforcement in the case of margin squeeze abuses would become more important.

2.4 Interim Conclusion

The NMa can, on the basis of competition law, intervene in the case of a margin squeeze abuse, but acknowledges that it is challenging to prove such an abuse. Because it is more likely that such an abuse would occur in regulated markets, it may be the case that, in the event of abuse, not only the NMa but also the specific regulator may intervene. Close cooperation between the regulator and the competition authority is in that case advisable. To date the NMa has received very few allegations of margin squeeze, and has made no finding of abuse on this ground. Several possible reasons for this have been discussed above. Furthermore, due to the gradual maturation of several liberalized markets, an increase in the number of allegations of margin squeeze could be expected should the emphasis shifts from ex-ante to ex-post regulation.

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13 OPTA Marktanalysebesluit vast telefonie 19 december 2008. The wholesale tariff is however still regulated by OPTA.

14 By not regulating the retail tariffs of the vertically integrated firm, the vertically integrated firm can still carry through a margin squeeze by lowering its own retail price. This practice is can be characterized as predatory pricing.

3. Mergers

3.1 Introduction

Margin squeezes have been previously described in this paper in the context of an abuse of a dominant position. However, competition concerns due to a margin squeeze may also arise as a result of a concentration, such as a merger, acquisition or the creation of a joint venture. [15] In most cases, the margin squeeze will be part of a more general theory of harm on vertical foreclosure by an upstream firm with market power. In the European Commission's *Non-horizontal Guidelines* for the assessment of concentrations[16], the margin squeeze is described as a way in which a firm can foreclose rivals from an input:

> *"Input foreclosure may occur in various forms. The merged entity may decide not to deal with its actual or potential competitors in the vertically related market. Alternatively, the merged firm may decide to restrict supplies and/or to raise the price it charges when supplying competitors and/or to otherwise make the conditions of supply less favorable than they would have been absent the merger".*

However, the way margin squeeze cases are handled in merger cases is different from Article 82 cases. Firstly, the assessment of mergers is solely concerned with the possible competition effects *as a result of* the merger, not about the effects of the behaviour of a dominant firm *per se*. This implies that certain mergers might not result in an ex-ante competitive concern because the possibility and incentive for a margin squeeze to occur is not related to the merger itself. In those cases any margin squeeze abuses will be dealt with ex-post under EC Article 82/NL Section 24.

Secondly, the Dutch procedure of first-phase and second-phase investigations (comparable to the procedure of the European Commission) provides opportunities to eliminate any competition issues which are identified during the investigation. If merging parties offer the NMa remedies in the first-phase investigation, the identified possible competition problems can be solved without having to investigate them thoroughly. Thirdly, in most cases, a theory of harm based on a margin squeeze would be part of a set of possible competition problems. In many cases, when a firm can profitably apply a margin squeeze as a result of a merger, it can also profitably completely refuse to supply the downstream market resulting in a significant lessening of competition.

3.2 Cases

The possibility of a squeeze as a result of a concentration has played an important role in the recent case 6397/*KPN – Reggefiber*[17]. This case concerns the creation of a joint venture between a vertically integrated telecom provider (KPN), and a relatively new company that provides unbundled local loop- or ULL-access to glass fiber networks (Reggefiber). KPN carries out activities, amongst others, on (i) the upstream ULL market for glass fiber and/or copper networks; (ii) the intermediate market for wholesale broadband access; and (iii) several downstream retail markets such as broadband-internet and telephony. Reggefiber only provides services on the upstream market for ULL-access to glass fiber networks.

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15 In the following, the term 'mergers' refers to all forms of concentrations under the jurisdiction of the Dutch Competition Act, such as acquisitions and joint-ventures.

16 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008/C 265/07, published on October 18, 2008, para. 33.

17 See http://www.nmanet.nl/nederlands/home/Besluiten/Besluiten_2009/6397BCM.asp in Dutch and http://www.nmanet.nl/engels/home/Decisions/Decisions_2009/6397BCM.asp in English.

The NMa concluded that it seemed feasible that, as a result of this merger, the incumbent KPN would have the possibility and an incentive to foreclose downstream rivals from access to the glass fibre network. The newly created joint venture would have, as the sole provider of ULL-access, several possible instruments to foreclose or raise rivals' costs such as:

- Deny access to the glass fibre network; or
- Raise the price of access to the glass fibre network; or
- Lower the quality level of access to the glass fibre network.

Secondly, KPN might pursue a strategy in which it sets prices below cost on the retail markets *and* increases input prices for rivals, thereby carrying out a margin squeeze.

If KPN and Reggefiber were to follow a strategy of input foreclosure through a margin squeeze and if they were to have an incentive to do so, it could lead to a loss of consumer welfare due to a loss of competition in the downstream retail markets. Competitors of KPN might no longer be able to compete profitably with KPN, and as a result might exit the market or might be forced to charge higher prices to consumers, dampening competitive pressure on KPN and leading to an overall higher price level.

The incentive to foreclose or to carry out a margin squeeze can be estimated by calculating the *critical diversion ratio.* With the input of KPN's cost and price data and its retail market share, the NMa has determined under what circumstances foreclosure would be profitable for the joint venture. The number of customers that need to switch, following foreclosure from alternate providers on KPN's network, to KPN's retail providers,[18] and not to alternative infrastructures,[19] to make this strategy profitable is called the *critical diversion ratio*. This *critical diversion ratio* revealed that the joint venture would likely have an incentive to foreclose downstream competitors, which could lead to a significant impediment of competition on the *downstream* markets.

The extent to which competition on the *retail* markets could be impeded depends in part on the level of competitive pressure that competitors on coaxial networks exert on the *retail* markets.[20] This topic would have been a subject of the second-phase investigation. However, parties have offered a set of remedies, similar to the current telecommunication's regulatory framework, that solved all the competitive concerns.[21] These remedies guarantee non-discriminatory open access and a price ceiling for access to the network. The price ceiling is designed in such a way that a margin squeeze by setting high access prices is avoided.[22]

The fact that, to some degree, the newly created joint-venture operates independently from KPN, and the fact that most investments in the FttH network[23] had yet to be made, provided some advantages in the

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18 Increased downstream revenues.

19 Decreased upstream revenues.

20 Compared to the rest of Europe, the coverage and penetration rates of the coaxial network are very high.

21 Regulator OPTA has been closely involved in the process leading to the final conditions imposed on the concentration. OPTA also has a special role in the enforcement of the conditions.

22 For more details on price regulation in this case, see OPTA (2008). Policy rules. Tariff regulation for unbundled fibre access. Available in English at http://www2.opta.nl/download/202874+Policy+rules+tariff+regulation+fibre%2Epdf .

23 FttH network (fibre to the home / fibre to the premises network).

determination of a reasonable price cap. In most cases of margin squeeze, it is difficult to separate the costs associated with either the upstream activities or the downstream activities and to determine which fixed costs should be taken into account. In this case, the business model of the joint venture for the deployment of the FttH network was available to the NMa and OPTA, which made it easier to assess the overall upstream costs associated with the product. These calculations were then used, together with an assessment of the 'all-risk WACC' to determine the price cap.

However, in order to avoid a margin squeeze, price floors regulating the downstream prices of KPN are not imposed on the joint venture, since the NMa and OPTA believe the upstream *price caps* should provide reasonable protection for competitors against a margin squeeze. Furthermore, regulation by OPTA and the conditions attached to the merger should guarantee that discrimination by the joint venture against competitors of KPN becomes impossible. Together, the price caps, non-discrimination and the obligation to provide access should create a viable business case for an *as efficient competitor* and avoid a margin squeeze or other forms of input foreclosure. If a margin squeeze would nevertheless occur, the NMa still has the option to start an investigation into the prices charged at the wholesale level in order to determine a violation of the conditions attached to the merger and the applicable regulation, and ultimately to intervene ex-post under EC Article 82 and Section 24 of the Dutch Competition Act.

3.3 Interim conclusion

In vertical mergers, a margin squeeze can play an important role in the vertical theory of harm on input foreclosure. Without the protection against a margin squeeze, downstream competitors might be forced to exit the market due to a negative margin between wholesale and retail prices. The possibility of imposing conditions on the merger and, in some sectors, the existence of a sector-specific regulator, mean that a margin squeeze can be avoided ex ante. The NMa has dealt with such a situation in the case *KPN – Reggefiber*, where a set of conditions were imposed to protect against input foreclosure and margin squeeze.

4. Conclusion

A margin squeeze occurs when a combination of upstream and downstream prices are set by a dominant integrated undertaking in such a way that an as-efficient competitor of the integrated undertaking cannot compete profitably on a lasting basis. The NMa's assessment of margin squeeze abuse cases is in line with the framework provided by the Commission's Guidelines on the enforcement priorities in Article 82 cases, although to date the NMa has only investigated one formal complaint of a possible margin squeeze abuse.

In this case, *KPN vs. Talkline*, the complaint by Talkline was rejected because the investigation showed that competitors that were at least as efficient as KPN were able to compete profitably on the market.

Several explanations can be put forward for the low number of allegations of margin squeeze abuses filed with the NMa. The most likely explanation is that margin squeezes typically occur in markets that, because of their specific characteristics, are subject to ex-ante regulation. A firm under regulation has limited room to squeeze the margins of competitors in such a situation.

If the level of competition improves on markets that are currently under regulation, this may lead to a reduction in regulation over time. As a result, the NMa could receive more allegations of margin squeeze abuses in the future.

Another important question is whether or not a competition authority should intervene in a market that is subject to regulation. In general, the NMa believes that it should always have the possibility to intervene

ex-post, but that it should closely cooperate with the regulators, if the regulator is also able to intervene on the basis of its own mandate.

In merger cases, a margin squeeze can also play an important role. The case *KPN – Reggefiber* provides an example of a possible margin squeeze by a vertically integrated firm with a significant degree of market power. The first-phase investigation led to a conditional approval of the merger, under strict non-discriminatory open-access rules and a price ceiling for the upstream product. These conditions are similar to the regulation present in that sector and were defined in close cooperation with the regulator.

NORWAY

1. Introduction

The Norwegian Competition Act treats margin squeeze in the same way as the EU legislation. Thus, margin squeeze constitute a possible abuse of dominant position in Norway.

The legal regime for competition policy in Norway was subject to revision in 2004. [1] The Act on competition between undertakings and control of concentrations (Competition Act 2004)[2] replaced the Act relating to competition in commercial activity (Competition Act 1993).[3]

With the revision in 2004, the Norwegian competition law regime was harmonized with the conduct rules in the European Union treaty and the EEA Agreement. The prohibition against abuse of a dominant position in the EU Treaty article 82 and EEA Agreement article 54 were incorporated in the Competition Act 2004 § 11. Thus, there are for practical purposes no differences in the assessment of abuse of dominant position between the law regimes in Norway, the EEA and the EU.

Section 11 paragraph 1 of the Competition Act 2004 states as follows:

> *"Any abuse by one or more undertakings of a dominant position is prohibited."*

Section 11 paragraph 2 lists a number of conducts that may constitute an abuse of a dominant position. 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."*

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1 A description (text in Norwegian) of the new Norwegian Competition Act and some of its peculiarities as compared to the EU competition law is given in Nese G., and R. Solberg (2006): "Den norske konkurranseloven – noen særegenheter" in The Finnish Competition Authority's Competition Law Yearbook 2006 ("2006 Kilpailuoikeudellinen Vuosikirja").

2 Act on competition between undertakings and control of concentrations of 5th March 2004 No. 12 (Competition Act 2004).

3 Act relating to competition in commercial activity of 11th June 1993 No. 65 (Competition Act 1993).

The wording of paragraph 2 corresponds to the equivalent paragraphs and letters in Article 54 of the EEA Agreement and Article 82 of the EC treaty.

Even if not specifically mentioned, margin squeeze would be treated as a separate, stand-alone form of abuse in the Norwegian competition act, in the same way as in the EU.

In the NCA's assessment, it is decisive that the conduct of the dominant undertaking may eliminate or reduce competition. It will therefore be necessary to investigate whether margin squeeze actually or potentially has an exclusionary effect on the relevant markets.

So far, the NCA has not made any decisions in any cases on margin squeeze since the implementation of the new Competition Act in 2004. However, from the legislative background of the Competition Act it follows that case law from the EU/EEA will strongly influence the interpretation of the Norwegian competition law. The handling of potential future margin squeeze cases by the NCA will, therefore, follow EU/EEA practice in this area.

Although the NCA has limited experience from assessment of margin squeeze under the new Competition Act, the authority recognizes margin squeeze as a potential form of abusive conduct by vertically integrated companies. The NCA's focus on margin squeeze is illustrated by the authority's implementation of a specific surveillance scheme to disclose potential margin squeeze in the markets for dairy products in 2008. This surveillance scheme is described below.

2. Surveillance of margins in the Norwegian dairy markets

2.1 Background

The NCA is responsible for enforcing the Competition Act in the dairy product markets, although these markets are subject to substantial regulations. Changes in the regulation of the Norwegian dairy sector in 2007 have brought about a change in the NCA's work on enforcing the law in the dairy markets.

The NCA's main response to the changes in the regulation has been to establish a *surveillance scheme of the gross margins in the dairy sector*. The Norwegian dairy sector is concentrated with a vertically integrated company with a dominant position both in the upstream and in most of the downstream parts of the markets. The purpose of the surveillance scheme is to observe whether the margins between the dominant company's prices upstream and downstream are so small that the NCA should open further inquiries to eventually establish that they constitute a competition-harming margin squeeze.[4]

2.2 The Norwegian dairy markets

Several sector regulations have been introduced to increase competition in the dairy sector. Nevertheless, competition is still limited.

Tine, an agricultural co-operative owned by the farmers (milk producers), is close to being a monopolist in the upstream market for raw milk and has a high market share in most downstream markets. Tine offers a wide range of different dairy products to final consumers. Tine faces limited competition for

[4] The NCA also monitors the dominant company's agreements with the grocery chains. Furthermore, the NCA has suggested an extension of the dominant company's obligation to supply its competitors with sufficient quantities of input (raw milk). Finally, the NCA wants to secure the competing companies' right to milk supplies by a different method than the current regulation.

some of the products in the dairy market.[5] Such a market structure provides incentives for Tine to lower its margins and engage in vigorous competition in the parts of the market in which it actually meets competition, while increasing its margins in the less competitive parts of the market.

Furthermore, the dairy markets are characterized by high barriers to entry, which makes it difficult for existing and potential competitors to enter and expand in these markets.

In the present situation where Tine has high market shares upstream and downstream, in combination with high barriers to entry, the NCA considers that the Norwegian dairy sector corresponds to the characteristic of markets exposed to margin squeeze, i.e. a dominant upstream firm that sells an essential input to downstream rivals and competes in the downstream market against those rivals.

Different regulatory schemes are implemented to prevent Tine from charging excessive prices on raw milk sold to downstream competitors. In 2007, the regulation in this area was subject to a change, as the traditional ex post control of purchase prices of raw milk on the dairy products markets was phased out on 1 July 2007. This scheme functioned mainly as a safety mechanism to limit competition restricting margin squeezes. The ex-post control of purchase prices was replaced by a regulation where Tine's competitors receive a compensation of 0.25 NOK pr litre of purchased milk through the price-equalization scheme.

Mainly caused by the repeal of the ex post control of purchase prices of raw milk, the NCA in 2008 implemented a surveillance scheme in order to continuously control for possible margin squeeze by Tine.

The objective of the surveillance is threefold: Firstly, it will help the NCA disclosing possible margin squeeze conduct by Tine and potentially provide a basis for the authority initiating further investigations on its own initiative. Secondly, the surveillance will establish a sound basis for assessing possible complaints from Tine's competitors about the dominant company's pricing conduct. Thirdly, the NCA is hopeful that the surveillance will have a preventive effect, reducing Tine's incentives to engage in margin squeeze.

It is worth mentioning that although the scheme is developed by the NCA, both Tine and its competitors have been consulted in order to make sure that the surveillance method, to the greatest extent possible, reflects the real markets characteristics.

2.3 The surveillance scheme in the Norwegian dairy market -methodology and results

In the surveillance scheme the NCA makes use of a test based on Tine's revenues and costs, equivalent to a so-called "*as efficient*" test. The scheme provides the NCA with information on prices, the structure of rebates and the allocation of costs of the dominant firm.

Based on these data, the test checks whether Tine's gross margins are sufficient to cover Tine's total refinement costs, including all fixed and variable costs, including a "normal" return on the capital employed.[6] If not, this indicates that even an as efficient competitor is unable to trade profitably in the downstream market. Thus, the test corresponds to the idea that if the downstream part of the vertically

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5 Tine mainly faces competition from domestic companies. Due to high tariffs the import of dairy products is limited to about 10 percent of total production for cheese and even less for liquid milk.

6 In the surveillance scheme, the NCA calculates Tine's cost of debt and cost of equity. The method employed is the estimation of the *weighted average cost of capital*. The first step in the estimation involves the determination of the capital employed and the rates of return on debt and equity. The next step involves the allocation of the capital costs on single products. This allocation is implemented by the means of a predetermined norm of distribution.

company earns a negative profit if faced with the input price charged by the upstream part of the company, then this will also be the case for equally efficient competitors.

To test whether Tine's gross margins are so small as to constitute a competition harming margin squeeze, the NCA collects data from Tine on approximately 50 different dairy products. The products included in the scheme include high-volume products that in most cases are close substitutes to products sold by other firms.

When considering the gross margins the NCA groups single products into narrow defined relevant markets, e.g. the market for mature white cheese. If Tine fails the test in a relevant market, the first step in an investigation is to consider whether the failing of the test is caused by elements other than a competition harming margin squeeze, such as short-term rebates or incorrect reporting from Tine. If no such causes are identified, the NCA considers if there are reasons for further analysis to determine whether Tine's margins are so low as to constitute a competition harming margin squeeze.

The evaluation of Tine's gross margins is carried out on a bi-annual basis. The main reason is that a margin squeeze must be of sufficiently long duration to have a competition harming effect. Temporary or short-term changes in the relative upstream or downstream prices will, in most cases, not have the effect to exclude a downstream competitor.

2.4 Results - first half year of 2008

As the surveillance scheme has only been active since 2008, the results so far are limited. The NCA has, however, published the results from the surveillance scheme for the first 6 months of 2008. In this period, 14 single products failed the test described above. However, when these products are grouped into relevant markets and the average results within each relevant market is computed, the NCA's preliminary conclusions are that no anti-competitive margin squeeze in any relevant markets can be identified.

2.5 General reflections

Margin squeeze tests can be carried out using either the dominant, vertically integrated firm's costs or the costs of the rivals in the downstream market. The two tests are usually referred to as the "*as efficient*" test and the "*reasonably efficient competitor*" test respectively.

When the dominant firm is more efficient than the rivals it is a common understanding that the "*as efficient*" test should be applied. In such cases the dominant firm should price according to its own costs, and it can be argued that the dominant firm will not have the responsibility to allow a margin so that less efficient rivals can survive.

However, there may be cases where the rivals in the downstream market are actually more efficient than the downstream part of the vertically integrated dominant firm. Then the *"as efficient*" test can be misleading. In such cases, a price below cost behaviour by the dominant firm does not necessarily have an anti-competitive effect on competitors already operating in the market. One way to solve this problem is to employ a "*reasonable efficient competitor*" test, e.g. by using the costs of the more efficient rival.

Still, when analyzing possible margin squeezes in such markets, attention should be paid to the possibility of entry from new firms. If the dominant firm's pricing strategy prevents firms that are as (or possibly *more*) efficient than the dominant firm to enter the market, a competition harming margin squeeze could occur, even though a margin squeeze would not be asserted by the "*reasonably efficient competitor*" test.

On this basis, the assessment of whether a margin squeeze is likely to be anti-competitive should be carried out on a case by case basis.

POLAND

Margin squeeze is an anti-competitive strategy which can be used by an undertaking active in vertically related markets and dominant in the upstream one. By controlling its upstream and downstream prices it can make it impossible for their downstream competitors, dependent on the upstream incumbent, to cover their costs, by setting the difference between its downstream and upstream prices at a sufficiently small level. Unable to turn to an alternative source of supply, downstream competitors are excluded from the market.

Therefore, for margin squeeze to be found, there must be a dominant firm, which supplies an essential input to firms in a downstream market, in which it is active as well. The price charged to competitors for the input must be so high, that the incumbent would suffer losses, if it had to buy the input at this price. In such circumstances equally efficient competitors are excluded from the downstream market, where the incumbent charges prices *de facto* below costs. In practice, the authority gathers data on total costs and revenues in the downstream market as well as on the prices charged for the upstream input to competitors. If downstream revenue minus cost of inputs at prices charged to competitors is lower than downstream costs for a non-negligible period of time, there is a possibility of margin squeeze occurring.

Margin squeeze is not a separate, stand-alone form of abuse under Polish competition law. Cases falling into this category are usually dealt with under art. 9.2.5 of the Competition and Consumer Protection Act, which prohibits dominant undertakings form "*acting against the formation of conditions indispensable to creation or development of competition*". The article is a catch-all category for exclusionary practices, from predatory pricing to refusal to supply. Margin squeeze, as appearing in the decisions of the Polish competition authority, is predominantly a method of proving exclusionary effects of the incumbent's pricing behavior.

The margin squeeze methodology, understood as testing the relations between upstream and downstream prices and costs has been relatively rarely applied in the Polish competition law, nevertheless there has been a number of cases where the behaviour of a dominant undertaking could be described as a margin squeeze.

1. Cases

Typical cases concern two industries: cemetery and waste disposal services, which are characterized by the presence of an upstream incumbent (cemetery manager and owner of a waste dumping site respectively), who may be active in the downstream market (funeral services and waste collection). Incumbents in the upstream market charge their downstream competitors prices, which would not allow the incumbents themselves to make a profit or require various "access fees" with a similar effect of raising competitors' costs.

Two cases from the waste collection sector may serve as an illustration. The first one concerned a municipal company in Cracow, an owner of a locally dominant waste dumping ground. It was also an important player in the local waste collection market. It was accused of excluding competitors in the waste collection market by charging high prices for waste deposition. During investigation cost, price and revenue data was collected, concerning the activities of the company in both markets: waste deposition and waste collection. The data showed that the price charged to competitors for waste deposition, if applied by

the company to itself, would not allow it to make a profit on its waste collection operations in the downstream market. The company was found to have abused its dominant position by excluding competitors from the waste collection market. As a matter of fact, the exclusion was not complete – there were still other companies active in the local waste collection market, but their collective market share was lower than the share of the municipal company (in proportion of roughly 40 to 60) and they were forced to use other, significantly more distant dumping sites – the municipal dumping site was used almost exclusively by the municipal company.

Another case where margin squeeze framework was used concerned local waste collection market in the north-east of Poland. The municipal company active in the waste collection market was also a manager of a local waste dumping ground. The town, a sole owner of the company, at the latter's request, sharply increased prices for storing waste and introduced maximum prices for waste collection services, based on the (unrealistic, as it turned out) calculations presented by the company. Increase in storage prices triggered a complaint from a firm preparing to enter the waste collection market, alleging unfair denial of access to it. As data gathered in the course of proceedings showed, the municipal company's costs associated with transporting waste were much higher than the difference between the prices it charged for waste collection and the rates for storing it – were it to incur costs it charged competitors, the company would suffer heavy losses. Anti-competitive intent of the increase in the waste deposition rates was evident from its timing: the decision to raise prices was taken in the (unusually long) period during which competitor's application for a permit to collect waste in the municipality was processed.

As mentioned, several cases in the cemetery markets may also be treated as a variation of margin squeeze, though, due to data problems, a cost test is usually not applied. A typical case involves a company, to which the management of a municipal cemetery is entrusted. The cemetery management company is also active in the funeral sevices market and introduces various fees, which are paid only by rival funeral companies and have the effect of pricing them out of the market and *de facto* reserving the cemetery to only one funeral company. Such cases are usually treated as exclusionary abuses, without explicit reference to margin squeeze.

An important telecommunications case may be mentioned in his context as well. Even though it was not prosecuted under margin squeeze allegations, it bore strong resemblance to this strategy. The case concerned access charges to the premium telephone services. Normally such services were used by providers of various information (weather forecast, exchange rates) or other services (e.g. chats). The revenue from such services was shared among three parties:

- access provider (for 90% of telephone users it was the incumbent – Telekomunikacja Polska SA [TP SA]) – 20% of the revenue,
- operator of the premium number – 80% of the revenue,
- service provider – paid by the operator of the premium number.

Independent telecom operators found it profitable to use the cheapest premium numbers (starting with the numbers 0-708 1, costing 0,29 PLN) to provide international calls, which affected TP SA's market share: the percentage of international calls provided by TP SA fell from ca. 84% in 2003 to 73,5% in 2004. The incumbent reacted with a two-pronged strategy. On the one hand, starting on 1 October 2005 it raised access charge for the cheapest premium number by 100%, on the other, it lowered price for international calls (1 September 2005, announced a month earlier) as well as preparing special plans and promotions (July 2005). It caused the volume of international calls provided via premium numbers to plummet. 10 days after the increase of access charges, upon complaint from an independent operator, Polish competition

authority issued an interim decision ordering TP SA to desist from introducing higher charges. The international calls volume handled through premium numbers returned to its former level.

The incumbent provided several justifications for the steep increase in access charges, none of them convincing. First, it claimed that the increase was a result of a cost analysis. It also pointed out that the increase in the premium numbers' popularity caused TP SA to incur additional variable costs, associated with billing customers, debt collection and complaints handling. Finally, the incumbent maintained, that it had to raise its price by 100%, as 0,29 PLN was its minimum tariff unit. As the proceedings showed, the charges for initiating international call (let alone its costs) were actually lower than the amount TP SA received for a 0-708 1 call even before the increase. The costs of billing customers, debt collection complaint handling were not specific to premium number calls – they were incurred also while providing other services, whose price did not rise. Additionally, costs of billing customers were calculated by the authority on the basis of other services and they turned out to be sufficiently low as not to justify the price increase. The cost arguments were suspicious also in light of the fact that since 1995 premium numbers rates were only decreasing (from 1,20 PLN in 1995 to 0,29 PLN in 2002). The incumbent therefore would have to provide services below costs for a long period of time, noticing that fact only after competition from operators using premium numbers made itself felt. Finally, the argument that the price could not have been raised by less than the multiple of 0,29 was particularly specious, as among nine 0-708 premium rates only two were multiples of that amount.

The case, even though it was not investigated within the margin squeeze framework, could plausibly be described as squeezing downstream competitors by increasing the price of an essential input by a quasi-monopolist and, at the same time, decreasing its own downstream price. An essential modification in this case was that the incumbent controlled not only upstream, but also downstream price of competitors (access charge).

2. Problems with practical application of the margin squeeze framework

There are several problems associated with applying margin squeeze approach in practice. First, there are problems with determining whether margin squeeze actually took place. The task of establishing upstream and downstream costs in case of multiproduct firms may be very complicated, due to existence of common costs. Second, higher price charged to competitors may result from transaction costs associated with making the input available to them or be a consequence of other efficiencies, which may be overlooked in an "automatic" application of the margin squeeze methodology. Third, undertakings faced with possible uncertainties or inefficiencies associated with the margin squeeze application may choose not to deal with downstream competitors at all, leaving consumers worse off. Finally, margin squeeze cases are to a large extent regulatory in nature, as they force competition authorities and/or courts to decide on the "right" level of prices, based on the companies' costs. Arguably, neither competition authorities, nor courts have the requisite expertise for this task.

Such issues, though they make the application of margin squeeze framework a difficult task, are not particularly pertinent to the cases that the Polish competition authority faces in practice. Several factors account for this state of affairs. First of all, in waste collection cases it is not difficult to establish downstream costs and revenues, as issues with common costs usually do not arise. Municipal waste deposition sites are also generally not in a position to refuse to deal without objective justification. Furthermore, we have never been presented with an indication of efficiencies which would justify the pricing policy of an incumbent. Had it been provided, it would have been taken into serious consideration. Finally, even though the margin squeeze cases pursued were in fact regulatory or at least quasi-regulatory, they concern situations in which a regulator – usually a municipality – either does not take any action to prevent competition from being distorted (by allowing the manager of an essential facility to act in a discriminatory manner) or actually colludes with an incumbent in order to thwart downstream competition.

Interventions in such cases have therefore an effect of preventing public facilities from being misused to the detriment of consumers with tacit or explicit consent of the institutions entrusted with their management.

PORTUGAL

1. Question 1

As a legal matter, is "margin squeeze" or "price squeeze" a recognised separate, stand-alone form of abuse in your jurisdiction – either as a breach of competition law, and/or as a breach of a sector-specific or regulatory law, such as say, an "imputation test" in the telecommunications sector? If so, what conditions must be satisfied to find a margin squeeze or price squeeze to be anti-competitive? What is the harm alleged from a margin squeeze?

The Portuguese Competition Law (PCL) doesn't directly refer "margin squeeze" or "price squeeze" as separate, stand-alone forms of abuse of dominant position.

The PCL states that an abuse of a dominant position can result from "directly or indirectly fix purchase or selling prices or interfere with their establishment by free market forces, thus causing them artificially either to rise or fall"(Article 4 (1), a), *ex vi* Article 6 (3) a) of the PCL).

So it is fair to say that even though the PCL doesn't literally refer "margin squeeze" it indirectly addresses the issue by referring "causing" prices "artificially either to rise or fall" in the sense that a margin squeeze is exactly a way in which the retail price is artificially set down in relative terms (when compared with the wholesale price) and the wholesale price is artificially set up also in relative terms (when compared with the retail price).

There is no such thing as a check list where all the conditions that must be met to find an anti-competitive margin squeeze or price squeeze are stated. Instead, the general principles apply, namely: dominance in the upstream market; active presence in the downstream market; vertically integrated company (economic unity); unfair difference between retail and wholesale prices (likely to eliminate competition); no objective justification.

The alleged harm is, also, a general one. An abuse of a dominant position is prohibited if it has the purpose or the effect of deterring or reducing competition (exclusionary effect).

Sector-specific or regulatory laws do not directly address the issue of margin squeeze. In some cases, like in the Energy sector, where the opening of the markets to competition is still incipient, there are markets where the wholesale and/or retail price is still set by the regulator.

In the telecommunications sector, the regulator developed guidelines for margin squeeze assessments that it applies to situations when the vertically integrated company has a dominant position in the downstream market and it is required to provide network access.

2. Question 2

Has your jurisdiction investigated or prosecuted cases which might fit within the definition of a margin squeeze, but which were treated as some other form of abuse? That is, looking at cases you have investigated involving an upstream provider of an essential input also competing on a downstream market, in which a key issue at stake was the downstream price relative to the price

for the essential input, were these cases treated as cases of "margin squeeze" or as some other form of abuse, such as refusal to deal, predatory pricing, price discrimination or, excessive pricing? Can you explain why the particular approach to the case was chosen? Was consideration given to characterising the case as another form of abuse? Were these cases primarily from one industry (e.g., telecommunications)?

The Portuguese Competition Authority (PCA) has recently decided its first case on margin squeeze, (issued the 28th August 2009), against the undertakings Portugal Telecom SGPS SA (PT SGPS), PT Comunicações SA (PTC)1, ZON – Multimédia, Serviços de Telecomunicações e Multimédia SGPS SA (ZON)2 and ZON – TV CABO Portugal SA (TV CABO). A fine of €53 million was applied to the companies for the abuse of dominant position in the wholesale and retail markets for broadband access. This decision is under appeal at the Lisbon Commercial Court[1].

The case was treated as a separate, stand-alone form of abuse.

All the answers to the next questions will be based on the PCA approach to that case.

3. Question 3

In these cases which broadly fit within the definition of a margin squeeze (as in question 2), were there particular factors which complicated the analysis – for example, was the essential input provided by the integrated firm to the downstream rivals somehow different from the input that it provided to itself? Were the downstream products sold by the downstream rivals only imperfect substitutes for the downstream products sold by the integrated firm? Did the downstream rivals target different customers to the integrated firm? Were the downstream services sold as part of a bundle of products? Did the integrated firm engage in volume discounts or other forms of price discrimination to its own customers? Was there only partial rather than full vertical integration? What other complicating factors did you consider?

In the margin squeeze case analysed by the PCA there were some complicating factors:

- The integrated firm engaged in volume discounts at the wholesale level (these discounts were found to be discriminatory);
- The integrated firm was operating at the retail level with three different subsidiaries (meaning three different cost structures);
- The integrated firm was offering retail services using two different technological platforms (with different costs and differentiated uses). One of the platforms (DSL) was opened to third parties for wholesale access and the other one (cable) wasn't.
- The integrated firm was offering retail services that were not possible to replicate by the competitors based on the wholesale offer it had in place.
- After the censored conduct, the vertically integrated company decided to split of part of its retail operations. Therefore, by the time the behaviour was censored by the PCA, part of the vertically integrated company was already in the hand of different shareholders.

[1] For further information on this case please consult: http://www.concorrencia.pt/download/pressrelease2009_16.pdf

4. Question 4

In these cases which might fit within the definition of a margin squeeze (as in question 2) was there a pre-existing duty-to-deal? (In other words, did the vertically-integrated firm have the right not to supply the essential input to its downstream rivals at all?) If there was no pre-existing duty to deal, were there concerns expressed about imposing a duty to deal? For example, was there a concern that imposing liability for a margin squeeze might deter the integrated firm from voluntarily dealing with downstream rivals at all?

In the margin squeeze case analysed by the PCA there was a pre-existing duty-to-deal in the sense that the integrated company wholesale offer was supported in a network. This network was bought from the State (its previous owner) by the incumbent with non discriminatory access obligations.

5. Question 5a

In these margin squeeze cases (as in question 2) where there was a pre-existing duty to deal with downstream rivals, was this pre-existing duty to deal a result of a competition law obligation or a regulatory requirement? Was the primary remedy considered (a) a change in the upstream price for the essential input; or (b) a change in the downstream price?

As stated in the answer to the previous question the pre-existing duty to deal was not the result either of a competition law obligation or a regulatory requirement. It was an obligation that was attached to the asset that the company bought. When the telecom company bought the telecommunication network it agreed with the seller (the State) to give access to third parties. Naturally, the price paid for the infrastructure included an implicit discount resulting from that obligation.

In what concerns the remedies on margin squeeze cases, a primary remedy to cease an unlawful margin squeeze practice is to force (usually through regulatory action) the integrated company to change its wholesale and/or retail prices so that the retail margin can increase. It is not necessary that the wholesale price goes down, although in most situations that is what happens. The fact is that companies are more likely to prefer squeezing the margin by having a relatively higher wholesale price because this way they can exclude rivals while making aggregate short term profits.

In the recent PCA Decision in the margin squeeze case, a fine of €53 million was applied to the companies for violating the PCL while the regulator imposed a decrease in the wholesale prices together with the introduction of a retail minus rule that would require the company to price its wholesale offer taking into consideration the prices it charges at the retail level.

6. Question 5b

In the case where the primary remedy considered was a change in the price for the essential input, was there any conflict between the competition law obligations (such as a breach of the rules against margin squeeze) with regulatory obligations (such as a requirement to provide the essential input at a specified price)? Was the integrated firm able to use the fact that its upstream prices were regulated as a form of defence against being found liable for an anticompetitive margin squeeze?

As stated in the previous answer, in the case involving the PCA there was coordination between the Competition Authority and the regulator.

Nevertheless, the integrated firm used the argument that its upstream prices were regulated as a defence against being found liable for an anticompetitive margin squeeze. However the fact is that, at the

time of the conduct, neither the upstream nor the downstream prices were regulated and the company had enough margin of discretion to set its own prices.

The regulator's intervention in the wholesale price formation mechanism occurred a posteriori, i.e., after the anticompetitive behaviour was detected by the regulator.

7. Question 6

What is your jurisdiction's approach to predatory pricing? How does that approach relate to your jurisdiction's approach to margin squeeze cases? In the margin squeeze cases (as in question 2) where there was a pre-existing duty to deal with downstream rivals and where the primary remedy considered was a change in the downstream price, how did your analysis or prosecution of the case differ (if at all) from a case of predatory pricing? In assessing whether the defendant's downstream price is predatory, did you impute to the defendant's downstream cost as the price the defendant charges rivals for the upstream product? Or did you use the defendant's cost of producing the upstream product? Did you seek to demonstrate the possibility of some form of recoupment? Did you seek to estimate the barriers to entry?

There have been no predatory pricing cases in Portugal in recent years. However European courts jurisprudence in this area is relatively extensive.

Predatory pricing cases have different features from margin squeeze cases.

First, predatory pricing strategies require a sacrifice of short run profits and an ability to increase profits in the long term by exercising market power once predation has been successful.[2] A margin squeeze doesn't require a short term aggregate (retail+wholesale) loss (if the wholesale price is set at high levels).

Second, in predation the company is trying to improve its market power in one market using the power it already has in that market. In margin squeeze cases the integrated company is using its power in the upstream market to obtain or increase its power in the downstream market. Therefore, effects tend to occur in different ways.

In what regards the costs measure that should be considered in predatory prices, the use of the cost of producing the upstream product together with the remaining relevant downstream costs seems adequate for most of the situations where predatory prices from integrated companies are being assessed.

In margin squeeze tests the relevant costs to access are the wholesale prices paid by competitors to the vertically integrated company and the downstream costs of the vertically integrated company retail arm.

The wholesale internal transfer prices are not necessarily a good fit for either predatory and margin squeeze tests as they can easily be manipulated by integrated companies, allowing them to exclude rivals without being detected in the tests.

In what concerns short term losses recoupment and barriers to entry, as referred earlier, this recoupment is not necessarily an issue in margin squeeze cases, because the company can have short term profits while excluding rivals, but it is an issue in predatory pricing. In fact, it only makes sense for a company to set a predatory price if it has the possibility to recoup its short term losses in the long term.

[2] See for example M Motta '*Competition Policy – Theory and Practice*' (2004) Cambridge Press – pg. 442.

The ability to recoup short term losses is strongly related with barriers to entry. The higher the barriers to entry the more likely is the company to recoup losses. Therefore, barriers to entry in the retail market are some of the most important features in predatory cases.

In margin squeeze cases the analysis of barriers to entry is more important in the upstream market than in the downstream market because the company is using the market power it has upstream to create or enhance its dominant position downstream.

8. Question 7

At what level of aggregation did you apply the margin squeeze test? Was it at the level of groups or classes or services? If so, what notion of price did you adopt? Was it an average price over a range of services? Or did you apply the margin squeeze test separately to individual services? If so, how did you allocate costs across those services?

The margin squeeze test was applied separately to individual services. The individual services analysed were the ones representing most of the company sales.

The variable costs were allocated to the product that generated these costs. All other incremental costs were allocated exactly according to the same assumptions that decision makers at the company were using internally when taking price decisions.

Using internal information from the decision process within the company to allocate costs proved to be a good strategy as it reduced substantially the litigation process.

9. Question 8

What test for a margin squeeze did you seek to apply? Did your test involve some assessment of the costs of the integrated firm? If so, what measure of costs did you seek to estimate? (marginal cost? incremental cost? variable cost? or average total cost?) How did you address problems of sunk costs, or economies of scale and scope (which given rise to joint and common costs)? Did you address issues of the cost of capital? Was the period of time in which the alleged margin squeeze was applying a factor in your analysis?

In the margin squeeze case, the PCA used the "equally efficient operator test" (EIO) to assess the existence of an abuse of dominant position in the form of a margin squeeze. That means that the PCA analyzed whether the margin that results from the difference between the integrated company retail prices and the wholesale prices it charged to its retail competitors was sufficient for an hypothetical retail competitor, at least as efficient as the one of the vertically integrated company that uses the same wholesale offer (that the retail competitors are using), to cover its retail costs in order to make a normal profit (economic profit equal to zero).

In a competition analysis of profitability, a long-run approach is appropriate since it is based on the minimum long-run level of costs that would be consistent with a financially sustainable business. The long-run is the time horizon over which all costs are variable. A cost floor based on a short-run measure of costs – such as short-run average variable cost (AVC) - would set a cost floor which a firm could price down to in the short-term but which would not be sustainable in the long-run where there are fixed costs. Using AVC as a (short-term) cost-floor would not provide any information about the long-term nature of competition.

As a consequence, the cost reference used by the PCA in the analysis was the long run incremental cost (LRIC).

The LRIC includes the total long run costs (capital and operating costs) of supplying a specified additional unit of output.

The long run average incremental cost (LRAIC) was then calculated by dividing the LRIC by a specified level of output of the given product.

If the price of a service covers all its LRAIC it will be profitable for the undertaking to offer the service.

This cost measure includes all the variable costs but also the short term fixed costs and investments that result from the production of that service.

The weighted average cost of capital (WACC) was calculated using the Capital Asset Pricing Model (CAPM) and the economic profit was calculated using the economic profit model (EP)[3].

10. Question 9

Did the margin squeeze result in exit (or prevent entry) of downstream firms? Did you seek to demonstrate (or were you required to demonstrate) any anticompetitive effects?

In the recent case handled by the PCA, the margin squeeze resulted in an exit of downstream competitors from the market. It also resulted on a temporary suspension of retail offers from some competitors.

As a result of the margin squeeze the most important competitors decreased their advertising levels and they were not able to capture customers at the same pace the integrated firm did.

The PCA considered also proved that the anticompetitive behaviour resulted in a decrease in the diversity and quality of the services in the downstream market.

The existence of effects is relevant to assess the severity of the infringement and determine the amount of the fine to be applied.

11. Question 10

What was the outcome in these cases? Was the competition authority successful in obtaining compliance? What was the remedy imposed? Was the case subject to litigation or appeal? What were the key matters at stake in the litigation?

As result of the abuse of dominant position in the form of a margin squeeze, the PCA imposed the companies involved a fine of 53 million Euro. In addition, the sector regulator decided to regulate the wholesale and retail offers by imposing a decrease of the wholesale prices by 20% and the creation of a "retail minus" rule for retail prices.

Companies appealed to the Lisbon Commercial Court.

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[3] Copeland, Koller, Murrin '*Valuation – Measuring and Managing the value of companies*' (2000) John Wiley & Sons, Inc. – pg. 143.

12. Question 11

Is the standard of proof in margin squeeze cases different from that in refusal to deal, predatory pricing, price discrimination or, excessive pricing cases? If so, please explain why this might be the case.

One of the most important questions in a margin squeeze case is: Should equally efficient (or more efficient) competitors in the retail market be excluded by the conduct of a vertically integrated firm that uses its market power in the upstream market to impose them losses downstream?

It seems reasonable to say that other typified forms of price abuses, namely predatory pricing, price discrimination, and refusals to deal cannot adequately control all the anticompetitive concerns arising from margin squeezes.

There may be cases where a predatory price can exist together with a margin squeeze (when the retail price is set too low compared with the wholesale price and the retail price taken alone is not sufficient to cover the relevant costs).

Note, however, that the existence of these two conducts simultaneously does not seem to be likely[4] because there are no economic incentives for the vertically integrated company to behave like that. A margin squeeze alone can reach the goal of excluding competitors without harming its short term profits while a predatory price would necessarily harm its short term profits.

Hence, if a margin squeeze results from wholesale prices being too high when compared to retail prices, it is likely that the retail price is not predatory. Therefore, the predation test wouldn't identify the conduct as illegal. However, competitors equally efficient or even more efficient than the integrated firm would be excluded from the retail market regardless of its merits.

Therefore, using the tests of predatory pricing to control margin squeezes could lead to under enforcement.

It is also clear that margin squeeze cases cannot fit the price discrimination antitrust liability umbrella. That doesn't mean that price discrimination cannot occur together with a margin squeeze. There may be situations where both forms of abuse are present at the same time.[5] Two illegal conducts can occur simultaneously but each one is illegal by itself.

The fact is that, most margin squeeze cases recently decided in Europe didn't include price discrimination features. So, even if the wholesale price charged by the integrated company is exactly the same to all players, it may well be that the wholesale price compared with the retail price charged by the integrated firm is insufficient for a competitor, at least as efficient as the integrated firm retail operations, to make a normal profit.

Finally, it seems challenging that a case that fits margin squeeze can be investigated as a refusal to deal.

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4 There may be rare situations (not very likely) where some incentives can arise to practice those strategies together. For example if there is a threat of a competitor entering the downstream market.

5 Pietro Crocioni & Cento Veljanovski, '*Price squeezes, foreclosure and Competition law Principles and guidelines*', Journal of Network Industries, Volume 4 (2003), No. 1 – Pg. 31.

In particular situations a refusal to deal can be similar to a margin squeeze. For example, in a situation where the margin between the retail and wholesale prices is so short that no retail competitor is willing to buy the wholesale input.

In this case, sometimes called constructive refusal to deal, the refusal to deal is not a formal one but it is very real.

So the question here is not so much whether refusals-to-deal can adequately control margin squeezes but the reverse one, i.e. whether margin squeezes can adequately control refusals-to-deal.

The answer to the latter question is open to debate. The fact is that although a constructive refusal to deal can have exactly the same effects of formal refusals to deal, margin squeezes require more complex economic analyses because they involve revenue and cost tests and allocations.

13. Question 12

How has the legal and economic thinking on margin squeeze evolved in your jurisdiction over the past few years? Do you foresee any developments in this area of competition law in your jurisdiction in the future? Has this area been recently reviewed or reconsidered? Are there any major decisions of the courts expected in the near future? If so, please describe the underlying fact patterns and allegations.

Margin squeeze cases are relatively recent in Portugal. So far there has been only one decision (taken by the PCA this August) regarding a margin squeeze in the broadband access markets.

As a consequence there have not been major changes in the legal and economic thinking in this area in the past years that are specific to the Portuguese jurisdiction. However, recent Decisions by the European Commission (Telefonica Case) and by the European Courts (Deutsche Telekom) are likely to represent major landmarks that will influence the PCA reasoning as well as Portuguese courts.

The recent CFI decision on the Deutsche Telekom Case, the European Commission Decision on the Telefonica case, and the US Courts decisions on the Covad, Cavalier and Linkline Cases were key to make precise the draft lines of the theory of antitrust liability based on margin squeeze.

Following these decisions, namely the most recent ones from American Courts, a few economists[6] have been criticizing the "margin squeeze" as a theory of antitrust liability sustaining that: Integrated companies do not have incentives to engage in a margin squeeze; The threat of such liability discourages investment and voluntary provision of inputs; In margin squeeze cases only competitors are being protected and welfare is not necessarily being promoted; In the presence of double marginalization a margin squeeze can be pro-competitive; Margin squeeze cases involve competition authorities and courts in regulatory price setting.

Several economists have, however, refuted these claims. Below, we will analyse the merits of these claims.

The first claim is that integrated companies do not have incentives to engage in a margin squeeze practice to exclude downstream rivals because their dominance in the upstream market already allows

[6] See for example J. Gregory Sidak '*Abolishing the price squeeze as a theory of antitrust liability*' (2008) J Competition Law & Economics; Dennis W. Carlton 'Should "price squeeze" be a recognized form of anticompetitive conduct?' (2008) J Competition Law & Economics.

them to extract all the rents from competitors. In this setting, rivals can only obtain a normal profit and the integrated company would have nothing to gain from excluding them.[7]

In some sense this critic resembles the "one monopoly profit theory" associated with the Chicago School.

If it is true that there may be situations where a vertically integrated company may not have incentives to exclude downstream competitors, it is also true that in several situations that is clearly not the case.[8]

Moreover, most authors that claim that integrated companies do not have incentives to engage in a margin squeeze practice rely on somewhat challenging assumptions regarding market transparency and perfect information. They assume that the incumbent company knows the cost structure of its rivals at any point in time and possibly, that all competitors have the same cost structure.[9]

First, it seems unlikely that the vertically integrated company will know its competitors' cost structures so that it can charge a wholesale price that will result exactly in them earning just a normal profit. Second, competitors' cost structure change over time making it hard for the integrated company to know them (this is particularly important in network industries or in the presence of economies of scale). Third, it is possible that cost structures from the different competitors will differ from each other. That would mean that in the absence of wholesale price discrimination (that could well be discriminatory if the discount system purpose was solely to extract the higher rent from the most efficient competitor) it wouldn't be possible to guarantee that all rents were being extracted by the integrated company at the wholesale level.

To sum up, assuming that an integrated company with market power in the upstream market doesn't have incentives to engage in margin squeeze may be misguided when competitors' cost structures are unknown and companies have different and evolving cost structures.[10]

The second claim is that the threat of margin squeeze liability would discourage investment and the voluntary provision of inputs.

The logic of this argument is that any liability would discourage investment and voluntary provision of inputs, being necessarily bad for competition and consumer welfare.

Arguing that a company will not enter markets or will exit markets (not selling inputs or reducing investments) because there is a threat of being liable would lead to the extreme conclusion that competition and regulatory laws would decrease consumer welfare by restricting companies' conducts.[11]

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7 Dennis W. Carlton '*Should "price squeeze" be a recognized form of anticompetitive conduct?*' (2008) J Competition Law & Economics – pg. 275.

8 M Motta and A Streel '*Exploitative and Exclusionary Excessive Prices in EU Law*' (2003) – pg. 25 and 26.

9 Dennis W. Carlton '*Should "price squeeze" be a recognized form of anticompetitive conduct?*' (2008) J Competition Law & Economics – pg. 275.

10 P Bolton, J Brodley and M Riordan '*Predatory Pricing: Strategic Theory And Legal Policy*' – pg. 6, 9 and 11.

John Vickers '*Some Economics of Abuse of Dominance*' - Department of Economics discussion paper series – (2007) University of Oxford – pg. 7.

Paul Milgrom, '*Predatory Pricing*' - The New Palgrave Dictionary of Economics – pg. 937.

11 See for example M Motta '*Competition Policy – Theory and Practice*' (2004) Cambridge Press – pg. 19.

On the contrary, the aim of the competition law is to encourage investment and the voluntary provision of inputs by levelling the playing field in order to increase total welfare.

In conclusion, it is true that any action a company takes (either by investing or providing services) can be scrutinized by regulators and competition authorities, and, therefore, the more actions it takes the more it might be scrutinized. However, that shouldn't be a deterrent for the company entering and exiting markets but only a deterrent for anti-competitive behaviour.

The third claim is that by recognizing margin squeeze as anti-competitive behaviour only competitors will be protected but social welfare won't necessarily be promoted is not a fair one.

If the correct test is applied in a margin squeeze analysis, social welfare will be promoted.

In a recent margin squeeze case, the PCA used the equally efficient operator test (EEO) to analyse potential margin squeeze cases. This test analyses if under the retail and wholesale conditions set by the vertically integrated operator a competitor in the downstream market which is at least as efficient as the incumbent's downstream operator would be able to earn a normal profit.

Therefore, the EEO test assures that only competitors that are more (or at least as) efficient than the vertically integrated company are protected from the integrated company unlawful conduct. The most efficient operators in the industry are also those likely to promote social welfare.

If a different test was used and inefficient operators were able to survive due to the competition authority intervention, then social welfare wouldn't be promoted.

In conclusion, if the right methodologies are used to assess the existence of an unlawful margin squeeze practice the critics' claim is not a fair one.

The fourth claim used is that in the presence of double marginalization a margin squeeze can be pro-competitive.[12]

Claiming the existence of a double marginalization problem in a margin squeeze case seems challenging.

First, because one of the conditions that must be met for a margin squeeze practice to hold is the existence of a vertically integrated company. So, if there is a vertically integrated company there shouldn't be a double marginalization problem because the vertically integrated firm has the incentives and the ability to avoid it in order to maximize profits. In fact, the company can define the internal transfer price between its wholesale and retail units in order to maximize the overall (wholesale+retail) profit without incurring in any abuse of a dominant position.[13]

Note that the relevant wholesale price to be considered in a margin squeeze test is the one the vertically integrated company charges to its competitors and not its internal transfer price.

Second, double marginalisation problems arise, not only when we do not have a vertically integrated company (which is not the case for margin squeeze), but also when there are two independent companies,

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12 See for example J. Gregory Sidak '*Abolishing the price squeeze as a theory of antitrust liability*' (2008) J Competition Law & Economics – pg. 306.

13 Areeda and Hovenkamp '*Antitrust Law*', Aspen Pub, (2002).

one with market power at the wholesale level and other with market power at retail level.[14] The fact is that most margin squeeze cases occur in a scenario where the company with market power at the retail level is exactly the vertically integrated one and not an independent company or in situations where there is no market power at all in the retail market.

Therefore it seems clear that the double marginalization problem is not an issue in margin squeeze cases.

Finally critics claim that margin squeeze cases involve competition authorities and courts in regulatory price setting.

Any form of abuse of a dominant position that involves price fixing (predatory pricing, price discrimination; excessive pricing;…), at the end of the day, requires competition authorities and courts to assess the price setting mechanism. Margin squeeze cases are not any different from other forms of price abuses in that respect.

In margin squeeze cases, competition authorities and courts will not be setting present or future prices. Competition authorities and courts will only analyze past prices and its formation process. As costs structure and competition dynamic evolve, for most of the cases, companies will be the ones to set their own present and future prices.

In conclusion, the main critics of the theory of margin squeeze as an antitrust liability theory tend to use general arguments that would fit pretty much any kind of abuse.

CFI decision on the Telefonica Case and Lisbon Commercial Court in Portugal Telecom/ZON Case expected in the coming years are likely to be important landmarks in this field of discussion.

[14] Simon Bishop and Mike Walker, '*The Economics of EC Competition Law*' (2002), Thomson – Sweet & Maxwell – pg 159.

SLOVAK REPUBLIC

1. Introduction

The focus of this report is an application of the "margin squeeze" concept in the practice of the Antimonopoly Office of the Slovak Republic (hereinafter "the Office"). The topic will mostly be treated on the basis of two recent Slovak telecommunication cases relating to the application of the margin squeeze concept.

Margin squeeze is considered as a breach of the competition law, according to the practice of the Office as a stand alone form of the abuse of a dominant position in our jurisdiction. The Act No. 136/2001 Coll. on the Protection of Competition (hereinafter "the Act") does not contain any special provision explicitly dealing with the margin squeeze abuse and the Office subsumes such conduct of a dominant player under Article 8 of the Act. This article contains a general prohibition of any abuse of a dominant position and demonstrative examples similar to those enumerated in Article 82 of the EU Treaty. From a legal point of view the Office labels a margin squeeze abuse of a dominant position as "an imposition of unfair prices or unfair trading condition" (Article 8 paragraph 2a) of the Act) in a sentence of a final decision (one of the demonstrative enumeration examples of abuses of the dominant position). This provision has a broader meaning and other pricing practices can also be treated under this paragraph, such as any excessive pricing.

In its practice the Office dealt with margin squeeze abuse in two specific cases (described under item 2 Examples). In both cases the Office applied the standard basic criteria to find a margin squeeze abuse as were applied by the European Commission and confirmed by the court's decisions. The Office considers as a margin squeeze abuse any conduct of the dominant undertaking which creates a disproportion between an upstream price charged by the dominant player to its competitors at a wholesale level (which represents an essential input for competitors) and a downstream price of a product which is charged by the dominant undertaking to its retail customers, which does not allow to its competitors to compete effectively.

Telecommunications Office of the Slovak Republic as the national regulatory authority and pricing authority in the sector of electronic communications has issued several decisions in which it amongst other duties imposed the duty on the dominant provider of telecommunication services provided on the fixed location not to impose towards the end users retail prices lower than wholesale prices charged to its competitors. The Office is aware of the existence of such duty on several markets, mainly the markets for local, national long distance and international calls in the fixed telecommunication network for residential and business customers provided on fixed location. This duty doesn't refer to any specific products of a dominant player but to the basket of dominant's player products as a whole (for example national calls in the fixed telecommunication network as a whole).

The basic conditions which must be satisfied to find an anticompetitive margin squeeze abuse are following:

- A litigant must be vertically integrated and supply its wholesale product or service to its competitiors as an input for retail market and at the same time must be active in the retail market for which it provides the wholesale input;

- The litigant must have the dominat position on the wholesale (upstream) market;
- The wholesale product must be an essential input for competitors of the dominat undertaking which represents a significant share of their downstream costs. If it constituted only insignificant share of competitor's downstream costs it would had been probably still possible for downstream competitors to remain competitive and profitable in the retail market.

The Office reviews the prices charged by the dominant undertaking and analyses if there is a sufficient margin left between wholesale (upstream) and retail (downstream) price. There is no need to demonstrate that the wholesale price is excessive or the retail price is predatory. The aim of the Office is to review the proportion of wholesale price to retail price, not the prices itself. To identify a margin squeeze abuse it is sufficient to find out, that the dominant undertaking applies the upstream and downstream prices in such rate which does not allow its competitors to remain competitive. If an upstream price is higher than a downstream price of the dominant undertaking the Office can conclude that there is a margin squeeze abuse without any additional analysis. If it is not, but the margin is very low, the Office analyses other retail costs of the dominant undertaking and compares the wholesale price together with retail costs of the dominant company and its retail price. The Office applies an "equally efficient competitor test".

The basic incentive and endeavour of the Office is to ascertain if the conduct of the dominant undertaking has anticompetitive effects. When analysing if a conduct of an undertaking represents margin squeeze abuse the Office evaluates its effects on consumers in mid and long term view. A threat of a potential harm which may allege from margin squeeze abuse is sufficient. Generally, a margin squeeze abuse resides in reducing or even eliminating a profit of the dominant company's competitors by controlling the price of the input, or by setting lower retail prices or by the combination of both. This may lead to an exclusion of competitors from downstream market and may strengthen the position of a dominant company on this market. Another result of its endeavours could be the prevention of entry of a potential competitor to the retail market. The aim of a dominant player is to transfer its power from wholesale market to downstream market and even to create a dominant position on a downstream market. In any case a final effect of the margin squeeze abuse would be the reduction of the competition in a downstream market what results in higher prices, reduction of choices or other worse conditions for consumers.

2. Examples from the Office's decision-making practice

2.1 ST VPN case

In 2008 the Office issued in a re-examination of the case (after the first decision was abolished by the court) a decision by which it imposed a fine of app. EUR 2 420 000 on the company Slovak Telekom, a.s. (hereinafter "ST", previously Slovak Telecommunications) for abuse of a dominant position in the tender for solution of "Integrated communication platform for Ludova Banka, a.s." (hereinafter "ST VPN case"). The decision was confirmed by the Council of the Office in March 2009 and the case is pending under the court's review to this date.

The undertaking Ludova banka, a.s. published the conditions for tender to procure the service of data virtual private network (hereinafter "VPN") for its head Office and branches placed in the whole area of the country. The subject of the tender consisted in the development of VPN allowing the safe data transmission among private networks via a public telecommunication network, e.g. interconnection of bank branches to allow their effective communication with the head office and with each other. The succesful undertaking in the tender should create the VPN service for the customer and provide it with neccessary data (internet) service for several years. In practice once the VPN is developed for the particular customer by certain undertaking the chance of its competitors to provide the data services through VPN to that

particular customer in the future is very low as the solution built by the winner of the tender is specific to the needs of the particular customer. The competitive struggle here was an endeavor to gain a long term profit from achieving the particular customer.

One of the most important criteria for success in this specific tender were safety, reliability and continuity of data transmission. Only one technology, fixed telecommunication infrastructure owned and administered by ST fulfilled this requirement. Therefore the only possible way how to build appropriate VPN in this tender was to use its leased lines (hereinafter "access circuit"). Each competitor who wanted to prepare the VPN offer for this tender had to lease the access circuits from ST. The access circuits were considered as essential input in this case.

ST is a former state monopoly with the most extensive telecommunication network of fixed telecommunication network which covers the entire territory of Slovakia. It is a vertically integrated company offering its products at wholesale and at retail level. In the time being (2004) it was not imposed any duty to deal on this company as to the service of leased lines. Such a duty to offer fixed telecommunication lines to its competitiors for lease was imposed by the regulatory authority only in 2005. But the dominant company has a general duty to deal under competition law as the refusal to deal (without objective justification) in the market, where the company has dominant position, or even de facto monopoly position could be classified as infringement of the Act.

Two undertakings participated in the tender, ST and one of its competitors who needed to lease the access circuits from ST. Based on the equally effective competitor test the Office came to the conclusion that the competitor of ST could not compete effectively and could not offer better price due to the pricing policy of ST. The Office compared the wholesale price ST charged to its competitors and other costs ST had at the retail level with its retail price. The wholesale price together with "other" retail costs of ST was higher than ST's retail price of the product.

The only plausible explanation was that the undertaking ST abused its position on the market for providing the service of leased lines in order to eliminate its competitor from this particular tender and to obtain the important customer. By its pricing policy ST did not allow the other competitor to submit a competitive bid in the tender and to compete for the customer. The result was an artificial tender in which the customer lost the possibility to purchase the product for the lowest price that would be generated in the competitive market. The intervention of the Office was inevitable and reasoned since there was a high risk of monopolisation of the market for providing VPN solutions for other customers in the future repeating similar scheme and using the same pricing policy by ST.

The main argument of ST raised during the procedure was that the product offered at the wholesale level to its competitor was not exactly the same as the product ST used to create its own retail product and therefore the prices were not comparable and the margin squeeze analysis was not possible and fair in this case. The reasoning was based on the technology differences and ST called for an expert opinion to confirm the differences. In the re-examining procedure the expert confirmed the differences between ST and the other competitor's wholesale inputs. But the differences were purely of technical nature and caused by the business policy of ST. The wholesale products used in preparing the retail products for the tender were the same from the view of technology used. Both were based on leased lines –access circuits. The difference consisted in the fact that the wholesale product ST used in the tender constituted just part of the access circuit (hereinafter in an simplified way only one "access point" was necessary) and the wholesale product the dominant undertaking provided to its competitors was the whole access circuit (two "access points" neccessary).

In reality it was the only possible way for the ST's competitor. The Access circuit based on two access points was the only available product of leased lines ST offered at that time. It means that the

competitor of ST could not choose the access circuit based only on one access point. The form of providing the wholesale access to leased lines was solely on ST so the differences between the wholesale product of ST and other competitor emerged due to its decision to offer access circuits only in this single form.

The Office came to the conclusion that as the difference between the wholesale inputs was created by the business policy of the dominant company itself, it couldn't serve as an objective justification of its behaviour. The competitors could not compete with ST as it could calculate with the cheaper wholesale product whilst offering a more expensive version of the same wholesale product to competitors. There was not any barrier which would hamper ST from offering the same wholesale product that it used in the tender to its competitors. Otherwise the dominant company should calculate with the same wholesale input as it provided to its competitors The Office concluded that in the margin squeeze test it is important to compare the wholesale price charged by the dominant company to its competitors and not the own wholesale costs of the dominant company..

Outcome of the case. This case was aimed more at the detterent effect in the future than at the rectification of the status quo, as the Office intervened only after the tender had been finished, the customer had chosen ST's product which had been realized already. The only remedy imposed was the sanction which reflected the detterent effect as well as appropriate punishment. To deter the dominant undertaking of committing similar abuse was the key issue in this case since the risk of monopolisation of the market existed.

The case was subject to the litigation and the court's review is still pending. The dominant undertaking again established its defence on the differences between wholesale products which according to its arguments implied the impossibility to do margin squeeze analysis. The Office maintains its position as was described above that after evaluating the circumstances of the case the margin squeeze analysis was correct. The Office can't predict when the decision of the court (which could be reviewed by the Supreme Court as the highest judicial instance) will be issued (approximate time period for court's reviewing is a year).

2.2 ST voice and data case

In 2008 the Office issued a decision imposing a fine of SKK 525 million (EUR 15.770.000) on the undertaking ST for abuse of a dominant position. Based on the appeal of the party to the proceedings the Council of the Office confirmed the decision (with small changes but not any as to the substance of the case) and it became valid in May 2009. To this date the case is pending before Regional court in Bratislava which reviews the legality of the decision upon the legal action brought by the undertaking ST.

2.2.1 The Litigant and the background of the case

ST is a former state monopoly with the most extensive telecommunication network for fixed lines which covers the entire territory of Slovakia, it is a vertically integrated company providing a wide range of telecommunication services provided via network of fixed lines both at the wholesale and retail levels.

The investigation started on the basis of several incentives mainly from competitors of ST in retail markets for providing voice and data services on the fixed telecommunication lines. Upon investigation the Office initiated administrative proceedings concerning possible abuse of a dominant position by the company ST according to Article 8 of Act and Article 82 of the Treaty. The case included several practices specifically tying and margin squeeze abuse which according to the Office's conclusion assessed together represented the main aim of the dominant undertaking to maintain its position on retail markets for voice and internet services provided via fixed telecommunication network (as as a former state monopoly in this area it still held a dominant position in relevant retail markets). The penetration of newcomers to those

markets was due to its conduct very slowgoing. In this connection it is inevitable to mention that approximately in the period when infringement started the relevant retail markets (especially voice services provided on the fixed telecommunication network) have been liberalized, therefore the Office considered the conduct of the dominant undertaking to be more serious.

2.2.2 Relevant markets

The Office defined twelve relevant markets at the wholesale and retail levels (some markets were defined separately for business and residential segment) in the area of access to the fixed telephone network, call termination and call origination, fixed voice services, low-speed and high-speed internet at which ST held the dominant position.

2.2.3 Other practices

To give a complex picture of the case it is inevitable to mention that the Office besides margin squeeye abuse also prohibited several practices (partly mentioned before) as tying and bundling. Namely tying of access to the network and voice services, tying of voice services and dial up internet services and also tying of xDsl services and voice services.

2.2.4 Margin squeeze

For the purposes of this material the case is described mainly as concerning the margin squeeze abuse with some reminders of other forms of abuse ST committed if necessary for proper explanation of the method that the Office used establishing the margin squeeze abuse. The Office proved a margin squeeze abuse of the ST's dominant position concerning fixed voice services as well as dial up internet services provided on the fixed location.

Within particular call plans at the retail market ST introduced during 2004 and 2005 tariffs enabling its customers to call free of charge in certain time during the day or almost free of charge in certain times (30 minutes per 0,03 EUR). These tariffs were introduced shortly before alternative telecommunication operators (hereinafter "AO") entered the market. Voice services were liberalized de iure on January 1, 2003. Entry to the market and the commencement of activities of AOs were conditional upon signing connection agreements between ST and AO. First agreements were signed only at the beginning of 2005 and the first AOs entered the market in August 2005.

The activities of AOs in the market of voices services for residential and business customers were limited to voice services provided on the base of so called carrier selection system. Within the carrier selection system an end user could only choose the specific telecommunication provider before each individual call. End users remain still connected to the telecommunication network of ST and could only choose AOs by dialing specific phone number before each phone call. AOs had to pay the wholesale price – interconnection fees to ST for each call of their customers through carrier selection. The more developed system of carrier preselection, where an end user can change the telecommunication provider and realise all his telecommunication needs via this provider has not been available.

The basic criteria for application of margin squeeze test were fulfilled so the Office compared the wholesale price ST charged to AOs and the retail price of the abovementioned tariffs. Simple comparison of zero or almost zero retail price for voice services per minute and wholesale price AOs were obliged to pay (calculated per minute) was used for the calculation of margin. The margin was negative and the Office concluded that such pricing policy represented the margin squeeze abuse. The Office observed that such fixing of wholesale and retail prices closed the market and hindered AOs from effective competition.

The margin squeeze analysis was done at the level of individual specific tariffs within the retail voice products of ST. This was also the core objection of the litigant during the proceedings as it claimed that this was an improper way for finding a margin squeeze abuse. The Office came to the conclusion that using certain level of aggregation of ST's voice products could not be the correct approach in this case because of the following peculiar features of the fixed telecommunication market:

- According to the ST's business policy each end user was obliged to buy together with the access to the fixed-line network one of the call plans offered by this company. The end users paid to ST only one mothly fee for two services – connection to the fixed line network and voice services (This practice was also assessed by the Office as prohibited tying). Every end user "pre-paid" the voice service of ST and naturally tried to use the services he had already paid for.

- Call selection system as only possible way for AOs to provide their services. Under this system AOs had to compete for each individual phone call as they could not compete to achieve that an end user would use solely their services

AOs could not offer competitive tariffs as ST, as due to the tying of connection and voice services AOs had to calculate with the wholesale fees per minute and they couldn't afford to offer similar advantages to its retail customers as ST with its abovementioned tariffs did. In this situation AOs could not predict the amount of phone calls the customers would realize via the particular AO instead of ST. Therefore they could set only retail prices for voice services per minute and couldn't afford to set retail price lower than wholesale price of interconnection fee per minute, which they were obliged to pay to ST.

If AOs would charged certain amount of minutes free of charge, it would had been highly probable that the end users would had been using this particular provider only in time reserved for those special tariffs (it was possible because of only carrier selection system available) and then the end users would had turned back to ST as the voice services here were prepaid. The AOs couldn't offer such tariffs without making continual losses.

The Office considered the conduct of the undertaking in question in the context of the whole market. The combination of tying of voice and access services by the dominant company and the fact that only possible system for AOs to penetrate the market was the system of call selection created the situation when only fair approach was to analyse margin squeeze on the basis of individual services. It means that the competition fight occurred at the level of each individual phone call. Under these circumstances the AOs couldn't compete for a customer (in that sense to offer him certain call plan) they had to compete for each individual phone call. The AO's could reach this goal and compete effectively with ST only when each individual tariff per minute would be competitively set up in comparison with the ST's tariffs. The pricing policy of ST caused that a significant part of telecommunication needs was carried out exclusively via ST.

Similar pricing policy was proved as regards dial up products offerred by ST compared to wholesale fees ST charged to its competitors.

2.2.5 Evaluation

The Office stated that all practices of dominant undertaking assessed in this case caused that the retail markets for both residential and business customers namely markets for providing voice services via fixed telecommunication network and market for dial up services via fixed telecommunication network (within the tying practice also as to the xDSL retail markets) were not opened for the competiton, the other providers of telecommunications services could not compete for customers and due to the pricing policy of ST the market remained monopolized

In the area of voice services all of the aforementioned practices were concurrently applied during a certain period and there was a high risk of the market closure and creating barriers to entry to the market. The Office came to the conclusion that the conditions that were created by ST caused that competition did not develop after AOs entered the market. Competition in the market, particularly in the segment of residential customers, remained at a "symbolic" level. This conclusion could be made on the basis of comparing market shares of AOs since they entered the market (the conduct was assessed almost two years from the first entry) when ST maintained its nearly monopoly position on the market. The common market share of all AOs was approximately 2% of end users on the market for providing voice services in the fixed telecommunications network. Number of customers of AOs which formaly signed contracts with AOs also didn't reflect the number of customers which after that really used the service of AOs.

3. Margin squeeze in relation with other practices

3.1 Examples

Few examples from the decision making practice of the Office as regards price discrimination and unfair trading conditions could broadly fit within the margin squeeze definition. The subsumption under margin squeeze concept of both below mentioned cases is just cursory as the Office did analyse both cases under another practices.

3.1.1 Leased lines case

The Office decided (in 2002) that the undertaking Slovak Telecommunications committed the abuse of the dominant position by several practices amongst other by price discrimination. The dominant undertaking was vertically integrated company providing the lease of the digital telecommunications circuits (or the service of the leased lines) at the wholesale level to its competitiors and at the same time was active at the retail market where it provided internet services based on the leased lines. By then the dominant undertaking wasn't under any regulatory duty to deal relating to leased lines.

The abuse of a dominant position consisted in applying different conditions to itself and to other internet service providers as regards calculating and charging the prices for providing the service of the lease of digital telecomunication circuits. The dominant undertaking applied the different condition indirectly through different conditions for its own end users and customers of other internet providers. The end users using internet services of the undertaking Slovak Telecommunications paid only the price for the so called Access service and the end users using internet services of other internet providers had to pay to Slovak Telecommunications (via their internet providers) the price for the product Access together with the certain share of the costs for the product called Interconnect. Products "Interconnect" and "Access" were part of one single digital telecommunication circuit which was used in the same way by all end users. Therefore it wasn't any plausible explanation why should the end users using internet services from other internet providers pay higher price for the same product. The Office came to the conclusion that the aim of this practice was the elimination of the competitors of the retail market for providing internet services in the fixed telecommunication network. The competitors of the dominant company using the same wholesale product of the digital telecommunication circuits were not able to offer the competitive price for internet services as their customers had to pay the higher price for digital telecommunication circuit as the end users using internet services provided by Slovak Telecommunications.

The Office did not consider to apply the test on margin squeeze abuse in this case. The prices which were under comparison were retail prices for the same product charged to the customers of internet services of the undertaking Slovak Telecommunications and to the customers of internet services of the other internet providers.

3.1.2 ST DSL case.

This case related to the first introduction of broadband internet services in the fixed telecommunication network. The undertaking Slovak Telecommunications as the dominant company on the wholesale market for providing the fixed telecommunication infrastructure introduced the product called ST Broadband ISP Direct designated to be sold at the wholesale level. The product represented an essential input for the competitors of the dominant undertaking at the retail market for providing ADSL internet services in the fixed telecommunication network to end users (hereinafter "other ISPs"). This product was called a testing product but in reality on the basis of buying it the competitors could create their own ADSL services and achieve real customers. It represented the whole complex of technical means neccessary for ISPs to provide ADSL internet services for end users. Slovak Telecommunications as the competitor of other ISP on the retail market also started to provide its own retail ADSL internet services to end users.

In connection with the wholesale ST Broadband ISP Direct product the dominant undertaking issued General conditions for providing ST Broadband ISP Direct to other ISPs which was supposed to be the part of the wholesale contracts between him and other ISPs and also the schedule of charges (hereinafter "Tariff"). The document "general conditions" included several conditions which were assessed by the Office as unfair trading conditions (defined in Aricle 8 paragraph 2a) of the Act).

In the context of the topic of this material it is interesting to mention the pricing conditions included in the Tariff which were also assessed as inadmissible and prohibited by the Office. According to the general conditions stated fees could not be changed on the other contracting party's proposal (the dominant undertaking could refuse to conclude the contract on access to the network if the other party didn't accept all conditions stated in the general conditions and Tariff).

According to the Tariff other ISPs were obliged to pay the price for Broadband ISP Direct product which was not proportionate to the service they could obtain from the dominant undertaking. The price for the product was fixed and was calculated for certain capacity of connections (certain number of users to be connected). At the same time during operation of this testing project the undertaking Slovak Telecommunications guaranteed to the other ISPs to connect only limited capacity of their end users, which was significantly smaller. The retail price for the end users was determined by the price which other ISPs should pay for the wholesale product of Slovak Telecommunications and by the real use of the capacity (the number of connected end users). Other ISPs could only make plans for using the capacity of connection which was guaranteed by the undertaking Slovak Telecommunications, but they had to pay the wholesale price equal to much larger capacity of connections. Other ISPs were obliged to pay for the capacity which they could not used within this testing project.

According to its internal documents the undertaking Slovak Telecommunications did not apply such limitation as for the capacity of its own planned connections of end users. The dominant undertaking could calculate its retail price based on the higher number of connections, which meant that its retail price was naturally lower than the retail price which other ISPs could offer. The Office came to the conclusion that the conduct was aimed at elimination of competition from new emerging market of ADSL internet services in the fixed telecommunication network for end users. The other ISPs which were dependent on the wholesale product offered by Slovak Telecommunications could not compete effectively due to the pricing conditions at the wholesale market while at the same time the dominant undertaking didn't applied the same conditions to itself.

This practice might fulfill the criteria of margin squeeze abuse as in general the subject was the difference between wholesale and retail price of the dominant undertaking. However in that time the Office

did not consider to apply the test on margin squeeze abuse, the analysis and calculation would be more difficult and it concentrated on other approach.

3.2 The relation between margin squeeze abuse and other forms of an abuse

The Office hasn't had any final decision relating to excessive pricing. Regarding refusal to deal practice, the Office has dealt with several cases but not a single broadly fitting within the definition of the margin squeeze abuse as the subject of none of those cases was the pricing policy of a dominant undertaking.

From legal point of view the standard of proof is the same, namely the Office is obliged to prove that certain conduct constitutes an infringement of competition law beyond reasonable doubt. Different forms of the abuse of dominant position then differ as to the argumentation and kind of evidence needed.

The Office hasn't had any decision concerning predatory pricing. Generally speaking, if the Office compares the retail and wholesale price, it does not consider whether the wholesale price is at the same time exccessive or if the retail price is predatory, the decisive element is if there is a sufficient margin for competitors to be able to compete effectively with dominant company. Both of these practices require somehow different evidence. It is connected with the abovementioned fact that in predatory pricing case the Office should compare the price of the dominat undertaking's retail product and its costs put in this product. In margin squeeze cases when the abovementioned basic criteria are fulfilled the Office compares the wholesale price charged to the competitors of the dominant company and the retail price charged by the dominant company to end users (the retail price and possibly also retail cost of the dominant company). The Office can not decide what would be the specific remedy to remove competition concerns. If the case concerned predatory pricing case the remedy would be logically inferred from the prohibition of such practice, namely the change of a downstream price. But in the margin squeeze cases as the Office does not decide if the price is excessive, below costs or both, it can not impose a specific remedy. It is on the undertaking to choose the best way to remove the restriction of competition and to improve market conditions.

4. Conclusion

Before 2005 the Office didn't have any case on margin squeeze abuse. Both margin squeeze cases are dated from the recent application practice of the Office and both cases concerned telecommunication sector. The incentive and reason for the intervention was the endeavour of the Office to prevent the elimination of competitors from retail telecommunication markets and to promote the markets to develop after liberalization. Margin squeeze doctrine was the most suitable and effective tool to use in these cases which enabled to prove the anticompetitiove conduct of the dominant company.

SWEDEN

1. Summary

- In a request for a preliminary ruling, several questions have been referred to the European Court of Justice about the conditions that must be satisfied in order for a margin squeeze to infringe article 82 EC.

- The SCA has received complaints of margin squeeze mainly in the telecommunications sector. These allegations are sometimes supplemented by allegations of other forms of abuse. The SCA has found that competition law controls on refusal to deal, predatory pricing and prohibition on price discrimination cannot adequately control all of the anticompetitive concerns arising from margin squeezes, and has found it justified to identify margin squeeze as a standalone form of abuse.

- Margin squeeze cases will be more complex to analyse as bundling downstream becomes more common and new innovative pricing strategies are introduced.

2. Introduction

In this note, the Swedish Competition Authority (the SCA) briefly presents a case which it brought before the Stockholm District Court. The Court has asked the European Court of Justice for a preliminary ruling on what conditions must be fulfilled for a margin squeeze to infringe Article 82 of the EC Treaty. The note also addresses some of the SCA's experiences from investigations into suspected margin squeeze. Lastly, some questions are raised for further discussion.

3. Powers to take measures against margin squeeze

The Swedish Competition Act prohibits abuse of a dominant position on the Swedish market by one or more undertakings. The prohibition is based on Article 82 of the EC Treaty.[1]

The SCA can order infringements of the prohibitions of the Act to be terminated with or without the attachment of a fine. A company in violation of any of the prohibitions of the Competition Act may be liable to pay an administrative fine. An administrative fine is determined by the Stockholm District Court subsequent to action brought by the Competition Authority.

No sector regulator in Sweden has the power to apply the Competition Act or Article 82 EC. Still, regulators deal with the issue of margin squeeze and its negative effects on competition. For example, a regulator may combine an access obligation with a non discrimination obligation to ensure that rivals of an integrated firm have equal opportunities to compete downstream. Also, so called retail minus pricing can be used in access regulation to avoid margin squeeze. Regulators and competition authorities may need to

[1] The SCA – as well as national courts – is also required to apply Article 82 EC in accordance with EC Regulation 1/2003.

coordinate their efforts in order to find the most effective remedies for the anticompetitive effects of margin squeeze.

4. ADSL case (TeliaSonera)

In December 2004 the SCA sent a summons application to the Stockholm District Court requesting that the telecommunications company TeliaSonera should pay fines amounting to 144 MSEK (approx. 14 MEUR) for having abused its dominant position. The SCA's investigation showed that from April 2000 to January 2003 the margin between the price charged by TeliaSonera for wholesale ADSL products and its retail price for ADSL services to consumers was insufficient to cover TeliaSonera's incremental downstream costs.

TeliaSonera is the incumbent telecommunications operator in Sweden and the company owns the nationwide copper based access network. The relevant downstream market was defined as the national market for broadband access to Internet to residential customers, including ADSL, cable and fibre networks. The relevant wholesale product is a reseller product, which includes both broadband access using ADSL technology and Internet connectivity. The reseller product was not subject to sector regulation, but was instead supplied voluntarily by TeliaSonera. TeliaSonera is required to give access to its fixed access network through local loop unbundling (LLUB). However, the opinion of the SCA is that access through local loop unbundling was not a viable alternative for rivals downstream during the time of the abuse.

The case is a "pure" margin squeeze case and the SCA has made no assertions about refusal to deal or predatory pricing. The SCA used the "as efficient competitor test" and made the margin squeeze test by comparing the margin between retail and wholesale prices with TeliaSonera's own long run incremental costs downstream.

The Stockholm District Court decided on 30 January 2009 to stay proceedings and to request a preliminary ruling from the European Court of Justice.[2] The ECJ has now the opportunity to make clear what conditions must be satisfied in order for a margin squeeze to infringe article 82 EC.

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[2] Case number C-52/09. The Stockholm District Court has asked the following questions (OJ C 90 of 18.04.2009, p.12).

Under what conditions does an infringement of Article 82 EC arise on the basis of a difference between the price charged by a vertically integrated dominant undertaking for the sale of input ADSL products to competitors on the wholesale market and the price which the same undertaking charges on the end-user market?

Is it only the prices of the dominant undertaking to end-users which are relevant or should the prices of competitors on the end-user market also be taken into account in the consideration of question 1?

Is the answer to question 1 affected by the fact that the dominant undertaking does not have any regulatory obligation to supply on the wholesale market but has, rather, chosen to do so on its own initiative?

Is an anti-competitive effect required in order for a practice of the kind described in question 1 to constitute abuse and, if so, how is that effect be to be determined?

Is the answer to question 1 affected by the degree of market strength enjoyed by the dominant undertaking

Is the dominant position on both the wholesale market and the end-user market of the undertaking engaging in the practice required in order for a practice of the kind described in question 1 to constitute abuse?

For a practice such as that described in question 1 to constitute abuse, must the good or service supplied by the dominant undertaking on the wholesale market be indispensable to competitors?

5. Some observations made by the SCA

This section summarises some observations the SCA has made during investigations into alleged margin squeeze. Complaints to the SCA with allegations of abuse of a dominant position in the form of margin squeeze have in most cases concerned the telecommunications sector. The products at the wholesale level have often been access to the incumbent's fixed network, but also call termination on fixed and mobile networks.

5.1 Margin squeeze and other forms of abuse

Complaints to the SCA with allegations of margin squeeze are often accompanied by allegations of other forms of abuses; notably price discrimination, predatory pricing and refusal to deal. It is certainly possible for a dominant firm to engage in several abusive practices at the same time. However, uncertainty regarding the legal standards to be applied to margin squeeze (reflected by the request for a preliminary ruling mentioned above) may partly explain why allegations of other forms of abuse are put forward by complainants in parallel with margin squeeze.

5.1.1 Price discrimination

The SCA has noted that complaints to the Authority with allegations of margin squeeze sometimes also include allegations of price discrimination between internal and external customers. The complainants' reasoning seems to be that if the dominant firm is able to offer lower prices to the end users, this implies that the dominant firm's downstream arm enjoys more favourable terms than its competitors. Although discrimination between internal and external customers has been found to amount to an abuse of a dominant position under EC competition rules, the SCA has so far found it more appropriate to analyse these allegations as margin squeeze cases. In the SCA's view, a duty on the dominant firm to charge its own downstream operations the same price for the relevant input as it charges its competitors would not necessarily eliminate the margin squeeze. Unless the dominant firm changes its retail and/or wholesale prices, the margin will still be squeezed and its competitors put at a disadvantage. Also, the dominant firm might not even use transfer pricing in the first place.

5.1.2 Predatory pricing

Margin squeeze complaints have also included allegations of predatory pricing, with the presumption that the wholesale price charged to competitors represents the dominant firm's costs for producing the input. In the SCA's opinion, the wholesale prices charged to competitors (or internally) may not always equal the costs relevant in a predatory pricing analysis. Consequently, the existence of a margin squeeze does not automatically imply existence of predatory pricing. Instead a more careful analysis of the dominant firm's production costs needs to be carried out on a case by case basis.

A vertically integrated firm could indeed engage in margin squeeze and predatory pricing at the same time. However, an integrated firm has the possibility to set its retail and wholesale prices in a proportion that does not allow as efficient rivals to be profitable, while at the same time being profitable on an end-to-end basis.

Is the answer to question 1 affected by the question whether the supply is to a new customer?

Is an expectation that the dominant undertaking will be able to recoup the losses it has incurred required in order for a practice of the kind described in question 1 to constitute abuse?

Is the answer to question 1 affected by the question whether a change of technology is involved on a market with a high investment requirement, for example with regard to reasonable establishment costs and the possible need to sell at a loss during an establishment phase?

5.1.3 Refusal to deal

One prerequisite for a margin squeeze is that the vertically integrated firm offers a product at the wholesale level and that there is a wholesale price to be used as a starting point. The offer can be made either voluntarily or as a result of regulation or an anti-trust duty to deal. Intuitively, it seems that a margin squeeze case cannot at the same time be characterised as a "pure" refusal to deal, where in the latter case there is no offer at all from the dominant firm. If there is no offer, there is no wholesale price and it will not be possible to calculate a margin between retail and wholesale prices.

Still, complaints to the SCA have included allegations of both margin squeeze and "pure" refusal to deal. First, the vertically integrated firm may offer a wholesale product to its downstream competitors at a price that does not leave a sufficient margin, indicating a margin squeeze. At the same time, the input provided by the integrated firm to the downstream rivals may be different from the input that it provides to itself, and the dominant firm may refuse to supply this latter input to its rivals.

In such a case the question arises if the dominant firm is engaged in a refusal to supply an "appropriate" wholesale product to its rivals. Measures against a refusal to deal may be taken based on competition law. In addition, if the wholesale product is the result of sector regulation, as is often the case in the telecommunications sector, it could also be argued that the obligations imposed on the dominant firm under the regulation are not properly designed. These cases call for co-operation between competition authorities and regulators to identify the most efficient way to remedy the anticompetitive conduct.

5.2 Complicating factors

In the ADSL-case described above, the wholesale input and the downstream product where easily comparable and the calculation of the margin quite straightforward. However, in other cases it can be more complex. Below are some examples of how recent developments in the telecommunications markets will affect the analysis.

5.2.1 Different pricing structures upstream and downstream

Telephony services to end-users have traditionally been priced on a per minute basis, but lately fixed price offers have become more common. Fixed price offers are available both for fixed and mobile telephony.

Interconnection with other operators is a necessary input to telephony services. All operators buy call termination from other operators. Operators which do not own an access network also need to buy call origination from the operator controlling the local loop. Just as with the end-user services, call termination and call origination have traditionally (at least in Sweden) had variable prices, either on a per minute or a per call basis.

When revenues are based on fixed fees and the costs are variable (and depending on the actual call pattern of the users), this may have some implications on the margin squeeze test.

First, the question is which call pattern should be used to calculate the margin between end-user revenues and wholesale costs; the dominant firm's customers' or its rivals' customers'? In order to ensure legal certainty, it seems in the SCA's opinion reasonable that it is the call pattern of the dominant firm that should be used.

Second, smaller operators and operators without own networks may face a bigger risk since they rely more heavily on buying interconnection at variable prices from other operators than incumbents do. A question here is whether calculation of a margin squeeze should include a "risk premium" that takes

account of this asymmetry? Or does the "as efficient competitor test" imply that no such considerations should be made?

Obviously, one way to reduce the risk of margin squeeze would be to move away from minute based interconnection fees towards a pricing structure that better reflects the pricing at the retail level. The so called bill and keep[3] model could possibly totally eliminate the risk for margin squeeze in these cases. This is another area that calls for co-operation between competition authorities and regulators.

5.2.2 Bundles

Another development that has been observed in the Swedish telecommunications market is increased bundling at the retail level. In the consumer market, broadband, telephony and television services are bundled in different combinations. In the business market, data communications services are bundled with IT services.

When end users buy several services from the same supplier, a margin squeeze can have effects on other, adjoining, markets. For example, a downstream rival exposed to margin squeeze in the broadband marked, may be forced to compensate its losses with cross subsidies from other services. This will cause distortions not only on the squeezed market, but also on the neighbouring markets.

This development raises the question at what level of aggregation the margin squeeze test should be applied. So far, the SCA has taken a case by case approach, taking into account the demand for separate products and for bundles in the downstream market.

5.2.3 The dominant firm uses other inputs than it offers its competitors

As mentioned above, the input provided by an integrated firm to its downstream rivals may be different from the input that it provides to itself. Such a case can have implications for the margin squeeze test. Incremental costs in the downstream operations can differ depending on what input is used, and the integrated firm may be more efficient downstream because of the different input it provides to itself. Consequently, the "as efficient competitor test" that uses the integrated firm's downstream costs may not be appropriate.

One alternative could be to use the "reasonably efficient competitor test" instead. In the SCA's opinion, this test might be justified in specific cases, for instance when competitors cannot achieve sufficient economies of scale due to the existence or the behaviour of the dominant firm. However, care must be taken since the "reasonably efficient competitor test" may not ensure the same legal certainty as the "as efficient competitor test".

If the integrated firm provides different input to rivals than it provides to itself, this raises suspicions of other forms of abuses, such as refusal to deal or discrimination. As mentioned above, if the wholesale input offered to rivals is a result of sector specific regulation, a change in the regulatory obligations may have to be considered.

[3] Bill and keep is a pricing scheme under which the reciprocal call termination charge is zero - that is, each network agrees to terminate calls from the other network at no charge.

6. Questions for discussion

6.1 Indispensability of the input

In the ADSL case described above, the SCA has not considered it necessary to prove that the wholesale input was indispensable in the sense of an essential facility. The wholesale product was provided voluntarily, and the practices under investigation differed from those in a refusal to deal case. In examining whether the vertically integrated firm had a dominant position, account was taken of the existence of possible substitutes. A dominant position was found, and it could be ruled out that the input was *un*necessary to downstream competitors. On the contrary, if alternative sources of supply could have been accessed by the downstream rivals, it is unlikely that the margin squeeze could have harmed competition. Hence, the issue of the indispensability of the input was part of the dominance test.[4]

A relevant question is whether the issue of indispensability can always be "taken care of" in the dominance test, or if there is a need for a separate criterion? If a separate criterion is justified, is the degree of indispensability required in a margin squeeze case equal to the concept of essential facility?

As noted above, there is a trend towards increased bundling in the telecommunications sector. To be able to offer bundles, several different inputs may be necessary. A necessary (and indispensable) input might then become "diluted" by other components in the bundle. It will still be possible to make a calculation to determine if the integrated firm can recover its downstream costs, but it may be less obvious that the integrated firm's pricing is crucial to the rivals' possibilities to compete. A question here is if this development will call for a separate criterion of indispensability in addition to what is included in the assessment of dominance?

6.2 Effects on incentives to invest

The question of indispensability is related to the concerns expressed by commentators that imposing liability for a margin squeeze might have negative effects on incentives to invest.

The high legal standard under EC competition law as to when a duty to deal may be imposed aim at protecting incentives for investments and innovation. A balance must in each case be struck between the interest of competition in a market and the interest of not deterring investments.

As noted above, there is a difference between margin squeeze and "pure" refusal to deal. In case of a margin squeeze, the vertically integrated firm does offer a product at the wholesale level. If the integrated firm has chosen to offer a wholesale product, it indicates that the firm has identified benefits from this. At the same time, the dominant firm may be tempted to expose downstream rivals to margin squeeze. Intervening against margin squeeze will prevent the dominant firm from controlling and limiting the competition on the downstream market.

A relevant question is then if an intervention against a margin squeeze risks having the same negative effects on investments and innovation as an introduction of a duty to deal in the first place?

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[4] Note that question number seven in the request for a preliminary ruling referred to above addresses the issue of indispensability. Further details about the SCA's position on the referred questions are given in the Authority's written observations submitted to the ECJ.

TURKEY

Price squeeze has been addressed in a limited number of decisions by the Competition Board in its enforcement practice since 1997. The issue has been discussed mainly in two decisions in telecommunications sector. First decision (*Turkcell Corporate Tariffs*)[1] concerns the allegations that the dominant GSM operator implemented price squeeze via its tariffs applicable to corporate customers while the second (*TTNet*)[2] deals with the allegations that the vertically integrated dominant fixed line telephone operator abused its dominant position in the downstream market of broadband internet access services. This contribution aims to concentrate on the latter case to highlight the approach of the Competition Board on price squeeze.

1. Price squeeze under the Competition Act

First of all, Article 6 of the Competition Act entitled "Abuse of Dominant Position" includes a general prohibition of abuse of dominant position with a non-exhaustive list of examples deemed as abuse. Although the list does not cite price squeeze as a separate form of abuse, it can be considered by the Competition Board under the examples of "*preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market*" or "*actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market*" or "*restricting production, marketing or technical development to the prejudice of consumers*".

2. Price squeeze

TTNet decision provides explanations regarding price squeeze and its assessment under the competition rules. Following is a summary of these explanations.

2.1 General remarks

Price squeeze emerges when an undertaking, which is vertically integrated and dominant in upstream (wholesale) market, narrows the margin between the wholesale price of the input it controls in the upstream market and the price of the product in the downstream market (retail market) produced via the use of the input by changing the level of both prices. As a result, the profit margin for rivals in the retail market, whose operations are dependent on the use of the input and who have to pay the wholesale price as well as compete with the retail price charged by the vertically integrated dominant undertaking, is squeezed. The vertically integrated dominant undertaking may cause price squeeze either by increasing the wholesale price (fixing it higher compared to retail price) or decreasing the retail price (fixing it lower compared to wholesale price, and the costs in the downstream market) or implementing both at the same time.

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1 Dated 4.7.2007 and numbered 07-56/634-216.

2 Dated 19.11.2008 and numbered 08-65/1055-411.

The practice by the vertically integrated dominant undertaking makes it impossible for the actual and potential rivals in the retail market to compete with it by obtaining a reasonable amount of profit against the decreasing margin. Although the vertically integrated dominant firm charges the same price for the input to its subsidiary/arm in the retail market, it is not affected by the margin between the wholesale and retail prices as the payment will only be transferred on paper. [3] In contrast, the cost of the rivals, who have to pay the price for the input, increases and it becomes possible that the retail market is foreclosed in whole or in part to those rivals.

As a result, price squeeze is considered under the Competition Act and especially its provisions prohibiting abuse of dominant position because the vertically integrated dominant undertaking may exclude actual or potential rivals in the retail market, restrain their activities or market shares and prevent competition by transferring its market power on the input in the wholesale market to the retail market.

2.2 Conditions for price squeeze

Certain economic and legal conditions regarding the structure of the market where the vertically integrated dominant firm and its rivals operate should concurrently exist before establishing that competition rules are infringed. The doctrine and the practice concerning price squeeze cite these conditions as follows:

- The relevant undertaking should be vertically integrated in a way to have operations in interrelated upstream and downstream markets (wholesale and retail markets) in a production/service chain and constitute an economic unit.

- The relevant undertaking should be dominant with market power approaching to monopoly in the wholesale market for the production or supply of the input.

- The input in the wholesale market is essential for the relevant undertaking as well as its rivals to produce and compete in order to stay in the market. In other words, there should be no close substitute (alternative) for the input in the upstream market and it should not be possible to produce the input with less cost and in a short period of time.

- The margin between the wholesale and retail price is fixed at such a low level that the relevant undertaking or its equally efficient rival can not profit in the downstream market and stay in the market in the long term. In other words, the relevant undertaking could not operate profitably if it had to pay the same wholesale price like its rivals did.

- Competition is restricted in the retail market as a result of conduct of the relevant undertaking leading to price squeeze.

- The relevant undertaking does not have objective justification for the pricing policy leading to price squeeze.

Absence of one or more of those conditions makes it difficult to identify that price squeeze harms competition.

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[3] Geradin, D. ve R.O'Donoghue (2005), "The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in Telecommunications Sector", Journal of Competition Law and Economics, Vol:1, No:2, p. 358.

TTNet decision cites that these conditions have also been mentioned in the Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector - Framework, Relevant Markets and Principles (98/C 265/02) (Access Notice) issued by the European Commission according to which price squeeze could happen and be exclusionary for the rivals in the retail market if "... *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*..."[4] or "... *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)*"[5].

Moreover, *TTNet* decision also mentions certain aspects of *Telefónica*[6] decision by the European Commission and the *Deutsche Telekom*[7] decision by the Court of First Instance for their relevance to the case.

2.3 Insufficiency of the margin, predatory price & margin squeeze and duration

Based on the explanations on price squeeze, before assessing the conduct in question under competition rules, *TTNet* decision addresses issues on how to calculate insufficiency of the margin, difference between price squeeze and predatory price and finally the duration of the conduct.

On insufficiency of the margin, whether the margin between retail and wholesale prices charged by the relevant vertically integrated dominant undertaking is negative and, if not, whether the margin between the two prices covers an equally efficient firm's increasing retail market cost peculiar to the product in question (the cost caused by production of the product) are taken into account. The vertically integrated dominant undertaking's (retail arm's) cost is taken as a benchmark for the equally efficient firm's own cost. While calculating the downstream costs, the customer acquisition costs can be spread over a certain period of time by considering the customer life and general economic factors prevailing in the market.

Regarding predatory price and price squeeze, the latter is different in the sense that retail price need not be predatory in the case of price squeeze. Therefore, price squeeze may happen even in the absence of predatory price. Moreover, although predatory price is hard to establish if the relevant undertaking is not dominant at retail level, there is no need for dominance in the retail market to apply price squeeze. Price squeeze emerges as a result of interaction between prices in two vertically related markets whereas analysis for predatory price concerns prices on a single market.

As to duration, short-term sales promotion/campaigns/discounts may be seen as objective justifications against allegations of price squeeze. However, in case such short-term discounts become continuous, price becomes excessively low as a result of such discounts or regular price changes lead to negative margins, then resulting price squeeze may be assessed as conduct having exclusionary effect.

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4 Paragraph 117 of the Access Notice.

5 Paragraph 118 of the Access Notice.

6 Case COMP/38.784 – Wanadoo España vs. Telefónica, 4.7.2007.

7 Deutsche Telekom AG vs. Commission, Case T-271/03, Court of First Instance, 10.4.2008.

3. The decision (*TTNet)*

3.1 Relevant undertakings and dominance

The relevant undertakings in *TTNet* decision are Türk Telekom, the incumbent fixed line telephone operator, which operates in the wholesale broadband internet access market, and TTNet, Türk Telekom's fully owned subsidiary, operating in retail broadband internet access market. Both undertakings are vertically integrated and constitute a single economic unit under competition law. Türk Telekom is dominant in the wholesale market and has a de facto monopoly over local network to which both TTNet and other rival Internet Service Providers (ISPs)[8] are obliged to have access in order to provide ADSL services. Moreover, TTNet is also dominant in the retail broadband internet access service market. It should again be mentioned that it is not necessary that TTNet is dominant in this retail market in order for its price and discount policies in its campaigns to constitute price squeeze and abuse of dominant position under competition law. It is sufficient that Türk Telekom, which is within the same economic unit with TTNet, is dominant in the wholesale market for existence of price squeeze. However, existence of dominant position in the retail market was established by the Competition Board to indicate the position of TTNet in the market and that the effects of the infringement in the market would be more serious compared to a situation where it was not dominant. In line with the basic allegation against these undertakings, the decision concentrates on whether there is price squeeze, which violates the relevant provision of the Competition Act on abuse of dominant position, as a result of Türk Telekom's setting the margin between its wholesale tariffs and retail tariffs (it applied through TTNet) in a way that it does not cover the costs of TTNet at retail level.

3.2 Profitability analysis

In the profitability analysis, incomes and costs of TTNet were averaged on monthly basis. Three sets of costs were taken into account.

The first group of costs consists of service payments to Türk Telekom for wholesale ADSL access under resale model. The second group includes operating costs. The second group of costs was calculated on average terms, i.e. total accounting costs were divided by average number of subscribers. The last group of costs was subscriber acquisition costs. These costs consisted of costs of free internet access, free modems, subscription fee that were not collected, discounts on the monthly fees and advertisements specific to the campaigns. Since these costs were incurred in order to get new subscribers and TTNet would enjoy the benefits over a long period, they were spread through a period of 36 months.

The profitability calculation method conducted by the Competition Board can be categorized as fully distributed costs. This method may not seem to be compatible with the European Commission's practice of using incremental costs (or avoidable costs as proposed by the DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses). However, considering the fact that TTNet's only business was limited to the resale model and this model does not require fixed investments, all costs incurred by TTNet can be categorized as incremental or avoidable.

It should be said that although the profitability analysis is based on costs incurred by TTNet, the decision also examined costs of other ISPs operating in retail broadband internet access services market. Although number of subscribers of other ISPs was too few to compare with that of TTNet in terms of

[8] The basic sales model used by ISPs is purchase of the service offered by Turk Telekom at wholesale price and resale of it at retail price (resale model). In this model, the ISPs including TTNet involve in marketing of ADSL service bought as a package from Türk Telekom for resale. Therefore, the ISPs operate like dealers of Türk Telekom rather than as operators.

economies of scale, it was thought that examining what cost items some other ISPs faced, determining whether they operated profitably and establishing the similarities and differences between their cost items and those of TTNet would contribute to the assessments regarding operations and profitability of TTNet. Although there were twelve ISPs having active subscribers in the market, only costs of four of them were selected based on certain criteria such as number of subscribers, duration of their presence in the market, recognition level by customers. The evaluations proved that rival ISPs incurred similar cost items compared to those of TTNet in a market where homogenous services were offered and the ISPs, who had to follow the price charged by TTNet and who operated on the same business model and whose subscriber base and history enabled to conduct profitability analysis, could not profit.

TTNet decision mentions that the profitability analysis concerning TTNet and its rivals indicated that an equally efficient rival would also incur losses. It should be said that there was no analysis in the decision to determine whether rival ISPs were as efficient as TTNet. However, assuming that they were not and therefore had faced higher costs, they would have incurred losses even if they had been equally efficient rivals.

As indicated above, the vertically integrated dominant undertaking's (retail arm's) cost is taken as a benchmark for the equally efficient firm's own cost, which is the cost of TTNet in this case. When Türk Telekom and TTNet argued that the cost of a hypothetically efficient firm should be used, the Competition Board mentioned existence of two methods in the doctrine and practice in calculating costs. First method, known as "reasonably efficient rival test", takes into account hypothetically efficient rival's costs. However, because it is hard to calculate costs of such a firm in practice, cost of undertakings other than the one subject to investigation (rival's cost) is used. Nevertheless, use of rival's cost is criticized as it would not be fair to expect the undertaking subject to investigation to know the costs of its rivals and arrange its price accordingly and otherwise be the subject of possible proceedings under competition law. This is also seen as incompatible with the aim of protection of competition rather than competitors under competition law. Therefore, it is seen that the method known as "equally efficient rival test" is preferred in the literature and practice which is also followed by the Competition Board in this case. The most important rationale for this test is the fact that liability may only occur when an equally efficient rival is excluded as a result of the pricing by the vertically integrated dominant firm.[9]

As a result of the profitability analysis, the Competition Board concluded that Türk Telekom/TTNet economic unit followed a pricing policy that did not cover its costs in the retail broadband internet access services market and implemented price squeeze aiming to complicate the activities of rivals and competition was restricted in the market. Therefore, it as decided that Türk Telekom/TTNet economic unit abused the dominant position it held in the wholesale broadband internet access services market in the retail broadband internet access services market.

3.3 Presence of intent and anti-competitive effects

Although general prohibition of abuse of dominant position by Article 6 of the Competition Act does not mention that intent of the conduct may be adequate to prohibit it as an abuse of dominant position, the example of "*actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market*" among the list of abusive practices under Article 6 overtly indicates that a conduct may be prohibited if its intent alone is anti-competitive. Moreover, the reasoning of Article 6 of the Competition

[9] O'DONOGHUE, R. ve A. J. PADILLA (2006), The Law and Economics of Article 82 EC, Hart Publishing, Oxford & Portland, 2006, Oregon, p. 361.

Act also mentions that intent or effect may be adequate to establish abuse.[10] Therefore, there is no need to demonstrate anti-competitive effects of the price squeeze to prohibit it as abuse. However, it should be said that although *TTNet* decision mentions some internal business plans, correspondence and presentations among high level officials of Türk Telekom and TTNet indicating that they incurred losses and campaigns could not compensate themselves within reasonable time, such evidence was used to prove that the price squeeze, which resulted in anti-competitive effects in the market, was intentional. Therefore, the decision demonstrated that price squeeze lasted over a certain period of time and resulted in anti-competitive effects in the market in addition to intent to complicate activities of rivals or exclude them from the market.

As to anti-competitive effects of the price squeeze in this case, the decision cites that although no rival exited the market as a result of price squeeze, it prevented them from expanding in the market and gaining market share as shown by analysis of the market shares and number of subscribers in the relevant period. In this context, the decision refers to literature[11] which says that apart from excluding rivals from the market, price squeeze also aims to control rivals.

3.4 Objective justification

The Competition Board did not accept the defence by Türk Telekom/TTNet economic unit that the investments it made, its contribution to development of broadband internet via alleged anti-competitive conduct, increasing penetration rate in recent years were objective justifications as there was documentation such as correspondence among high level officials found during on-the-spot inspections indicating the anti-competitive intent and strategy behind the relevant conduct. For instance, such correspondence proved that foreclosure of the market in favour of TTNet by ensuring rapid subscription of many users was adopted as a strategic target. According to the decision, although the dominant undertaking has the right to respond to competition in a proportionate manner, the price squeeze implemented by Türk Telekom and TTNet was not a competitive behavior when its duration and effects in the market were taken into account.

3.5 Outcome

The Competition Board imposed a fine of approximately 6 million Euros and required Türk Telekom/TTNet to refrain from practices that might lead to price squeeze. Before the final decision was taken, the Competition Board had to take interim measure[12] to terminate price squeeze practices increasingly used by the Türk Telekom/TTNet during the investigation stage. Türk Telekom/TTNet terminated the relevant practices in compliance with the interim measure and documented this before the Competition Board.

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10 "*…On the other hand, it is prohibited for the undertakings that obtain dominant position in the market to abuse their position with an aim to restrict, prevent or distort competition in our country or in a way to cause such effects. …*"

11 See footnote 9, p.306.

12 See Decision by the Competition Board, dated 11.7.2007 and numbered 07-59/676-235.

UNITED KINGDOM

1. Executive summary

This is a joint submission of the Office of Fair Trading (OFT), Competition Commission (CC), Office of Communications (OfCom) and the Water Services Regulation Authority (OfWat) to the OECD. All of these authorities have examined issues related to margin squeeze in the course of their competition work and are pleased to make this submission.

Margin squeeze falls into the category of an exclusionary abuse under Chapter II of the Competition Act 1998 (CA98) and Article 82 of the EC Treaty. In assessing complaints about margin squeeze UK authorities consider:

- Whether the upstream firm has the ability to foreclose due to its input being essential for downstream competition.
- To what extent a firm has an incentive to foreclose a downstream rival if it holds market power upstream. One consideration is why such a firm cannot already extract all rents through the wholesale price it charges.
- Whether the margin squeeze is likely to have the effect of foreclosing an efficient competitor.
- The potential trade off if requiring cheaper access to an upstream asset or products which may impact on investment against the benefits of downstream competition. This is particularly important given the precedent value of such decisions outside of the markets directly concerned.

These combined factors suggest the need for a realistic theory of harm, supported by the facts of the case, before deciding whether to take a case forward and proceeding to an infringement decision.

Margin squeeze can also be a potential concern under sector specific legislation when sector regulators directly price control firms with significant market power. However, there are a number of factors that may lend weight to a more interventionalist approach using regulatory powers within such sectors initially. First, downstream competition in these sectors is often nascent, highly reliant on an entrenched upstream firm, and may provide substantial potential benefits to consumers. Second, intervention using sectoral powers does not necessarily set a precedent outside the sector or under general competition law. Third, where the upstream price is regulated, the vertically integrated firm may have a strong incentive to leverage its upstream position into the downstream market.

In the remainder of this paper, we briefly discuss our approach to the assessment of margin squeeze, its relationship to other exclusionary abuses and how this may differ under general competition law, sector-specific competition regulation and some of the main issues arising from UK experiences.

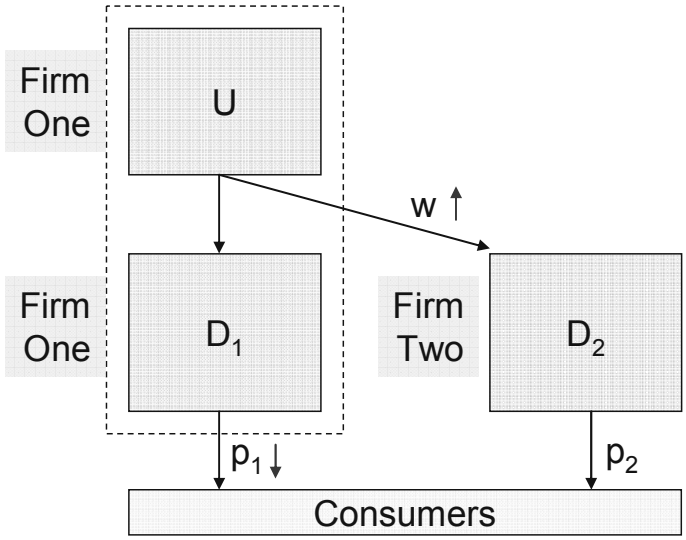
2. Overview of margin squeeze

Margin squeeze is a recognised potential abuse of a dominant position under both Article 82 of the EC Treaty[1] and Chapter 2 of the Competition Act 1998. More generally, it is also addressed within sector specific legislation of the sectoral regulators.

A margin squeeze takes place where a vertically integrated firm supplies a downstream rival and reduces downstream competition by either raising the wholesale cost to its rival or reducing its retail price in competition with its rival.[2] The diagram below illustrates this:

- Firm One makes an input in the upstream market and is also active in the downstream market in which the input is used.
- Firm One can increase its wholesale price of its input to Firm Two and/or decrease its retail price in the downstream market.
- Either change implies Firm Two faces a reduced margin between its production costs and its retail prices in order to remain competitive with Firm One.

Diagram 1: Margin Squeeze



For the purposes of this paper we continue to refer to this diagram and to Firms One and Two to illustrate points made.

Margin squeeze will result in a reduction in competition if an efficient rival cannot profitably remain in the market or its competitive constraint is significantly reduced. Such reductions are likely to cause significant consumer harm.

For margin squeezes to be a concern, the vertically integrated firm needs to be dominant at the upstream level and usually at the downstream level.[3,4] In addition, the input must represent a significant input either in cost or technology which cannot easily be replicated or bypassed by the downstream rival.

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1 See European Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings'.

2 Margin squeeze requires the margin between the wholesale price and retail price to decrease to the point where the efficient firm can no longer profitably survive. This need not require the retail price to fall.

Furthermore, it is important to differentiate between foreclosure of efficient competitors and non-efficient competitors. A margin squeeze test based on an inefficient downstream competitor risks forcing a vertically integrated firm to subsidise the inefficient firm through lower wholesale costs, or raise downstream prices to consumers. For this reason, if an inefficient firm is foreclosed but an efficient firm would not be, it may not be appropriate to intervene under general competition law (such as with BSkyB which is described in the annex). This raises substantive issues on how the cost test should be formulated.[5] There may be some circumstances in regulated sectors which justify a different approach – this is discussed later.

Margin squeeze exclusively concerns vertically integrated firms. However, we know that there can be legitimate reasons why a vertically integrated firm may seek to increase prices to competing downstream firms: for example, to ensure a return on upstream investment which would not have occurred without such profits or to facilitate new investment in infrastructure capacity or technology. Preventing upstream firms from such action may harm consumers in the long term (through a reduction in investment).[6] This underlies the potential risk of falsely condemning benign conduct. The absence of investment is often not as visible as high retail prices; however, its impact can be very large in terms of new products and services which can offer substantial benefits to consumers. We also know that downstream rivals will always have an interest in measures that would persuade their vertically integrated supplier/rival to increase their downstream prices and/or decrease their wholesale price. It is important to be aware of these potential pitfalls.

In considering complaints concerning margin squeeze a useful starting point is to ask the question posed by the Chicago critique: *if the firm in question already holds market power, why does it not already extract all rents through exercising that market power in the wholesale price it charges*? This goes to the incentives (rather than ability) to engage in margin squeeze: why would Firm One need to eliminate Firm Two in order to increase overall profits

There are four main reasons[7] why UK authorities are potentially concerned, despite this critique:

- It can lead to a decrease in downstream competition such that the vertically integrated firm can eventually raise price (or prevent price falling as much as it would have done, absent the behaviour). The reason why this may be more profitable than just increasing wholesale price can be due to limited input substitution by the downstream rival which in turn can limit the profits earned through wholesale price. For example, a downstream retailer of branded goods may need

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3 Although this depends on the facts of the case. If the firm is the sole source of supply at the wholesale level of a significant input cost, the extent of downstream market power may be less important. Substantive upstream barriers to entry must exist for a firm to hold significant market power: for example, if there are few barriers to upstream entry, the 'squeezed' firm could become vertically integrated itself. Under Article 82 of the EC Treaty and Chapter II of the Competition Act 1998, a firm would need to hold a dominant position in a relevant market before any margin squeeze abuse could be established.

4 There may also be a concern if a dominant downstream purchaser squeezes the margin of its upstream competitor.

5 The practical details of margin squeeze tests can be complex and raise several questions which are beyond the scope of this paper.

6 In *BSkyB,* a non-infringement decision was taken following mixed evidence of margin squeeze, in the context of a firm who had undertaken substantive and risky investment in a new service (satellite pay TV).

7 There are further possible reasons, such as the ability to price discriminate downstream: this list is not exhaustive.

to stock the main brand in order to attract sufficient customers to be viable but can still choose how heavily to promote the main brand in preference to other substitutes.[8]

- It can lead to upstream foreclosure if access to downstream distribution is an important factor in facilitating upstream entry, and hence it can enhance market power at both levels.

- It can be a form of punishment mechanism to enforce a horizontal or vertical price fixing arrangement which itself generates additional rents. This type of abuse is primarily related to the price fixing and is not discussed further within this paper.[9]

In summary, there are both anti-competitive and efficiency rationales for higher upstream prices or lower downstream prices. As such, we believe it important to have a robust theory of harm consistent with the facts of the case which can explain how consumers suffer in the long term before finding an infringement.

3. Links to other forms of abuse

A question that has come up is the link between margin squeeze and both refusal to supply and predation, specifically whether margin squeeze should be treated as a separate abuse or whether it is analogous with the other two abuses. This played a prominent role in the recent *linkLine* decision in the US.[10]

3.1 Does margin squeeze differ from predation?

Predation occurs when the price falls lower than the appropriate cost measure.[11] In terms of our diagram, that is equivalent to the retail price of Firm One being lower than the downstream costs of Firm Two plus wholesale price. However, there are two potential differences between margin squeeze and predation.

First, which firm's costs you look at may differ in the legal test between the two abuses. For margin squeeze, the wholesale price Firm One charges Firm Two is explicitly taken into account. In a predation test, the internal cost of the input within the vertically integrated Firm One is implicitly included. Hence, it is plausible that a firm can pass a predation test and fail a margin squeeze test if the wholesale price is higher than its true cost.[12] If the wholesale price charged to Firm Two is considered to be the appropriate cost for predation, then a margin squeeze test is *de facto* applied. Second, there may also be differences in the appropriate cost measure for both tests, particularly when there are common and joint costs, as discussed later in the paper.

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8 This concern can be found in the literature on exclusive dealing and bundling. It is dependent on some form of scale economies for a firm to be viable within a market. See Nalebluff , *Bundling Tying and Portfolio Effects,* (2003), DTI Economics Paper No. 1.

9 It's assessment may also vary in that the infringement decision may not include margin squeeze given it does not need to eliminate rivals but need only make the cost of deviating from the agreement more costly so as to increase the stability of the agreement(s).

10 *Pacific Bell Telephone Co. v linkLine Communications, Inc. 555 U.S.* (2009).

11 For the purposes of this paper we do not go into the details of predation cost price tests.

12 Arguably, this is what happened in the US *linkLine* decision.

3.2 Does margin squeeze differ from refusal to supply?

A constructive refusal to supply, whereby the prices charged are such that no supply occurs, is very similar and has an identical effect to margin squeeze: this is because both involve looking at whether a rival is foreclosed given the price the vertically integrated charges for the input. It is also noticeable that they are both dealt with under the same section of the new Article 82 Guidelines[13] issued by DG Comp. We agree with the similarities in DG Comp's approach.

From a practical perspective, we believe it is fair to say most margin squeeze complaints tend to be from firms who are already being supplied by their vertically integrated competitor. Likewise, most refusal to supply complaints concern firms seeking supply for the first time from a vertically integrated competitor.

In *Genzyme*, the Competition Appeals Tribunal (CAT) did consider whether a different approach would be taken under a refusal to supply. The CAT emphasised the need to examine the final impact on the consumers whilst recognising there may be cases where issues akin to essential facilities and returns to investment are relevant.[14] The OFT considered if the case had been run as a constructive refusal to supply and concluded that the result would be the same.[15]

3.3 Vertical foreclosure in mergers?

The OFT and CC recently consulted on its revised merger guidelines.[16] These include the approach taken to potential concerns relating to vertical mergers. In principle, margin squeeze is one of the concerns which can arise under vertical input foreclosure.

Input foreclosure arises when a merged firm with upstream market power raises the costs of non-vertically integrated downstream rivals; for example, by raising the input price, or worsening the terms of access, to them of an important input. It is only anti-competitive if it significantly lessens competition in the downstream market (i.e. by forcing exit of one or more firms).

In assessing the likelihood of either type of foreclosure, the OFT and CC will examine the ability and incentive of the merged firm to engage in foreclosure, as well as the effect of any such foreclosure. The ability to foreclose will usually be greater the larger the merged firm's market power in the foreclosing market (i.e. the market that rivals are being restricted from accessing), with a share of under 30 per cent being unlikely to raise concerns about market power. The incentive to foreclose depends on whether it is profit-enhancing.[17]. The effect of foreclosure will allow for merger efficiencies (such as removal of double

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13 See footnote 1.

14 See Case No: 1016/1/1/04, *Genzyme Limited v Office of Fair Trading*, [2004] CAT, paras 567 - 575. See also paragraph 567 where the CAT stated, 'As to Genzyme's contention that this case is a case of refusal to supply, the first difficulty we have with that argument is that Genzyme has not refused to supply Healthcare at Home, but has continued to do so since May 2001.'

15 See *Genzyme*, para. 451, footnote 14.

16 OFT1078, Office of Fair Trading and Competition Commission, 'Merger Assessment Guidelines: Consultation Document', April 2009.

17 Foreclosure will be more profitable when the margin in the foreclosing market (where the merged firm sacrifices sales) is less than in the foreclosed market (where the merged firm hopes to gain sales). It will also depend on other factors, namely the volume of business lost in the foreclosing market compared to the gain in business in the foreclosed market; the change in prices paid by rivals in the foreclosing market; and the degree to which rivals pass these prices on, and thus further worsen their competitive offers.

marginalisation) and will depend on the nature of contractual relations between upstream and downstream firms.

Details of specific merger cases in which vertical input foreclosure issues have featured significantly are included in Annex 1.

4. Sectoral regulation

Within the UK, we have several sectoral regulators with parallel powers to enforce competition law in their sectors. Both OfCom (which covers telecommunications) and OfWat (which covers water and sewage industries) have had experience in margin squeeze cases.

Generally, sector regulators have several tools that can be used in addition to competition law.[18] They have significant market power within their sectors, with the power to regulate directly both the wholesale and retail prices of firms. To the extent that the regulator can set both retail and wholesale price, these powers can effectively prevent the possibility of margin squeeze. There are several reasons why additional powers may be required in these sectors:

- Margin squeeze may be potentially a greater problem in regulated sectors precisely because price controls exist (especially where they apply only to wholesale price). Unlike non-regulated sectors, the Chicago critique clearly does not apply because the price control system limits the rents that can be earned through upstream monopoly power. As such, in a regulated environment the incentive to protect or increase market power in the downstream market are increased.[19] In addition, firms may have incentive to inflate wholesale costs to drive up wholesale prices as a way of circumventing price controls and gaming the system.

- Where competition is just being introduced into these sectors there may be a justification for applying the 'reasonably efficient entry' rather than 'equally efficient' test.[20] Firms may need to gain efficiency through experience and potential investors may be more easily scared away if early entrants fail due to aggressive competitive responses. The ability to intervene *ex ante* and expediently can thus be more important and is not provided by general competition law, which is generally more cautious before intervention.

- Sectoral regulators are typically better placed to determine what prices should be in such a market. Generally they will have greater sector experience and detailed costing information. As such, the potential risks of wrong decisions are likely to be smaller.

- Unlike decisions under general competition law, decisions under sector specific legislation may not have the same ramifications outside the relevant sector.

All these factors support a justification for a lower intervention threshold for sector specific legislation which regulates a sector monopoly.

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18 Typically these relate to price controls on the upstream market (w in diagram one) although this can include price controls on both the upstream and downstream markets (p_1 in diagram one).

19 This is a hugely simplified aspect of a complex topic: for further information see Geradin, D. and O'Donoghue, R., 'The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector', Journal of Competition Law and Economics 1(2), 2005, 355-425.

20 The *Albion Water* case and ruling of the CAT discusses a reasonable efficient entrant test in the water industry with respect to margin squeeze (see Annex 1 for details on *Albion Water*).

It has been considered that the dual application of sector specific regulation and general competition law can cause jurisdictional problems of double jeopardy.[21] However, there are also important benefits from dual application.

Regulation is always second best to effective competition. Competition is a driver of sound investment decisions. In most markets, competition is the most effective way of distinguishing good investments from bad.[22] Competition is also the driver of innovation, low prices, cost reduction and efficiency. Price regulation is unlikely to replicate this process and may significantly distort the market.[23] The fact that margin squeeze can be tackled under general competition law is a useful tool here for regulators. It can make it easier to start to withdraw detailed price regulation by providing a tool to deal with the threat of margin squeeze once price controls are removed.[24,25]

This appears to contrast with the approach in the US where, with regards to Linkline, one author has stated: 'In most cases, the presence of a regulator with jurisdiction to compel and regulate such dealings precludes an antitrust duty to deal.'[26]

The UK Competition Appeals Tribunal has taken a very different approach with regards to the possibility of different cost tests. In *Albion Water,*[27] the CAT analysed the sector specific regulation and considered the use of both an 'equally efficient' test and 'reasonably efficient competitor' test. Ofcom has also considered the use of an 'adjusted equally efficient competitor' test. Indeed, an adjusted test may be appropriate in cases where the competitor has unavoidable additional downstream costs beyond those of the vertically integrated firm.[28,29]

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21 See reference at footnote 19 for further discussion.

22 This issue can be particularly important in the regulated sectors such as telecommunications, water and sewage, energy and rail, all of which are characterised by long term substantial investment decisions.

23 A good example of this is air transport which until comparatively recently was effectively monopolized with regulated air fares. The advent of competition, initiated through the process of Single Market liberalisation in Europe, led to entry of low cost airlines and consequential effects in driving lower prices and wider choice of destination. It would be difficult for any regulator of air travel to replicate this process through regulation.

24 For example, detailed price regulation has been much reduced in the Telecommunications sector with margin squeeze complaints now assessed under general competition law by OfCom.

25 This point is valid from both an economic perspective (that such firms may be capable of margin squeeze and some safeguards are required) as well as a political economy perspective (that such safeguards mitigate lobbying to prevent relaxation of price controls).

26 Barnett, T., Gaskings, S. and Graubert,J., 'Price Squeeze Claims Succumb to Need for 'Clear Rules'', (April 2009), Global Competition Policy, Release One.

27 Case No: 1046/2/4/04, Albion Water Limited supported by Aquavitae (UK) Limited v Water Services Regulation Authority (formerly Director General of Water Supplies), [2006] CAT23.

28 In *NCCN 500* Ofcom took account of scale disadvantages in the application of the 'Adjusted EEO' test by adjusting for the local call disadvantage BT's competitors always faced. Ofcom found that any such disadvantages were not sufficiently material to alter its findings that there was no margin squeeze under the EEO test. NCCN500, Decision published 1 August 2008 at http://www.ofcom.org.uk/bulletins/comp_bull_index/ comp_bull_ccases/closed_all/cw_823/NCCN_500.pdf

29 The same principle was also stated in the BT Together decision. See Investigation against BT about potential anti-competitive exclusionary behaviour: Decision of the Office of Communications, 12 July 2004.

5. Key issues to emerge for the UK

5.1 Appropriate cost measures

The cost tests, in practice, need to address difficult questions. The BSkyB decision and Ofcom's experiences in Annex 1 illustrate the complexity. In finding a non-infringement in BSkyB the OFT explicitly recognised the margin for error in these calculations.

The application of the cost tests becomes particularly complicated when firms provide multiple products/services. This raises two interrelated issues. First, one must determine the appropriate set of products/services on which to conduct the test. Second, one must determine how common or joint costs between different products/services should be allocated.

With regards to the first issue, in many cases the set of services over which it is appropriate to assess the margin is the narrowest set of services sold by competitors rather than a single product. If this test indicates there is no margin squeeze, it may not be necessary to carry out tests on margins of a larger bundle as these may be assumed to be profitable.

With regards to the second issue, how these costs are allocated may have a significant impact on the outcome of a margin squeeze test. Ofcom has analysed both Fully Allocated Costs (FAC) and Long Run Incremental Costs (LRIC) within its decisions.[30] FAC is often higher than LRIC, and thus, if the test is passed on an FAC basis, it will often be passed on a LRIC basis.

We would welcome views on approaches to cost and revenue allocation and how these problems have been resolved in practice.

5.2 Risk of erroneous decisions

Margin squeeze is easy to allege and offers the potential benefit to complainers of either a reduced wholesale price upstream, higher rival's price downstream or both. This provides an incentive for complainants to submit spurious allegations, and competition authorities need be aware of this risk and hence the potential for errors. This can be important for the following reasons:

- Sometimes there is a balancing between short-run static harm to consumers from the reduction of downstream competition and potentially longer term harm to consumers from dampening investment incentives upstream.

- As well as errors in whether or not a margin squeeze has occurred and harms consumers, there are also potential errors in remedies. By condemning pricing by a firm a competition authority is, by induction, reducing their ability to determine their own prices freely. This raises the issue of

[30] In the *NCCN 500* decision, Ofcom's analysis was primarily based on FAC. In this case, estimates of variable/incremental cost and FAC measured across the service in question were relatively close together. Ofcom concluded that because, within Telecoms, FAC is greater than LRIC, there was no need to look at LRIC for the finding of non-infringement. In the *BT 0845 & 0870* decision Ofcom considered that the relevant cost standard to apply in this case was LRIC. This was because the relevant question was whether BT Openworld's price could be matched on a sustainable basis. In *BT Together* OFCOM carried out cost tests based on both fully allocated costs and LRIC. 'BT 0845 & 0870 retail price change- Suspected Internet Service Provider (ISP) margin squeeze - Decision of the Office of Communications' published 19 August 2004 at http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_647/decision/decis_647.pdf

what prices should be allowed and introduces the implicit risk of direct price regulation – a risk that is especially dangerous where the authority or court is not a sector regulator.

We would welcome views on approaches to these issues and how this has worked in practice.

5.3 Application of general competition law in regulated and non-regulated sectors

As previously stated, for regulated industries the direct error cost of erroneously condemning behaviour may be lower. However, this may not be true in industries which are not regulated. One approach to dealing with this would be to differentiate the way in which competition law is applied by the different underlying circumstances in regulated and non-regulated sectors.

We would welcome views on alternative approaches of authorities or courts in other countries on this issue.

ANNEX 1: SUMMARY OF UK MARGIN SQUEEZE CASES

The OFT has had two margin squeeze cases. In *Genzyme*, we found Genzyme had engaged in exclusionary behaviour through margin squeeze and this finding was upheld under appeal. In *BSkyB*, a non-infringement decision was made. OfWat has one case with Albion Water which was subjected to extensive appeals and debate in the courts, and OfCom have had a series of non-infringement decisions.

1. Genzyme

Genzyme was dominant in the upstream market for the supply of drugs for the treatment of Gaucher disease (with a greater than 90% market share which was likely to persist into the foreseeable future). The abuse was pricing Cerezyme in a way which excluded other delivery/homecare services to Gaucher patients being treated with Cerezyme at home. Genzyme set the price for third party homecare providers for the Cerezyme drug at the same level as it charged the NHS (the ultimate customer of these services) for the bundled product of the drug and homecare provision. Hence, it was clearly impossible for the independent homecare provider to compete, despite a demand existing from the NHS for their services. It was also recognised that this abuse also was likely to somewhat raise barriers to entry for upstream market entry which were already considerable.

This decision was appealed and upheld by the Competition Appeals Tribunal (CAT).[1] One interesting aspect to this case was the Genzyme argument that this was a refusal to deal case with a previous exclusive distributor not a margin squeeze case. This was not upheld by the CAT who reasoned that because third parties did not seek to use any Genzyme facilities just to purchase the drugs this was a margin squeeze case.

2. BSkyB

In December 2002, the then Director General of Fair Trading found a non-infringement decision in respect to complaints of margin squeeze by BSkyB.[2] BSkyB was dominant in the supply of wholesale premium pay TV sports channels which it supplied to premium channel distributors.[3] The test applied looked at BSkyB's distribution costs as a benchmark for whether an efficient rival could profitably compete given BSkyB's wholesale and retail prices (an 'equally efficient competitor' test). This test was complicated by the fact that this was a fairly nascent market where it was not unreasonable that DisCo would be making short term losses in order to increase subscriber base to the point it became profitable. Given BSkyB is a multi-product firm, a cost allocation and required profitability was a difficult task, and the decision evaluated this issue in detail.

The analysis showed that 'DisCo' did make losses over a certain period of time and then returned to profitability due to rising retail prices and increased subscriber numbers, as well as other factors affecting company profitability. Given the intermittent nature of the losses and the possible influence of other

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1 The first appeal body within the UK against competition decisions by the UK competition authorities.

2 This decision also rejected a complaint of mixed bundling which is not covered within this summary.

3 NTL, Telewest and ITV Digital.

factors, it was not considered that sufficient grounds stood to support a margin squeeze infringement decision.

3. Albion Water

The *Albion Water* case related to the provision of non-potable water to Shotton Paper, a large industrial customer located in Deeside, north Wales. In 1999, Albion Water was appointed[4] as the statutory undertaker serving Shotton Paper, in place of Dwr Cymru (the vertically integrated incumbent provider for the relevant area). In order to supply the customer, Albion Water has purchased non-potable water from Dwr Cymru, with this water then being sold on to Shotton Paper. Albion Water subsequently investigated securing its own source of raw water and sought to negotiate 'common carriage' terms with Dwr Cymru. These terms provided for the transportation and partial treatment of the raw water that had been put onto its network. Albion Water complained that the price that it was offered by Dwr Cymru for common carriage amounted to an abuse of a dominant position under the Competition Act 1998. The price was said to give rise to a margin squeeze, to be excessive and discriminatory. Only the margin squeeze issues are considered here.

The complaint was rejected by the Director General of Water Services in May 2004. However, the Competition Appeal Tribunal subsequently found that Dwr Cymru had abused a dominant position by imposing a margin squeeze[5]. This finding was then upheld by the Court of Appeal[6].

The CAT applied two tests for margin squeeze: an 'equally efficient competitor' test and a 'reasonably efficient competitor' test. Thus, it considered whether the incumbent's downstream operation could earn a normal profit on the basis of the price offered, and whether a reasonably efficient competitor could do so. As a secondary matter that did not affect its upholding of the CAT finding of abuse, the Court of Appeal noted that, in Deutsche Telecom, the former approach (the 'equally efficient competitor' test) had been endorsed in preference to the latter.

It had been argued in the appeals, that both of these formulations of the margin squeeze test were only appropriate in circumstances where the third party requiring the upstream input for its downstream activity displaces the incumbent from that activity – that is, that some level of activity displacement and avoided costs should be understood as a necessary feature of the margin squeeze test. Consistent with the CAT approach, however, the Court of Appeal concluded that displacement and avoided costs were not necessary features of the margin squeeze test. While they were identified as plainly relevant and potentially important considerations, the appropriate context within which to consider them was said – in line with the approach taken by the CAT – to be objective justification.

This displacement/avoided cost issue has clear relevance to consideration of the regulatory provisions that are currently in place for the determination of access pricing under the Water Supply Licensing regime[7]. In particular, the implementation of these provisions has involved the application of a 'retail minus' approach to access pricing, with the available margin thus driven by views on the levels of costs

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4 This is referred to as a 'New Appointment', and the process provides a means for some new entry in the provision of water and wastewater services to customers and new developments. New Appointments have previously been referred to as 'Inset Appointments'.

5 Albion Water Limite & Albion Water Group Limited v Water Services Regulation Authority (Dŵr Cymru/Shotton Paper), [2006] CAT 36.

6 [2008] EWCA Civ 536.

7 A new licensing regime was introduced part way through the legal proceedings in the Albion Water case, under the Water Act 2003. This is referred to as the Water Supply Licensing (WSL) regime.

avoided by the incumbent when it loses business to a competitor and the costs incurred by the incumbent in supplying the new retailer. Ofwat, the economic regulator for the water and sewerage sectors in England and Wales, has argued that this approach to the determination of access prices is a significant barrier to the development of competition in the sector and that this should be addressed through legislative change[8] A recent independent review of competition and innovation in the sector for government (the Cave Review)[9], also recognised the detrimental impact that the existing retail minus approach could have on competition, including by reference to the CAT findings in the Albion Water case, and recommended that legislative change provided for new access pricing principles to be put in place.

4. Telecommunications sector

In addition, there have been a series of complaints and non-infringement decisions issued by OfCom.

4.1 NCCN 500

On 1 April 2004 BT notified the industry, via Network Charge Change Notice 500 ('NCCN 500'), that its charges for termination of certain types of NTS calls would increase from 1 May 2004. Ofcom received a complaint from Energis alleging that BT's charges had imposed an anti-competitive margin squeeze on Energis, discriminated in favour of BT's own business and against Energis in terms of price; and were excessive. Energis further alleged that the increased charges set out in NCCN500 had increased Energis's costs of providing a competing service, increased BT's market power in relevant markets; and formed part of a strategy on BT's part to dilute competition.

Ofcom concluded that BT was dominant in the market for NTS call termination/hosting between 1 May 2004 and 31 December 2005, the period during which the prices notified in NCCN 500 were in force. However, Ofcom concluded that BT's conduct did not constitute an abuse of its dominant position and that there are, therefore, no grounds for action.

4.2 Gamma Telecom

Ofcom received a complaint from Gamma Telecom Limited against BT Wholesale about reduced rates for Wholesale Calls from 1 December 2004

Ofcom investigated whether BT's revised wholesale calls tariff represented an anti-competitive margin squeeze and/or was structured in such a way as to foreclose competition in the markets for the provision of wholesale end-to-end voice calls to resellers.

The decision set out in detail Ofcom's finding that, under a range of assumptions and scenarios, there was no margin squeeze in respect of BT's revised wholesale call tariff structure and, therefore, no grounds for action.

4.3 BT Together

BT revised its terms and pricing on 24 March 2004, of its BT Together Options 1, 2 and 3 residential retail services. Ofcom decided that the conditions for prohibition were not met and, therefore, had no grounds for action.

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8 Ofwat (December 2007), Market competition in the water and sewerage industries in England and Wales – Part one: Water Supply Licensing.

9 Cave Review: competition and innovation in water markets. Interim Report, November 2008.

Ofcom's decision followed an investigation opened in response to representations from a number of competing Carrier Pre-Selection (CPS) providers that BT's revised pricing of its Together Options packages, together with the withdrawal of BT's standard line rental offering, was likely to result in the exclusion of competitors from relevant markets in the provision of calls to end users.

4.4 BT UK-SPN

The investigation concerned BT's UK-SPN calls only service (the 'UK-SPN service'). The UK-SPN service is a wholesale Indirect Access ('IA') product provided by BT using a network leased from the administrators of a failed telecommunications company ('telco'). The UK-SPN service supplies end-to-end calls to service providers for resale to end users. These service providers either do not have a telecommunications system ('systemless service providers), or do not wish to carry certain calls on their own telecommunications system.

The complainants were; Thus plc, Kingston Communications (Hull) plc, MCI Worldcom Ltd, Energis Communications Ltd, Omne Communications Ltd, COLT Telecommunications Group Plc, Telia International Carrier (UK) Ltd, and Cable and Wireless Plc ('the complainants'). The complainants made three allegations: the UK-SPN service was being provided by BT below cost; BT was using the UK-SPN service to specifically target markets to the detriment of alternative network providers; BT's pricing of the UK-SPN service may represent price discrimination at the retail level between systemless service providers and BT's other corporate retail customers.

The Director concluded that BT had not infringed the Chapter II prohibition. BT had not engaged in anti-competitive practices in terms of the prices charged for its UK-SPN service.

4.5 Vodafone, O2, Orange and T-Mobile

Ofcom concluded that the mobile operators did not infringed the Chapter II prohibition or Article 82 of the EC Treaty in respect of Business On-Net calls.

Ofcom's decision followed an own-initiative investigation, which was opened in response to representations made by three fixed operators that the mobile operators were pricing the delivery of certain fixed-to-mobile calls to business customers at levels that constituted a margin squeeze vis-à-vis the wholesale charges that fixed operators pay for mobile call termination. Ofcom's investigation covered two types of fixed-to-mobile call: Closed User Group (CUG) calls and Business On-Net calls.

In respect of CUG calls, Ofcom concluded that the relevant upstream market is the market for the provision of call termination for CUG calls across all the mobile operators' networks covering the whole of the United Kingdom. Ofcom concluded that none of the mobile operators is dominant in this market. Accordingly, Ofcom concluded that there was no infringement.

In respect of Business On-Net calls, Ofcom's viewed the relevant upstream market being the provision of call termination for Business On-Net calls on each respective mobile operator's network covering the whole of the United Kingdom. Ofcom considered that each of the mobile operators is dominant in the relevant market(s).[10] Ofcom did not consider that the mobile operators' conduct amounts to an abuse.

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[10] Ofcom also recognised that there is a possible alternative upstream market for the provision of call termination for Business On-Net calls across all the mobile operators' networks covering the whole of the United Kingdom, in which none of the mobile operators would be dominant.

4.6 BT 0845 & 0870

Ofcom concluded that BT's conduct is not caught by the Chapter II prohibition or the prohibition in Article 82 and, therefore, there are no grounds for action.

Ofcom's investigation was opened in response to representations from a number of competing Internet Service Providers that BT's reduction in price of evening calls to 0845 number ranges and weekend calls to 0870 number ranges, was likely to result in the exclusion of competitors from relevant markets in the provision of narrowband metered internet access. Following its investigation, Ofcom considered the available evidence and concluded that BT's conduct is not caught by the Chapter II prohibition or the prohibition in Article 82.

ANNEX 2: SUMMARY OF UK VERTICAL FORECLOSURE MERGER CASES

The potential for post-merger margin squeeze has been considered by the UK authorities in at least five recent merger cases that had vertical as well as horizontal elements: BOC/Ineos (chlorine), Nufarm/AH Marks (herbicides), EWS/Marcroft (rail freight), Rolls Royce/Goodrich (aero engines) and Celsa/BRC/ROM/Express (steel).

In summary, in BOC/Ineos and Nufarm/AH Marks the OFT referred the cases on the basis of horizontal concerns and did not conclude on vertical effects. The CC found an SLC in both cases on horizontal grounds and did not need to consider the vertical aspects. In EWS/Marcroft the OFT referred on horizontal grounds and did not therefore conclude on vertical concerns. The CC did not find a horizontal SLC but did find a vertical SLC (reducing maintenance quality to harm the availability of downstream competitor's vehicles). In the other two cases (Rolls Royce/Goodrich and Celsa/BRC/ROM/Express) the OFT considered vertical theories of harm but cleared the cases at first phase. These cases are discussed in more detail below.

1. BOC/Ineos

The acquisition by BOC of the packaged chlorine business of Ineos[1] resulted in an asymmetric duopoly of chlorine packagers and reduced the number of competitors in chlorine distribution from four to three. On this basis, although the OFT raised the possibility of vertical concerns, it did not find it necessary to conclude on them given its concerns over horizontal unilateral effects in distribution and co-ordinated effects in packaging.

There are three levels of the chlorine supply chain: the production of raw chlorine (where Ineos was a monopolist), its packaging and its distribution. The vertical theory of harm that the OFT did not conclude on, was that merger changed the incentives of the two remaining chlorine packagers (BOC and Albion) to tacitly collude once Ineos' became the monopoly supplier of raw chlorine to them. Pre-merger, Ineos had the incentive to sell as much chlorine as possible in the two downstream levels of the supply chain (packaging and distribution). Pre-merger, Albion—which was also a distributor—would be aware that, if it refused to supply rival chlorine distributors then they could purchase from Ineos' chlorine packaging business. By breaking the vertical link with monopoly production, the merger better aligned BOC and Albion's incentives, such that they might tacitly recognise that it is in their interest to foreclose competing chlorine distributors (if they could share the benefits from this strategy).

The CC found an SLC on the basis of horizontal unilateral effects at the downstream chlorine-distribution level where the merger combined the two closest competitors.[2] In order to remedy the concerns the merger was unwound and it was not necessary for the CC to conclude on any vertical issues.

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1 Anticipated acquisition by BOC Limited of the packaged chlorine business and assets carried on by Ineos Chlor Limited, OFT June 2008.

2 BOC Limited / Ineos Chlor Limited CC December 2008.

2. Nufarm/AH Marks

In the merger of Nufarm and AH Marks, which were the only UK producers of some types of acid used to make herbicides, the OFT again did not conclude on possible vertical theories of harm because the upstream post-merger monopoly was sufficient for reference to the CC on the basis on horizontal unilateral effects.[3] There are four levels of the herbicide supply chain: the production of phenoxyacetic acids (only by Nufarm and AH Marks), their combination with other chemicals to make concentrates (also only by the parties), the formulation of concentrates into herbicides (by Nufarm and other intermediaries), and the distribution of herbicides (by third parties).

The OFT considered whether Nufarm may have the ability to foreclose rival formulators post-merger. However, the OFT could not determine whether the profit gained by Nufarm on extra sales of formulated product diverted to it from rival formulators would exceed the profit lost on sales of concentrates no longer made to rival formulators (who may have provided greater product variety and distribution channels). Given the OFT's horizontal concerns in the manufacture of concentrates, it therefore did not conclude on this issue.

The CC found an SLC on the basis of this upstream horizontal overlap, implying at least an ability to engage in foreclosure.[4] The CC did not consider in detail the ways in which Nufarm may choose to exert its upstream market power, but considered that under the counterfactual, a competitor (UPL) might have similar incentives (although it would still face some constraint from Nufarm). Therefore, the CC did not find that the merger raised specific vertical concerns separate from the horizontal issues.

3. EWS/Marcroft

In EWS/Marcroft, the leading rail haulage firm (EWS) acquired Marcroft, the leading supplier of wagon maintenance to other rail hauliers, including EWS's main competitors. EWS, with over half the haulage market, supplied its wagon maintenance internally, with a minor supply of maintenance to other rail hauliers. The OFT found a realistic prospect of horizontal unilateral effects in wagon maintenance on the basis that the merger removed the most important actual or potential constraint on Marcroft, especially for the largest rail hauliers that needed national coverage for wagon maintenance and who could not self-supply.[5]

The OFT considered whether the strong position of the merged firm in wagon maintenance would provide it with an incentive to foreclose rival rail hauliers, on the basis that wagon maintenance was less profitable than rail haulage—so the rail haulage business diverted to EWS was worth more than the wagon maintenance business forgone to rival hauliers. Marcroft claimed it did not have sufficient market power, in particular because it was loss-making, but the OFT did not conclude on this issue.

Unlike the OFT, the CC concluded that self-supply of wagon maintenance (in particular by EWS) did not constrain its supply on the open market. [6] Therefore, the CC found no horizontal SLC in wagon maintenance as the merger involved only a small (three per cent) increment to Marcroft's (56 per cent) share, with the next largest supplier Wabtec having 34 per cent.

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3 Completed acquisition by Nufarm Limited of AH Marks Holdings Limited, OFT September 2008.

4 Nufarm / AH Marks, CC February 2009.

5 Completed acquisition by Railway Investments Limited of (a wholly owned subsidiary of English Welsh & Scottish Railway Holdings Limited) of Marcroft Holdings Limited and Marcroft Engineering Limited, OFT February 2006.

6 EWS Railway Holdings / Marcroft Engineering inquiry, CC September 2006.

The CC nonetheless found that Marcroft possessed market power and could raise prices or reduce service because some of its largest customers (including EWS's competitors) required a national provider which even Wabtec was not able to supply adequately. It was concluded that EWS could be expected to follow both foreclosure strategies. There was a stronger incentive to lower service quality to EWS' competitors in haulage markets: EWS could de-prioritise the maintenance of its competitors' wagons; longer maintenance delays would cause downstream competitors either to move to a less suitable provider (Wabtec) if capacity allowed, or to suffer reduced availability of wagons lessening their ability to compete, and possibly causing them to lose customer contracts to EWS. It could also be expected to raise maintenance prices to its haulage rivals; whilst the effect of raising prices might not be very large (maintenance is a small proportion of overall haulage costs) the downside to EWS of doing so appeared to be minimal. The CC imposed divestment remedies to prevent this.

4. Rolls Royce/Goodrich

In the formation of a Joint Venture between the second-largest aircraft engine manufacturer (Rolls Royce) and its leading supplier of engine control systems (Goodrich) there was no horizontal overlap and the OFT focussed on potential foreclosure.[7] The industry was already highly vertically integrated with three aircraft engine manufacturers owning upstream suppliers of engine control systems, and two more (including Rolls Royce) having long-standing preferred supplier relationships. Post-merger there were two remaining suppliers of engine control systems without preferred supplier relationships with aircraft engine manufacturers.

The OFT considered input foreclosure unlikely on the basis that Goodrich had at most a 20 per cent market share, with most of its output already going to Rolls Royce, and on the basis that profit margins in engine control systems were relatively high (compared to aircraft engines).

The OFT also ruled out customer foreclosure. Rolls Royce was expected to have 25-35 per cent of future engine orders but current engines and orders were excluded from the JV. There were several new engine programs that Rolls Royce was not competing in, and the strength of downstream competition meant that Rolls Royce would need to use the best engine control system supplier if they were to secure future orders. Very long-term contracts of 25 to 50 years gave little scope for raising prices and the existing vertical links showed that competitors could adequately protect themselves. The JV included measures to ensure competitors' confidential information would not be disclosed to Rolls Royce. On this basis, the OFT cleared the JV.

5. Celsa/BRC/ROM/Express

In the simultaneous acquisition by upstream steel reinforcement manufacturer Celsa of three downstream steel fabricators and distributors (BRC, ROM, and Express), the OFT considered the horizontal issues of combining the three largest downstream fabrication/distribution firms, as well as vertical issues.[8] Given the undifferentiated nature of reinforced steel, horizontal unilateral effects would have required the merged firm to withhold at least 80 per cent of downstream production due to the availability of structural (as opposed to transient) excess capacity amongst competitors. The OFT did not consider this plausible.

Input foreclosure was prevented by the willingness of customers to use the other UK supplier of reinforced steel and imports, meaning the merged firm had less than half the upstream market little market

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7 Anticipated joint venture between Goodrich Corporation and Rolls Royce plc, OFT January 2009.

8 Completed acquisitions by Celsa Steel Service (UK) Limited of the manufacturing and reinforcement divisions of: BRC Limited, Express Reinforcements Limited, and The ROM Group, OFT February 2009.

power, and little ability to foreclose. In addition, upstream manufacture of reinforced steel was a high fixed cost, high margin business giving limited incentive to reduce output, and downstream fabricators/distributors could mothball plant easily rather than exiting.

The lack of horizontal market power arising from the merger in downstream distribution/fabrication prevented customer foreclosure. The merger was a completed one, and BRC, Rom and Express were already sourcing their reinforced steel from Celsa and not from Celsa's upstream competitor or from imports with Celsa controlling up to 75 per cent of demand. The remaining UK supplier was able to vertically integrate and had previously only supplied 5-10 of the market. The OFT further concluded that any foreclosure strategy by Celsa had not affected the viability of any significant UK suppliers and not had any anti-competitive customer-foreclosure effect.

UNITED STATES

This note discusses "margin squeeze" (also called "price squeeze") as a theory of liability under the competition laws of the United States. A margin squeeze can occur when an upstream firm sells an input for which there are no good economic substitutes to firms against which the upstream firm also competes in the downstream market. A common example is a vertically integrated firm that engages in both wholesale and retail sales, who has market power at the wholesale level, and competes with nonintegrated rivals at the retail level. A margin squeeze arises where the margin between the downstream retail price and the wholesale price charged for an input is too small to allow a firm to survive as a retail competitor.

This note is divided into three parts. The first part discusses current case law in the United States that addresses whether or not margin squeeze is a recognized theory of antitrust liability. It discusses the US Supreme Court's rejection of price-squeezes as stand-alone claims in the absence of an antitrust duty to deal and its decision that most such complaints must be brought as predatory pricing claims. Part II discusses the economics of margin squeezes. Part III concludes and discusses open questions for margin squeezes under US law.

1. Margin squeeze as a theory of liability under the U.S. antitrust laws

In the United States, the law on margin squeeze claims has been evolving, with some questions settled and others left open under current antitrust doctrine. The US Supreme Court has specifically addressed only margin squeezes by an integrated firm that has no duty under antitrust law to deal with its downstream rivals. The Court ruled that in such cases US antitrust law does not recognize margin squeezes as a standalone form of anticompetitive abuse.[1] The Supreme Court has not found an antitrust duty to deal since its decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[2] and it is uncertain after the Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko* (*Trinko*)[3] under what additional circumstances it would find such a duty to exist. That said, unilateral refusals to deal are not legal *per se*, and under some circumstances can lead to antitrust liability. The Supreme Court has not ruled on whether a separate margin squeeze doctrine is recognized where there is a duty to deal in the upstream product. In cases where there is a duty to deal, there is an open question as to whether margin squeezes are or should be recognized as a distinct form of anticompetitive conduct under US law. We will return to this question later in this section.

1.1 linkLine and margin squeezes by integrated firms with no duty to deal

Although some lower courts and enforcement agencies in the past have more broadly recognized margin squeeze as a theory of harm, in February of 2009 the Supreme Court held in *Pacific Bell Co. v. linkLine* ("*linkLine*") that, when an integrated firm can legally refuse to deal in the upstream product, a margin squeeze complaint may not be brought under Section 2 of the Sherman Act.[4] In reaching that

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1 Pacific Bell Tel. Co. v. linkLine, 555 U.S. ___ (2009).

2 472 U.S. 585, 608-611 (1985).

3 540 U.S. 398 (2004).

4 555 U.S. ___ (2009).

conclusion, the Court built on its 2004 decision in *Trinko* and held that absence of a duty to deal at all precluded an inquiry into the prices at which a firm chose to deal.

The facts in *linkLine* were as follows: four independent Internet service providers were competing with AT&T[5] in the provision of digital subscriber line (DSL) service to retail broadband customers in California. AT&T owns infrastructure and facilities that its rivals needed in order economically to provide competing DSL service, including lines that connect homes and businesses to the telephone network. Pursuant to conditions imposed by the Federal Communications Commission (FCC), AT&T was obligated to provide "wholesale DSL transport services" to independent firms at a price no greater than the retail price of AT&T's DSL service.[6] The independent retailers sued AT&T for monopolizing the DSL market by refusing to deal with the plaintiffs, denying the plaintiffs access to essential facilities, and engaging in a margin squeeze. Specifically, the independent retailers argued that "AT&T squeezed their profit margins by setting a high wholesale price for DSL transport and a low retail price for DSL Internet service."[7] AT&T's conduct allegedly "exclude[d] and unreasonably impede[d] competition," thus allowing the company to "preserve and maintain its monopoly control of DSL access to the Internet."[8]

The Court found that in order to prove cognizable harm from a margin squeeze where the defendant has no duty to deal with rivals under Section 2 of the Sherman Act, the plaintiff must show that the retail price at which the defendant sold in competition with the plaintiff was predatory as defined by the Supreme Court's precedent. The Court declined to create any independent doctrine for margin squeezes.

Price-squeeze claims have long been part of the Section 2 doctrine,[9] and price-squeeze theory was embraced by Judge Learned Hand in the Second Circuit's seminal opinion in the *Alcoa* case over sixty years ago.[10] In that case, Alcoa was a monopolist in the market for aluminum ingot, which is used to produce aluminum sheet. It also sold ingot to downstream rivals that produced aluminum sheet. In *Alcoa*, the defendant and the plaintiffs competed for retail customers, but plaintiffs alleged that the defendant enjoyed monopoly power over an essential input and had set wholesale prices for that input so high that plaintiffs could not profitably compete downstream.[11]

The gravamen of the margin squeeze found in *Alcoa* was that the downstream competitors could not make a "living profit" because they were squeezed between Alcoa's high price for ingot and its low price for sheet.[12] In *Alcoa*, the court took the price of Alcoa's ingot and its 'rolling' costs as a fair measure of costs and compared those costs to Alcoa's sheet prices.[13] It found that the margin was negative in many instances (that is, the costs exceeded the price) and only barely positive in other instances (by a few pennies).[14] The rivals' costs of the ingot plus the process of rolling it into sheet were greater than Alcoa's

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5 The defendants in linkLine consisted of several corporate entities whose names and structures changed throughout the linkLine litigation. Like the Supreme Court, we refer to the defendants collectively as "AT&T", for simplicity.

6 Id. at 2.

7 Id. at 3.

8 Id.

9 See Pet. App. 8a-9a.

10 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

11 Compare linkLine, 503 F.3d at 879, with Alcoa, 148 F.2d at 437-38.

12 Brief at 13.

13 Alcoa, 148 F.2d at 437.

14 Id.

own retail price for aluminum sheet. The court held that Alcoa was unlawfully using its monopoly power to price its wholesale ingot "unfairly" high and its retail sheet unreasonably low.

Alcoa was not the last word in margin squeezes before *linkLine*. A number of courts after *Alcoa* recognized that price-squeeze allegations may support liability under Section 2.[15] The First Circuit in *Town of Concord* rejected a price squeeze claim where the defendant's prices were fully regulated at both the wholesale and retail levels.[16] In so doing, however, the court did identify several respects in which a margin squeeze may have anticompetitive effects in an unregulated industry. Even accepting the economic argument that "there is but one maximum monopoly profit to be gained from the sale of an end-product,"[17] the First Circuit pointed to at least two arguments for not permitting the extension of monopoly power to a second industry level: entrenching the monopoly in the upstream market, and eliminating non-price competition in the downstream market.[18] As to the first scenario, a monopolist in the upstream market can raise the costs of entry into that market by extending its dominance to the downstream market. A prospective upstream new entrant will thus be deterred not only by the pre-existing entry barriers but also by the prospect of having to compete on unequal terms with the incumbent because of the latter's control over the downstream market. "And insofar as the monopolist previously set prices cautiously to avoid attracting a competitive challenge, the added security of a two-level monopoly could even lead that monopolist to raise its prices."[19] Likewise, even assuming no price effects from eliminating the downstream competition of an integrated monopolist, non-price competition in areas like quality and service can also be harmed by reducing the incentives for the monopolist to develop better products and more efficient means of production, and by eliminating the possibility of an independent downstream actor challenging the monopolist by developing better and more efficient downstream products.[20]

The *linkLine* Court's holding that, absent a duty to deal in the upstream product, margin squeeze does not constitute a valid claim under the Sherman Act relied partly on the Court's statement in *Trinko* 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."[21] Applying this reasoning to the margin squeeze context, the Court ruled that in the absence of an antitrust duty to deal, there is no violation of competition law if an upstream monopolist uses its power in the wholesale market to prevent rival firms from competing effectively in the retail market,[22] unless a plaintiff can show that prices in the retail market are predatory under the standards of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[23] While the Supreme Court in *linkLine* did not explicitly overrule *Alcoa*, it noted that "[g]iven developments in

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15 See, e.g., Covad Communications Corp. v. BellSouth Corp. 374 F. 3d 1044 (11th Cir. 2004).

16 Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990) (Breyer, C.J.) (holding that a price squeeze in which the defendant's prices are regulated at both the primary and secondary levels does not ordinarily violate Section 2 of the Sherman Act). See also linkLine at 2 (Breyer, C.J. concurring) ("When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits.").

17 Id. at 23 (citing 3 P. Areeda & D. Turner, Antitrust Law ¶725b, at 199 (1978)).

18 Id. at 23-24.

19 Id. at 24 (citing Areeda & Turner ¶725h, at 204-08; William G. Shepard, Potential Competition Versus Actual Competition, 42 ADMN. L. REV.5-34 (1990)).

20 See id. (citing Areeda & Turner).

21 LinkLine at 9.

22 Id. at 10.

23 509 U.S. 209 (1993).

economic theory and antitrust jurisprudence since *Alcoa*, we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us."[24]

Turning specifically to the predatory pricing issue, the *linkLine* Court cautioned that impositions of antitrust liability for prices that are too low are "especially costly, because they chill the very conduct the antitrust laws are designed to protect."[25] Thus, U.S. competition law sets a very high standard for finding that prices are too low or predatory. These standards, as set out in *Brooke Group*, are: (1) "the prices complained of are below an appropriate measure of its rival's [the alleged predator's] costs;" and (2) "there is a 'dangerous probability' that the defendant will be able to recoup its 'investment' in below-cost prices."[26]

The *linkLine* Court added that "[i]nstitutional concerns also counsel against recognition of [price squeeze] claims" that hold firms liable for failure to leave their rivals a "fair" or "adequate" margin between wholesale and retail prices.[27] Said the Court, "[i]t is difficult enough for courts to identify and remedy an alleged anticompetitive practice at one level, . . . [r]ecognizing price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. And courts would be aiming at a moving target, since it is the interaction between these two prices that may result in a squeeze."[28] The Court recognized that firms rely on "safe harbors" in making pricing decisions. The absence of such safe harbors may cause firms to avoid price cutting, which is the essence of competition and benefits consumers. *Brooke Group* sets a safe harbor – a firm will not be liable for predatory pricing if its retail price is above its cost.

The *linkLine* Court also rejected a "transfer price test" that would find an unlawful margin squeeze if the upstream monopolist could not make a profit by selling at its retail prices if it purchased inputs at its own wholesale rates. The Court reasoned that "[a]n upstream monopolist with no duty to deal is free to charge whatever wholesale price it would like; antitrust law does not forbid lawfully obtained monopolies from charging monopoly prices."[29] After *linkLine*, absent a duty to deal a margin squeeze claim cannot be upheld where the defendant's retail price remains above cost or otherwise non-predatory within the meaning of *Brooke Group*.

1.2 Margin squeeze by a defendant who cannot unilaterally refuse to deal with rivals

Under certain circumstances, US courts have recognized that a firm's refusal to deal with competitors is illegal under antitrust law.[30] While the *Trinko* Court circumscribed the kinds of cases in which antitrust law recognizes a duty to deal, it did not overrule precedent establishing such duties under Section 2 of the Sherman Act. Given that an outright refusal to deal would be illegal in certain cases, what would happen if an integrated firm with a duty to deal did not refuse to deal at the wholesale level but instead dealt only at a high enough price to place the purchaser in a price squeeze?

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24 LinkLine footnote 3.

25 Matsushita Elec. Industrial Co. v Zenith Radio, 475 U.S. 574 (1986).

26 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-224.

27 LinkLine at 12.

28 Id. at 13.

29 Id. at 14.

30 See, e.g., Lorain Journal Co. v. United States, 342 U.S. 143 (1951); United States v. Otter Tail Power Co., 410 U.S. 366 (1973); MCI Commc'ns Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir. 1983), cert. denied, AT&T Corp. v. MCI Commc'ns Corp., 464 U.S. 891 (1983).

One possible approach to such a situation is to treat the high wholesale price as a constructive refusal to deal. Such a theory, however, would face many hurdles and is in considerable tension with the holdings of *Trinko* and *linkLine*. The drawback of this approach is two-fold. First, a court must determine what price is so high that it amounts to a refusal to deal. While there are certain measures one could use—for example price in excess of the price at which the monopolist would maximize its wholesale profits—the question is complicated and the measurement difficult to accomplish. Second, once a court determines the price was so high as to amount to a refusal to deal, it must decide how much lower the price should be and then enforce remedy of making sure the wholesale price does not rise above that level.

Allowing the price squeeze to be treated as a distinct form of abuse where the upstream refusal to deal would be illegal might have an advantage as an alternative approach. Instead of having to decide whether the wholesale price was so high as to constitute constructive refusal to supply the upstream input and then having to decide on a price at which the defendant must deal, the court could allow the defendant to set any wholesale price it wants but with the knowledge that the wholesale price it charges to others will be attributed to the defendant's own costs in the downstream retail market. The Supreme Court of course rejected such an attribution approach in *linkLine* and was skeptical of a standalone margin squeeze doctrine.[31] Much of the economic analysis underlying concerns about a standalone margin squeeze doctrine in the *linkLine* context might apply in cases where there is an upstream duty to deal. It is to that economic analysis that we turn next.

2. Economic analysis of margin squeezes

In this section the US addresses three questions raised in the Secretariat's request for country contributions for the Roundtable on Margin Squeeze: "(a) whether or not existing forms of abuse of dominance can adequately control all of the anticompetitive concerns arising from margin squeezes; (b) if not, what modifications or extensions of existing competition law principles might be necessary; and (c) whether there is a danger, in separately identifying margin squeeze as a stand-alone form of abuse, that some behavior that is, in fact, pro-competitive will be deterred, or a risk that downstream firms will engage in 'abuse shopping' to stifle potentially competitive discounting by their integrated rival."

In summary, we conclude: (a) depending on the formulation of predatory-pricing doctrine, the anticompetitive concerns arising from margin squeezes could be addressable without making margin squeeze a separate avenue of inquiry in an abuse of dominance case; (b) in most cases, existing competition law principles are adequate to formulate antitrust law that controls the potential harms to competition associated with margin squeezes; (c) to treat a margin squeeze as a separate antitrust abuse could risk deterrence of pro-competitive behavior by enabling firms to seek redress for unavoidable by-products of certain efficient conduct.

The risk of deterring pro-competitive conduct arises because efficient, consumer-welfare enhancing vertical integration in the presence of pre-existing market power is efficient precisely because it reduces downstream margins that consumers would otherwise pay. Those reduced margins in turn may squeeze nonintegrated downstream rivals. In antitrust terminology, the reduction in downstream margins may harm competitors, but not competition. Forcing an integrated firm to increase its downstream margin (or avoid reducing it) usually results in a loss in savings through higher prices and lower consumer welfare. Because the objective of US antitrust policy is to protect competition rather than competitors, plaintiffs are required to demonstrate not just that they are harmed by low retail prices, but that consumers and the competitive

[31] LinkLine at 15 ("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 . . . [T]o the extent a monopolist violates one of these doctrines, the plaintiffs have a remedy under existing law.").

process are harmed as well. To the extent those instances in which a margin squeeze may be associated with anticompetitive effects can be captured through existing predation and refusal-to-deal doctrine, margin squeeze as a standalone antitrust doctrine would be redundant and potentially costly.

We say "to the extent" in the above paragraph because in the event that predatory pricing doctrine either over-protects price-cutting firms or under-protects consumers, those errors will be compounded by forcing margin-squeeze cases into the predatory pricing box. To the extent doctrine allows pricing too easily to be categorized as "predatory," even when it benefits consumers, efficient vertical integration that reduces downstream margins may be inefficiently proscribed. On the other hand, where inefficient predatory pricing that maintains monopoly and over time harms consumers escapes antitrust doctrine, harmful margin squeezes will similarly escape scrutiny in the absence of a better, standalone cause of action for margin squeezes. In principle, the cleaner way to resolve any such problems is directly through a reformulation of predatory pricing doctrine.

The remainder of this part is organized as follows. Part A reviews the economics of a margin squeeze, which we use to answer question (c), above. Part B then discusses examples in which a margin squeeze may be used anticompetitively and explains how existing areas of the antitrust law can be used to treat margin squeeze in these cases.

2.1. The economics of a margin squeeze

A margin squeeze can only arise when an upstream supplier of an input is vertically integrated into a downstream market for a good or service that is produced using that input. The effects of a margin squeeze are therefore inextricably linked to the effects of vertical integration.

It is helpful to consider a simple environment in which an upstream firm sells an input used in fixed proportions by downstream firms to produce a final product. Internet service, the product at issue in *linkLine* is a good example; it requires one unit of content "transport" (the upstream product) to deliver one unit of the access service to retail subscribers (downstream product).[32] Assume the upstream firm that owns the transport infrastructure has upstream market power. For simplicity, we will assume that it is a monopolist, though the ideas in this note are also relevant whenever the upstream firm has substantial market power.

For the purposes of this section, we define a margin squeeze as a situation in which the downstream rival is as efficient as the monopolist but cannot remain in business without the monopolist's input. For example, suppose hypothetically that the unit cost of producing internet transport service is $1, the cost of producing each unit of retail internet service is $3, the wholesale price of transport is $4, and the retail price of internet service is $6. Under these assumptions, a nonintegrated downstream firm's margin would be retail price - wholesale price - downstream unit cost, or 6 - 4 - 3 = -1. An integrated firm's margin would be retail price - upstream unit cost - downstream unit cost, or 6 - 1 - 3 = 2. In this hypothetical example, the nonintegrated downstream firm's margin is less than that of an equally efficient vertically integrated firm and the nonintegrated firm's margin is "squeezed" to the level that it exits the market. If the wholesale price were equal to the upstream unit cost, then there would be no margin squeeze, as both the integrated and nonintegrated firms would have margins of $2.

[32] Internet service was the subject of margin squeeze claims in the recent AT&T/linkLine case in the U.S. Technically, internet transport and service can move in variable proportions by adjusting the speed of service. The presence of variable proportions does not alter the conclusions of this paper.

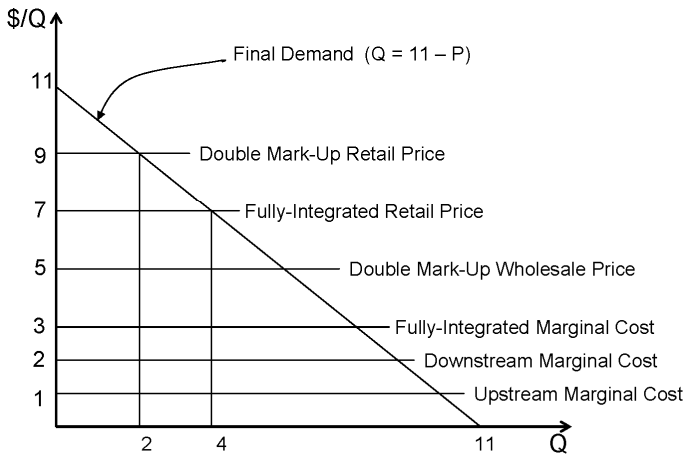
2.1.1 Margin squeeze in an unregulated environment

In the absence of regulation, economic analysis has identified two efficiency motivations for an upstream firm with market power to integrate forward into a downstream market in which the input is used in a fixed proportion to output: (1) the elimination of double marginalization;[33] and (2) production cost savings or quality enhancement.[34] In addition, another motivation might be to reduce problems with coordinating decisions and planning at two levels.

As to the first of these motivations, it is well known that when firms at both the upstream and downstream levels of a chain of production have some degree of market power, a pricing distortion known as "double marginalization" may arise. In considering what price maximizes its own profit, each firm may fail to account for the negative effect on the demand and profit of the firm at the other, complementary level of production. The effect may be a total price above that which would be set by a single vertically integrated firm. This vertical externality can provide an efficient motivation for an upstream monopolist to vertically integrate.

An example of the effects of double marginalization is illustrated in Figure 1 and the associated chart.[35] Suppose initially that the upstream and downstream markets are monopolized by separate firms. The profit-maximizing wholesale price is then $5, and the downstream firm marks the retail price up to $9. There is double marginalization, as both firms have positive margins ($4 for the upstream firm and $2 for the downstream firm). Thus, the retail price of $9 will exceed the price a vertically integrated firm would charge.

Figure 1: Example of Pro-Competitive Margin Squeezes



33 It is well known that nonlinear pricing is sometimes a way to overcome double marginalization without vertically integrating. When this is the case, cost savings or quality enhancement may still motivate vertical integration. On the other hand, nonlinear pricing may not be a perfect instrument, e.g., when retailers are risk averse or manufacturer decisions are subject to moral hazard.

34 We are ignoring issues relating to horizontal product differentiation (i.e., situations in which brand A is preferred by some consumers and brand B is preferred by others).

35 Formally, demand is Q = 11 – P, the marginal cost of the upstream component is $1, and the marginal cost of the downstream component is $2. Under these assumptions, the fully integrated monopoly price is $7. Under successive monopoly, the wholesale price is $5, and the retail price is $9.

	Wholesale Price	Retail Price	Output
Downstream monopoly			
No integration:	5	9	2
Integration/margin squeeze:	5	7	4
Downstream competition			
No Integration:	4	7	4
Integration with $1 retail cost savings & margin squeeze:	> 4.50	6.50	4.5

The upstream firm can eliminate double-marginalization by integrating forward and competing in the downstream market, eliminating the downstream margin. In particular, the profit-maximizing price for a vertically integrated firm in this example is $7. By integrating forward and charging the nonintegrated firm a wholesale price of $5, the upstream firm can induce the fully integrated price of $7. The nonintegrated firm cannot charge more than $7 because it competes with integrated firm, which also charges $7. It cannot charge less because its unit cost is $7 (the wholesale price of $5 plus the downstream unit cost of $2). Note that vertical integration results in a margin squeeze. However, vertical integration in this example reduces price from $9 to $7, increasing output from 2 units to 4 units.

Reducing the profit margin of independent, downstream retailers can help mitigate the vertical externality from double marginalization and result in lower retail prices and greater total output. Ideally, these efficiencies would not be prevented by an antitrust doctrine recognizing margin-squeeze claims. And, many margin reductions that occur through efficient vertical integration will not cause the downstream firm to exit or otherwise impede its ability to compete. Pricing efficiencies pursuant to vertical integration should not be equated with margin squeezes. The challenge is to identify when the margin reduction is both large enough to exclude competitors (or impede their ability to compete) without inappropriately preventing efficient pricing that benefits consumers.

The policy risk in recognizing stand-alone margin squeeze claims is that it may be difficult to achieve the sorting just described. If the integrated firm is compelled (*e.g.*, by an antitrust enforcement action) to increase the nonintegrated firm's margin, it may decide not to integrate in cases where integration would be efficient. In this case, double marginalization remains and prices are higher. Alternatively, the firm may integrate, but raise its rivals' margins by charging higher prices at retail. The firm may also attempt to mitigate double marginalization through a less efficient means. In all three cases, a policy aimed at eliminating potential margin squeezes could lead to higher prices for consumers and lower welfare.

When the downstream market is competitive and no markups are set at that level, the double margin problem does not exist. However, absent the anticompetitive factors identified in *Town of Concord*, the upstream firm cannot increase its profits by integrating into the downstream market unless it can offer a lower cost or higher quality product than existing downstream firms. For example, suppose integration lowers the downstream unit cost to $1, while the nonintegrated downstream firms still have unit costs of $2. In this case, the profit-maximizing price of an integrated firm falls from $7 to $6.50. By integrating forward and charging downstream firms more than $4.50, the integrated firm will drive inefficient firms out of the market, allowing it to charge the fully-integrated price of $6.50. In this case, integration lowers the retail price from $7 to $6.50, raises output from 4 units to 4.5 units, and raises consumer and total welfare. At a wholesale price above $4.50 and a retail price of $6.50, however, the nonintegrated retailer's margin is negative and it will exit the market. However, it is this margin squeeze that allows the integrated firm to sell its lower-cost product.[36] Moreover, the sales occur at a price that is no higher than the price

[36] A similar argument would hold if vertical integration enhanced quality by increasing consumers' willingness to pay for each unit by $1. Vertical integration would then reduce the "quality-adjusted" price from $7 to $6.50 in this example.

that prevails in the absence of integration. Put differently, setting a wholesale price high enough to permit even inefficient firms to survive will result in higher prices and lower output for final consumers.[37]

The purpose of the above examples is not to argue that there is some theorem or formula by which vertical integration and any associated margin squeezes are always efficient and pro-competitive. Instead, the point is to show that when an upstream firm vertically integrates to eliminate double margins, introduce new products, or engage in more efficient retailing, reduction in margins of downstream competitors is an inextricable by-product of the process. This efficient reduction in downstream margins can sometimes be substantial enough to cause non-integrated firms to exit the market. Such exit may also, however, be anticompetitively motivated. The difficulty is in separating the efficient from anticompetitive exclusions. Rules that would introduce antitrust liability for margin squeezes prevent the anticompetitive exclusions but carry the real risk of impeding efficient activity; emphasis on that risk has been the motivating force in US Supreme Court treatment of margin squeeze claims to date.

2.1.2 Margin Squeeze in a Regulated Environment

Suppose the upstream firm is required by regulation to charge a wholesale price below what it might otherwise find to be most profitable. In such cases, the firm has a profit incentive to engage in so-called "regulator evasion" and may be able to do so in a variety of subtle ways. The firm might, for example, degrade the quality of service it provides to independent downstream rivals, thereby driving out independent retailers and monopolizing the unregulated retail market (and setting monopoly prices there). In effect, the margin being provided on the degraded input would be too low to permit effective competition downstream. .

Second, regulation might allow the monopolist to charge wholesale prices exceeding its upstream marginal costs. When this occurs, the integrated firm would effectively have a cost advantage over nonintegrated rivals in the downstream market because rivals would pay the wholesale price for the input while the integrated firm would impute the true cost of the input to itself. It is possible that downstream rivals would exit as a result. However, this would not necessarily imply that the monopolist was attempting to drive the rivals from the market in order to raise downstream prices later. In fact, recent economics literature shows that an increase in the regulated wholesale price typically reduces the integrated firm's incentive to engage in predation in the downstream market.[38] The reasoning is straightforward: the greater the wholesale margin of the integrated firm, the greater the upstream profit it loses when it drives rivals out of the downstream market. So higher wholesale prices actually discourage using a margin squeeze to drive downstream rivals out of the market.[39]

It is worth emphasizing that imperfect (above marginal cost) wholesale price regulation preserves the incentives for forward integration discussed earlier in this note. If there is market power in the downstream market, the upstream firm will have an incentive to integrate forward to reduce the downstream price, increase the quantity it sells at the regulated wholesale price, and increase its profits in the upstream market. The upstream firm also benefits from integration if it can produce at lower cost or offer a higher quality product than downstream rivals, as this would also increase the quantity it sells and

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37 There is also a question as to why, if other downstream firms were equally or more efficient at retail than is the monopolist, the monopolist would find it more profitable to squeeze them out of business than to set a wholesale price and have them provide efficient services downstream. Possible reasons are discussed in Section B below.

38 See, e.g., Biglaiser and DeGraba (2001).

39 Biglaiser & DeGraba allow for product differentiation in the downstream market, but their results hold when the degree of product differentiation is arbitrarily small.

increase the profit it earns at the regulated wholesale price. Both of these welfare-enhancing motivations for vertical integration lead to efficiencies precisely because they reduce downstream margins.

2.2 Implications for the antitrust treatment of margin squeezes

The basic model, with a downstream market that employs the integrated firm's upstream component in fixed proportions with output, implies that an integrated firm would not raise its profits by using a margin squeeze to exclude equally or more efficient downstream competitors.

If the integrated and nonintegrated downstream rivals sell differentiated products, the incentive to use a margin squeeze to monopolize the downstream market is even lower. The presence of a differentiated competitor increases the derived demand for the upstream component of the integrated firm's product. Excluding such competitors reduces the integrated firm's profits.[40]

If the integrated firm is more efficient than downstream rivals, then inefficient rivals may be forced to exit. However, in such cases, a margin squeeze is not anticompetitive, as it lowers costs and may reduce the retail price.[41]

The above examples suggest that margin squeezes are often the consequence of the integrated firm being more efficient in the downstream market than its competitors or that the integrated firm is reducing the harmful effects of market power at the downstream level (*i.e.* double margins). The above models do not capture dynamic or non-price effects of downstream competition, nor do they consider scenarios in which a firm with monopoly power over an input may be able to profitably squeeze out its rivals and monopolize additional markets. Despite the efficiency-enhancing examples presented above, there are ways in which a firm can use margin squeezes as an anticompetitive strategy. We next discuss three such examples and explain how they can be treated with existing antitrust doctrine.

2.2.1 Predatory pricing in regulated environments

A vertically integrated firm that is regulated in the upstream market may, as discussed above, have incentives to engage in predatory pricing in the downstream market, if regulation constrains the wholesale price to below the monopoly level. The integrated firm may have incentives to engage in predatory pricing, but this behavior could be treated via standard predation doctrine.[42] As already discussed, to the extent predation doctrine is well formulated to protect aggressive pricing while preventing anticompetitive exclusion, no separate margin squeeze doctrine is necessary in this setting.

If regulation is imperfect and the wholesale price exceeds upstream unit cost, then there will be a margin differential in the downstream market because the integrated firm's upstream costs will be lower than those of a nonintegrated downstream firm paying the regulated wholesale price. The potential margin squeeze that arises is not anticompetitive in and of itself, however. If the downstream firm is not excluded from the market, the margin squeeze lowers the retail price for any given wholesale price. The integrated firm may, however, attempt to exclude downstream rivals by engaging in predatory pricing.

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40 The logic is analogous to that in Whinston (1990) for why a monopolist over product A would not tie it with a complementary product B simply to exclude a differentiated rival supplier of B from the market in which A also sells B. The monopolist can always do better selling to the rival supplier of B because it enhances the demand for its monopolized product A.

41 Similarly, the integrated firm may have an incentive to use a margin squeeze to exclude rivals if it costs less to transfer the upstream product internally than to sell it to downstream rivals.

42 As noted earlier, the regulated firm may evade regulation by degrading the quality of the input sold to nonintegrated rivals.

As discussed earlier in this note, the antitrust treatment of predatory pricing in the U.S. is governed by *Brooke Group*, which requires the plaintiff to show 1) that the alleged predator has set prices below an "appropriate measure" of cost, incurring losses over the period of predation, and 2) that the losses can likely be recouped after the targeted rival exits the market. This standard can be applied to downstream predatory behavior by a regulated, integrated firm. To the extent the *Brooke Group* test protects competitive price cutting and prevents anticompetitive harm, it will protect against inefficient margin squeezes by the regulated firm.

2.2.2 Exclusion for monopoly maintenance or extension

While an integrated monopolist does not usually have an incentive to employ a margin squeeze to monopolize the downstream market, it may benefit from excluding downstream firms if doing so helps maintain its upstream monopoly. For example, if there are economies of scale in upstream production, or economies of scope in the production of the upstream and downstream components, then a nonintegrated rival may be in a position to enter the upstream market only if it also has a downstream presence. Alternatively, a third party may be in a position to enter the upstream market but find that it is too costly to enter both markets simultaneously. In either case, an integrated firm with upstream market power may have an incentive to use a margin squeeze to drive downstream rivals out in order to preserve its upstream monopoly.

In the conduct just described, there is an analogy with the use of tying to maintain monopoly (Whinston, 1990; Carlton and Waldman, 2002). Analytically, a margin squeeze that drives downstream firms out of the market is equivalent to tying the upstream and downstream components of the product.

There is another possible, anticompetitive motivation for a margin squeeze that is closely related to ideas in the antitrust treatment of tying and exclusive dealing. Suppose the integrated firm's downstream unit competes in other markets in which it does not have market power over the upstream input. If the downstream market is subject to economies of scale in production, a margin squeeze that drives a nonintegrated firm out of one market may cause it to exit or otherwise raise its incremental costs, thereby enhancing the integrated firm's market power in other downstream markets.[43]

3. Conclusions

The purpose of this note has been to address the questions set out by the request for country contributions for the Roundtable on Margin Squeeze. We began by addressing the legal environment in the US, explaining that since the Supreme Court's decision this past year in *linkLine*, the Sherman Act does not recognize margin squeeze as a standalone theory of harm in monopolization cases where there is no duty to deal upstream. There remains an unresolved question of how margin squeezes will be treated in the US in cases where antitrust law would impose a duty to deal with rivals on the upstream monopolist. In the majority of cases, however, plaintiffs will have to bring margin squeeze cases as predatory pricing claims.

We turned next to the three economic questions on which the Secretariat invited us to comment: "(a) whether or not existing forms of abuse of dominance can adequately control all of the anticompetitive concerns arising from margin squeezes; (b) if not, what modifications or extensions of existing competition law principles might be necessary; and (c) whether there is a danger, in separately identifying margin

[43] The most direct analogy is with the use of exclusive dealing in one market to enhance a firm's market power in other markets. See, e.g., Bernheim and Whinston (1998). Whinston's (1990) analysis of tying complementary products when the tied good has alternative uses that do not require the monopoly component is also similar.

squeeze as a stand-alone form of abuse, that some behavior that is, in fact, pro-competitive will be deterred, or a risk that downstream firms will engage in 'abuse shopping' to stifle potentially competitive discounting by their integrated rival."

Starting with question (c), we have shown that a margin squeeze can be an inevitable consequence of efficient, price-reducing, and consumer (and total) welfare-enhancing vertical integration. Imposing liability for margin squeezes risks discouraging efficient vertical integration and/or making integration less efficient. It would amount to protecting competitors at the expense of consumers. This risk does not, however, arise because margin squeezes can never occur in an inefficient or anticompetitive manner; it arises because such harms are rare and hard to distinguish from beneficial conduct, thus warranting caution by the courts and a rigorous showing by plaintiffs.

As mentioned earlier and as should be clear from the economic analysis of margin squeeze presented above, margin squeeze claims implicate two pre-existing areas of antitrust doctrine: predatory pricing and unilateral duties to deal. Under US law as established in *linkLine*, in the absence of a duty for the defendant to deal with the plaintiff in the wholesale market no margin squeeze claim can be made absent proof of the predatory pricing elements the Court established in *Brooke Group*. So long as predatory pricing standards ensure that defendants do not price in a way that will eventually harm consumers in the downstream market, holding margin squeezes to a less rigorous, standalone liability standard risks inefficient protection of competitors, to the detriment of consumers.

Because in *linkLine* the Court did not formally decide whether margin squeezes should be recognized in those uncommon cases in which antitrust law would impose a unilateral duty to deal on an upstream monopolist, there remains an open question about the US standard for margin-squeeze behavior in cases where a pure refusal to deal in the upstream market might be illegal. Existing doctrine does not foreclose a specific price-cost test (for example, with attribution of wholesale prices to retail costs) or a standalone margin squeeze claim in such cases. The *linkLine* decision suggests the Court will be generally skeptical of such arguments, and the US takes no position on such an approach in this note. As things currently stand under US law, the Supreme Court has directly addressed margin squeezes as standalone claims where there is no duty to deal at wholesale and has ruled that in such cases plaintiffs complaining of margin squeezes must bring their cases as predatory pricing claims under the predation standards the Court established in *Brooke Group.*

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EUROPEAN COMMISSION

1. Introduction[1]

The European Commission has investigated margin squeeze allegations in a series of cases, four[2] of which have led to a formal decision, and three[3] have resulted in court proceedings. In *Industrie des Poudres Sphériques* the Commission did not follow the complainant in its margin squeeze allegations and the Court upheld the Commission's findings. The European Court of First Instance (CFI) upheld the Commission's decision in *Deutsche Telekom.* As to *Telefónica*, the Courts have not ruled on it yet.

It follows that this submission is mainly based on the 2003 *Deutsche Telekom* decision of the Commission and the CFI judgment of 10 April 2004 on the same case. It should however be noted that this judgment has been appealed to the European Court of Justice (ECJ).

In *Deutsche Telekom*, the Commission took the view that there can be an abusive margin squeeze under Article 82 of the EC Treaty, which prohibits the abuse of a dominant position, if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs of the dominant operator for providing its own retail services on the downstream market.

It indeed follows from the case law[4] that the abusive nature of a margin squeeze is connected with the spread between the upstream prices and the downstream prices. In other words, there is no need for the Commission to demonstrate that either the wholesale or the retail prices are abusive in themselves. In this sense, margin squeeze is a stand-alone abuse under Article 82.

The anticompetitive effects associated with margin squeeze under the case law are the risks of foreclosure of equally efficient competitors whose access to the market is eliminated or hampered: in the

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1 This paper owes to the contribution of Katja Viertiö, Unit A-2, Directorate-General for Competition of the European Commission.

2 Commission Decision of 29 October 1975 adopting interim measures concerning the National Coal Board, national Smokeless Fuels Limited and the national Carbonising Company Limited, OJ L 35, 10.2.76 ("*National Carbonising*"), Commission Decision of 18 July 1988 relating to a proceeding under Article 86 of the Treaty of the EEC Treaty (Case No IV/30.178 Napier Brown – British Sugar), OJ L 284, 19.10.1988 ("*Napier Brown-British Sugar*"); Commission Decision of 21 May 2003 relating to a proceeding under Article 82 of the Treaty (Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG), OJ L 263, 14.10.2003 ("Deutsche Telekom"), Commission Decision of 4 July 2007 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/38.784 – Wanadoo España V. Telefónica), OJ C 83, 2.4.2008 ("*Telefónica*")

3 Judgment of the Tribunal of First Instance of 30 November 2000 in Case T-5/97 ("Industrie des Poudres Sphériques"), Judgment of the Court of First Instance of 10 April 2008 in Case T-271/03 ("Deutsche Telekom"), Action brought on 10 September 2007 – Telefónica and Telefónica de España v Commission), Case T-336/07, OJ C 269, 10.11.2007

4 Judgment of the Court of First Instance of 10 April 2008 in Case T-271/03 ("Deutsche Telekom"), paragraph 167.

presence of a margin squeeze the competitors of the dominant undertaking cannot trade profitably in the downstream market on a sustainable basis[5]. In *Telefónica* the Commission also established that by containing competitive pressure, the dominant firm could cash in both high wholesale prices and supra-competitive retail prices to the detriment of consumers.

One common feature in the margin squeeze cases handled by the Commission so far is that, on the facts, there do not appear to have been viable substitutes[6] to the relevant input that would have enabled competitors to compete effectively on the downstream market. The input of the dominant undertaking was therefore objectively necessary for competing in the downstream market, and without it, there was a risk of elimination of effective competition on that market.

This is reflected in the Communication adopted by the Commission in December 2008 in order to provide guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings[7]. This Guidance includes a chapter called "Refusal to supply and margin squeeze". It covers situations in which the dominant undertaking competes on the "downstream" market with a buyer that needs the dominant firm's input in order to manufacture a product or provide a service on that market. Three conditions are established in that chapter for such cases to be considered as an enforcement priority under Article 82: the (upstream) product or service concerned should be objectively necessary[8] for competitors to be able to compete effectively on the downstream market, there should be is a risk of elimination of effective competition on the downstream market, and there should be likely consumer harm. This approach allows for a careful balancing of the incentives to invest and innovate of both the dominant undertaking and its competitors and therefore preserves consumer welfare.

In certain very specific circumstances it is however clear that the Commission does not need to test the above three conditions, because the input owner's and/or other operators' incentives to invest and innovate upstream, whether *ex ante* or *ex post,* are manifestly not affected[9]. The Commission considers that this is particularly likely to be the case where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. This could also be the case where the upstream market

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5 In *National Carbonising* the Commission referred to a "margin sufficient to enable [a reasonably efficient competitor] to survive in the longer term". In *Napier Brown/British Sugar* the Commission considered that because of an insufficient margin, "if maintained in the longer run", any company equally efficient competitor would have been "obliged to leave" the retail market.

6 See for example *Napier Brown/British Sugar*, paragraph 66: "It is clear from the facts as set out above that should British Sugar have maintained this margin in the long term, Napier Brown, or any company equally efficient in repackaging as British Sugar without a self-produced source of industrial sugar, would have been obliged to leave the United Kingdom retail sugar market".

7 Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45/7, 24.2.2009 ("Article 82 Guidance"). The Article 82 Guidance outlines the analytical framework that the Commission applies in determining whether to intervene against exclusionary conduct under Article 82 as a matter of priority. This will be the case if the conduct of a dominant undertaking is likely to restrict competition in such a way as to have harmful effects on consumers, whether in the short or longer term.

8 This relates to the absence of viable actual or potential substitutes, and to .whether competitors could effectively duplicate the input produced by the dominant undertaking in the foreseeable future. In the assessment of the existence of viable substitutes, account should be taken of any relationship-specific investments made by the competitors to use the relevant input and all other relevant switching costs.

9 Article 82 Guidance, paragraph 82.

position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources.

2. Margin squeeze and predatory pricing

As mentioned above, and in accordance with the CFI Judgment in *Deutsche Telekom*, the abusive nature of a margin squeeze is connected with spread between the upstream prices and the downstream prices. In other words, there is no need to demonstrate that the wholesale prices are excessive or that the retail prices are predatory.

There are substantive differences between conduct in the form of a margin squeeze, on the one hand, and predatory pricing, on the other hand. In a predatory pricing case, the dominant company first incurs losses because it charges prices below cost. After this has led to foreclosure, the dominant company may recoup such losses in the longer term as it exploits its strengthened market power.

On the contrary, margin squeeze does not require such a trade-off or *ex ante* sacrifice as the dominant company may not incur losses on an end-to-end basis, and a margin squeeze may involve a high retail price (relative to end-to end costs) in the short-run as well as the long run. Indeed, by restricting entry and/or growth of competitors on the market and ultimately reducing competitive pressure, the margin squeeze allows the dominant firm to sustain a high level of retail prices. A margin squeeze can be a profitable strategy for the dominant firm already during the period in which it engages in the margin squeeze: the profits extracted from a high level of retail prices may surpass by far the forsaken profits related to the forsaken wholesale sales as a result of the high wholesale prices relative to the retail prices[10].

3. Margin squeeze and duty to deal

The margin squeeze cases mentioned in the Introduction involve both situations in which there was no pre-existing obligation to supply (whether under Article 82 or sector specific regulation), and in which such an obligation had been established. In both *Deutsche Telekom* and *Telefónica*, the dominant firms were obliged to provide access to the relevant upstream input under sector specific regulation.

In *Deutsche Telekom* the CFI held that competition rules apply where sector-specific legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings[11]. In this case, the dominant firm was found to infringe Article 82, because the sector-specific legislation left it with sufficient scope for autonomous conduct as to eliminate the margin squeeze, but it did not do so.

In *Telefónica*, only the prices of one of the two upstream products in relation to which the Commission established a margin squeeze (which accounted for approximately 30% of the wholesale prices covered in the Decision in 2006) were regulated: they were subject to maximum prices, which means that the dominant firm was free to set prices below the maximum. The prices of the other upstream product (accounting for the remaining 70%) were not regulated. In other words, the dominant firm had all the necessary room of manoeuvre to put an end to the margin squeeze(s). However, it did not take this initiative on its own free will, and this in spite of the fact that its internal documents showed that the company was aware that it was engaging in a margin squeeze contrary to Article 82. The margin squeeze eventually ended when the national telecommunications regulator lowered the prices of the relevant upstream inputs.

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10 *Telefónica,* paragraph 611.

11 See paragraphs 88 and 89 of the CFI Judgment.

In *Telefónica*, the question whether there needs to be an obligation to supply under Article 82 (rather than any sector-specific regulation) before a margin squeeze is found to be abusive was at the centre of the dominant firm's argumentation. It argued that it had no antitrust duty to supply the relevant input. However, its obligation to provide access to that input (and also the express obligation not to engage in a margin squeeze) had been imposed by the national telecommunications regulator after a market and dominance analysis based on competition law principles, as required by the relevant EC Directives, including in particular a careful balancing of the respective incentives to invest and innovate of the dominant firm and its competitors, which was in all material aspects the same as one that the Commission would do in application of Article 82.

This issue has not been expressly addressed by the Community judicature yet. The ECJ will nonetheless be called to pronounce on it, also because of a reference for a preliminary ruling from the Tingsrätt Stockholm (Sweden) lodged on 6 February 2009 - Konkurrensverket v TeliaSonera Sverige AB (Case C-52/09).

4. Relationship between competition law obligations and regulatory obligations

In their appeals against the two above-mentioned Commission decisions, both dominant firms have argued that the existence of price regulation at the national level should, as it were, have shielded them from an intervention by the Commission under Article 82 of the EC Treaty.

However, as mentioned above, in *Deutsche Telekom* the CFI held that competition rules apply where sector-specific legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings. In other words, competition rules apply where sector specific legislation leaves scope for competition in the regulated sector but the dominant firm prevents, restricts or distorts that competition.

In the Commission's view[12], ex ante regulation and ex post antitrust intervention go hand in hand, and complement each other. Regulators set access regimes and prices on the basis of market and cost projections (in other words, estimates) to reduce the risk of market failures, but cannot entirely eliminate them. Therefore, antitrust authorities that work with historical data and actually incurred costs must be able to sanction infringements of Article 82. What matters is that there is scope for autonomous conduct and that the dominant firm could not have ignored that it was engaging in a margin squeeze contrary to Article 82.

5. The margin squeeze test as applied by the Commission in its decisional practice

5.1 Equally efficient competitor test

The CFI in *Deutsche Telekom* established that it follows clearly from the case-law that the abusive nature of a dominant undertaking's pricing practices is to be determined in principle on the basis of its own situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors[13]. This is because any other approach could be contrary to the general principle of legal certainty. If the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly their cost structure – information which

[12] See press release from the Commission - IP/O7/1011 and MEMO/07/274 of 4 July 2007.

[13] CFI Judgment in *Deutsche Telekom*, paragraph 188.

is generally not known to the dominant undertaking – the latter would not be in a position to assess the lawfulness of its own activities[14].

5.2 The cost standard

The Commission's preferred measure of cost is long run average incremental cost (LRAIC), when the latter is available or can be constructed[15]. This is in accordance with economic theory and the Commission's decisional practice where the ability of competitors to operate profitably in the long term was assessed. In order to assess whether the prices that the dominant firm applies over time are such that they can foreclose equally efficient competitors the costs considered must include the total costs which are incremental to the provision of the product/service. These are also the prices which form the basis of the firm's decision to invest.

5.3 The level of aggregation of the test

In *Deutsche Telekom*, there was a (regulated) single charge for the upstream input which had to be compared with the prices of a range of retail services. The Commission thus carried out a quantitative weighing exercise in respect of the applicant's various retail charges. Also in *Telefónica*, the margin squeeze test was conducted on the basis of an aggregated approach, i.e. on the basis of the mix of services marketed by the dominant firm at the retail level. This approach is based on the principle that equally efficient competitors must at least be able to profitably replicate the dominant firm's product pattern.

In *Telefónica*, the Commission conducted the margin squeeze test in respect of three upstream inputs, one of which was not substitutable with the two others and thus belonged to a distinct upstream product market. The two other upstream inputs were substitutable among themselves. The Commission took the view that the dominant firm's retail prices had to be replicable by an equally efficient competitor on the basis of at least one product of the dominant firm in each relevant upstream market. The result of the margin squeeze test was that they were not replicable on the basis of any of the three upstream inputs.

5.4 Allocation of costs

With the LRAIC standard, the allocation of common costs is often a thorny issue. The issue is so case-specific that reference is made here to the relevant Commission Decisions. As an example of the issues discussed, the Commission noted in *Telefónica* that the mere fact that a cost is common to different services does not necessarily imply that the LRAIC is zero. Indeed the LRAIC also includes any increase in the common costs that are due to the provision of the relevant product/service in the downstream market. This may in particular be the case for common assets whose capacity is progressively adapted to the short and medium term demand of all the services that share the common asset. If the traffic generated by the product in question represents a significant proportion of the traffic generated by the totality of the services that share the common asset, it is highly probable that a significant proportion of the corresponding common cost is an avoidable cost and hence incremental[16].

5.5 Profitability analysis

A margin squeeze test entails assessing whether the vertically integrated dominant firm's own downstream operations could operate profitably on the basis of the upstream price charged to its

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14 CFI Judgment in Deutsche Telekom, paragraph 192.

15 See also the Article 82 Guidance mentioned in footnote 7.

16 *Telefónica,* paragraph 431.

competitors by its upstream operating arm. In *Telefónica* the Commission applied two methods for assessing this, namely the "period by period" approach and the discounted cash flow ("DCF") approach.

The former; which has been applied by the Commission in Decisions involving price abuses (which have subsequently been upheld by the Courts)[17], compares for every year (or for shorter periods) the observed revenues and costs extracted from the dominant firm's accounts in which investment expenditure have been amortised over appropriate periods.

The DCF approach consists in assessing the overall profitability over an adequate period (in general several years) in order to take account not only of current revenues but also of future revenues flowing from current investments. The firm's future growth is taken into account in the profitability analysis by aggregating the expected future cash flows over time in order to arrive at a single measure, namely the net present value ("NPV"). What constitutes an "adequate period" and the cost of capital to the company are two important parameters in this analysis. In *Telefónica* the Commission calculated the NPV over a little bit more than five years (by reference to the economic lifetime of the assets employed in the business in question), using a weighted average cost of capital of 15.72%, which was used by the regulator and proposed by the dominant firm itself , but subsequently contested by the latter

The DCF approach displays a number of shortcomings in that it can be biased because it can include the rewards from an anticompetitive behaviour, which preclude it from being the main or only method of assessing the profitability of business. It was used by the Commission in *Telefónica* in support of the "period by period" approach in order to avoid a situation where the latter would point to a margin squeeze due to accounting distortions resulting from the fact that the market was growing.

[17] See for example Commission Decision of 16 July 2003 relating to a proceeding under Article 82 of the Treaty (COMP/38.233 - Wanadoo Interactive) ("*Wanadoo*"), upheld by the ECJ in its Judgment of 2 April 2009 (Case C-202/07P).

BRAZIL

1. Introduction

Margin squeeze or price squeeze has emerged as an important issue in Brazil´s antitrust arena. This text describes how the topic in question is generally treated by the country´s antitrust authorities[1] and legislation. It also describes how the issue was dealt with by the antitrust authorities in three recent major cases in the following sectors of the Brazilian economy: ports, telecommunications and natural gas.

2. How margin squeeze is treated in Brazil

The Brazilian antitrust system[2] has established that margin squeeze is a distinct form of abuse in this jurisdiction, even though it may manifest itself together with other undesired conducts such as predatory pricing. The system also established that margin squeeze should be addressed under the following legal provisions in the national competition law (Law no. 8,884 of 1994):

> *Article 20. Constitute violation of the economic order, regardless of fault, acts, under any circumstances, that aim to or which may produce the following effects, even if they are unsuccessful:*
>
> *Restrict, distort or otherwise affect free competition or free enterprise;*
>
> *Dominate relevant market of goods or services;*
>
> *(...)*
>
> *Exercise a dominant position abusively.*
>
> *(...)*
>
> *Article 21. The following measures, among others, when characterized under article 20 and its sections, are violations to the economic order:*
>
> *Restrict or impede firms of having access to a market;*

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1 The following are Brazil´s antitrust authorities: the Secretariat of Economic Defense (SDE) of the Ministry of Justice, the Secretariat for Economic Monitoring (SEAE) of the Ministry of Finance, and the Administrative Council for Economic Defense (CADE) which is linked though not subordinate to the Ministry of Justice. There is no subordination between the three bodies, each having its own role in the system. SDE specializes in investigating anticompetitive conduct and in promoting consumer protection; SEAE focuses on preparing advisory opinions on mergers and acquisitions and CADE on judging all antitrust cases after evaluating the works of each Secretariat. CADE's decisions can only be reviewed by the Judiciary Branch (Article 50 of Law 8,884 of 1994).

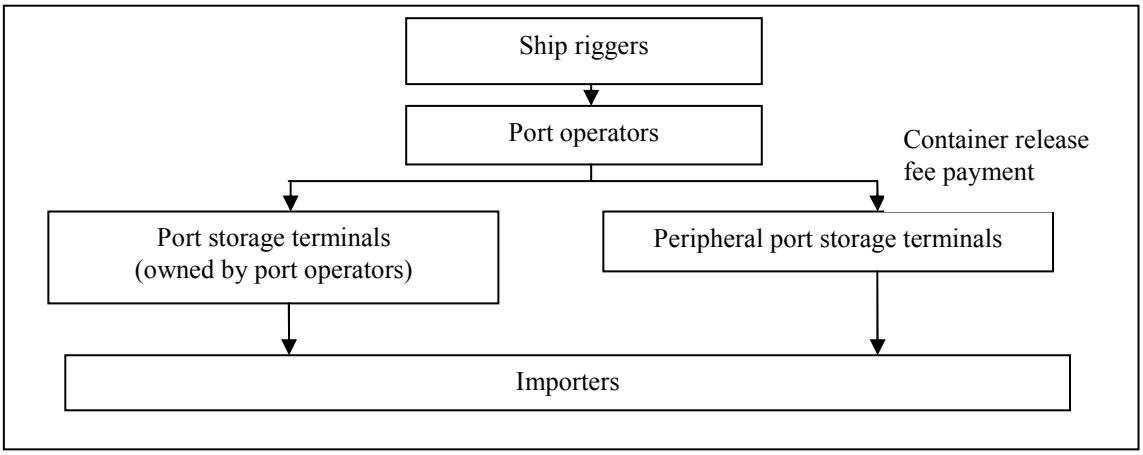
2 See Section 3. Republic of Brazil vs. Tecondi, Terminal 37, Usiminas and Tecon.

Create difficulties for the establishment, operation or development of a competitor or supplier, purchaser or financier of goods or services;

To determine the presence of significantly harmful price squeezing, the Brazilian antitrust system has used imputation tests[3]. It has also set out that price squeeze may endanger existing competition, impede entrance of new firms, cause harm to industry at large and impose unfair burdens on consumers, especially in the form of higher prices. Furthermore, when margin squeeze, or any other anticompetitive conduct, is suspected to have occurred within a regulated sector, the Brazilian antitrust system has assured itself leeway to still apply the provisions of the national antitrust legislation.

3. Republic of Brazil vs. Tecondi, Terminal 37, Usiminas and Tecon[4]

In 1999 the following four private port operators in the Santos Port, located in the state of São Paulo, where investigated by Brazil´s antitrust system: Right Margin Containers Terminal (Tecondi), Santos Libra Terminals S.A. (Terminal 37), Usiminas Rio Cubatão Port Logistics Ltd. (Usiminas) and Santos Brasil (Tecon). The port operators, which where vertically integrated as owners of storage facilities within or near the port area, where accused of charging high container release fees to private peripheral port storage terminals. The diagram below illustrates the service chain involved.



It should be noted that the regulatory authorities involved had not prohibited the existence of container release fees but also had not regulated its price or form of application either. Furthermore, the four defendants were the only firms with the necessary installations to receive and transfer private ship cargos inside the Port of Santos – a condition which assured these companies very high market power. It was also alleged by periphery storage firms that they were, on several occasions, charged the container release fee before the arrival of ships and without confirmation of the quantity of cargo that would be unloaded. Periphery storage firms also denounced an initiative by the defendants to charge lower fees to periphery storage firms that would contractually agree to the fees and to charge double price or to even refuse to deal with periphery storage firms that declined to such agreements. The defendants argued that they charged a legitimate and fair fee which covered their services.

[3] Imputation tests determine if a vertically-integrated firm sets its retail price so that the revenue it receives is less than the cost of the relevant inputs faced by its competitors plus any additional costs faced in supplying the retail service. If this situation manifests itself then it may be concluded that harmful margin squeezing is occurring. This test can be implemented on a marginal or average revenue basis. In Brazil both are used within relevant markets usually defined through the well known hypothetical monopolist test.

[4] Administrative Process no. 08012.007443/99-17.

The Administrative Council for Economic Defense, in deciding this case, noted that antitrust law should apply to regulated sectors such as the one in question. It also found that the defendant´s conducts: had endangered the existence of the current downstream competition in port storage; had encouraged new firms to not enter the market; had unfairly increased prices for end buyers (the importers); and had caused harm to the competitiveness of the Brazilian industry. Hence the Council, applying Sections I, II and III of Articles 20 and Sections IV and V of Article 21 of Law 8,884 of 1994 detailed earlier, sentenced the defendants to:

- stop charging the container release fee;
- pay a fine of 1% of gross profits in the year previous to the initiation of the administrative process, excluding taxes;[5]
- publish, and pay for the publishing, of CADE´s decision in a newspaper of national circulation;
- pay a daily fine of over R$20,000 (approximately €7,000) if they violated any of the above decisions; and
- Prove, within 60 days, their compliance with the decisions listed above.

The defendants appealed to the Judiciary and gained injunctions that suspended the Council´s decisions but only on the condition that they deposit the value of the fines applied. The case is still under judicial review.

4. Embratel and Intelig vs. Telesp, Telemar and Brasil Telecom[6]

In 2002 the Brazilian Telecommunications Company S.A. (Embratel) and Intelig Telecommunications Ltd. (Intelig) accused the following three private telecom firms of adopting anticompetitive practices against them: São Paulo Telecommunications (Telesp), Telemar North East S.A. (Telemar) and Brasil Telecom.

The plaintiffs owned long distance networks and provided long distance telephone services. But they could only provide such services to non-corporate customers by also having access to the defendant´s local networks which complemented their long distance ones[7]. Since, replicating the defendant´s local networks was not economically viable to the plaintiffs and there were no other alternatives available, the local networks could be seen as essential facilities.

The complaint made by the plaintiffs was that the defendants charged them a higher fee to gain access to their local networks than they did for their own vertically integrated service providing units. This practice, according to the plaintiffs, endangered their permanence in the market and increased barriers to entry. The fee in question was called Local Telephone Network Usage Fee (LTN-UF). The diagram below illustrates the chain of goods and services involved.

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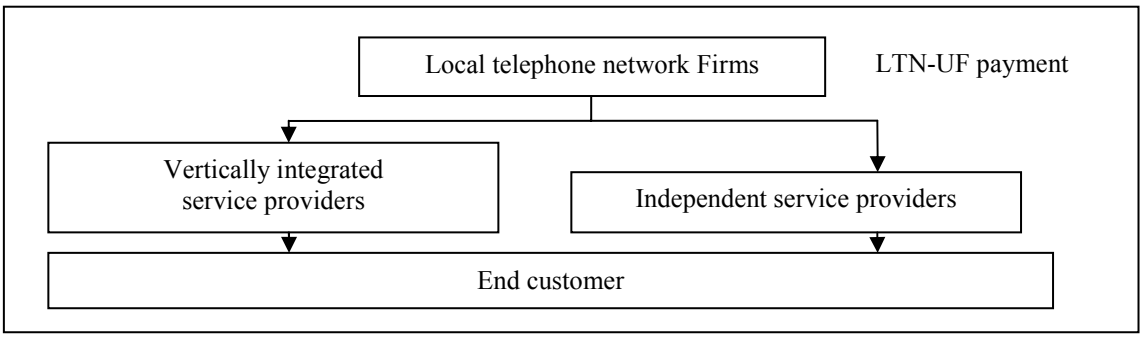
5 In the case of Usiminas, which has several other activities besides those pertaining to port operations and storage, the fine was limited to its port activities in the Santos Port only.

6 Administrative Processes nº 53500.001821/2002 (Embratel and Intelig vs. Telesp), nº 53500.001823/2002 (Embratel and Intelig vs. Telemar) and nº 53500.001824/2002 (Embratel and Intelig vs. Brasil Telecom).

7 Corporate customers were given direct access to Intelig and Embratel´s long distance networks.



The plaintiffs also argued that the regulated price cap on the LTN-UF was not low enough to impede anticompetitive behavior by the defendants. The defendants denied all charges and argued that their fee was fair and legitimate.

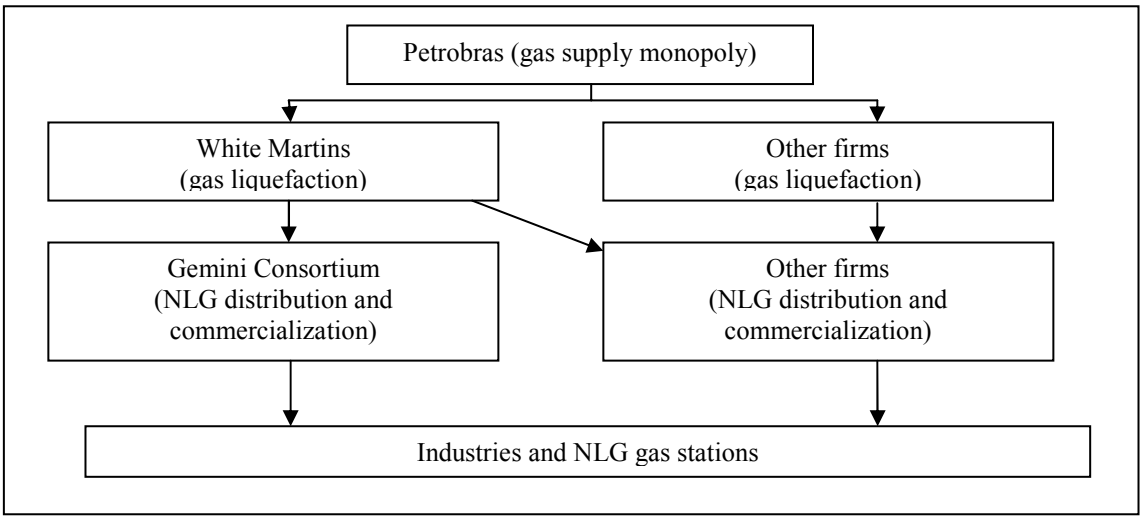
Brazil´s antitrust system conducted substantial investigations on this matter looking into the possibility of the existence of price squeeze, cross subsidies and price discrimination. In the end the Administrative Council for Economic Defense found that the investigations did not produce sufficient evidence of any kind of anticompetitive conduct. Therefore the case was discontinued by the Council.

It should be noted though that the National Telecommunications Agency, which closely monitored the case, considered that the limited evidence that was produced in terms of price squeezing by the investigation was a call for more conservative action. Hence the Agency lowered price caps for the LTN-UF when renewing concession contracts in 2006.

5. White Martins & Petrobras joint venture[8]

In 2004 White Martins, a private enterprise, and Petrobras, a federal state owned enterprise with private investments, engaged in a joint venture to form a firm called GNL Gemini Gas Commercialization and Logistics Ltd. (GNL Gemini) and a consortium under the name of Gemini Consortium, which would operate jointly in the production, commercialization and distribution of Natural Liquefied Gas (NLG).

In the Gemini Consortium, Petrobras supplied natural gas of its own property to White Martins, which acted as owner and operator of a liquefying plant. GNL Gemini in its turn distributed and commercialized the product. GNL Gemini was 40% owned by Petrobras and 60% owned by White Martins. The project began with a pilot plant in the state of São Paulo, but the firms informed that there was a possibility of expanding the initiative. It should be noted that Petrobras detained a near monopoly in gas supply. The diagram below illustrates the chain of goods and services involved in this case.



The case in question generated judicial dispute between the federal gas regulator and the gas regulator of the state of São Paulo. The dispute was over the legal classification of the main activity involved. Depending on the classification, the federal or the state of São Paulo regulator would have sole responsibility over the joint venture. When the case reached the Administrative Council for Economic Defense, the judicial dispute was still to be decided by the country´s supreme court.

Again, in this case, the Administrative Council for Economic Defense reaffirmed its prerogative in applying antitrust norms to regulated sectors, especially when such sectors lack clearly defined rules in some issues. Voicing concerns over the joint venture in terms of price squeeze possibilities, considering the vertical integration involved and the high market power of the state giant Petrobras, the Council approved the project with the following restrictions:

- relevant details of the consortium accord should be made public, including product prices and quantities involved;
- the non-compete clause between GNL Gemini and Minas Gerais Gas Company (Gasmig) should be eliminated;
- the firms involved in the joint venture should provide quarterly audited reports of their operations to the Council;
- the firms should refrain from introducing new clauses in any accord between them which may produce the effects of the clauses that were altered or eliminated by the Council; and
- the accounts of GNL Gemini should be publicized.

The Council´s decision was accepted by Petrobras and White Martins. Both also signed a performance agreement and there was no dispute in the Judiciary. But some time after this the São Paulo Gas Company (Comgas) petitioned the Council[9] against Petrobras and White Martins arguing that these firms had broken their agreement with the Council by adopting anticompetitive practices. This petition is currently under analysis by the Council.

6. Conclusion

In sum, margin squeeze is a recognized stand alone infraction in Brazil which may be determined through imputation tests. Such conducts have been considered by authorities as harmful not only towards the competitiveness of specific markets but also to broader economic sectors. Hence Brazil´s antitrust authorities have committed themselves to investigating and punishing such practices whenever identified, even within regulated sectors. The three cases described in this text have served to illustrate these points.

[9] Administrative Process nº 08012.011881/2007-41.

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CHILE

1. Introduction

The anticompetitive behaviour known as "margin squeezing" (sometimes, price squeezing) encompasses some forms of exclusionary abuse involving an interaction between two levels in a supply chain. This conduct applies to cases where the controller of an essential facility or input, who has a dominant position, seeks to keep to himself parts of a related downstream market.[1]

The Chilean Competition Act (DL 211[2]) —the purpose of which is "*to promote and defend free competition in markets*" [Art.1]— includes in its Article 3 a general provision stating that "*the anticompetitive illicit are any deed, act or contract that prevents, restrict or obstruct free competition, or that tends to produce these effects*" in a wide sense. Art.3's literals, however, exemplify different types of anticompetitive conducts, such as collusive agreements [Art.3 a)], abuses of dominant position [Art. 3 b)] and predatory practices [Art.3 c)].

In addition, the DL 211 neither addresses market share presumptions nor establishes *per se* treatments for any conduct. In any case, the actual or potential harmful effects on competition in the relevant market must always be proved, following the rule of reason. Therefore, alleged *margin squeeze* behaviour must be considered in itself or by means of the figure of abuse of dominance.

According to technical literature and international experience, margin squeeze practices are usually observed in the telecommunications sector. In Chile, the corresponding sectoral or regulatory framework[3] includes no express definition of margin squeeze. Nevertheless, in one of its articles the GTL states that regulated firms cannot transfer the cost of their unregulated activities to the regulated ones, by increasing the basis for calculating the efficient-tariff definition (GTL, Art. 30 e)[4]). It is worth noticing, however, that there is no regulatory accounting framework or principles to guide the cost imputation procedure.

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1 Following this, some exclusionary conducts can be viewed as a case for extreme margin squeeze.

2 Decree Law No. 211/ 1973 and its subsequent amendments, enacted by Law No. 19911/ 2004 –which introduced structural changes for the Competition System, mainly the setting up of the *Tribunal de Defensa de la Libre Competencia,* a judicial specialised body. It was also amended by Law No. 20361/ 2009 – which increases the investigative powers of the *Fiscalía Nacional Económica* (the competition agency) when dealing with cartels and collusive agreements.

3 The regulatory law for the telecom sector is Law No 18,168 (from September 1982; and its subsequent amendments), also known as General Telecommunication Law (TGL). This legal body contains general specifications on franchising, violations and penalties, among others, and permits exploitation and operation of telecom services.

4 GTL's Article 30 states that "For *each area, efficient tariff rates are determined, understood as those that, applied to expected demand for the lifespan of the corresponding expansion project, generate a revenue equal to the respective development's incremental cost."* Its literal e), includes clauses regarding unregulated services belonging to the same provider, establishing that *"If, having defined the efficient firm ... for reasons of indivisibility of expansion projects, these also allow satisfy the demand, in a whole or in part, referred to unregulated services that the concessionaires provide, it should be considered only a fraction of the incremental costs for development, for purposes of calculating efficient tariffs. This*

2. Chilean case law on margin squeeze

Ever since the current Chilean Competition System came into operation in 2004, the *Tribunal de Defensa de la Libre Competencia* (hereafter, TDLC[5]) has issued 87 decisions in contentious procedures, just one of which makes explicit mention of margin squeeze as a potential anticompetitive conduct (Case GPS Chile vs. Entel PCS). Later on, a second case on margin squeeze in the telecom sector was brought before the TDLC (Case OPS, Etkom, Interlink and Sistek vs. Telefónica Móviles 'Movistar', better known as the "Celulink" [6] case). Decision in this case is still pending.

The following section will discuss the main aspects involved in both.

2.1 Case GPS Chile vs. Entel PCS

2.1.1 The facts

In October 2006 *GPS Chile* –a GPS solutions provider– brought a lawsuit to the TDLC against *Entel PCS*, a local mobile operator, charging it with several abuses of its dominant position and with unfair competition.[7]

GPS Chile began operating in Chile in 2001, with its focus on selling GPS satellite receivers, imported from US GPS products manufacturer, Garmin, and on supplying real time positioning services. *Entel PCS,* in turn, launched its GPS system around 2002 through *Entel GPS.*

According to *GPS Chile*, cross subsidies and *Entel PCS'* major financial capacity enabled the company to sustain a predatory pricing policy aimed at eliminating competition in the automatic vehicle location (AVL) services market. Secondly, the lawsuit established that *Entel PCS* had also carried out a margin squeeze policy derived from *Entel's* integrated participation in the intermediate wireless data transmission market (upstream), which is an essential input for the service.

2.1.2 Analysis during the judicial process

The TDLC granted *Entel PCS* a legal term to respond to the lawsuit, asking at the same time the Chilean competition agency, the "*Fiscalía Nacional Económica"* (hereafter FNE) to put forward an expert's report.[8] This one, submitted in May 2007, drew on information requested to the firms in the market and to the Sub secretary of Telecommunications (SUBTEL), the telecom regulator.

SUBTEL noted that by then there was not, nor will there be, a regulation of the global positioning services provided via mobile network (GPS), because it implies authorized means to dealers. In addition, and in view of access charges, the FNE asked whether the administrative structure required for the GPS

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percentage shall be determined in accordance with the rate at which the project's assets are used by regulated and unregulated services." (non-official translation)

5 Competition Tribunal, which since the 2004 amendments to the Competition Law decides on antitrust matters with adjudicative powers.

6 These are services provided by electronic gear acting as an interface between one or several cell phones with an Analog / Digital Phone Systems (PBX).

7 The Chilean Competition Act allows for private enforcement of the law.

8 Legally the FNE also serves as an expert reporter at the TDLC's request in cases not initially conducted by the agency.

business line is incorporated in the 'efficient-firm' model [9] for *Entel PCS*. SUBTEL answered negatively, remarking that the tariffs study incorporates only those essentials to offer regulated services. Thus, the latter's non-essential services must not be included in the tariffs determination.

Finally, the FNE's analysis focused on the economic rationale of *Entel*'s potentially predatory strategy and other exclusionary practices, such as crossed subsidies and margin squeezing. These practices could not be discarded as *Entel PCS* does not provide GPS service through a separate business line or a subsidiary, and consequently has no separate financial reports, out of which the FNE could not observe each line's indirect and incremental costs.

In particular, concerning margin squeeze, the transfer price –referred to as the net access charge- should be the same for *Entel PCS,* as a GPS service provider, and for its competitors. In this way, the price should reflect the opportunity cost of net use, thus precluding potential anticompetitive practices. Yet in the FNE's opinion and upon the incomplete information available,[10] *Entel PCS* was providing a product (data transmission in the GPRS network) to some customers (companies providing the GPS service in a related market) at a different rate, with no rationale to justify this differential within a pro competitive setting.

Nevertheless, in 2008 the TDLC issued its ruling[11] rejecting the lawsuit brought by *GPS Chile*, grounded on the fact that in the relevant input market *Entel PCS* displayed no market power enough to recover the short-term losses of a predatory pricing policy. Besides, the annual profitability of *Entel PCS*' AVL (analyzed as a whole, that is, considering the provision of both equipment and of GPS services), although decreasing from 2005 to 2006, remained positive.

On the other hand, the TDLC also rejected the margin squeeze plead, since it found it unsustainable that *Entel PCS* had set abusive prices in the wireless data transmission market (upstream) to allow GPS Chile's squeezing. This squeezing was deemed unlikely because this market was a duopoly and *Movistar* was (and still is) a strong competitor to *Entel PCS*. In addition, there is a clear possibility of entry by other operators (for instance, *Claro*, the third provider playing at the mobile services' market). Finally, the TDLC also rejected the cross subsidies *GPS Chile*, for the practice and its circumstances could not be fully established

After an appellation before the Supreme Court, its decision of April 2009 confirmed the TDLC ruling.

3. Final remarks

The theory for the analysis of margin squeeze has just recently been introduced to antitrust practices. The effects of such practice are still controversial.

In Chile, Competition Law does not specifically address margin squeezing as anticompetitive behaviour, thus further analysis on this subject will require a definition of the conditions and pieces of evidence typifying the conduct.

As stated above, the Chilean case law concerning margin squeeze is very limited, leaning on just two cases in the telecom sector, one already ruled and one pending. The only ruled case so far (GPS Chile v/s Entel PCS) stressed the relevance of the analysis of cost imputations for multiservice firms, in different

[9] The "efficient-firm" has been the regulation model implemented in Chile for almost two decades. The efficient-firm regulation sets prices equal to the long-run average cost, which is optimal when the firm is to be self-financed.

[10] Information submitted to the FNE by the firm, under request.

[11] Ruling No. 78, issued on December 4, 2008.

stages of the upstream-downstream chain, as well as for other sectors without regulatory accountancy where margin squeeze conducts may arise.

It follows from this that the network sectors –as essential inputs- and the rapid technological changes and developments leading to the regular emergence of new products, may propitiate risks in the relationship between suppliers and customers to allow for margin squeezing. Being aware of this risk, the FNE is currently deepening its efforts by preparing a market study in the telecommunication sectors and doing research on the scope of margin squeeze as an anticompetitive conduct.

APPENDIX

GSM GATEWAY OPERATORS VS. TELEFÓNICA MÓVILES DE CHILE[1]

In October 2009, the Chilean Competition Tribunal fined the mobile phone company, *Telefónica Móviles de Chile S.A* (TMCH) for infringing the Chilean Competition Act, abusing its dominant position through conducts of price discrimination, margin squeeze and refusal to deal against several GSM gateway operators.

GSM gateways are electronic devices containing one or more subscriber identity modules (SIMs) for one or more mobile networks, which enable calls from fixed line telephones to mobile telephones by directly routing them to the relevant mobile network. Thus, a call to a mobile phone that is made via a GSM gateway is actually made from a mobile number. The GSM device chooses one among its available SIMs such as to make the call cheaper.

To provide their services, GSM gateway operators have to purchase a number of subscriptions to different mobile network operators in order to route the calls of their costumers to the respective called party's network.

GSM gateway operators originated due to a regulatory failure which allows mobile operators to charge different retail prices in virtue of price differences between interconnection or access charges –*off-net tariffs*– and charges for subscribers –*on-net tariffs*.

In this case, the Competition Tribunal identified two markets: the respective mobile network in the upstream market (TMCH's mobile network), and the fixed to mobile on-net call termination services market, downstream. The Tribunal considered that TMCH held a dominant position on the upstream market and that such position provided TMCH with significant advantages in the downstream market. Furthermore, the Tribunal deemed that the subscriptions to TMCH's mobile plans in the upstream market constituted an input that was essential for companies –the complainants in the case– to provide the downstream on-net call termination services.

The controversy began when TMCH raised the mobile plans prices charged to GSM gateway operators without increases in costs, prices charged to other customers or other economic justifications.

The Tribunal ruled that by discriminating prices against costumers and by increasing subscription prices paid by the complainants (to access the input), TMCH was in fact margin squeezing the latter thus not allowing them to compete in the downstream market of on-net call termination services. The Tribunal also found that TMCH had abused its dominant position by refusing to deal with the defendants.

The Tribunal imposed a fine on TMCH of approximately US$2.5 million. It further prohibited the company to charge discriminatory prices to GSM gateways operators, and ordered it to refrain from practicing any discriminatory conduct unless such discrimination is justified by objective circumstances.

[1] Tribunal de Defensa de la Libre Competencia - CHILE - Ruling N° 88/2009, 10.16.2009

This ruling was affirmed by a Supreme Court decision on July 7th 2010.

The ruling (Spanish version) is available at:
http://www.tdlc.cl/DocumentosMultiples/Sentencia%20_88_2009.pdf

LITHUANIA

A "margin squeeze" or "price squeeze" is not a separate, stand-alone form of abuse of dominance reflected in the Lithuanian legal acts. I.e. it is not specifically mentioned in legislation. However, it is recognized by courts as inappropriate behaviour by dominant firms, a form of abuse. Notably, in two recent cases involving price squeeze, one case (involving telecoms operator TEO) was decided (2006) to have violated Article 9(1) of the Lithuanian Competition Act (imposition of unfair prices), whereas another one (involving post services provider *Lietuvos Pastas* (LP)) was decided (2007) to have infringed the general part of Article 9, which prohibits a dominant firm from all activities restricting competition and constraining the other firms' possibilities to operate in the market.

The latter case with LP was essentially a margin squeeze case. However, the case was judged not as such, but as some other form of abuse, some restricting-competition behaviour. I.e. a dominant post-services provider, having a monopoly over delivery of letters up to a certain established weight (a monopoly over "reserved postal services"), being an upstream provider of an essential input (delivery of letters by post), was also competing on downstream markets, e.g. in providing a complex service of delivery of electricity bills to customers, which included not only the delivery itself, but also other delivery-related services (i.e. printing out of electricity bills, putting them into envelopes, writing addresses of the clients, posting the envelopes). The key issue at stake was the downstream price (of a complex service) relative to the price for the essential input (delivery of letters). No other firm operating in the market for complex delivery services was capable of delivering letters, because this was reserved by law to LP, all of them actually had to subcontract LP and use their delivery services[1].

However, this case was treated neither as a "margin squeeze" case, nor as other traditional form of abuse, such as refusal to deal, predatory pricing, price discrimination or excessive pricing. The reason for that probably was that, firstly, this was not a telecommunications case (most common area of margin squeeze abuses), secondly, the Lithuanian Competition Act allows to catch all kinds of possible abusive behaviour restricting competition. Consequently, the case was judged as the latter abusive behaviour.

The first case involving an incumbent telecoms operator TEO (telephone fixed line monopoly) was decided as a price squeeze case. No other consideration has been given to characterising this case as another form of abuse, this case was considered as fitting into price-squeeze framework right from the beginning of the investigation.

In the TEO case, TEO is vertically integrated undertaking and provided broadband internet ADSL services both in wholesale and in retail markets. The essential input provided by the integrated firm to the downstream rivals was broadband internet connection via ADSL technology (wholesale services). This input was the same as the input that TEO provided to itself (TEO also acted in the retail market for broadband internet connection). The downstream products sold by the downstream rivals and by the integrated company TEO were substitutes – basically in both cases they were retail broadband internet connection services. Both the downstream rivals and the integrated firm targeted the same two broad

[1] Delivering of letters by others, than LP, was not prohibited *de jure*, though. It was legally allowed to deliver letters by other companies as well, but they were obliged to apply prices 3 times higher than LP's prices, which made impossible for them to compete with LP.

groups of retail customers – business clients and home users. The downstream services were not sold as part of a bundle of products but rather as separate products ensuring a particular level of speed of data flow (download / upload). The integrated firm did not engage in volume discounts or other forms of price discrimination to its own customers.

Analysis was made of retail broadband internet ADSL connection and of expenditures incurred by companies acting in retail services using data mainly from TEO. For the internet consumers, there were 18 different plans (differing from one another mainly in the speed of the internet, and in some other characteristics) by TEO for retail customers (end-users) to choose from. For each separate plan, the Competition Council made calculations, using the cost data presented by TEO, of the retail price that should have been set by TEO. It appeared that the wholesale costs for DSL access, wholesale DSL flow costs, and wholesale international DSL flow costs in sum exceeded the retail price of the given plan. That is, irrespective of the other retail-related costs (as installation costs, indirect costs, etc.), the retail price of the plan by TEO was lower than the wholesale price (for DSL access, flow costs).

The same was true for most of the plans by TEO, i.e. most of the offers (plans) of TEO (oriented towards households) in the retail markets were sold at a lower price than the price it set for buyers of wholesale ADSL services. The retail rivals buying the wholesale ADSL services from TEO for creating the retail broadband connection internet access services to end-user, were incurring larger expenses than TEO's retail prices. If these rivals had provided retail services, reflecting wholesale prices of TEO, their services would have been loss-making and they would not have been able to operate in the retail markets in the longer run. And because of that there was little competition, if any, in the market for households.

The retail ADSL services of TEO could not be profitable when they were provided on the basis of the wholesale ADSL prices set in the wholesale market. Since the income TEO earned from services provided in the retail market did not cover the expenses of providing such services, the conduct of TEO was treated as an abuse of a dominant position through the use of a *price squeeze*.

During the time of application of the price squeeze schemes by TEO, there was an increase in the number of customers signed up with TEO for the services which was an indication of retail competitors being pushed out of the market.

In the TEO case, there was no pre-existing duty-to-deal based on other, than competition, laws (i.e. there were no regulatory requirement to deal). Only competition law could be used to force the incumbent to deal. However, there were no considerations about imposing a duty to deal because the incumbent did not refuse to deal completely, it only offered inappropriate terms and conditions for retail rivals.

TEO was found to have abused a dominant position in the wholesale ADSL market using a price squeeze. TEO applied such prices for wholesale and (or) retail services that reasonable efficient TEO competitors, operating in the retail markets, could not obtain a normal profit. Because of that these competitors were being forced out from retail markets. TEO didn't offer any justifications for the alleged abuse and recognized that its conduct was an abuse of a dominant position. TEO paid the fine imposed and did not challenge the decision of the Competition Council in court.

The Competition Council in its decision did not specify the exact remedy, it only pointed out the violation of the law and obliged the company to remove the violation. It was then up to the company to choose whether to change the upstream price for the essential input or to change the downstream price. There were no regulatory obligations, such as a requirement to provide the essential input (wholesale broadband internet connection) at a specified price, so there could not be any conflict between the competition law obligations and regulatory obligations. Also because of no regulation on this, the

integrated TEO could not rely on regulation as a form of defence against being found liable for an anticompetitive margin squeeze.

Lithuanian competition law is rather young and we have not had much experience with margin squeeze cases. The two cases on margin squeeze by the Competition Council mentioned earlier were brought in 2006-2007. One case was not challenged in court, another one was brought to court, but on market definition grounds (eventually the company lost the case). At the moment we do not foresee any changes in this area. Standard of proof, in our experience, is different in various forms of abuse. For instance, a predatory pricing case may require showing of a loss-recoupment theory (which is not present in margin squeeze cases); refusal to deal cases may mean outright refusals (whereas in margin squeeze there is no refusal as such); an excessive pricing case requires showing price in no connection with the "value of the product" (whereas in margin squeeze cases there is no such requirement). However, a margin squeeze case in some circumstances may be considered as a price discrimination case if price-discriminated are all the clients of the dominant firm, and price-favoured is the dominant firm (i.e. when all the clients have to pay the wholesale price, and the dominant firm does not "pay" an appropriate wholesale price). On the other hand, it is not clear what aim can be achieved by incorporating margin squeeze cases into one of the traditional abuses (predatory pricing, price discrimination, excessive pricing, refusal to deal) and by eliminating margin squeeze cases completely from the map of abuses.

RUSSIA

The competition legislation of the Russian Federation and the legislation in the field of telecommunications do not contain the term "Margin squeeze". "Creation of discriminatory conditions" can be considered as an analog established in the Russian competition law.

The prohibition to create discriminatory conditions is provided for in part 1 Article 10 of the Federal Law of 26.07.2006 № 135-FZ "On Protection of Competition" (hereinafter - the Law) if such actions are performed by the economic entity occupying dominant position on the wholesale market. Actions that can be determined as "Margin squeeze", as a rule, are qualified as the creation of discriminatory conditions for the retailers on the product market (purchasers on the wholesale market) in comparison with the activity of the economic entity that operates both on the wholesale and retail markets. In accordance with the telecommunication legislation the operator that occupies significant part of the Public telecommunication network (operator who runs through more than 25% of traffic volume, or has more than 25% of numbering capacity) is prohibited to create discriminatory conditions for connection and passing through the traffic in comparison to its affiliated parties, structural subdivisions (Article 19 of the Federal Law of 07.07.2003 №126-FZ "On Communications").

During the investigations on establishing inadmissible difference between the wholesale and retail price the following issues are analyzed by the FAS Russia:

- Technologic similarity of services provided to the end users;
- Similarity of the product by functionality and quality characteristics that is sold on the retail market;
- The amount of production (purchasing) costs of product on the wholesale market and of its production (selling) on the retail market;
- Possibility of cost-efficient production (selling) of the product on the retail market on conditions of purchasing the product on the wholesale market at the price that is established on the retail market by the wholesaler.

At that, the price established on the wholesale market for own consumption is considered to be the cost value that remains after reduction of the profit rate and the cost for product production (selling) on the retail market from the retail price in the conditions of technologic similarity of the production. Such an approach is also applied by the authorities that oversee the sectoral legislation.

In 2006-2007 the antimonopoly authority investigated cases on violation of the antimonopoly legislation in form of creation discriminatory conditions by the major telecommunications companies that set higher or equal prices for passing the wholesale traffic for alternative operators rather than for its end users of local loop or Internet services. In this situation the alternative operators could not provide its services to the subscribers (on the retail market) at prices comparable with the prices of wholesale operators. The FAS Instructions on termination of violation contained the requirements to establish equal conditions for alternative operators activity in comparison with the own production. The Instructions were executed.

In principal, during the investigation of "Margin Squeeze" cases, the violations of the antimonopoly legislation can be considered as the establishment of monopolistically high price (on the wholesale level) or monopolistically low prices (on the retail level). In 2009 the FAS Russia investigated the case of the establishment of monopolistically high prices for providing access for alternative telecommunication operator to the local loop for the following provision of Internet services. During investigation of this case the FAS Russia considered the same factors as during the investigation of creation of discriminatory conditions as well as the economic feasibility of establishment of wholesale prices. The FAS Instructions provided for the prices that allowed an alternative operator to provide access to the Internet at comparable prices of wholesaler. The Instructions were executed.

Moreover, the Article 11 of the Law prohibits the agreements or concerted actions between economic entities if they lead or can lead to the restriction of competition on the market. In 2007 basing on the Article 11 of the Law the FAS Russia investigated the case of the three major Russian mobile operators ("big group of three") in fact of concerted unjustified establishment of different prices on the same product (service). The price for traffic transmission service between their own networks equaled 0.95 rubles (0,03 cents) and the price for other telecom operators equaled 1.10 rubles (0,04 cents). The costs of purchasing traffic transmission service took essential part in the overall expenses of the mobile operators (not a part of "big group of three") for providing mobile services to their end users so the difference of 0.15 rubles did not allowed them to provide its services at comparable prices. Moreover it was determined that the reduction/increase in prices depending on the volume of traffic transmission is an economically feasible under the certain circumstances of the construction of connection network. The FAS Instruction obliged the "big group of three" to establish the same price for operators that are not a part of the "big group of three" as for itself taking into account the regional particularities of traffic transmission. The Instruction was executed.

There are different ways of classification of the "margin squeeze" violations. If the "margin squeeze" violation is determined as the establishment of monopolistically high price, apart from the establishment of discriminatory conditions for the retailers, the economic feasibility and comparative analysis of pricing as the indicators of monopolistically high prices are investigated. If the violation is determined as establishment of different prices for the same product, besides establishment of discriminatory conditions for retailers, the conditions of production, purchasing and selling of the commodities at different prices are investigated as well as the differences depending on the subjective consumer's structure on the wholesale market, notably on nature of the retailers' activity.

The competition authority must investigate the consequences of "margin squeeze" for the market. If there is a reduction in the number of economic entities on the market, the competition authority conducts an investigation with the aim to suppress the restriction of competition. In 2008 the FAS Russia and investigated that the number of economic entities providing access to the Internet on the territory of the Russian Federation using the networks of operators who sell the traffic on the wholesale market has significantly went down during 2006-2008, particularly because of establishment of "margin squeeze" by the wholesalers. In 2009 several cases in relation to the two companies were investigated, as well as the investigation in relation to the two other big companies in part of the "margin squeeze" on the local loop market.

As a rule an economic entity occupying dominant position on the wholesale telecommunication market of traffic transmission, occupies the substantial position on the public telecommunication market. In this case the sectoral legislation vests this operator with a function to provide connection to telecommunication networks and services on traffic transmission. Besides, this entity has to run separate income and expenditure accounting on regulated activities in order to facilitate the analysis of the economic feasibility of prices establishment on such a market.

As for the markets or economic entities that are not regulated by the Government the responsibility of wholesaler to cooperate with the competitive retailers is not established, but the antimonopoly legislation can impose the requirements that prohibits groundless refusal from making contracts. In “margin squeeze” cases this issue can not be investigated by the antimonopoly authority on its own initiative because according to the Law, the obligation to make contracts can be investigated and the corresponding instruction can be given only if the person submits the petition on establishment of responsibility to make a contract. Or, if as a result of case investigation such a petition was not submitted but competition authority considers that vesting the concrete economic entity with the obligation is necessary for ensuring the competition on the market, the competition authority runs a claim on imposition of an obligation. But there were not “margin squeeze” cases of this kind considered by the FAS Russia.

SOUTH AFRICA

Although allegations of a dominant legal firm perpetrating a margin squeeze have been raised in a number of complaints we have only one case thus far where the complaint has been determined by the Competition Tribunal, the adjudicative arm of our competition system.

The facts of the case are complex so this summary limits itself to those necessary for appreciating the margin squeeze complaint and how it was determined. The case was brought by the Competition Commission the body responsible for prosecuting prohibited practice cases in our system.

The firm accused of perpetrating the margin squeeze in this case, was Senwes, an agricultural services firm. Amongst its activities relevant to this complaint were that Senwes was an owner and operator of various grain silos which stored grain for farmers and traders in grain (the upstream market) but it also was a trader in grain (the downstream market). In the downstream market, traders purchase grain from farmers and then sell the grain to milling companies for processing. Between the time that traders purchase grain from farmers and sell it, they need to store the grain in silos.

Senwes was a former co-operative which enjoyed a statutory monopoly in grain storage areas until the 1990's, when legislation to increase competitiveness in agricultural ended the monopolies enjoyed by co-operatives.[1] Notwithstanding this, Senwes' dominance in the regions where it had silos remains resilient. The evidence was that it enjoyed roughly 80% of the market in its area, defined as a radius around its various silos, a region that included large portions of the inland area of the country, where grain farms are predominantly located.

Grain farmers sell some of their grain at harvest time (usually one –third) and put the balance in storage in silos. Some of the grain in storage is sold after a period of three months, whilst the balance is kept in storage to be sold towards the end of the season, usually about six months after the harvest. The reason why farmers sell grain on a staggered basis, instead of all at once, is that they expect prices to rise over time in the period following the harvest as grain becomes scarcer and before the next harvest restores supply into the market. However they need to sell some grain early in the season to repay loans and meet immediate expenses incurred in the planting season.

Farmers typically sell their grain to intermediaries rather than directly to milling firms who ultimately process the grain. These intermediaries are specialist traders who buy grain as early as they can in a season with a view to selling it at later stages in the season to milling companies. Their business model depends on them buying grain from farmers at a lower price than they can sell it and minimising costs while they trade. It also means trying to buy as much grain as possible in the early part of the season and selling it as late as possible. Apart from the actual cost of the grain one of their most significant costs are storage and transport. Although traders do not pay the cost of transport from the farm to the silo they are responsible for transport costs from the silo to the processor. This makes location of grain important because mills require grain to be delivered net of transport costs. They do this through the practice of awarding tenders throughout the season for supply. These 'mill door contracts' as they are known, account for the most significant purchases of grain in the industry and a successful trading business depends on being able to

[1] A licence is required to conduct a grain storage business.

tender competitively against rival traders for the contract. The lower a trader's transport costs to the mill in question the more competitive the trader's bid.

The other factor determining the success of a bid was the cost of storage. Up until 2003, this factor was neutral. To appreciate how the costs of storage work, since this is the key input in the margin squeeze allegation, one needs some understating of the agricultural futures exchange known as Safex, operates. The majority of grain is traded on Safex, through contracts whose prices are determined on a daily basis. The Commission accepted that this price is a competitive one and is responsive both to changes in domestic supply and international prices.

Trade in Safex involves not only trade in spot market prices for grain contacts but also futures. Different futures contracts are traded, typically bi –monthly. Thus grain may be traded as an October contract or a December contract. On any given day the price in the newspaper will reflect a higher price for the December contract than the October. Note that although the contract prices for October and December may vary on a daily basis, the differential remains fairly constant. The differential between the earlier and later contract prices reflects the cost of holding grain or to put more correctly the markets perception of the cost of holding grain. The cost of holding grain is influenced by two factors, interest rates reflecting the cost of capital in acquiring the grain earlier from the farmer and secondly the cost of storage. The longer the period from harvest the higher these costs will be, and hence this is reflected in the differential between the prices quoted for the successive contract months.

When traders quote prices in mill door contracts they quote it as a price derived from the Safex price. Thus a trader quoting in June for delivery for a mill door contract might quote the price as " October Safex less …".

Now Senwes as a grain storage company also has a trading arm that competes with its trader customers. Senwes was dominant in the grain storage market but not the grain trading market. As long as the futures market compensated traders for the costs of holding grain, traders were satisfied that they could compete with it for mill door contracts.

However something happened that led to the futures market in grain no longer reflecting the full costs of carrying grain and instead only the partial costs. As a result traders in the Senwes area found that they were experiencing a loss of market share in the Senwes area for mill door contracts late in the season. Since the late season contracts were the most lucrative as grain prices were at their highest the loss of volumes was aggravated by the increased loss of value per contract.

The Commission argued that the actions of Senwes were responsible for the fact that the Safex price no longer reflected the long term costs of grain. Up until 2003, Senwes' practice was to charge a daily tariff for storage and then a flat fee capped at the cost of 100 days of storage, for any storage of grain lasting longer than 100 days. When the Safex price reflected the costs of storage for grain stored over 100 days, it reflected the costs of grain stored for a maximum of 100 days at the daily rate. In 2003 Senwes decided to change its tariff structure. Traders were denied the benefit of the capped tariff after 100 days and instead had to pay the tariff on a daily basis throughout the storage period. Effectively this meant that for a trader who stored in a Senwes silo, the costs of storage were raised for any storage in the post 100 day period and increased incrementally the longer the period of storage. [2]

[2] The Tribunal found that although traders had other options for storing grain none of these replicated the advantages of storing in a Senwes silo from a convenience point of view. Additionally storage at a silo meant a trader would be issued a silo certificate enabling it to trade grain on the exchange an essential part of the trading business. Other storage options such as storage on a farmers farm or in privately erected silos did not offer this option.

However the increased costs of storage were not reflected in the futures price on Safex on which the prices for mill door contract are derived. Thus a trader which had to quote on a mill door contract for delivery in October, and which could confidently assume that a price of Safex October less 10% would be competitive, would find its margin squeezed for any contract after the 100 day period – the extent of that squeeze was a multiple of the daily storage charge for the period stored after 100 days.

In what perhaps was the most crucial piece of evidence in the case, a trader witness showed how based on actual Safex prices over two past periods, even Senwes would not have traded profitably if it had to pay the storage costs faced by traders. This was because margins in trading were so thin, seldom exceeding 1%. However the loss of the cap on trading after 100 days led to an increase in cost of over 3% for traders. The evidence was that Senwes did not pass on storage costs to its trading arm. Senwes without this encumbrance, was able to outbid rivals for mill door contracts for mills situated in its area in the post 100 say period.

Was this a margin squeeze case? The Tribunal found that it was. The vertically integrated dominant firm had raised the costs of its rivals who had to buy a key input from it (storage in the Senwes area) which it also self supplies. As a result, traders in competition with Senwes were prevented from achieving a viable price–cost margin and could not bid competitively to win mill door contracts.

The evidence of anticompetitive effects was consistent with the theory of harm. This demonstrated that traders in the Senwes area had lost market to Senwes in the post 100 day period, while they retained their market shares in the pre- hundred day period. In non-Senwes areas, where traders stored in other silos which still offered the 100 day storage cap, these traders had increased market share; both these trends suggest that the loss in market share was not attributable to traders lack of efficiency, a theory Senwes had originally posited.

Further the evidence of change in market shares largely corresponded with the change in the tariff.

1. Was a margin squeeze a new theory?

The Tribunal did not have to deal with argument as to whether a margin squeeze is a self standing theory of harm. There are two possible reasons for this. In the first place Senwes had not engaged particularly vigorously on the margin squeeze theory issue for procedural reasons.[3] In the second place the Competition Act leaves open for parties to argue a new theory of harm because it makes it possible for the Tribunal to find an act exclusionary on the base of effects. Thus legally introducing a new theory of harm is wholly permissible. However this is not to say that South African law will not be influenced by approaches to the subject in other jurisdictions. However given that margin squeeze cases frequently arise in recently liberalised industries and the fact that these industries, as in the Senwes case, have resisted effective entry into their traditional markets ,it is likely that the South African authorities will recognise the margin squeeze as a self –standing contravention.

The case does not consider whether Senwes had a duty to deal with rivals or whether the pricing in the downstream market where Senwes competed with its trader rivals was predatory. The Tribunal followed the test suggested by O'Donoghue and Padilla and finding the facts fitted the test found a margin squeeze.[4]

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[3] Senwes argues that as the Commission did not explicitly plead a margin squeeze case it was not obliged to meet it. The Tribunal held that whilst the observation on the Commission's pleading was correct, as the theory was subsequently advanced in witness statements served prior to the hearing, Senwes had ample time to react to the defence and should have done so.

[4] See *The Law and Economics of Article 82 EC*, Hart Publishing 2006, page 310.

It is arguable on these facts that the firm had a duty to deal and that had it refused to deal with rivals, instead of implementing the margin squeeze it would still have been liable for an abuse of dominance. [5]

The Tribunal also did not need to decide whether the test for a margin squeeze should be assessed from the vantage point of an equally efficient rival or an efficient rival. On both tests the margin squeeze theory would have been met.

It is interesting to note that in this case the Commission did not initially proceed with a margin squeeze theory of harm. Initially it alleged that the practice amounted to bundling or price discrimination. [6] Only when its economist presented her report at the commencement of the case did the Commission in addition advance a case for a margin squeeze.

No remedies have been imposed in this case to date. This is because both the Commission and Senwes have appealed the findings on the contravention. [7] The Tribunal gave both parties the right to exhaust the appeals prior to imposing a remedy. If the appeals are unsuccessful, to the extent that the margin squeeze finding is upheld, then the case will come back to the Tribunal for the imposition of a remedy. One of the reasons why the Commission may have wanted the finding to be one of bundling or price discrimination is that due to an unusual feature in our law, a fine is competent for some abuses of dominance, but not others.[8] The Commission thus seeks to bring the margin squeeze case under the rubric of a contravention for which a fine is competent for a first time contravention. Thus the Commission's classification is justified by a focus on remedy rather than doctrine. The Tribunal found that the margin squeeze abuse fell into a provision of the law that holds conduct exclusionary because of its effect and does not prescribe the content of that conduct. If the Tribunal is upheld on this point a remedy imposed will not include a fine.

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5 The statute's clause dealing with a refusal to deal states that a dominant firm may not refuse to supply scarce goods to a competitor when supplying them is economically feasible. In this case the evidence suggests that the good in question – i.e. storage capacity, was scarce and that supplying it was economically feasible, particularly at the end of the season when silos were emptying.

6 The price discrimination arose because farmers were still given the benefit of the 100 day cap on storage but not traders. The Commission alleged that this amounted to price discrimination between these two classes of customer.

7 The Commission had contended for a further contravention unrelated to the margin squeeze which the Tribunal found had not been established.

8 Certain abuses which are specifically listed in the section, and price discrimination, are contraventions for which a fine is competent on a first violation. However other abuses which are not named in the statute, but which have an exclusionary effect, are not subject to a fine for a first contravention.

CHINESE TAIPEI

1. Introduction

A "margin squeeze" or "price squeeze" is not precisely defined as a recognized separate, stand-alone form of abuse in Chinese Taipei's Fair Trade Act and related regulations. After reviewing relevant regulations stipulated by the FTC, only a "vertical price squeeze" is defined in the "Policy Statements on the Telecommunications Industry," as one type of possible violation of the Fair Trade Act by a telecommunications monopolist.

However, the aforesaid "Policy Statements on the Telecommunications Industry" only provides examples of possible violations of the Fair Trade Act based on the characteristics of the telecommunications industry, and does not cover all types of business practices in the industry. Thus, the application of the Fair Trade Act to telecommunications enterprises still needs to be decided on a case-by-case basis by the FTC.

2. A "margin squeeze" or "price squeeze" constitutes an anti-competitive practice

In 2000, as the telecommunications industry was being liberalized, the FTC issued its Policy Statements on the Telecommunications Industry under the Fair Trade Act. After taking into consideration the content of the Act and the characteristics of that industry, the FTC defined a "vertical price squeeze" in that statement as referring to "where a vertically-integrated telecommunications enterprise in both the upstream and downstream markets raises the prices of the products or services in the upstream market to increase the purchasing costs of intermediate inputs by competitors in the downstream market, in order to impede or exclude competitors in the downstream market, and furthermore, to weaken their capacity for competition."

In judging whether a telecommunications enterprise is engaging in a vertical price squeeze, which is clearly described in the Policy Statements on the Telecommunications Industry under the Fair Trade Act, the FTC will consider the following factors:

- whether the subject is vertically-integrated and has a monopolistic status in the upstream market;
- whether its product or service provided in the upstream market is the essential input for other competitors in the downstream market;
- whether the price is sufficient to force competitors with the same efficiency in the downstream market to exit the market.

The FTC applies the imputation test to determine and test the anticompetitive effects of a vertical price squeeze in the telecommunications sector. The scenario in which the test will be applied could be illustrated as follows.

The company is a vertically-integrated telecommunications enterprise which provides wholesale and retail services. The company is the only supplier in the wholesale market, while there are multiple competitors in the downstream retail market. The company provides the wholesale service at the price of w

dollars/per unit to itself and other competitors in the downstream market, and the company's price and cost at the retail stage are p and c, respectively.

In the case where the company's wholesale price is higher than the retail margin (retail price minus retail cost), i.e., $w>p-c$, such a wholesale price is going to force other downstream competitors with the same efficiency to exit the market due to lack of profits. Thus, the conduct of such a company may constitute a vertical price squeeze. On the contrary, if the company's wholesale price is not higher than the retail margin (retail price minus retail cost), i.e., $w \leq p-c$, then there shall be no vertical price squeeze.

3. Margin squeeze case

In 2002, several private fixed-line operators reported to the FTC that Chunghwa Telecom Co., Ltd. (hereinafter "Chunghwa Telecom") improperly set its interconnect fees. The FTC considered the interconnect service to be an intermediate input for a telecommunications enterprise to serve final users, and the nature of such service was wholesale service. In determining whether Chunghwa Telecom, a provider of the interconnect service, has used excessive-pricing strategies to squeeze vertically the retailers at the downstream market in violation of the Fair Trade Act, the FTC initiated an investigation on this case.

In its decision, the FTC found that there was no so-called "retail price" for interconnect services in this case. Even though other private fixed-line operators contended that the rent for the designated line charged by Chunghwa Telecom to final users could be deemed to be the retail price for interconnection, this was deemed not to be a proper basis for comparison in the imputation test.

After considering the fees for interconnect services in other countries, the fee structure and methods for handling preferential discounts made by Chunghwa Telecom for interconnection were comparable to those of other international telecommunications enterprises. In addition, Chunghwa Telecom had no significant monopoly profits in comparison with other private fixed-line operators' unit costs in relation to interconnect services. Thus, based on the investigation, there was insufficient evidence to prove that Chunghwa Telecom had violated Article 10 of the Fair Trade Act.

Up to this date, the FTC has not found any cases in violation of the Fair Trade Act which fit within the definition of a margin squeeze, and the FTC has not dealt with or investigated cases which might fit within the definition of a margin squeeze, but which have been treated as some other form of abuse.

BIAC

1. Introduction

The Business and Industry Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its roundtable on Margin Squeeze of October 19, 2009.

The issue of whether margin squeeze is a stand-alone test for abuse of dominance or if it should rather be subsumed under other modalities of abusive conduct as well as the issue of its design are crucial to network industries and particularly to the telecoms industry, as they result in different incentives for market behaviour and particularly for investment.

Over the past few years, a number of jurisdictions have adopted different approaches towards the relevance and design of the margin squeeze test, most notably, the US and the EU. In the United States, the debate about margin squeeze has triggered a more general debate about whether the antitrust laws should protect competition (which would lead to barring margin squeeze as an independent claim) or competitors (whereby margin squeeze would remain a stand-alone form of abuse of dominance).

This US position is based on the fact, stated also by the OECD Secretariat in its background notes, that economically equivalent actions or economically equivalent market structures should receive equivalent treatment under antitrust law. This demands, first, that the application of an independent market squeeze test has to be critically evaluated and, second, that in the exceptional cases where a margin squeeze may be recognized as a stand-alone form of abuse, the principles and standards applied have to be identical to those applied in the prosecution of an equivalent alternative form of abuse of dominance.

In the EU, the concern has been raised that, where a vertically integrated firm controls an essential input and competes in the downstream segment, it may employ such control as a means to drive downstream competitors out of the market or deter them from entering in the first place. In particular, the vertically integrated firm may charge high wholesale prices and, at the same time, low retail prices so that downstream competitors cannot earn a positive margin. In such situations regulators and competition authorities would attempt to either lower the infrastructure access price charged by the vertically integrated firm or increase its downstream price. Moreover, they may impose fines for anti-competitive behaviour.

If the margin squeeze test is conceptualized and applied in this extremely comprehensive manner, several concrete risk-areas can be identified.

- First, some business models could be induced to restructure (e.g. to de-integrate) only to reduce their liability risk, with no positive economic effects and even with a possible negative impact on consumer welfare due to efficiency losses. This is the case because a de-integrated firm can legally charge high prices upstream, as long as they are not abusive and low prices downstream, as long as they are not predatory. To the contrary, a vertically integrated firm might be found liable for the exact same market behaviour. Therefore, some firms could partially or completely escape liability for their behaviour while having been able to demand more beneficial terms and conditions from the vertically integrated market players.

- Second, there are a number of circumstances where the above described test may suggest anticompetitive behaviour whilst it does not exist, leading to price changes that hinder large-scale investments needed to increase competitiveness as well as economic and social growth.

In order to avoid these situations, BIAC submits that the recognition of the margin squeeze test as a stand-alone test for abuse of dominance should be carefully assessed and that, in those scenarios where its application may be appropriate, its design has to be adjusted to protect competition instead of competitors and foster large-scale investments for the benefit of consumers.

2. Comments on the margin squeeze test as a distinct form of abuse of dominance

Different approaches to the issue of whether margin squeeze is a different form of abuse of dominance or if it should rather be subsumed under other modalities of abusive conduct have a direct impact on investment, especially in state of the art infrastructure with high sunk costs. For example, the EU lags behind other jurisdictions such as the US when it comes to the development of very high-speed broadband networks. Although this is not only a consequence of the differences in treatment of margin squeeze claims, this issue does play an important role.

In the US, the view has been taken that a firm with no antitrust duty to deal in the wholesale market has no obligation to deal under terms and conditions favourable to its competitors.[1] In other words, in the absence of a duty to deal in any terms, refusal to deal in specific terms cannot be sanctioned. This is a logical, effects-based approach which provides legal certainty and an adequate legal framework for large scale investments.

In the EU, the principle is that an antitrust duty to deal (as imposed under the essential facility doctrine)[2] is a prerequisite for a margin squeeze test claim, but this principle has lost much of its meaning through the various exceptions introduced.[3]

First, the Commission and the Court of First Instance have both stated that the specific factual, economic and legal context of the case may indicate the adequacy of a margin squeeze test even in the absence of an antitrust duty to deal.[4] This does not provide the legal certainty needed to make grand-scale investments, particularly those with high fixed costs and an uncertain level of demand, such as next generation access networks.

Second, the Commission has stated the margin squeeze test is applicable in the absence of a duty to deal if dominance in the upstream market has been achieved through state resources or special or exclusive rights.[5] This criterion seems somewhat at odds with the principle of ownership neutrality guaranteed by the EC Treaty and therefore should be revised.

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1 Pacific Bell Telephone Company v. linkLine Communications, 555 U.S._2009.

2 ***Case C***-7/97 ***Bronner*** [1998] ***ECR*** I-7791.

3 See i.a. Communication from the Commission, "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings," C(2009) 864 final.

4 Cases COMP/38.233 – Wanadoo Interactive [2003] and T-339/04 France Télécom v Commission [2007].

5 Communication from the Commission, "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings," C(2009) 864 final.

Third, the EU institutions have considered that an antitrust duty to deal must not be proven if the company is under a regulatory duty to supply.[6] The underlying assumption is that a balancing of incentives to invest and/or innovate has already been carried out by the regulator. For the energy and telecommunications industries (among others) this means that all firms that must grant access to their infrastructure are potentially subject to a margin squeeze claim. This highly discourages investments, as it does not take into account that the objectives of regulation and competition law may differ and that sector specific regulation can impose access obligations where antitrust law cannot. Moreover, it deprives firms of an in depth analysis by the Commission and/or the National Competition Authorities by substituting their assessment by the mere transposition of a regulatory decision.

Indeed, the Commission has stated in the aforesaid communication that in pursuing refusal to deal cases, it will consider

- If such refusal is necessary to allow the firm to realize an adequate return on the investments required to develop its input business, taking the risk of failed projects into account;

- The fact that innovation by the sanctioned firm will be negatively affected by the obligation to supply or by the structural changes in the market conditions that imposing such an obligation will bring about, including the development of follow-on innovation by competitors.

Such analysis is in line with the opinion of academics,[7] that the imposition of a duty to deal should be contingent upon two cumulative conditions

- There must be scope for significant added-value in the downstream market;

- The ex-post consumer benefits of the duty must outweigh its negative impact on the undertakings' ex-ante incentives to invest.

BIAC agrees with this approach, which is crucial to businesses as it directly affects their return on existing investments as well as their incentives to invest in the future.

Disregard for these conditions (by wrongly imposing a duty to deal or by applying a margin squeeze test in its absence merely because a regulatory obligation has been imposed) may lead to finding conduct abusive although it would most likely not lead by itself to the elimination of effective competition downstream or to consumer harm. This is the case when competitors can either replicate the facility or input in question and/or use alternative facilities or inputs to provide the downstream service. Indeed, the fact that sector specific regulatory obligations facilitate the finding of abusive conduct allows the EU institutions to intervene even in situations where competitors are able to develop their own network and where as a result the incumbent's network is not a monopolistic bottleneck.

For all of the above, BIAC contends that the assessment on whether to impose a duty to deal (thereby making a firm potentially liable under a margin squeeze claim) should be conducted by the Commission and/or the National Competition Authorities on a case by case basis rather than automatically presumed whenever an access obligation has been imposed.

Even where an antitrust duty to deal exists, there may be no need for a margin squeeze test if the abusive conduct can be subsumed under another category of anti-competitive behaviour. As stated by the OECD Secretariat in its background notes, the price of the upstream input can be imputed as either

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6 Cases COMP/38.233 – Wanadoo Interactive [2003] and T-339/04 France Télécom v Commission [2007].

7 See i.a. O' Donahue and Padilla (2006).

excessive or discriminatory and the price of the downstream component can be found to be predatory. For this to be possible, the price of the upstream product must be reliably determined. This occurs if the firm is either partially integrated downstream (so that the upstream price is observable on the market) or, being fully integrated downstream, it is still possible to impute or infer the upstream price using an economically clear and reliable methodology. Although BIAC agrees with the OECD Secretariat that several methodologies coexist and may even lead to divergent results, it proposes the sharing of best practices and/or the fostering of a common methodology to impute and/or infer prices for upstream products offered by a fully vertically integrated firm to its downstream component.

Again, this has been the US position. The US Supreme Court held that in order to have anticompetitive effects, the prices charged must be either abusive upstream or predatory downstream. Otherwise, the alleged insufficient margin between the two prices cannot give rise to an abuse where none existed otherwise.[8]

In the EU the trend has gone in a different direction. Indeed, the Court of First Instance held that if prices are neither abusive upstream nor predatory downstream, the fact that the applicant cannot remain competitive because of its cost structure does not mean that the pricing policy of the vertically integrated firm is abusive, since even a dominant undertaking is not obliged to sell its products below costs.[9] However, in a more recent case, the same Court concluded that the abuse can be connected to the unfairness of the spread between the wholesale and retail prices and not to the fact that the prices are, as such, abusive.[10] According to this position, margin squeeze constitutes a constructive refusal to deal, because the upstream product is offered on terms that are unviable and hence do not allow competitors to operate on the downstream market.

Although this approach is meant to increase consumer benefits by fostering competition in the downstream market, the fact that the spread between the wholesale and retail prices is considered abusive without any reference to the underlying cost structure may have a negative impact on consumer welfare by artificially eliminating the economic efficiencies of vertical integration. This is certainly the case if the benchmark of a "(hypothetically) reasonably efficient competitor" is applied instead of that of an "equally efficient competitor."

Consumers are harmed when a margin between upstream and downstream prices based on economic efficiencies is increased by raising the retail price, thereby forcing the integrated firm to create a downstream "price umbrella" which ensures the survival of non-equally efficient competitors. Consumer welfare is also negatively impacted when a merely formal margin squeeze is sanctioned by imposing a decrease of the wholesale prices, thereby adversely affecting incentives to invest.

Moreover, discrimination of integrated firms takes place when abuse shopping is viable. As stated by the FTC and US Department of Justice, "in Europe, (…) different abuses may well have different tests or different cost benchmarks, although the economic effect is the same, and sometimes, it's easier to prove one form of abuse than another. That shouldn't be the position. It should not enable (…) to abuse shop, to use the easiest form of abuse to prove."[11]

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8 Pacific Bell Telephone Company v. linkLine Communications, 555 U.S._2009.

9 Case T-5/97 Industrie des poudres sphériques SA v Commission of the European Communities [2000].

10 *Case T*-271/03 *Deutsche Telekom* AG v. Commission [2008].

11 FTC and US Department of Justice Sherman Act Section 2 Joint Hearing of September 12, 2006.

BIAC notes that in these cases, antitrust law would protect competitors that have chosen alternative business models to vertical integration, to the detriment of others and of the competitive process. In order to avoid the aforesaid discrimination BIAC contends that

- The application of a margin squeeze test should be confined to situations where the upstream price cannot be reliably imputed or inferred and the abusive conduct can therefore not be otherwise addressed;

- Where the application of the margin squeeze test is appropriate, such test should be purely effects based and guided by the same standards and principles as other forms of abuse of dominance under competition law.

3. Comments on the design of the margin squeeze test in situations where it remains applicable

BIAC notes that in those situations where the margin squeeze test is appropriate, multiple reasons call for a thorough effects based analysis (rather than the per se approach as generally applied) in order to promote investments and avoid consumer harm.

Since in some network industries many (if not all) of these situations prevail simultaneously, BIAC has taken the example of the telecommunications industry to illustrate the issues at hand.

The telecommunications industry is currently in the midst of a quantum leap technological development. Next generation networks allow the increase of data transmission speeds in the local fixed network from the current 16Mbit/s up to 100Mbit/s. This enables new applications such as IP based and high definition TV as well as interactive gaming and TV and has the potential to re-shape society by enabling the development of e-health, e-education and e-governance. However, the rollout of these networks requires substantial investment while the returns on the investments are highly uncertain. Most notably, at this stage, consumers' willingness to pay for new services is unclear, but there are additional uncertainties in the form of upcoming infrastructure competition (e.g. cable and mobile networks) and complementary services (most notably content, e.g. games).

The characteristic problematic of investment in next generation access networks is that the price for the wholesale input is related to the investment case, while the price for the retail product has to meet consumers' willingness to pay and is therefore ruled by market conditions.

New services based on new technologies usually involve start-up costs as well as a period of trial and error before processes run smoothly. In such situations, average unit production costs decrease as output increases due to economies of scale and learning by doing.[12] Therefore, the situation may arise where the retail price per user with only few network users is lower than the wholesale price, which constitutes a formal margin squeeze.

As a consequence, investments would be made in fewer regions, not be as extensive in quality or quantity or simply be delayed. And for what is still being deployed, the vertically integrated firm might be forced to increase the retail price above the optimal level so as to exceed the wholesale price. In either case, the application of the margin squeeze test in the early stages of development of new technologies leads to consumer harm.

[12] Cabral and Riordan (1997).

On these grounds, BIAC submits that the margin squeeze test should therefore be designed on the basis of a time period that is sufficiently long as to allow the firm a positive margin after a start-up period.[13]

Furthermore, BIAC notes that the margin squeeze test as generally applied seems at odds with newly developed regulatory instruments to promote investments, such as risk sharing and risk premiums. Firms that engage in risk sharing will typically receive lower access prices than those firms that do not carry any risk. Under a risk premium, the investor is allowed to increase wholesale prices in relation to risk and without regard to retail prices. This might result in situations which could be subject to sanctions under a generally applied, formal margin squeeze.

Therefore, BIAC considers that the margin squeeze test should be designed in a way that does not undermine the purpose of regulatory instruments specifically put in place to foster large scale investments.

4. Conclusions

First, BIAC submits that the margin squeeze implies a duty to deal on certain terms and conditions and is therefore logically contingent upon the existence of a general antitrust duty to deal - and not necessarily of a regulatory duty to supply.

Second, BIAC is of the opinion that the margin squeeze as an independent modality of antitrust control should applied to situations where the upstream price cannot be reliably imputed or inferred and the abusive conduct can therefore not be otherwise addressed. For this purpose, BIAC proposes that best practices are shared and/or a common methodology for imputing upstream price of a fully integrated firm is fostered.

Third, BIAC contends that, where a margin squeeze test is appropriate, such test should

- Be purely effects based and guided by the standards and principles of competition law in order to avoid abuse shopping and provide legal certainty. In particular, the application of the test should neither be facilitated by the imposition of sector specific regulatory obligations nor contingent upon vague benchmarking criteria;

- Be designed in a way that takes due account of the sector particularities and does not discourage firms to make the large-scale investments needed to keep up with technological change.

Fourth and lastly, BIAC notes that disregard for these principles could lead to disrupting competition by protecting some competitors to the detriment of others. The business model of vertical integration is being discriminated against when economic efficiencies are being artificially eliminated and competitive behaviour is being sanctioned. The concern is that such discrimination unavoidably leads to consumer harm by increasing retail prices and/or reducing incentives to invest, thereby hindering competitiveness as well as economic and social growth.

[13] See Geradin and O'Donoghue (2005) and Cases COMP/38.233 – Wanadoo Interactive [2003] and T-339/04 France Télécom v Commission [2007] ECR II-521.

SUMMARY OF DISCUSSION

The Chairman, Alberto Heimler, opened the roundtable by stating that a margin squeeze is a form of exclusionary abuse of dominance that arises when a vertically integrated monopolist sells an upstream bottleneck input to rival firms that compete with the monopolist in the provision of a downstream product charging prices that leave margins 'too small' for them to compete. A margin squeeze may also be characterised as some other form of abuse of dominance e.g. refusal to deal, predatory pricing, price discrimination or excessive pricing. The Chairman set out the topics which would be discussed; (1) What is a margin squeeze, (2) Which measure of costs should be used, (3) Is there a difference between a regulated and an unregulated industry, (4) What is the remedy for margin squeeze cases and how can incentives be maintained for the dominant firm to reduce prices for consumers?

The Secretariat gave a presentation covering (1) the necessary conditions for a margin squeeze to be in place (2) how a beneficial margin squeeze could occur, (3) how a harmful margin squeeze could occur and (4) the potential level of harm that can arise from margin squeezes. It was emphasised that a margin squeeze has a very significant consumer harm element to it that easily runs into billions of dollars. The three main preconditions for margin squeeze were set out as (1) where a company has a unique control of an upstream input for making a downstream product, (2) where the company is required to provide other companies with access to that input (although there are debates over whether the obligation is regulatory in nature or is an antitrust obligation) and (3) where the company is also active in the downstream retail product market. A margin squeeze would then arise when the margin between the price at which the firm with the bottleneck asset sells the downstream product and the price at which the firm sells the upstream bottleneck asset to its rival is 'too small' to allow an efficient downstream firm to effectively compete. The Secretariat then provided two visual examples of margin squeeze cases in the wholesale ADSL line and retail internet markets. A margin squeeze could be beneficial to consumers if it eliminates substantial double marginalisation, but which could be mistakenly construed as a margin squeeze. However, it is hoped that the relevant authority would recognise this situation and not prosecute. To illustrate the level of consumer harm in a real margin squeeze case a visual example from a European case was given to demonstrate that one year of consumer harm could be estimated at €2.5 - €4.3 billion in one year. The margin squeeze in this case was alleged between 2001-2006, but the fine attached to the decision was small in comparison to the estimated consumer harm.

1. What is a margin squeeze and how can consistency in enforcement be ensured?

The Chairman commented that if a margin squeeze is similar to a refusal to deal, there has to be a duty to deal in the first place. Therefore the upstream input must be 'indispensible', which the chairman noted was the terminology he would adopt and which was also similar to that in the Oscar Bronner case. A price squeeze often means pricing an indispensible input very high and at the same time pricing the final output so low that a competitor purchasing the indispensible input is unable to gain enough profits to stay in the market. The mere fact that a competitor of a vertically integrated firm exits on the market does not imply that the consumer suffers any harm, since the excluded competitor may be less efficient than the vertically integrated firm. A price squeeze may be considered analogous to a refusal to deal, or a constructive refusal to deal in EC terminology i.e. where access is so costly that it is tantamount to a refusal. In these circumstances a margin squeeze is an antitrust violation only if there is an antitrust duty to deal on the part of the dominant firm. This is the main argument in the linkLine Supreme Court judgement.

The Chairman then gave the floor to the U.S. delegation to discuss the legal difference between an antitrust and regulatory duty to deal, and whether they are always separate concepts.

A delegate from the United States stated that there is not a fundamental difference between an antitrust duty to deal and a regulatory duty to deal. Both involve the provision of access to a downstream competitor. However, in the U.S. there is a doctrinal difference as evidenced in the 2004 Trinko case in which the Supreme Court defined antitrust duties to deal as obligations to deal with a competitor which had been previously established. Regulatory duties to deal would be duties to deal pursuant to a separate statute. This is a doctrinal difference, but there are also theoretical and institutional reasons to differentiate between the two. As regards the institutional difference, a regulator may be better placed to decide what narrow circumstances permit the imposition of a duty to deal. Requiring a dominant firm to share their returns on investment with a downstream firm has a deterrence effect on future innovation and investments by the dominant firm. It therefore requires a careful balancing of the short term effects on competition in the downstream market against the longer term possible deterrence of beneficial conduct in the dynamic sense by the dominant firm. A regulatory agency may also be better placed to set upstream prices than an antitrust court.

The Chairman referred to the linkLine case in which the court concluded there was no antitrust duty to deal and therefore no margin squeeze. The Chairman asked the U.S. to clarify if there could, hypothetically, have been an antitrust duty to deal, given the duty to deal was imposed via commitments in a merger decision, i.e. could margin squeeze be a case worth pursuing in the U.S..

The delegate from the United States stated that if an antitrust agency were to impose a certain access condition as part of a remedy for a merger involving an upstream price and this access condition was then violated, the courts would be likely to view this as a violation of a consent decree. However, there was great reluctance to open a stand-alone margin squeeze claim under section 2 of the Sherman Act for this type of case and actions would therefore be pursued at the District Court as an enforcement of the consent decree. The U.S. delegate confirmed that the question of whether there is a duty to deal comes before the question of price and if there is no antitrust duty to deal, there can never be a constructive refusal to deal through price. Where an antitrust duty to deal does exist, there has to be the notion of a constructive duty to deal through price. While the Supreme Court does not deal with the concept of a stand-alone margin squeeze case where there is a duty to deal, there could be a basis for a stand-alone margin squeeze doctrine in that context. There is still the risk of deterring beneficial activity even where there is a duty to deal by recognising a margin squeeze doctrine, but the problem is setting the upstream wholesale price. However, the requirement to set an upstream price can be avoided if there is a stand-alone margin squeeze doctrine that imputes any whole sale price charged to a rival to a company's own retail price. Predatory pricing is then defined, imputing the wholesale price at which a company sells to its rivals. A company could then sell its products at any price it wanted, as a margin squeeze would be recognised, and the court would take into account if the company was predatory pricing (i.e. pricing below costs) plus the costs being charged to its competitors and the company would be liable under antitrust laws. Therefore margin squeeze in this context could perform the useful function of freeing antitrust authorities from setting a regulated upstream price and avoid constructive refusal issues. It would not be possible to have a constructive refusal to deal through price without acknowledging a duty to deal.

The Chairman observed that two broad definitions of margin squeeze emerged from the submissions, the 'not enough profits' standard and the 'efficient component pricing rule' (ECPR). The not enough profits standard would treat margin squeeze in a more lenient way than predation. For example, in the CFI judgment in *Industrie des Poudres Sphériques*, 2000, the Court defined price squeezing as a situation where a dominant undertaking "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". For many years this was the point of reference for the EC on margin

squeeze. However in a subsequent judgment on Deutsche Telekom, the Court provides a more rigorous definition. Following that case, margin squeeze is defined as a situation where the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs of the dominant operator for providing its own retail services on the downstream market. This second definition is clearly within the ECPR standard. The Chairman therefore asked the European Commission to confirm if the correct standard used was that suggested in *Industrie des Poudres Sphériques* or in *Deutsche Telekom,* or whether there was no difference between the two.

A delegate from the European Commission confirmed that in *Industrie des Poudres Sphériques* reference was made to a sufficient margin, but in subsequent decisions and case law, including Deutsche Telecom, reference was made to a negative margin or coverage of product specific costs. This was also the approach adopted in Telefónica in applying the equally efficient competitor test, without waiting for the CFI to adopt this more rigorous approach. This reflects a reticence on the part of antitrust regulators to become price regulators.

The Chairman commented that in the Deutsche Telekom case the duty to deal originated from a regulatory obligation, although the regulation allowed some leeway in retail prices. The Chairman asked the EU to confirm whether a regulatory duty to deal is exactly the same as an antitrust duty to deal, or whether there were differences between the two in EC practice.

The delegate from the European Commission responded that the objectives of antitrust intervention and regulation may not always be exactly the same, in the sense that regulators may be entrusted with the task of not just preserving competition for the benefit of consumers, but actively promoting competition in certain sectors. In practice 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). In such sectors *ex ante* regulation is often necessary, and regulators may be more interventionist than antitrust authorities. However, the two have complementary roles: while regulators try to minimise *ex ante* the risk of market failures, antitrust authorities act *ex post* in order to remedy abuses. In Deutsche Telekom and Telefónica both firms had the leeway necessary to put an end to the margin squeeze, and neither company could have ignored that a margin squeeze was taking place It should be added that in the EC, telecoms regulators carry out a balancing of incentives to invest and innovate which is materially the same as that which an antitrust authority would carry out in order to establish if an obligation to supply should be imposed under Article 82. Also, any access obligations imposed by national regulators on incumbent telecoms operators are considered by both the Directorate-General for Information Society and the Directorate-General for Competition of the European Commission. If after such an analysis, a regulatory obligation to supply was lifted it would be unlikely for the Commission to take action under Article 82.

The Chairman turned to BIAC's contribution which discussed whether or not margin squeeze is a stand-alone practice to be prohibited under abuse of dominance. The Chairman questioned the concept of what constitutes a 'stand-alone' practice, and gave the example of predation which is prohibited only in so far as the predatory practices are exclusionary and asked whether it would not be more appropriate to define a margin squeeze (e.g. which cost definition to use) provided a dominant form is subject to an antitrust duty to deal.

A delegate from BIAC responded that it was questionable whether margin squeeze is a single abuse, or connected to other more common types of abuses of monopoly power or market power. BIAC agreed there should be a clear definition of what constitutes a margin squeeze especially in light of the Telefónica and Deutsche Telekom cases. Both cases took the access price, which was regulated, for granted. The EC described this as an access price, but at the time these cases occurred the price had one function i.e. easing

entry to other competitors and giving them a high enough margin to stay in the market, whether they were efficient or not. The goal of the access pricing was to lower the market shares of the incumbent. If a margin squeeze case occurred, the main question would be whether this price served the needs of the new entrant. While it is clear that the U.S. has more elaborate case law on this, in BIAC's view the EC case law does not reach the economic standards of setting a margin squeeze test.

The Chairman clarified that in the Deutsche Telekom case the retail price was at, or sometimes even below the cost of access. The delegate from BIAC responded that it was the access price for the telephone line which was below the local loop unbundled price. However, the local loop was used for ADSL, and the price for this was more than double at the time. This was one of the main factual arguments used. If the ex-ADSL price had been taken there would have been no margin squeeze separation at first sight, and this was the heart of the discussion before the court.

The Chairman continued that besides exclusionary conduct, there are other reasons why a margin squeeze practice may be prohibited including discrimination and excessive (access) prices. The French report referred to the Direct Energy case in which the plaintiff considered that the price offered for the provision of electricity was discriminatory, given the internal transfer conditions that EDF gave to its own non-regulated downstream activities. A similar complaint was made in Chile in the Entel PCS case. However the complaint was rejected by the TDLC for lack of market power. The Chairman asked France if simple discrimination would be sufficient to prove a margin squeeze and what would be the standard of proof.

A delegate from France confirmed that margin squeeze is effectively a form of discrimination, and this was the basis of the Direct Energy case. However, for the French Competition Authority margin squeeze is regarded as an exclusionary practice. Discrimination is not prohibited and is not the key aspect of margin squeeze; the key issue is the exclusion of equally effective downstream competitors. The standard of proof is very important; the upstream input produced by the historical operator must be indispensible to allow the downstream competitors to exercise competitive pressure on the historical operator. If the upstream input is absolutely essential it can be presumed there is a potential risk of exit from the market. The French Supreme Court has recently indicated that it is only under this condition that a potential anti-competitive effect can be presumed. If the downstream competitors have the option to substitute the input of the historical operator, anticompetitive effects cannot be presumed and therefore the effect on competition must be examined. A further condition related to the standard of proof is the requirement for the operator to have the choice to operate a margin squeeze i.e. if the margin squeeze is automatically derived from a regulation then a company cannot be held responsible. In the majority of French cases there was a duty to deal meaning access was a regulatory obligation, and the downstream input price was regulated. This interaction between regulation and the competition authority is very important, and margin squeeze is by definition is a hybrid subject. There are wholesale prices which are evident mainly in the regulated sectors, but there are also retail prices, e.g. in telecoms which in general are not regulated. There is a pragmatic collaboration between sector regulators and competition regulators, with examination taking place on a case-by-case basis. The sectoral regulator is more competent in the upstream wholesale market and the competition authority more competent in the retail downstream market, and as margin squeeze is a combination of the two, both sectoral and competition regulators are involved.

In the Direct Energy case, which concerns nuclear energy, there was no duty to deal. In France nuclear energy is very important, and accounts for around 80-90% of production. Without it a company cannot reasonably serve downstream customers and it is therefore an essential input. At the time the historic operator was EDF, and while it was under no obligation to do so, EDF nonetheless signed a contract with its competitor Direct Energy to provide access to its nuclear energy. This contract resulted in a margin squeeze. The competition authority started a margin squeeze case and this resulted in commitments in which EDF accepted to provide nuclear energy to its competitors on the downstream

market, and proposed a bidding mechanism to do so. At the time of the Direct Energy case there was no regulation in the electricity market. The Council's partial remedy was to use a bidding mechanism to require the historic operator to provide access. There is currently debate in France concerning how to proceed in this area and the beginnings of significant reform have been put in place by the government with the establishment of an independent commission. It is likely this will result in a regulation in France, requiring obligatory access to nuclear energy.

The Chairman observed that in order to define an abuse it is necessary to prove the existence of dominance in a relevant market. In this respect in most jurisdictions a duty to deal with competitors is associated with a notion of indispensability of access. The Oscar Bronner and Aspen Skiing cases provide quite similar characteristics for the reasons why access is indispensable. Under U.S. law there is an additional aspect to duty to deal not found in the EU, which is the requirement for an interruption of a previously held relationship. Indispensability of access is very significant, as it suggests that simple dominance is not sufficient for an ordinary refusal to deal case, and in fact a monopoly or quasi monopoly would be needed. A company with only a 45% market share cannot have an indispensible product, unless there is significant capacity restraint on other actors in the market. However, in some jurisdictions the standards seem to be lower than this. The Chairman referred to the Polish submission which detailed a margin squeeze case in the area of waste collection. The Chairman asked Poland to confirm whether the dumping site controlled by the municipality was dominant (given it only had a 60% share of the market), which standard the Polish authority used for assessing dominance and whether it considered the fact that there were other more distant sites that could also have been used.

A delegate from Poland responded with three points. Firstly a firm holding 60% of the market against 40% atomised competition (which represented around 70 firms) can safely be considered dominant under Polish law. Secondly the situation was largely artificial as the fact the competitors had to use dumping sites a significant distance away was actually a consequence of the anticompetitive practice that the owner of the dumping site had engaged in. Thirdly, this was not only a case of margin squeeze as on the basis of the evidence the municipal dumping site could also have been accused and held liable for price discrimination. Therefore in terms of equivalence of certain practices, the kind of behaviour that the municipality engaged in could also be pigeonholed into another category of abuse.

The Chairman then turned to the Swedish contribution which asked a number of questions related to a request made by the Stockholm district court to the European Court of Justice ("ECJ"). The Swedish competition authority asked in its report whether dominance is sufficient or if there is a need for something more, a so-called super dominance in the line of the Oscar Browner conditions. The Chairman asked Sweden what its views were on this question and whether or not there should be full symmetry between refusal to deal and margin squeeze.

A delegate responded that Sweden recognised that there was a difference between margin squeeze and refusal to deal which can motivate different treatments under competition law. The national court had asked for a preliminary ruling from the ECJ on a margin squeeze case, and in which the dominant firm supplied the wholesale product to its rivals voluntarily. The question concerned whether a dominant firm can engage in margin squeeze without violating the competition rules, given it could have chosen not to supply the input at all, and if it does supply and supplies at certain prices should this be a deemed violation? This has implications for other forms of abuse, such as predatory pricing and discrimination, as a dominant firm may argue that since they had the right to refuse to deal they cannot be found to have acted abusively through discriminatory or predatory behaviour. In the Swedish case the dominant firm did supply wholesale products so it was not a refusal to deal situation, and the duty to deal question was therefore not really relevant as the firm already dealt. The same is true for discrimination cases i.e. if a dominant firm discriminates it may be a violation of competition rules, but there is no consideration of whether there is a duty to deal before a remedy is imposed for discriminative behaviour. The Chairman

commented that it would still have to be proved that somehow the behaviour is exclusionary otherwise any discrimination would be prohibited. The delegate from Sweden responded that there might be some competitors who are very efficient or ready to take initial losses, and some who might enter the market anyway, but in the long run efficient competitors would be excluded.

The Chairman observed that in Chinese Taipei the only margin squeeze case opened was eventually dismissed as a result of an international comparison of pricing patterns of telecom operators and profit margins of telecom operators. Similarly in Canada the two cases that were discussed in the report, one concerning internet service and the other concerning gasoline, were both dismissed. In the internet service case the company concerned, Canada Bell, only had a margin squeeze equating to 35% suggesting the company was not dominant downstream and appeared to be the reason why the case was dismissed. In general the key issue in margin squeeze cases is to clarify whether a practice is exclusionary and the firm dominant in the upstream input market. The Chairman therefore asked Canada to explain the specific circumstances that led the Bureau to consider competition in the downstream market instead.

A delegate explained that in Canada margin squeeze is addressed as a form of abuse of dominance pursuant to section 79 of the Competition Act, and the subsection sets out three elements all of which must be established in order for the competition tribunal to grant an order: (*i*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business, (*ii*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and (*iii*) the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market. Canada Bell was a vertically integrated company, which offered high speed residential services. The Bureau received a request to initiate an enquiry, following allegations that Bells subsidiary (Bell Global Solutions) was selling these high speed internet services to residential consumers at retail prices which were below the tariff that Bell was charging the other internet service providers. It was alleged that the price constituted below cost selling or a margin squeeze, and therefore an abuse of a dominant position pursuant to section 79. The evidence obtained by the Bureau found that retail prices were below cost, but that elements of section 79 were not met as the retail internet market was found to be very highly competitive and was characterised by low barriers to entry. Considering the downstream market was important to understand the result of Bell's pricing policy, and given there was clearly evidence of effective competition on the market there was no harm and therefore no case to be made.

The Chairman then turned to the Korean contribution, which stated that where large business groups have disproportionately strong economic power (as is the case in Korea) potential margin squeeze through affiliates can be a problem. The Chairman therefore asked the Korean delegation to confirm what the definition of a firm under Korean antitrust law was, and whether the boundary of the definition cut across legal definitions, i.e. where a single group is treated as a single firm.

A delegate from Korea responded that the definition given under the Monopoly Regulation and Fair Trade Act defines a firm as an entity which operates a manufacturing business or service business or any other businesses. A firm is not defined differently under a margin squeeze case, and therefore a single business group is not treated as a single firm for the purposes of margin squeeze. In Korea large business groups have market dominance in major industries and they operate in various business areas through their affiliates. There is therefore a high potential for business groups to be involved in anticompetitive behaviour, such as a margin squeeze, through their affiliates. The concept of affiliates can have various meanings, and can include fully controlled or partially integrated companies.

2. Which measure of costs should be used in the margin squeeze calculation? Would a regulator choose a different standard than an antitrust enforcer?

The Chairman observed that most delegations applied the 'as efficient competitor standard', implying that they refer to the costs of the incumbent in order to measure whether the prices are exclusionary or not. This also helps to ensure that an incumbent has all the necessary information to determine whether it is violating the law or not. The issue becomes more complicated if the 'as efficient competitor standard' is not applied. The UK contribution referred to the 'reasonably efficient competitor standard' and the 'adjusted equal efficient competitor standard'. The costs relevant to these standards are higher, for example to ensure that an entrant will be able to exploit economies of scale and scope in the future. Margin squeeze cases could then be defined referring to costs that would make such an entry possible. However in an antitrust setting the adoption of the standard is very difficult because it is based on the hypothesis that the dominant company is fully informed of what the reasonable costs are. In the UK submission these asymmetric standards are applied by sector regulators only, and not by the antitrust authorities. The Chairman asked the UK to confirm whether these standards are applied under antitrust or regulatory provisions, as many sectoral regulators apply the antitrust law as well, and whether there is a difference between an antitrust and a regulatory standard with respect to the costs of access.

A delegate from the UK responded that all the cases described in their paper were competition cases, but that they were implemented by regulatory authorities as the regulatory authorities in the UK have competition powers. However, there may be discussions concerning regulation and what a suitable margin is, and in this case under explicit ex-ante regulation there are examples, for instance in telecoms, where a specific margin has been put in place between two different products. Ofcom has in the past set a specific margin between the local loop price and an ATM access. Therefore, regardless of whether ex-ante regulation or competition law is used, it is a valid question whether a reasonably efficient or equally efficient competitor should be used. This is because there are differences between the regulated industries and non-regulated industries.

Firstly, an equally efficient competitor test may actually foreclose more efficient competitors if adjustments are not made for economies of scope and economies of scale. These factors are particularly relevant when considering regulated industries in which there are usually large economies of scale, with several products being provided over a single infrastructure. Secondly, certain characteristics of the regulated industries may mean different standards should apply, specifically (i) the incentives to innovate in regulated industries are often explicit as there is a regulated wholesale price, (ii) the Chicago critique, which increases sensitivity to refusal to supply and using an equally efficient competitor test, does not necessarily apply in the regulated industries, (iii) in a regulated monopoly industry even a less efficient competitor may be preferable to no competitor at all, (iv) a different test should ensure there is not an incorrect read across to non-regulated industries.

The Chairman commented that in regulated sectors only just opened up to competition leaving a margin big enough should provide the right incentive for entry, but would involve some asymmetry in place to ensure that when competition is finally functioning well, the industry would stabilise and return to normal. Therefore neither the reasonable efficient competitor standard nor the adjusted equally efficient competitor standard would be needed, as the economies of scale and scope would have already been exploited by the new entrant, meaning a return to the efficient competitor standard. Therefore some form of rule would be needed to clarify which cost definition to apply according to the circumstances of the downstream market.

The delegate from the UK agreed this would be largely true, and added that provided there is an explicitly regulated upstream market then there will be different incentives to innovate upstream and these different upstream incentives would have to be regulated. Therefore, even if there is a competitive

downstream market, there may be concerns related to the regulated upstream market. Once there is no regulation upstream market then an equally efficient competitor test would probably be the correct one, if at all. The issue is what happens when the switch is made from the adjusted equally efficient competitor or reasonably efficient competitor to an equally efficient competitor, and at the moment it is not clear what the term is.

The Chairman recalled that in predation there is a presumption of illegality (provided there is a high probability of recoupment) where prices are below average variable costs, and there remains an uncertain verdict concerning prices above average variable costs but below average total costs. In margin squeeze cases the definition of costs is less clear. The question is why would a margin squeeze need a more favourable attitude towards entrants than predatory pricing? The Chairman asked Germany to explain why in a recent case the Bundeskartellamt used long run average incremental costs as a measure for a violation in a margin squeeze case, and whether the average incremental cost test would also be used in a predatory pricing case.

A delegate from Germany explained that the general provisions of abuse control were applied in the case (which concerned the telecoms sector) and the Bundeskartellamt used the concept of long run average incremental costs after considering the specifics of the economic sector at hand. The case concerned not only a vertically integrated incumbent but also a market characterised by a high proportion of fixed costs. This specific structure seemed to be mostly adequately addressed through long run average incremental costs. However the approach taken was tied to the specifics of the telecom sector, and while the standard fitted this case it would not necessarily be the de facto standard applied by the Bundeskartellamt in every single margin squeeze case.

The Chairman then referred to the Portuguese report which contained an analysis of the costs to be considered when assessing whether margins are exclusionary or not. In particular, according to the Portuguese Authority, a long-run approach is appropriate and the Authority should calculate the minimum long-run level of costs that would be consistent with a financially sustainable business. Marginal cost pricing on the part of the vertically integrated company is therefore prohibited. The Chairman commented that such a standard may be fully appropriate for a regulator to introduce in certain specific circumstances, and asked Portugal whether it was appropriate for a competition authority to apply that standard as a general rule.

A delegate from Portugal referred to the recent margin squeeze case in the broadband market and explained that the long run average incremental costs test was used as the costs measure and this allowed a consideration of costs at the retail level but not the retail plus the wholesale level. In terms of marginal costs, and the marginal costs used by the company to maximise its profits, this involves a consideration of a company's vertically integrated business. The costs are therefore being considered at different levels, with retail on the one hand and retail plus wholesale on the other. The long run average incremental cost is often used by regulators in the telecom industry not only for margin squeeze cases but also for access price regulation. It is important to ensure consistency with cost methodologies used by regulators as they provide opinions on the decisions made by competition regulators, and the opinions are generally similar. The concept of long run average incremental cost is very close to the concept of avoidable cost. This is often used in predatory pricing and if a company is (i) pricing below variable costs, or (ii) pricing in between average variable costs and avoidable costs, and there is an intention to exclude, then the company is presumed to be doing something illegal.

The Chairman remarked that in the Turkish report reference was made to a case against Turkish Telecom (the incumbent telecom operator) in which the standard of proof was unclear. Although no rival left the market due to the price squeeze, the practice nonetheless prevented rivals from expanding and gaining market shares. The Chairman asked Turkey whether the conclusion depended on the cost

definition that was used and whether the same definition of costs would be used in a pure predatory pricing case and if not why not.

A delegate from Turkey explained that in the mentioned case there was an obligation on the incumbent telecom operator, Turk Telekom, to provide internet services through a legally separate entity called TTNet. In the profitability analysis conducted, the incomes and costs of TTNet were averaged on a monthly basis. In doing this, three groups of costs were taken into account including (i) service payments to Turk Telekom for wholesale ADSL access under resale model, (ii) operating costs calculated on average terms and (iii) subscriber acquisition costs spread over a period of three years As TTNet's sole activity was the provision of retail broadband internet access service, the incremental costs and fully distributed costs it had incurred were almost equal. Therefore, even if the case had been treated as a predatory pricing case, the analysis and the cost definition would not have changed,. Therefore, the Turkish Competition Authority did not use different cost standards for the price squeeze analysis.

The Chairman then turned to the Dutch contribution, which stated that it is not always desirable for an antitrust authority to intervene in regulated markets where there is a margin squeeze case as the regulator may be better placed. The Chairman commented that this may result in a good division of responsibility and asked the Netherlands if they had any examples where regulators had dealt with margin squeeze cases rather than the competition regulator.

A delegate from the Netherlands stated that the competition regulator had only dealt with one case of margin squeeze as regulators dealt with margin squeeze directly in the regulations. The NMA does have the ability to intervene ex-post if required, but this had not occurred as yet. In the [KPN –CHECK] merger, which concerned the creation of a new glass fiber network, the NMA imposed conditions as competition issues were foreseen regarding the vertical relationship. While discussing the type of conditions to be imposed, the NMA worked in close conjunction with the Dutch independent post and telecom authority who were at the time drafting a piece of legislation concerning margin squeeze. The fact that both agencies operate from the same building facilitated easier case handling, and the day the decision was handed out the legislation was also published. In the end the conditions were almost a mirror image of the regulation as drafted by the regulator and such cooperation serves to ensure that future margin squeezes in this sector would be directly handed by the regulator. It is more efficient for regulators to assess whether margin squeeze is likely or actually occurring post merger as they have experience in the field, sector specific knowledge, resources and expertise at their disposal and are looking at the market anyway. This relives the NMA of the time consuming margin squeeze assessments, but allows the option of intervention if necessary. The NMA also has integrated energy and transport regulators within the same organisation which facilitates better coordination between these bodies and assessment of margin squeeze is also much easier.

The Chairman turned to the contribution from the Czech Republic and a margin squeeze case concerning the provision of adsl services in which the Competition Office cooperated with the telecom regulators in the investigation of the case. The Chairman asked why the case was taken up by the antitrust authority and whether there was any question of sharing competences between the regulators.

A delegate from the Czech Republic responded that under both national and European law, the Competition Office is authorised to deal with the competition issues including margin squeeze in the telecom sector. The case in question concerned a margin squeeze in the broadband access market and therefore the Office is obliged to deal with it. The Czech telecom office has historically dealt with margin squeeze issues ex-ante and they concluded that there was no problem, and the Competition Office therefore intervened.

3. Is there a difference between a regulated and an unregulated industry?

The issue is not whether the industry is regulated, but whether there is a duty to deal that is relevant for antitrust cases. The United States is the only jurisdiction where either there is a regulatory obligation to supply (and in that case no antitrust duty) or an antitrust duty to supply (outside of a regulatory obligation). In Lithuania, the competition authority clearly referred to the notion of an essential facility in the definition of dominance in the provision of access to DSL fixed line services. In Norway the competition authority intervened in the agricultural sector (as did the South African authority), by identifying an abusive margin squeeze in the market for cheese, where the integrated cooperative held a dominant position in milk. The Chairman asked Norway whether competing cheese producers could import milk, whether there was enough foreign competition in the Norwegian cheese market (through imports), and what, if any, were the effects of the abuse on consumer welfare.

A delegate from Norway responded that the NCA had not so far identified any abusive margin squeeze in the market for cheese where the integrated cooperative held a dominant position in milk and therefore there were no established effects on consumer welfare. However, the NCA had lodged an appeal at the Norwegian court of appeal to overturn the district court judgment in a case which concerns an exclusive distribution agreement in the market for cheese and not an anticompetitive margin squeeze. In terms of monitoring possible margin squeeze in the Norwegian dairy market, the NCA established a surveillance scheme of the dominant firm's gross margins. This was motivated by the fact the Norwegian diary sector has a number of characteristics typical in margin squeeze cases i.e. dominant upstream firms selling an essential input to downstream rivals and competing in the downstream market against those rivals. The purpose of the surveillance scheme is to observe whether the margins between the dominant companies' prices upstream and downstream are so small that the NCA should open further enquiries to establish if they constitute a margin squeeze. The NCA is using a test based on the dominant companies' revenues and costs and is equivalent to the so called 'as efficient' test. The object of the surveillance is three fold; (i) to help the NCA disclose a possible margin squeeze conducted by the dominant firm and potentially provide the basis for the authority to initiate further investigation, (ii) to establish a basis for assessing possible complaints from competitors about the dominant firms pricing, (iii) to act as a deterrent effect on the dominant firm. In terms of whether competing downstream cheese produces could import milk, this is unlikely given the high import tariffs on raw milk and transport costs which would make this an unprofitable strategy. In prior cases the NCA has concluded that geographical market for raw milk is national. As a consequence the raw milk provided by the dominant vertically integrated firm is an essential input for the downstream rivals. In terms of foreign competition in the Norwegian cheese market, the import of cheese to Norway is limited to about 10% of the total production, and raw milk cheese faces high tariffs when imported to Norway. In addition a large share of the imported cheese are products that are not produced in Norway and consequently the products that are imported may not be in the same relevant product market as the cheese produced in Norway.

The Hungarian contribution referred to a margin squeeze case concerning the funeral industry in which the funeral provider, which also owned a mortuary, priced its downstream services lower than the price that downstream competitors had to pay for accessing the mortuary. The Chairman asked Hungary how other competitors could operate if access was so restrained.

A delegate from Hungary clarified that the mortuary was a building in the cemetery where relatives and friends pay their respect to the dead during the first stage of the memorial service. Usually this facility is owned by a dominant firm active in the mortician industry and other firms active in the market would hire the mortuary for the days before the funeral. Without access to this facility competitors cannot do business. Following complaints in the 1990's, regulation was introduced and municipalities regulated certain parts of the activity, including the provision of the mortuary facilities. To some extent the price was regulated, but there was room to manouver. Since the access was mandatory via regulation and action

had already been taken under the competition act against the dominant firms for refusing to deal, firms realized that they needed to do the same thing in a different way. They therefore engaged into various pricing strategies including price squeeze.

The Chairman observed that the CFC in Mexico linked margin squeeze cases to the existence of an essential facility. Regulation establishes which facility is essential and introduces a statutory third party access regime. A very similar regime appears to be in existence in Russia where it is very difficult, if not impossible, for the FAS to intervene in margin squeeze cases in unregulated settings. Mexico's contribution makes it clear that there is full correspondence between margin squeeze and refusal to deal cases. The Chairman asked Mexico if, given its regulated access regime, a regulated company which refused to provide access would commit a regulatory or an antitrust violation, whether this situation would be the same for margin squeeze, and whether it would be possible to have a margin squeeze case in an unregulated setting.

A delegate from Mexico responded that it would be possible to have a margin squeeze case in an unregulated market as the concept of margin squeeze does not really exist in Mexico. All illegal exclusionary conducts have to be included in the law, and as margin squeeze is not included, it is therefore characterised as something that is regulated. To date margin squeeze cases have only occurred in regulated markets, and margin squeeze cases in both regulated and non-regulated sectors would be carried out under the normal exclusionary conduct standards. There is no reason why there would not be a case in a non-regulated sector. There is an interesting interaction between the regulators and the competition commission, and the threat of possible intervention by the competition authority can encourage regulators to act more quickly. The decision as to which agency will act is carried out on a case by case basis. However, if the conduct is included or can be characterised under Article 10 of the competition law it is an antitrust violation and therefore the competition agency has full authority. It might be the case that it is also illegal under sectoral law and there is overlap, and in this case there will be an exchange of information with regulators. However, there is no clear line between what the competition agency and what other regulators do.

4. What is the remedy for margin squeeze cases and how can incentives for the dominant firm to reduce prices for consumers be maintained?

There is some concern from both economists and lawyers that imposing an antitrust obligation to deal in the presence of a regulated price for access would impede the vertically integrated firm from reducing retail prices to the benefit of consumers (eliminating double marginalisation) and would therefore lead to higher prices. This is a genuine worry, because it would be contrary to any principle to impose an antitrust obligation that would lead to higher prices for consumers, without any losses on the part of the integrated supplier.

In the Slovak Republic the Office recently concluded two major margin squeeze cases. In one of these cases, the Slovak Telecom voice and data case, the margin squeeze occurred in fixed telephony services. Slovak Telecom, the incumbent telecom operator, was charging retail prices that were lower than the access charges that a competitor had to pay. The Office found a margin squeeze. The Chairman asked the Slovak Republic whether these retail prices were below cost and therefore whether Slovak Telecom was making a profit on the calls, and if Slovak Telecom was making losses why was predation not used, given this is much more flexible in terms of remedies.

A delegate from the Slovak Republic explained that the analysis was carried out with simple comparison of wholesale access cost price and retail price and there was no inclusion of cost in the analysis. It was therefore not clear if Slovak Telecom was making losses, but it was highly probable given the retail price of the specific product in question was almost 0 and it was the only price for the specific

retail products. However, Slovak Telecom did not appear to be making any losses in the area of fixed voice telephony. As no costs were reviewed it was not possible to carry out predation tests.

The Chairman then turned to the Italian contribution. Telecom Italia won a two and a half year contract for telephone services for the Italian public administration by offering a price unmatchable by Telecom Italian rivals, given the regulated access price. The bid by Telecom Italia was profitable, but it would have been even more profitable for Telecom Italia to leave the service with competitors. The intent was clearly exclusionary and the reason was that having the Italian Public Administration as a customer was reputation enhancing for Telecom Italia and for its rivals. The Chairman asked Italy if there were any solutions for this type of public policy related problem.

A delegate from Italy clarified that the purpose of the authority's intervention was not to require Telecom Italia to make a higher bid, as this would result in both consumers and tax payers being worse off as the customer was the public administration. The point in this case concerned the cost of access to networks, which is arguably a matter for regulators. The costs for the access to the network was based on the cost that Telecom Italia had provided to the telecom regulator using an accounting system which was based on historical costs and not long run incremental costs as it should have been. The issue was not that Telecom Italia should have made a higher bid and charge higher retail prices, but perhaps should have applied lower costs for access to the network. The problem of the intervention of regulators or competition authority in this matter remains open.

The Chairman commented that if Telecom Italia had been required by the bidding company, regulator, or antitrust authority to match any future reduction in price with a corresponding reduction in access prices, then the problem would have been solved. The dilemma is that if the access price remains fixed then the only remedy possible is to increase retail prices.

The Chairman then referred to a case in Japan in which the Supreme Court did not confirm the 2003 margin squeeze decision by the JFTC until May 2009. Delays in judicial review are common in many jurisdictions, for example in Brazil a 1999 case is still under review ten years later. The Chairman asked Japan what the prospects were for a reform and whether having such long judicial reviews is problematic.

A delegate from Japan explained that the 2003 case concerned Nippon Telegraph and Telephone East Corporation (NTTEC) which was a dominant carrier in telecom services, alleged to be engaged in the conduct of exclusionary private monopolisation under the AMA. The JFTC issued recommendations in December 2003 to take elimination measures, but NTTEC did not accept them. The JFTC started the hearing procedure in January 2004, with the hearing decision given in March 2007. It decided that NTTEC excluded the business activity of its competitors and caused substantial restraint of competition in the field of FTTH service. NTTEC filed a suit to oppose the decision, but the Tokyo High Court dismissed the appeal in May 2009. It therefore took 6 years from the beginning of the recommendation in 2003 to the decision of the high court in 2009. One of the reasons why it took so long is that the accumulation of private monopolisation cases is still very limited so there was a long debate in the proceedings. In this specific case NTTEC voluntarily ceased its violating conduct in April 2004 immediately after the recommendations were issued. Therefore there was no immediate concern of aggravating the adverse effect of violating conduct on competition despite the long hearing procedure. In the hearing decision the JFTC eventually required no elimination measures to be taken. This case fell directly before the 2005 amendment of the Antimonopoly Act, following which the JTFC is able to issue a cease and desist order which is not suspended even if the hearing procedure started. The JFTC is dealing with the violation with the petition to the court for the urgent suspend order. The JFTC promotes the acceleration of the procedure process and Article 18 of the hearing procedure rules stipulate that the hearing examiner should aim to conclude the procedure as soon as possible and at least within 2 years.

The Chairman concluded that the discussion had commenced with an implicit debate between the United States and EC approaches i.e. the strict division between a regulatory duty to deal and an antitrust duty to deal in the U.S. (with a different statue applying for regulatory duties) as opposed to the more cooperative approach at EC level between antitrust and regulation, with regulatory decisions being shared with the competition authority. The concepts being used in the enforcement of the regulation mimic the antitrust concepts of dominance and exclusionary conduct, meaning the distinction between regulation and antitrust is much less clear. In legal terms there may not be any violation of regulatory provisions, in which case antitrust rules may be the most appropriate way to address the problem. The key issue related to margin squeeze is not guarantee a certain level of profits, but to ensure that the as efficient competitor is not excluded.

No final conclusions were drawn concerning the issue of costs, with marginal costs, average variable costs and long run incremental costs all being used. In certain jurisdictions where antitrust provisions were applied by the sector regulator, standards advantageous to entry were used, such as the reasonably efficient competitor or the adjusted efficient competitor. There was minimal difference found between regulated and non regulated industries, with many jurisdictions applying the same standard for margin squeeze cases across both.

An important issue that came out of the discussion concerns remedies. In regulated industries margin squeezes may be associated with profitable retail pricing by the vertically integrated incumbent operator, which may lead to a situation where entry is blocked but the vertically integrated company is not making losses. A solution to this may be imposing a ruling requiring the vertically integrated company to match any reduction in retail prices with a corresponding reduction in regulated access costs. This would be beneficial to consumers as it would allow low prices to come about while at the same time maintaining the possibility of entry on the part of as efficient competitors.

COMPTE RENDU DE LA DISCUSSION

Le Président, M. Alberto Heimler, a ouvert la table ronde en déclarant qu'une compression de marge constitue une forme d'éviction par abus de position dominante qui se produit lorsque un monopoleur intégré verticalement vend à des entreprises qui sont en concurrence avec lui pour la fourniture d'un produit situé en aval des moyens de production qui constituent un goulet d'étranglement en amont, en appliquant des prix qui leur laissent des marges « trop faibles » pour être compétitifs. Une compression de marge peut également être définie comme constituant une autre forme d'abus de position dominante comme le refus de vente, la fixation de prix d'éviction, la discrimination par les prix ou la fixation de prix excessifs. Le Président expose les sujets qui seront examinés ; (1) qu'est-ce qu'une compression de marge, (2) quel est l'indicateur de coûts à utiliser, (3) y a-t-il une différence entre un secteur réglementé et un secteur non réglementé, (4) quel est le recours en cas de compression de marges et comment peut-on maintenir des dispositions incitant l'entreprise dominante à réduire les prix qu'elle applique aux consommateurs ?

Le Secrétariat a présenté un exposé qui porte sur les points suivants (1) les conditions nécessaires pour qu'on se trouve en présence d'une compression de marge (2) les modalités d'une compression de marge bénéficiaire, (3) les modalités d'une compression dommageable de marge et (4) le niveau potentiel des dommages qui peuvent résulter de compressions de marges. Il a été fait observer qu'une compression de marge comporte des aspects très dommageables pour les consommateurs et qu'elle peut facilement se chiffrer à plusieurs milliards de dollars. Les trois principales conditions requises suivantes pour qu'il y ait compression de marges ont été mentionnées : (1) lorsqu'une société dispose d'un contrôle exclusif sur un moyen de production situé en amont pour la fabrication d'un produit vendu en aval, (2) lorsque la société est tenue d'accorder à d'autres sociétés l'accès à ce moyen de production (bien que la question de savoir si cette obligation est légale par nature ou s'il s'agit d'une obligation résultant du droit de la concurrence soit controversée) et (3) lorsque la société intervient également sur le marché de détail situé en aval. Une compression de marge se produit donc lorsque la marge entre le prix auquel l'entreprise qui dispose du bien constituant un goulet d'étranglement vend le produit en aval et le prix auquel l'entreprise vend le bien qui constitue un goulet d'étranglement en amont à sa concurrente est « trop faible » pour permettre à une entreprise efficiente intervenant en aval d'affronter efficacement la concurrence. Le Secrétariat a donné ensuite deux exemples de cas de compression des marges sur les marchés de gros de vente en ligne d'ADSL et les marchés de détail d'Internet. Une compression des marges peut être bénéfique pour les consommateurs si elle supprime une double marginalisation importante qui pourrait être interprétée à tort comme une compression de marge. Toutefois, on espère que les autorités compétentes tiendront compte de cette situation et n'engageront pas de poursuites. Pour illustrer l'importance du dommage subi par les consommateurs dans le cas d'une compression de marge réelle, un exemple de cas observé dans le cadre de l'Union européenne a été donné pour montrer qu'une année de préjudice pour les consommateurs pouvait être estimée entre 2,5 et 4,3 milliards €. Dans ce cas, la compression de marge était censée être intervenue entre 2001 et 2006, mais l'amende liée à la décision en question était faible par comparaison avec le préjudice estimé pour les consommateurs.

1. Qu'est-ce qu'une compression de marge et comment l'application de la loi peut-elle être assurée d'une manière cohérente ?

Le Président fait observer que si une compression de marge est similaire à un refus de vente, il faut qu'il existe au préalable une obligation de vente. Par conséquent, le moyen de production qui se trouve en amont doit être « indispensable », terme que le Président a estimé devoir adopter et qui est également similaire à celui utilisé dans l'affaire Oscar Bronner. Une compression de prix désigne souvent la fixation à un niveau très élevé du prix d'un moyen de production indispensable tandis que le prix du produit final est en même temps fixé à un niveau si bas qu'un concurrent devant acquérir ce moyen de production indispensable se trouve dans l'impossibilité de réaliser des bénéfices suffisants pour rester sur le marché. Le simple fait qu'un concurrent d'une entreprise intégrée verticalement sorte du marché n'implique pas que le consommateur subisse des dommages, puisque le concurrent évincé peut être moins efficient que l'entreprise intégrée verticalement. Une compression de prix peut être considérée comme analogue à un refus de vente ou à l'équivalent d'un refus de vente selon la terminologie de la Commission européenne, qui désigne le cas où l'accès au bien est si coûteux que cela équivaut à un refus de vente. Dans ces conditions, une compression de marge ne constitue une violation du droit de la concurrence que si ce droit comporte l'obligation de vendre de la part de l'entreprise en position dominante. C'est le principal argument du jugement de la Cour Suprême dans l'affaire linkLine. Le Président a ensuite donné la parole à la délégation des États-Unis pour traiter de la différence juridique entre l'obligation de vente qui résulte du droit de la concurrence et celle qui résulte des réglementations et déterminer si ces concepts sont toujours distincts.

Un délégué des États-Unis a déclaré qu'il n'existe pas de différence fondamentale entre l'obligation de vente qui résulte du droit de la concurrence et celle qui résulte des réglementations. Ces deux obligations portent sur la fourniture d'un accès à un concurrent situé en aval. Cependant, aux États-Unis, il existe une différence doctrinale comme l'a montré l'affaire Trinko de 2004 dans laquelle la Cour Suprême a défini l'obligation de vente résultant du droit de la concurrence comme l'obligation de vendre à un concurrent qui a été déterminé précédemment. Les obligations de vente résultant des réglementations seraient des obligations conformes à un texte juridique distinct. Il s'agit d'une différence doctrinale, mais il existe aussi des raisons théoriques et institutionnelles d'opérer une différence entre les deux. En ce qui concerne la différence institutionnelle, une autorité réglementaire pourrait être mieux placée pour décider quelles sont les circonstances particulières qui permettent l'instauration d'une obligation de vente. Obliger une entreprise dominante à partager le rendement de ses investissements avec une entreprise située en aval a un effet dissuasif sur les activités futures d'innovation et d'investissement de l'entreprise dominante. Il est donc nécessaire de comparer avec soin les conséquences à court terme pour la concurrence sur le marché en aval avec le risque à plus long terme de dissuader l'entreprise dominante d'adopter un comportement bénéfique au sens dynamique du terme. Une autorité réglementaire pourrait par ailleurs être mieux placée pour fixer des prix en amont qu'un tribunal anti-trust.

Le Président s'est référé à l'affaire linkLine, dans laquelle le tribunal a conclu qu'il n'existait pas d'obligation de vente résultant du droit de la concurrence et, par conséquent, pas de compression de marges. Le Président a demandé aux États-Unis de préciser s'il pouvait exister théoriquement une obligation de vente résultant du droit de la concurrence, étant donné que cette obligation avait été imposée par des engagements pris à la suite d'une décision de fusion, en d'autres termes si un contentieux valait la peine d'être engagé aux États-Unis dans le cas d'une compression des marges.

Le délégué des États-Unis a déclaré que si une autorité de contrôle de la concurrence devait imposer une certaine condition d'accès comme moyen de remédier à une fusion prévoyant la fixation d'un prix en amont, cette condition d'accès ayant ensuite été violée, les tribunaux seraient susceptibles de considérer cette décision comme une violation d'une ordonnance prise par consentement mutuel. Toutefois, on a observé une vive réticence à déposer un recours autonome contre une compression de marge en vertu de

l'article 2 du Sherman Act pour ce type d'affaire et des actions ont donc été intentées devant le Tribunal de District pour faire appliquer l'ordonnance prise par consentement mutuel. Le délégué des États-Unis a confirmé que la question de savoir s'il existe une obligation de vendre l'emporte sur la question du prix et que s'il n'existe pas d'obligation de vente résultant du droit de la concurrence, on ne peut jamais déduire un refus de vente du prix pratiqué. Lorsqu'il existe bien une obligation de vente résultant du droit de la concurrence, on doit pouvoir en déduire que le prix pratiqué doit être conforme à cette obligation. Bien que la Cour Suprême ne traite pas du concept d'affaire de compression des marges autonome lorsqu'il existe une obligation de vente, cela pourrait servir de base à une doctrine concernant la compression des marges dans ce contexte. Le risque subsiste de décourager une activité bénéfique, même lorsqu'il existe une obligation de vente, en reconnaissant une doctrine portant sur la compression des marges, mais le problème est de fixer le prix de gros appliqué en amont. Toutefois, l'obligation de fixer un prix en amont peut être évitée s'il existe une doctrine concernant la compression des marges autonome qui impute tout prix de gros appliqué à un concurrent sur les prix de détail pratiqués par l'entreprise elle-même. La fixation de prix d'éviction est ensuite définie comme s'appliquant au prix de gros auquel une entreprise vend à ses concurrents. Une société pourrait donc vendre ses produits au prix qu'elle souhaite, dans la mesure où une compression de marges serait reconnue et le tribunal rechercherait si la société fixait des prix d'éviction (c'est-à-dire des prix inférieurs aux coûts) en plus des coûts qu'elle facturait à ses concurrents et cette société tomberait sous le coup de la législation anti-trust. Par conséquent, dans ce contexte, la compression des marges remplirait la fonction utile de dispenser les autorités de contrôle de la concurrence de fixer réglementairement le prix appliqué en amont ainsi que d'en déduire l'existence d'un refus de vente. Il ne serait pas possible de déduire un refus de vente du prix pratiqué sans reconnaître l'obligation de vente.

Le Président a fait observer que deux définitions générales de la compression des marges se dégageaient des contributions transmises, la norme d'« insuffisance des bénéfices » et la « règle de tarification efficace des composants » (« efficient component pricing rule » ou ECPR). La norme d'insuffisance des bénéfices aurait pour effet de traiter la compression des marges d'une manière plus indulgente que la fixation de prix d'éviction. Par exemple, dans un jugement concernant l'*Industrie des Poudres Sphériques*, le Tribunal de première instance de l'Union européenne a défini en 2000 la compression des prix comme une situation dans laquelle une entreprise dominante « fixe le prix auquel elle vend le produit non transformé à un niveau tel que ceux qui l'achètent ne disposent pas d'une marge bénéficiaire suffisante sur sa transformation pour rester compétitifs sur le marché du produit fini ». Depuis de nombreuses années, cette décision servait de référence à la Commission européenne en matière de compression des marges. Toutefois, dans un jugement ultérieur concernant Deutsche Telekom, le Tribunal donne une définition plus rigoureuse. A la suite de cette affaire, la compression des marges est définie comme une situation dans laquelle la différence entre les prix de détail appliqués par une entreprise dominante et les prix de gros qu'elle facture à ses concurrents pour des services comparables est négative, ou insuffisante pour couvrir les coûts spécifiques à un produit que comporte, pour l'opérateur dominant, la fourniture de ses propres services de détail en aval. Il est clair que cette seconde définition est conforme à la Règle de tarification efficace des composants. Le Président a donc demandé à la Commission européenne de confirmer si la norme à retenir était celle suggérée dans l'affaire *Industrie des Poudres Sphériques* ou celle suggérée dans l'affaire *Deutsche Telekom,* ou s'il n'y avait pas de différence entre les deux.

Un délégué de la Commission européenne a confirmé que, dans l'affaire *Industrie des Poudres Sphériques,* il a été fait référence à une marge suffisante, mais que, dans les décisions ultérieures et la jurisprudence, y compris celle concernant Deutsche Telecom, il a été fait référence à une marge négative ou à la couverture de coûts spécifiques à un produit. C'est également l'approche qui a été adoptée au sujet de Telefónica, en appliquant le critère du concurrent d'une efficacité équivalente sans attendre que le Tribunal de première instance adopte cette approche plus rigoureuse. Cela montre que les autorités de contrôle de la concurrence sont réticentes à devenir des autorités de contrôle des prix.

Le Président a fait observer que, dans l'affaire Deutsche Telekom, l'obligation de vente était d'origine réglementaire bien que la réglementation applicable permette une certaine souplesse dans la fixation des prix de détail. Le Président a demandé à l'Union européenne de confirmer si une obligation de vente d'origine réglementaire équivaut exactement à une obligation de vente en vertu du droit de la concurrence, ou s'il existe des différences entre les deux dans la pratique suivie par la Commission européenne.

Le délégué de la Commission européenne a répondu que les objectifs de l'intervention des autorités de contrôle de la concurrence et ceux des autorités réglementaires peuvent n'être pas toujours exactement les mêmes, en ce sens que les autorités réglementaires peuvent se voir charger d'une tâche qui consiste non seulement à préserver la concurrence au profit des consommateurs mais aussi à promouvoir activement la concurrence dans certains secteurs. En pratique, la compression des marges se produit le plus souvent lorsqu'il existe des entreprises dominantes intégrées verticalement qui étaient auparavant des monopoleurs et qui contrôlent l'accès à des installations qui ne sont pas facilement reproductibles, comme les infrastructures déjà en place (par exemple, dans les télécommunications). Dans ces secteurs, une réglementation *ex ante* est souvent nécessaire et les autorités réglementaires peuvent être plus interventionnistes que les autorités de contrôle de la concurrence, Toutefois, elles ont des rôles complémentaires. Si les autorités réglementaires s'efforcent de minimiser *ex ante* le risque de défaillances du marché, les autorités de contrôle de la concurrence interviennent *ex post* pour remédier aux abus. Dans les affaires Deutsche Telekom et Telefónica, les deux entreprises avaient la marge de manœuvre nécessaire pour mettre fin à la compression des marges et aucune de ces sociétés n'aurait pu ignorer qu'une compression de marges avait lieu. Il y a lieu d'ajouter qu'au sein de la Commission européenne, les services chargés de la réglementation des télécoms cherchent à assurer un équilibre entre les incitations à investir et à innover qui est essentiellement le même que celui que rechercheraient des autorités de contrôle de la concurrence afin de déterminer s'il y a lieu d'imposer une obligation de fourniture en vertu de l'article 82. Par ailleurs, toutes les obligations d'accès imposées par les autorités réglementaires nationales aux opérateurs de télécoms déjà en place sont examinées à la fois par la Direction générale de la société de l'Information et des Médias et par la Direction générale de la concurrence. Si, après une telle analyse, une obligation de fourniture était levée, il serait peu probable que la Commission engage une action en vertu de l'article 82.

Le Président a ensuite examiné la contribution du BIAC, qui recherchait si une compression de marge constituait une pratique autonome à interdire comme constituant un abus de position dominante. Le Président s'est interrogé sur la notion de pratique « autonome » et il a donné l'exemple de prix d'éviction qui ne sont interdits que dans la mesure où ces pratiques aboutissent à une exclusion, puis il s'est demandé s'il ne serait pas préférable de définir la compression de marge (c'est-à-dire en précisant quelle définition de coût il y a lieu d'utiliser) dès lors que l'une des formes dominantes fait l'objet d'une obligation de vente résultant du droit de la concurrence.

Un délégué du BIAC a répondu qu'on pouvait se demander si la compression des marges constitue un abus isolé ou si elle est liée à d'autres types plus courants d'abus de pouvoir de monopole ou de pouvoir de marché. Le BIAC a convenu qu'il faudrait définir clairement ce qui constitue une compression de marge, notamment à la lumière des affaires Telefónica et Deutsche Telekom. Dans ces deux affaires, le prix d'accès, qui était réglementé, était considéré comme une donnée. La Commission européenne a décrit ce prix comme un prix d'accès mais, à l'époque où ces affaires sont intervenues, ce prix avait une fonction qui était de faciliter l'entrée à d'autres concurrents et de leur accorder une marge suffisante pour qu'ils puissent rester sur le marché, qu'ils soient efficaces ou non. L'objectif de la fixation de prix d'accès était de réduire les parts de marché des entreprises en place. Si un cas de compression des marges se produisait, la principale question était de savoir si le prix appliqué répondait aux besoins du nouvel arrivant. S'il est clair qu'aux États-Unis il existe une jurisprudence plus élaborée à ce sujet, selon le BIAC, la jurisprudence de la Commission européenne ne se réfère pas à des normes économiques permettant d'appliquer correctement un critère de compression des marges.

Le Président a précisé que, dans l'affaire Deutsche Telekom, le prix de détail correspondait au coût d'accès ou était même parfois inférieur. Le délégué du BIAC a répondu que c'était le prix d'accès correspondant à la ligne téléphonique qui était inférieur au prix dégroupé de la boucle locale. Toutefois, la boucle locale était utilisée pour ADSL et le prix pratiqué dans ce cas était à l'époque plus de deux fois plus élevé. C'était l'un des principaux arguments factuels invoqués. Si l'ancien prix appliqué à ADSL avait été adopté, il n'y aurait pas eu lieu, à première vue, de faire cesser la compression des marges et c'est sur ce point qu'a porté l'essentiel de la discussion devant le tribunal.

Le Président a poursuivi en indiquant qu'au-delà du comportement d'éviction, il y a d'autres raisons pour lesquelles les pratiques de compression de marges pourraient être interdites, notamment la discrimination et les prix (d'accès) excessifs. Le rapport de la France mentionnait l'affaire Direct Energy, dans laquelle le plaignant considérait que le prix offert pour la fourniture d'électricité était discriminatoire, étant donné les conditions de prix de transfert qu'EDF appliquait en interne à ses propres activités non réglementées en aval. Une plainte similaire a été déposée au Chili dans l'affaire Entel PCS. Toutefois, cette plainte a été rejetée par le TDLC pour cause d'insuffisance du pouvoir de marché. Le Président a demandé à la France si une simple discrimination serait suffisante pour prouver une compression des marges et quel serait le critère de preuve à retenir.

Un délégué de la France a confirmé que la compression de marges constitue effectivement une forme de discrimination et que cet aspect tenait une place essentielle dans l'affaire Direct Energy. Toutefois, pour l'Autorité française de la concurrence, la compression de marges est considérée comme une pratique d'exclusion. La discrimination n'est pas interdite et ne constitue pas l'aspect principal de la compression de marges ; l'élément essentiel est l'exclusion de concurrents tout aussi efficaces situés en aval. Le critère de preuve est très important ; le moyen de production fourni en amont par l'opérateur historique doit être indispensable pour permettre aux concurrents situés en aval d'exercer la pression de la concurrence sur cet opérateur historique. Si le moyen de production fourni en amont est absolument essentiel, on peut admettre qu'il y a un risque potentiel de sortie du marché. Le Cour de cassation française a récemment indiqué que ce n'est qu'à cette condition qu'un effet anti-concurrentiel potentiel peut être présumé. Si les concurrents situés en aval ont la possibilité de trouver un substitut aux moyens de production fournis par l'opérateur historique, les effets anti-concurrentiels ne peuvent être présumés et, par conséquent, il faut examiner les effets sur la concurrence. Une autre condition liée au critère de preuve est l'obligation, pour l'opérateur, d'avoir le choix lorsqu'il procède à une compression de marge, ce qui revient à dire que, si cette compression résulte automatiquement d'une réglementation, la société ne peut être tenue pour responsable. Dans la majorité des affaires jugées en France, il existait une obligation de vente signifiant que la fourniture d'accès constituait une obligation réglementaire et le prix de l'intrant situé en aval était réglementé. Cette interaction entre la réglementation et l'autorité de la concurrence est très importante et la compression des marges est par définition un sujet hybride. Il existe des prix de gros qui sont visibles surtout dans les secteurs réglementés, mais il existe aussi des prix de détail, notamment dans le secteur des télécoms qui, en général, ne sont pas réglementés. Les autorités chargées de la réglementation sectorielle et les autorités chargées de la réglementation de la concurrence coopèrent entre elles de façon pragmatique en examinant les affaires au cas par cas. L'autorité chargée de la réglementation sectorielle est plutôt compétente pour le marché de gros situé en amont et l'autorité de contrôle de la concurrence est plutôt compétente sur le marché de détail en aval, et comme la compression des marges est une combinaison des prix pratiques sur les deux marchés, les autorités chargées de la réglementation sectorielle comme les autorités chargées de la concurrence sont concernées.

Dans l'affaire Direct Energy, qui concerne l'énergie nucléaire, il n'y avait pas d'obligation de vendre. En France, l'énergie nucléaire est très importante et représente environ 80 à 90 % de la production. Sans elle, une société ne peut raisonnablement approvisionner ses clients en aval et il s'agit par conséquent d'un intrant essentiel. À l'époque où l'opérateur historique était la société EDF, celle-ci, bien qu'elle n'eut pas l'obligation de le faire, avait néanmoins signé un contrat avec son concurrent Direct Energy pour lui

fournir l'accès à son énergie nucléaire. Ce contrat a abouti à une compression de marge. L'autorité de la concurrence a déposé un recours pour compression de marge, ce qui s'est traduit par des engagements pris par EDF de fournir de l'énergie nucléaire à ses concurrents sur le marché situé en aval et par une proposition de mise en place d'un mécanisme d'appel d'offres à cette fin. A l'époque de l'affaire Direct Energy, il n'existait pas de réglementation sur le marché de l'électricité. Le Conseil s'est efforcé de remédier partiellement à cette situation en utilisant un mécanisme d'appel d'offres pour obliger l'opérateur historique à fournir l'accès. Un débat a lieu actuellement en France au sujet de la manière de procéder dans ce domaine et le gouvernement a jeté les bases d'une réforme importante en mettant en place une commission indépendante. Il est probable que cela aboutira à l'établissement d'une réglementation rendant obligatoire l'accès à l'énergie nucléaire.

Le Président a fait observer qu'afin de définir un abus il était nécessaire de prouver l'existence d'une position dominante sur le marché concerné. A cet égard, dans la plupart des juridictions, l'obligation de vendre à des concurrents est liée à la notion d'accès indispensable. Les affaires Oscar Bronner et Aspen Skiing comportent des caractéristiques tout à fait similaires pour ce qui est des raisons pour lesquelles l'accès est indispensable. Dans le cadre de la législation des États-Unis, l'obligation de vente comporte un aspect supplémentaire qui n'existe pas au sein de l'Union européenne, et qui est l'obligation d'une interruption d'une relation antérieure. Le caractère indispensable de l'accès est très important, car il montre que la simple position dominante ne suffit pas dans le cadre d'une affaire courante de refus de vente, et qu'en fait il faut que l'on se trouve en présence d'un monopole ou quasi-monopole. Une société qui ne dispose que d'une part de marché de 45 % ne peut disposer d'un produit indispensable, à moins qu'il n'y ait une restriction significative des capacités de la part des autres intervenants sur le marché. Toutefois, dans certaines juridictions, les normes semblent avoir été fixées à un niveau plus bas. Le Président s'est référé à la contribution de la Pologne, qui exposait en détail une affaire de compression des marges dans le domaine de la collecte de déchets. Le Président a demandé à la Pologne de confirmer si la décharge contrôlée par la municipalité disposait d'une position dominante (étant donné qu'elle ne détenait qu'une part de marché de 60 %), de préciser la norme que les autorité polonaises utilisaient pour évaluer la position dominante et d'indiquer si elle avait pris en compte le fait qu'il existait d'autres sites plus éloignés qui auraient pu également être utilisés.

Un délégué de la Pologne a répondu en trois points. En premier lieu, une entreprise qui contrôle 60 % du marché, les 40 % restants étant répartis entre des concurrents atomisés (représentant près de 70 entreprises) peut être à bon droit considérée comme détenant une position dominante selon la législation polonaise. En second lieu, la situation était dans une large mesure artificielle, car le fait que les concurrents devaient utiliser des décharges sensiblement plus éloignées était en réalité une conséquence des pratiques anti-concurrentielles dans lesquelles le propriétaire de la décharge s'était engagé. En troisième lieu, il ne s'agissait pas seulement d'une affaire de compression de marge car, sur la base des preuves disponibles, la décharge municipale aurait pu également être accusée de discrimination par les prix et jugée responsable de ces pratiques. Par conséquent, si l'on considère l'équivalence de certaines pratiques, le type de comportement adopté par la municipalité aurait pu également être classé dans une autre catégorie d'abus.

Le Président a examiné ensuite la contribution de la Suède qui soulevait un certain nombre de questions liées à une demande présentée par le Tribunal de District de Stockholm à la Cour de justice des communautés européennes (« CJCE »). L'autorité de contrôle de la concurrence suédoise a demandé dans son rapport si la position dominante est suffisante ou si une condition supplémentaire qui serait qualifiée de super position dominante, dans la ligne des conditions fixées pour l'affaire Oscar Browner, serait nécessaire. Le Président a demandé à la Suède son avis sur cette question et s'il doit y avoir ou non une symétrie totale entre le refus de vente et la compression de marges.

Un délégué a répondu que la Suède reconnaissait qu'il existait une différence entre la compression de marges et le refus de vente qui peut justifier l'application de traitements différents au regard du droit de la

concurrence. Le tribunal national avait demandé une décision préalable à la CJCE sur une affaire de compression de marges dans le cadre de laquelle l'entreprise dominante fournissait volontairement le produit en gros à ses concurrents. La question était de savoir si une entreprise dominante peut pratiquer la compression de marges sans violer les règles de la concurrence, étant donné qu'elle aurait pu décider de ne pas du tout fournir l'intrant concerné et que l'on peut se demander, au cas où elle déciderait cependant de le fournir à un certain prix, si cela pourrait être considéré comme une violation. Cela a des conséquences pour d'autres formes d'abus, telles que la fixation de prix d'éviction et la discrimination, dans la mesure où une entreprise qui se trouve en position dominante peut soutenir que, puisqu'elle a le droit de refuser de vendre, elle ne peut être considérée comme ayant eu un comportement abusif sous forme de discrimination ou de comportement abusif. Dans le cas de la Suède, l'entreprise en position dominante fournissait effectivement des produits en gros, de sorte qu'il ne s'agissait pas d'un cas de refus de vente, et la question du refus de vente n'était par conséquent pas réellement pertinente dans le mesure où la vente avait déjà eu lieu. Il en est de même dans les cas de discrimination, à savoir que si une entreprise en position dominante se livre à des discriminations, cela peut constituer une violation du droit de la concurrence, mais la question de savoir s'il existe une obligation de vente n'est pas abordée avant qu'une sanction soit prise au titre d'un comportement discriminatoire. Selon le Président, il restait à prouver que, d'une certaine manière, ce comportement aboutissait à une exclusion car sinon toute discrimination serait interdite. Le délégué de la Suède a répondu que certains concurrents pouvaient être très efficaces ou prêts à subir des pertes initiales tandis que d'autres pouvaient souhaiter accéder au marché à tout prix, mais qu'à long terme les concurrents efficaces se trouveraient exclus.

Le Président a fait observer qu'au Taipei chinois, le seul recours qui ait été déposé dans une affaire de compression de marges a été finalement rejeté à la suite d'une comparaison internationale des barèmes de prix des opérateurs de télécoms et de leurs marges bénéficiaires. De même, au Canada, les deux affaires qui ont été examinées dans le rapport, l'une concernant les services Internet et l'autre la distribution d'essence, ont abouti à un rejet. Dans l'affaire concernant le service Internet, la société concernée, Canada Bell, faisait apparaître une compression de marge égale à 35 % seulement, ce qui montrait que la société n'était pas en position dominante en aval, ce qui semblait être la raison pour laquelle la demande a été rejetée. En général, le point essentiel dans les affaires de compression de marge est de préciser si une pratique aboutit à une exclusion et si l'entreprise se trouve en position dominante sur le marché des intrants en amont. Le Président a donc demandé au Canada d'exposer les circonstances particulières qui ont amené le Bureau à évaluer plutôt le degré de concurrence sur le marché situé en aval.

Un délégué a expliqué qu'au Canada, la compression de marges est traitée comme une forme d'abus de position dominante en vertu de l'article 79 de la Loi sur la concurrence, et un alinéa de cet article expose trois éléments qui doivent tous être établis pour que le tribunal de la concurrence rende une décision : (*i*) une ou plusieurs personnes contrôlent largement ou totalement, sur tout le territoire du Canada ou dans l'une de ses régions, une catégorie ou un type d'activités, (*ii*) cette personne ou ces personnes se sont engagées ou s'engagent dans des pratiques anti-concurrentielles, et (*iii*) ces pratiques ont eu ou ont, ou sont susceptibles d'avoir pour effet d'entraver ou d'atténuer sensiblement la concurrence sur un marché. Canada Bell était une société intégrée verticalement, qui offrait un service internet haut débit pour les particuliers. Le Bureau a reçu une demande en vue de lancer une enquête, à la suite d'allégations selon lesquelles une filiale de Bells (Bell Global Solutions) vendait ces services Internet haut débit à une clientèle de particuliers à des prix de détail inférieurs au tarif que Bell appliquait aux autres fournisseurs de services Internet. Il a été soutenu que ce prix constituait une vente à perte ou une compression de marge, et par conséquent, un abus de position dominante en vertu de l'article 79. Les données obtenues par le Bureau ont permis de conclure que les prix de détail étaient inférieurs au coût mais que les différentes conditions énumérées à l'article 79 n'étaient pas remplies, dans la mesure où il est apparu que le marché de détail de l'Internet était très concurrentiel et comportait de faibles barrières à l'entrée. Considérant que le marché situé en aval était important pour comprendre les résultats de la politique de prix de Bell, et étant donné les

preuves évidentes d'une concurrence effective sur le marché, il n'y avait pas de dommages et par conséquent pas lieu d'intenter un recours.

Le Président a ensuite examiné la contribution de la Corée, selon laquelle lorsque de grands groupes disposent d'un pouvoir économique disproportionné (comme c'est le cas en Corée) le risque de compression des marges par l'intermédiaire de leurs filiales pourrait poser des problèmes. Le Président demande donc à la délégation de la Corée de confirmer la définition de l'entreprise donnée dans le cadre du droit de la concurrence de la Corée et si la portée de la définition allait au-delà de l'aspect juridique, c'est-à-dire si un groupe donné est considéré comme une seule entreprise.

Un délégué de la Corée a répondu que la définition donnée par la Loi sur la réglementation des monopoles et le commerce équitable (« Monopoly Regulation and Fair Trade Act ») considère une entreprise comme une entité qui exerce des activités manufacturières, des activités de services ou toutes autres activités. Une entreprise n'est pas définie différemment dans le cadre d'une affaire de compression des marges et, par conséquent, un seul groupe d'entreprises n'est pas traité comme une seule entreprise dans un cas d'étranglement des marges. En Corée, les grands groupes ont une position dominante sur le marché dans les principaux secteurs et ils opèrent dans divers domaines par l'intermédiaire de leurs filiales. Ces groupes ont par conséquent beaucoup de possibilités de se livrer à des activités anti-concurrentielles, telles que la compression de marges par l'intermédiaire de leurs filiales. La notion de filiale peut avoir diverses significations et peut s'appliquer à des entreprises entièrement sous contrôle ou partiellement intégrées.

2. Quel indicateur de coûts doit-on utiliser dans le calcul de la compression de marges ? Une autorité réglementaire choisirait-elle une norme différente de celle adoptée par une autorité de contrôle de la concurrence ?

Le Président a fait observer que la plupart des délégations appliquaient la « norme du concurrent aussi efficient » ce qui implique qu'elles se référaient aux coûts de l'entreprise en place pour déterminer si les prix sont ou non des prix d'exclusion. Cela permet de s'assurer qu'une entreprise en place dispose de toutes les informations nécessaires pour déterminer si elle viole la loi ou non. La question devient plus complexe si la « norme du concurrent aussi efficient » n'est pas appliquée. La contribution du Royaume-Uni se référait à la « norme du concurrent raisonnablement efficient » et à la « norme ajustée du concurrent d'une efficience équivalente ». Les coûts correspondant à ces normes sont plus élevés, par exemple pour faire en sorte qu'un entrant soit en mesure d'exploiter des économies d'échelle et de gamme à l'avenir. Les cas de compression des marges pourraient alors être définis en se référant aux coûts qui auraient rendu une telle entrée possible. Toutefois, dans le contexte du droit de la concurrence l'adoption de cette norme est très difficile car elle est fondée sur l'hypothèse selon laquelle l'entreprise en position dominante est pleinement informée de ce que sont des coûts raisonnables. Dans la contribution du Royaume-Uni, ces normes asymétriques ne sont appliquées que par les autorités chargées de la réglementation sectorielle, et non par les autorités de contrôle de la concurrence. Le Président a demandé au Royaume-Uni de confirmer si ces normes sont appliquées en vertu du droit de la concurrence ou de dispositions réglementaires, car de nombreuses autorités réglementaires sectorielles appliquent également le droit de la concurrence, et s'il y a une différence entre une norme fixée par l'autorité de la concurrence et une norme réglementaire en ce qui concerne les coûts d'accès.

Un délégué du Royaume-Uni a répondu que toutes les affaires décrites dans la note de ce pays étaient des affaires de concurrence, mais qu'elles avaient été mises en œuvre par les autorités réglementaires car celles-ci disposent au Royaume-Uni de pouvoirs en matière de concurrence. Toutefois, la réglementation, ainsi que la question de savoir ce qui constitue une marge acceptable, peuvent donner lieu à des discussions et, dans ce cas, lorsque la réglementation ex-ante est explicite, il y a des cas, par exemple dans les télécoms, où une marge spécifique a été fixée entre deux produits différents. Dans le passé, Ofcom a

fixé une marge spécifique entre le prix de la boucle locale et un accès à ATM. Par conséquent, indépendamment de la question de savoir si l'on utilise la réglementation ex-ante ou le droit de la concurrence, il y a lieu de poser la question de savoir s'il faut utiliser la norme du concurrent raisonnablement efficient ou celle du concurrent d'une efficience équivalente. En effet, il y a des différences entre les secteurs réglementés et les secteurs non réglementés.

En premier lieu, un critère du concurrent d'une efficience équivalente peut avoir pour effet d'éliminer des concurrents plus efficients si l'on ne procède pas à des ajustements en fonction des économies de gamme et des économies d'échelle. Ces facteurs sont particulièrement pertinents si l'on considère les secteurs réglementés dans lesquels il existe généralement d'importantes économies d'échelle, plusieurs produits étant fournis à partir d'une infrastructure unique. En second lieu, en raison de certaines caractéristiques des secteurs réglementés, des normes différentes devraient s'appliquer, en particulier dans les domaines suivants : (i) les incitations à innover dans les secteurs réglementés sont souvent explicites car il existe un prix de gros réglementé, (ii) la critique de l'école de Chicago, qui accroît la sensibilité au refus de vente et le recours aux critères du concurrent d'une efficience équivalente, n'est pas nécessairement valable dans les secteurs réglementés, (iii) dans un secteur réglementé comportant un monopole, même un concurrent moins efficient peut être préférable à l'absence totale de concurrence, (iv) l'application d'un test différent devrait permettre de vérifier qu'une interprétation inexacte ne s'applique pas aux secteurs non réglementés.

Le Président a fait observer que, dans les secteurs réglementés qui viennent seulement de s'ouvrir à la concurrence, le fait de laisser une marge suffisamment élevée devrait constituer une incitation suffisante à l'entrée, mais comporterait une certaine asymétrie afin de faire en sorte que, lorsque la concurrence fonctionne finalement d'une manière satisfaisante, le secteur se stabilise et revienne à la normale. Par conséquent, ni la norme du concurrent raisonnablement efficient ni la norme ajustée du concurrent d'une efficience équivalente ne seraient nécessaires, car les économies d'échelle et de gamme auraient déjà été exploitées par le nouvel arrivant, ce qui signifie un retour à la norme du concurrent efficient. Par conséquent, il serait nécessaire de fixer une règle sous une forme ou sous une autre afin de préciser la définition des coûts à appliquer en fonction des conditions du marché situé en aval.

Le délégué du Royaume-Uni a convenu que cela était vrai dans une large mesure et il a ajouté que, dès lors qu'il existait un marché en amont réglementé d'une manière explicite, il y aurait des incitations différentes à innover en amont et que ces incitations devraient faire l'objet de réglementations. Par conséquent, même s'il existe un marché concurrentiel en aval, le marché réglementé en amont peut poser des problèmes. Lorsqu'il n'existe pas de marché réglementé en amont, le critère à appliquer s'il y a lieu serait probablement celui du concurrent d'une efficience équivalente. La question est de savoir quelles sont les conséquences du passage du critère ajusté du concurrent d'une efficience équivalente ou du concurrent raisonnablement efficient au critère du concurrent d'une efficience équivalente, et pour le moment la réponse n'apparaît pas clairement.

Le Président a rappelé que, dans les cas de comportement abusif, il y a présomption d'illégalité (à condition qu'il y ait une probabilité élevée de compensation) lorsque les prix sont inférieurs aux coûts variables moyens, et le verdict reste incertain en ce qui concerne les prix supérieurs aux coûts variables moyens mais inférieurs aux coûts totaux moyens. Dans les affaires de compression des marges, la définition des coûts est moins claire. La question est de savoir pourquoi une compression de marge doit faire l'objet d'une attitude plus favorable à l'égard des entrants que les pratiques abusives de fixation des prix. Le Président a demandé à l'Allemagne d'expliquer pourquoi, dans une affaire récente, le Bundeskartellamt a utilisé les coûts marginaux moyens à long terme comme indicateurs de violation de la loi dans une affaire de compression des marges, et si le critère du coût marginal moyen serait également utilisé dans une affaire de prix d'éviction.

Un délégué de l'Allemagne a expliqué que des dispositions générales concernant le contrôle des pratiques abusives ont été appliquées dans cette affaire (qui concernait le secteur des télécoms) et que le Bundeskartellamt a utilisé le concept de coûts marginaux moyens à long terme après avoir examiné les caractéristiques spécifiques du secteur économique concerné. L'affaire concernait non seulement une entreprise en place intégrée verticalement mais aussi un marché caractérisé par une forte proportion de coûts fixes. La notion de coûts marginaux moyens à long terme a semblé dans l'ensemble appropriée pour traiter cette structure spécifique. Cependant, l'approche adoptée était liée aux caractéristiques spécifiques du secteur des télécommunications et si la norme était adaptée à cette affaire, il ne s'agissait pas nécessairement de la norme applicable en fait par le Bundeskartellamt dans chaque affaire de compression de marges.

Le Président a ensuite examiné le rapport du Portugal, qui contenait une analyse des coûts à examiner pour déterminer si les marges appliquées aboutissent ou non à une exclusion. En particulier, selon l'autorité portugaise, il y a lieu d'adopter une approche à long terme et il lui appartient de calculer le niveau minimum en longue période des coûts qui seraient compatibles avec une activité industrielle ou commerciale financièrement viable. La fixation de prix correspondant au coût marginal de la part de la société intégrée verticalement est donc interdite. Le Président a fait observer que l'adoption d'une telle norme par une autorité réglementaire pourrait être tout à fait appropriée dans certaines circonstances spécifiques et il a demandé au Portugal s'il était souhaitable qu'une autorité de la concurrence applique cette norme en règle générale.

Un délégué du Portugal a mentionné une affaire récente de compression de marges sur le marché à large bande et il a expliqué que le critère des coûts marginaux moyens à long terme était utilisé comme indicateur des coûts et que cela permettait d'examiner les coûts au niveau du détail mais ne permettait pas d'envisager à la fois le niveau du détail et le niveau du marché de gros. En termes de coûts marginaux et de coûts marginaux pratiqués par la société pour maximiser ses bénéfices, cela amène à envisager la prise en compte des activités d'une société intégrée verticalement. Les coûts sont donc pris en compte à différents niveaux, d'une part au niveau des ventes au détail et de l'autre à la fois au niveau des ventes au détail et des ventes en gros. Le coût marginal moyen à long terme est souvent utilisé par les autorités réglementaires dans le secteur des télécommunications non seulement pour les affaires de compression de marges mais aussi pour la réglementation des prix d'accès. Il est important d'assurer une cohérence avec les méthodologies utilisées par les autorités réglementaires en matière de coûts car celles-ci permettent d'évaluer les décisions prises par les autorités chargées de réglementer la concurrence et ces évaluations sont en général identiques. La notion de coût marginal moyen à long terme est très proche de la notion de coût évitable. Cette notion est souvent utilisée dans les cas de fixation de prix d'éviction et lorsqu'une société (i) fixe des prix inférieurs aux coûts variables, ou (ii) fixe des prix compris entre les coûts variables moyens et les coûts évitables, et lorsqu'on observe une intention d'exclure ses concurrents, la société est présumée se livrer à des pratiques illicites.

Le Président a fait observer que, dans le rapport de la Turquie, il a été fait référence à un recours intenté contre Turkish Telecom (l'opérateur de télécommunications en place) dans le cadre de laquelle la norme de preuve n'était pas claire. Bien qu'aucun concurrent n'ait quitté le marché à la suite de la compression des prix, cette pratique avait néanmoins pour effet d'empêcher les concurrents de se développer et de gagner des parts de marché. Le Président a demandé à la Turquie si la conclusion dépendait de la définition des coûts qui était utilisée, si la même définition des coûts serait utilisée dans le cadre d'une affaire portant uniquement sur les prix d'éviction et, si ce n'était pas le cas, pour quelle raison.

Un délégué de la Turquie a expliqué que dans le cas mentionné, l'opérateur de télécommunications en place, Turk Telecom, avait l'obligation de fournir des services internet par l'intermédiaire d'une entité juridiquement distincte, appelée TTNet. Dans l'analyse de profitabilité qui a été effectuée, une moyenne mensuelle des revenus et des coûts du réseau de TTNet a été calculée. Ce faisant, trois groupes de coûts ont

été pris en compte : (i) paiement de services à Turk Telecom pour l'accès aux services de gros ADSL dans le cadre du modèle de revente, (ii) coûts d'exploitation calculés sur la base de données moyennes et (iii) coûts d'acquisition pour les souscripteurs étalés sur une période de trois ans. Comme la seule activité de TTNet était la fourniture de services d'accès Internet à large bande, les coûts marginaux encourus par cette entreprise étaient à peu près identiques aux coûts totalement imputés. Par conséquent, même si l'affaire avait été considérée comme portant sur la fixation de prix d'éviction, l'analyse et la définition des coûts n'auraient pas été modifiées. L'autorité turque de contrôle de la concurrence n'a donc pas utilisé de normes de coûts différentes pour l'analyse de la compression des prix.

Le Président a ensuite examiné la contribution des Pays-Bas, qui concluait qu'il n'est pas toujours souhaitable que les autorités de contrôle de la concurrence interviennent sur les marchés réglementés au sujet d'une affaire de compression de marges, dans la mesure où les autorités réglementaires pourraient être mieux placées pour le faire. Le Président a fait observer que ce principe pourrait aboutir à une répartition satisfaisante des responsabilités et il a demandé aux Pays-Bas s'ils pouvaient citer des exemples de cas dans lesquels les autorités réglementaires avaient traité des affaires de compression de marges à la place des autorités de contrôle de la concurrence.

Un délégué des Pays-Bas a déclaré que les autorités de contrôle de la concurrence n'avaient traité qu'une seule affaire de compression de marges, dans la mesure où les autorités réglementaires traitaient directement ces affaires dans le cadre de leurs réglementations. La NMA est effectivement en mesure d'intervenir ex-post si nécessaire, mais cela ne s'est pas produit jusqu'à présent. Dans le cadre de la fusion [KPN–CHECK] qui concernait la création d'un nouveau réseau de fibre optique, la NMA a fixé des conditions dans la mesure où des problèmes de concurrence étaient prévisibles étant donné la relation verticale qui existait. Tout en examinant le type de conditions à imposer, la NMA a travaillé en liaison étroite avec l'autorité indépendante néerlandaise responsable des postes et des télécommunications qui était en même temps en train d'élaborer une loi concernant la compression des marges. Le fait que les deux agences opèrent à partir du même bâtiment a facilité le traitement des affaires et le jour où la décision a été annoncée la législation a également été publiée. Finalement, les conditions fixées étaient presque le reflet des dispositions énoncées dans les termes fixés par les autorités réglementaires et cette coopération permet de faire en sorte qu'à l'avenir les affaires de compression des marges dans ce secteur soient directement traitées par l'autorité réglementaire. Il est plus efficient pour les autorités réglementaires de rechercher si une compression des marges est probable ou se produit effectivement à la suite d'une fusion du fait qu'elles disposent d'expérience dans ce domaine et d'une connaissance précise du secteur ainsi que de ressources et d'expertise, et tiennent compte du marché de toute manière. Cela libère la NMA des évaluations en matière de compression de marges qui prennent beaucoup de temps mais laisse aussi la possibilité d'intervenir si nécessaire. La NMA a également intégré les autorités réglementaires en matière d'énergie et de transport dans la même organisation, ce qui facilite la coordination entre ces organismes et l'évaluation de la compression des marges est également grandement facilitée.

Le Président a ensuite examiné la contribution de la République tchèque et une affaire de compression de marges concernant la fourniture de services ADSL dans le cadre de laquelle l'Office de la concurrence a coopéré avec les autorités réglementaires des télécommunications au cours de l'enquête sur cette affaire. Le Président a demandé pourquoi l'affaire a été traitée par l'autorité de contrôle de la concurrence et si des problèmes se posaient en ce qui concerne la répartition des compétences entre les autorités réglementaires.

Un délégué de la République tchèque a répondu qu'en vertu de la législation nationale comme du droit européen, l'Office de la concurrence est autorisé à traiter des affaires de concurrence, y compris les affaires de compression de marges dans le secteur des télécommunications. L'affaire en question concernait un cas de compression de marges sur le marché de l'accès au réseau à large bande et, par conséquent l'Office était obligé de la traiter. L'office tchèque des télécommunications avait dans le passé

traité ex ante de problèmes de compression de marges et conclu qu'il n'y avait pas de problèmes, ce qui a amené l'Office de la concurrence à intervenir.

3. Y a-t-il une différence entre un secteur réglementé et un secteur non réglementé ?

La question n'est pas de savoir si le secteur est réglementé mais s'il existe une obligation de vendre qui soit pertinente dans les affaires anti-trust. Les États-Unis sont le seul pays où il existe soit une obligation de vente résultant de la réglementation (et dans ce cas aucune obligation résultant du droit de la concurrence) soit une obligation de vente résultant du droit de la concurrence (indépendamment d'une obligation résultant d'une réglementation). En Lituanie, l'autorité de contrôle de la concurrence s'est clairement référée à la notion de facilité essentielle dans la définition d'une position dominante concernant la fourniture d'accès à des services en ligne fixe DSL. En Norvège, l'autorité de la concurrence est intervenue dans le secteur agricole (comme l'a fait l'autorité d'Afrique du Sud), en détectant une compression abusive de marges sur le marché du fromage, où une coopérative intégrée détenait une position dominante pour l'approvisionnement en lait. Le Président a demandé à la Norvège si les producteurs de fromage qui se trouvaient en concurrence pouvaient importer du lait, si la concurrence étrangère était suffisante sur le marché norvégien du fromage (par le biais des importations) et quels étaient les effets éventuels des pratiques abusives sur le bien-être des consommateurs.

Un délégué de la Norvège a répondu que, jusqu'à présent, le NCA n'avait pas identifié de compression abusive de marges sur le marché du fromage où la coopérative intégrée détenait une position dominante en ce qui concerne le lait et que, par conséquent, il n'y avait pas d'effets avérés sur le bien-être des consommateurs. Toutefois, le NCA avait déposé un recours devant la Cour d'appel norvégienne pour contester le jugement d'un tribunal de district dans une affaire concernant un accord de distribution exclusive sur le marché du fromage et non une compression de marge anti-concurrentielle. En ce qui concerne le suivi d'une compression éventuelle de marges sur le marché norvégien du lait, le NCA a mis en place un dispositif de surveillance des marges brutes de l'entreprise dominante. Ce dispositif était justifié par le fait que le secteur norvégien du lait comportait un certain nombre de caractéristiques typiques dans les affaires de compression de marges, c'est-à-dire des entreprises dominantes en amont vendant un intrant essentiel à des concurrents situés en aval et leur faisant concurrence sur le marché situé en aval. L'objet du dispositif de surveillance est d'observer si les marges entre les prix des entreprises dominantes situées en amont et en aval sont si faibles que le NCA devrait procéder à de nouvelles enquêtes pour déterminer si elles correspondent à une compression de marges. Le NCA utilise un test fondé sur les recettes et les coûts des entreprises dominantes qui équivaut au critère « d'efficience équivalente ». L'objet de cette surveillance est triple : (i) aider le NCA à dévoiler une pratique éventuelle de compression de marges menée par l'entreprise dominante et fournir éventuellement à l'autorité responsable des bases pour lancer de nouvelles enquêtes, (ii) mettre en place une base pour l'évaluation des plaintes éventuelles des concurrents concernant la fixation des prix par les entreprises dominantes, (iii) exercer un effet dissuasif sur l'entreprise dominante. Pour ce qui est de la question de savoir si les produits à base de formage qui se trouvent en concurrence sur le marché situé en aval avaient la possibilité d'importer du lait, cela est peu probable étant donné les droits élevés à l'importation de lait cru et les coûts de transport qui rendraient une telle stratégie peu rentable. Dans des affaires précédentes, le NCA avait conclu que le marché géographique du lait cru est national. En conséquence, le lait cru fourni par l'entreprise dominante intégrée verticalement constitue un intrant essentiel pour les concurrents situés en aval. En ce qui concerne la concurrence étrangère sur le marché norvégien du fromage, l'importation de fromage en Norvège est limitée à environ 10 % de la production totale et le fromage au lait cru est soumis à des droits de douane élevés lorsqu'il est importé en Norvège. En outre, une part importante des fromages importés est constituée de produits qui ne sont pas fabriqués en Norvège et, par conséquent, les produits qui sont importés peuvent ne pas relever du même marché que les fromages produits en Norvège.

La contribution de la Hongrie mentionnait une affaire de compression des marges concernant le secteur des pompes funèbres, dans laquelle l'entreprise de pompes funèbres, qui possédait également une morgue, fixait le prix de ses services en aval à un niveau plus faible que celui que ses concurrents devaient verser pour accéder à la morgue. Le Président a demandé à la Hongrie comment les autres concurrents pouvaient opérer si l'accès était ainsi limité.

Un délégué de la Hongrie a précisé que la morgue était un bâtiment situé dans le cimetière où les parents et amis pouvaient rendre hommage à la personne décédée au cours de la première phase du service funéraire. En général, cette facilité appartient à une entreprise dominante dans le secteur des pompes funèbres et à d'autres entreprises intervenant sur le marché qui louent la morgue au cours des jours précédant les obsèques. En l'absence d'accès à cette facilité, les concurrents ne peuvent exercer leur activité. À la suite de plaintes émises au cours des années 90, une réglementation a été instaurée et les municipalités ont réglementé certaines parties de cette activité, notamment la fourniture des installations mortuaires. Dans une certaine mesure, le prix était réglementé mais il existait une certaine marge de manœuvre. Comme l'accès était obligatoire en vertu de la réglementation applicable et que des mesures avaient déjà été prises dans le cadre de la loi sur la concurrence contre les entreprises dominantes refusant de fournir leurs services, les entreprises ont pris conscience du fait qu'il leur fallait procéder d'une manière différente pour arriver au même résultat. Elles ont donc entrepris de mener diverses stratégies de fixation des prix, y compris la compression des prix.

Le Président a observé qu'au Mexique la Commission fédérale de la concurrence a rattaché les affaires de compression de marges à l'existence d'une facilité essentielle. La réglementation détermine les facilités qui sont essentielles et instaure un régime légal d'accès des tiers. Il semble qu'il existe un régime pratiquement identique en Russie où il est très difficile sinon impossible au Service fédéral anti-monopole d'intervenir dans des affaires de compression de marges en l'absence de réglementation. La contribution du Mexique précise qu'il existe une correspondance totale entre les affaires de compression de marges et les affaires de refus de vente. Le Président demande au Mexique si, étant donné son régime d'accès réglementé, une entreprise soumise à une réglementation qui refuserait l'accès au marché serait coupable d'une violation de la réglementation ou du droit de la concurrence, si cette situation serait la même pour une compression de marges et si une affaire de compression de marge pourrait être évoquée en l'absence de réglementation.

Un délégué du Mexique a répondu qu'il serait possible d'évoquer une affaire de compression de marges sur un marché non réglementé dans la mesure où la notion de compression de marges n'existe pas réellement dans son pays. Tous les comportements d'exclusion illégaux doivent être prévus par la loi, et comme la compression de marges n'y figure pas, il est donc considéré comme une pratique qui est réglementée. À ce jour, les affaires de compression de marges n'ont été évoquées que sur des marchés réglementés et les affaires de ce type, qu'elles concernent des secteurs réglementés ou non réglementés, seraient traitées en vertu des critères normaux concernant les comportements d'exclusion. Il n'y a pas de raison pour qu'une affaire soit évoquée dans un secteur non réglementé. Il existe une interaction intéressante entre les autorités réglementaires et la Commission de la concurrence, et la menace d'une intervention éventuelle de l'autorité de la concurrence peut inciter les autorités réglementaires à agir plus rapidement. La décision concernant l'agence qui doit intervenir est prise au cas par cas. Toutefois, si le comportement en question est visé l'article 10 de la loi sur la concurrence ou peut relever de cet article, il s'agit d'une violation du droit de la concurrence et, par conséquent, l'autorité de la concurrence dispose des pleins pouvoirs pour la traiter. Il est possible que ce comportement soit également illégal en vertu de la législation sectorielle applicable et qu'il existe des chevauchements, auquel cas il y aura échange d'informations entre les autorités réglementaires. Toutefois, il n'existe pas de ligne de partage claire entre les attributions de l'autorité de la concurrence et celle des autres autorités réglementaires.

4. Quel est le recours dans les affaires de compression de marges et comment est-il possible de maintenir les incitations, pour l'entreprise dominante, à réduire les prix à la consommation ?

Les économistes, comme les juristes, craignent que le fait d'imposer, dans le cadre du droit de la concurrence, une obligation de vente en présence d'un prix d'accès réglementé n'empêche l'entreprise intégrée verticalement de réduire ses prix de détail au profit des consommateurs (en éliminant la double marginalisation) ce qui se traduirait donc par des prix plus élevés. Il s'agit d'une inquiétude réelle, dans la mesure où il serait contraire à tous les principes d'imposer une obligation résultant du droit de la concurrence qui aboutirait à appliquer des prix plus élevés aux consommateurs sans aucune perte de la part du fournisseur intégré.

En République slovaque, l'Office de la concurrence a pris récemment des décisions dans deux affaires majeures de compression de marges. Dans l'une de ces affaires, l'affaire Slovak Telecom voice and data, la compression de marges est intervenue dans le cadre des services de téléphonie fixe. Slovak Telecom, l'opérateur de télécommunications en place, facturait des prix de détail qui étaient inférieurs aux frais d'accès qu'un concurrent devait acquitter. L'Office a constaté une compression de marges. Le Président a demandé à la République slovaque si ces prix de détail étaient inférieurs aux coûts, si par conséquent Slovak Telecom réalisait un bénéfice sur les appels et, au cas où cette entreprise subissait des pertes pourquoi il n'était pas recouru à la notion de prix d'éviction, dans la mesure où cette notion permet une plus grande souplesse dans la présentation des recours.

Un délégué de la République slovaque a expliqué que l'analyse était effectuée par une simple comparaison entre le prix de gros d'accès et le prix de détail et que le coût n'était pas pris en compte dans cette analyse. La réponse à la question de savoir si Slovak Telecom subissait des pertes n'apparaissait donc pas clairement mais cela était très probable étant donné que le prix de détail du produit spécifique en question était proche de 0 et que c'était le seul prix des produits de détail spécifiques. Toutefois, il n'apparaissait pas que Slovak Telecom subissait des pertes dans le secteur de la téléphonie vocale fixe. Comme aucun coût n'a été examiné il n'a pas été possible de contrôler l'application de prix d'éviction.

Le Président a examiné ensuite la contribution de l'Italie. Telecom Italia a réussi à obtenir un contrat de deux ans et demi pour la fourniture de services téléphoniques à l'administration publique italienne en proposant un prix impraticable par ses concurrents étant donné le prix d'accès réglementé. L'offre de Telecom Italia était rentable mais elle l'aurait été encore plus si cette entreprise avait laissé ses concurrents accéder à ce service. L'intention d'exclusion apparaissait clairement et cela s'expliquait par le fait qu'avoir la clientèle de l'administration publique italienne améliorait l'image de marque de Telecom Italia et de ses concurrents. Le Président a demandé à l'Italie s'il existait des solutions à ce type de problème lié aux politiques publiques.

Un délégué de l'Italie a précisé que l'objet de l'intervention de l'autorité n'était pas d'obliger Telecom Italia à relever le prix offert car cela aurait été préjudiciable aussi bien aux consommateurs qu'aux contribuables, dans la mesure où le client était l'administration. Dans cette affaire, la question posée était celle du coût d'accès au réseau, dont on peut soutenir qu'elle relève des autorités réglementaires. Les coûts d'accès au réseau étaient fondés sur le coût que Telecom Italia avait communiqué à ces autorités réglementaires en utilisant un système comptable qui était fondé sur les coûts historiques et non sur les coûts marginaux à long terme comme il aurait dû l'être. La question n'était pas que Telecom Italia aurait du proposer un prix plus élevé et facturer des prix de détail plus élevés mais peut-être qu'elle aurait dû appliquer des coûts d'accès au réseau plus faibles. Le problème de l'intervention des autorités réglementaires ou des autorités de la concurrence dans ce domaine reste ouvert.

Le Président a fait observer que s'il avait été exigé de Telecom Italia par l'entreprise concurrente, par l'autorité réglementaire ou par l'autorité de la concurrence qu'elle fasse correspondre toute réduction future de prix à une réduction équivalente des prix d'accès, le problème aurait été résolu. Le dilemme est dû au fait que si le prix d'accès reste fixe, le seul recours possible est d'augmenter les prix de détail.

Le Président a mentionné ensuite une affaire dans laquelle la Cour Suprême du Japon n'a pas confirmé la décision de la JFTC de 2003 concernant une compression de marge jusqu'en mai 2009. Les retards dans l'examen des affaires par les tribunaux sont courants dans de nombreux pays, par exemple au Brésil où un procès intenté en 1999 est toujours en cours d'examen dix ans plus tard. Le Président a demandé au Japon quelles étaient les perspectives de réforme et si l'existence d'aussi longs délais dans les procédures judiciaires posait des problèmes.

Un délégué du Japon a expliqué que l'affaire de 2003 concernait la société Nippon Telegraph and Telephone East Corporation (NTTEC), qui était un opérateur dominant dans les services de télécoms accusé de s'être livré à des pratiques d'exclusion dans le cadre de son monopole privé conformément à la Loi anti-monopole. Le JFTC a formulé des recommandations en décembre 2003 pour qu'il soit mis fin à ces pratiques, mais la société NTTEC ne les a pas acceptées. Le JFTC a engagé en janvier 2004 une procédure d'audition qui a abouti à une décision en mars 2007. Il a été décidé que NTTEC excluait l'activité de ses concurrents et était la cause d'entraves considérables à la concurrence dans le domaine des services FTTH. NTTEC a intenté un procès pour s'opposer à cette décision mais la Haute Cour de Tokyo a rejeté son recours en mai 2009. Il a donc fallu six ans depuis la première recommandation de 2003 pour aboutir à la décision de la Haute Cour en 2009. L'une des raisons de ce long délai est le fait que le nombre total d'affaires de monopoles privés reste très limité, de sorte que la procédure a donné lieu à de longs débats. Dans cette affaire spécifique, NTTEC a volontairement cessé ses infractions en avril 2004 immédiatement après la formulation des recommandations. Par conséquent, il n'y avait pas de risque immédiat d'aggraver les effets dommageables de ces infractions sur la concurrence malgré la longue durée de la procédure d'audition. Dans sa décision prise à la suite des auditions, le JFTC n'a finalement exigé la prise d'aucune mesure pour mettre fin à ces pratiques. Cette affaire est intervenue juste avant l'amendement de 2005 à la Loi anti-monopole, à la suite duquel le JTFC est en mesure de prendre une ordonnance d'interdiction dont l'effet ne peut être suspendu même si la procédure d'audition a déjà débuté. Le JFTC traite cette infraction en demandant au tribunal de prendre une mesure de suspension d'urgence. Le JFTC s'efforce de faire accélérer la procédure et l'article 18 des règles applicables aux procédures d'audition prévoit que l'autorité examinatrice doit s'efforcer de conclure la procédure le plus vite possible et au plus tard dans un délai de deux ans.

Le Président a conclu que la discussion avait commencé par un débat implicite entre les approches des États-Unis et de la Commission européenne, c'est-à-dire la division stricte entre une obligation de vente résultant d'une réglementation et une obligation de vente résultant du droit de la concurrence aux États-Unis (avec l'application d'un régime juridique différent pour les obligations résultant des réglementations) par opposition avec l'approche plus coopérative au niveau de la Commission européenne entre le droit de la concurrence et les réglementations, le pouvoir de réglementation étant partagé avec l'autorité de la concurrence. Les concepts utilisés dans l'application de la réglementation s'inspirent des principes de position dominante et de comportement d'exclusion relevant du droit de la concurrence, ce qui signifie que la distinction entre réglementation et droit de la concurrence est beaucoup moins nette. Du point de vue juridique, il se peut qu'il n'y ait pas de violation des dispositions réglementaires, auquel cas les règles anti-trust pourraient être la manière la plus appropriée de traiter le problème. Le principal problème posé par la compression de marges n'est pas de garantir un certain niveau de bénéfices mais de faire en sorte que le concurrent d'une efficience équivalente ne se trouve pas exclu.

Aucune conclusion définitive n'a été tirée concernant la question des coûts, les coûts marginaux, les coûts variables moyens et les coûts marginaux à long terme étant tous utilisés. Dans certaines juridictions

où les dispositions anti-trust ont été appliquées par l'autorité chargée de la réglementation sectorielle, des normes avantageuses pour les entrants ont été utilisées, telles que la norme du concurrent raisonnablement efficient ou la norme ajustée du concurrent efficient. On a constaté une différence minime entre les secteurs réglementés et les secteurs non réglementés, beaucoup de juridictions appliquant la même norme aux affaires de compression de marges dans ces deux secteurs.

Une question importante qui s'est dégagée de ces discussions concerne les recours. Dans les secteurs réglementés, la compression de marges peut s'accompagner de la fixation de prix de détail rentables par l'opérateur en place intégré verticalement, ce qui peut aboutir à une situation dans laquelle l'accès au marché est bloqué mais la société intégrée verticalement ne subit pas de pertes. Dans ce cas, la solution pourrait consister à appliquer une réglementation obligeant la société intégrée verticalement à accompagner toute réduction des prix de détail d'une réduction correspondante des coûts d'accès réglementés. Une telle disposition serait bénéfique pour les consommateurs dans la mesure où elle permettrait la fixation de prix faibles tout en maintenant la possibilité d'accéder au marché pour les concurrents efficients.