Margin Squeeze in the Telecommunications Sector: A More Economics-based Approach

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A margin squeeze occurs when a vertically integrated company, dominant in the supply of an indispensable upstream input, pursues a pricing policy which prevents downstream competitors from trading profitably, thereby leading to their ultimate exclusion from the downstream market.

In the telecommunications sector, where large ex-State firms still enjoy considerable market power, margin squeeze has long been frequent. Interestingly, the United States and the European Union have tackled this problem in considerably different ways. Dismayed by the idea of an antitrust court intervening in a company’s price setting, the US Supreme Court held that margin squeeze was exclusively the domain of regulation. Conversely, the Court of Justice of the European Union has endorsed a modern economics-based approach enabling competition authorities to engage in a coherent and verifiable antitrust assessment of the price differentials that potentially amount to a margin squeeze.

This paper will argue that (1) the economics-based approach is the right solution in the European context, but that (2) this approach will only lead to convincing results if it includes a rigorous and transparent analysis of the effects on competition and consumers.

1 INTRODUCTION

A margin squeeze occurs when a vertically integrated company, which is dominant in the upstream market, supplies an indispensable upstream input to downstream competitors and charges them a price which would not allow equally efficient downstream rivals to trade profitably, thereby leading to their ultimate exclusion from the downstream market.1

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It is not by accident that the telecommunications sector has been home to many margin squeeze cases. For decades, telecommunications had been an industry of monopolies, special rights and subsidies, sheltered from competition and ideal for the creation of extensive network infrastructures by public utilities.\(^2\) It was only in the late 1980s – after similar steps had already been undertaken in the United States and the United Kingdom – that the European Commission declared its intention to fully liberalize the European telecommunications market by 1 January 1998.\(^3\) Driven by regulatory and antitrust intervention, this process towards full competition led to lower prices and significant investment by the private sector; however, it failed to reduce the dominance of the incumbent companies.\(^4\) New digital networks have certainly enabled some entrants to compete profitably in the telephony, internet and television markets.\(^5\) Yet, in most parts of Europe, the success of these entrants is contingent on access to the incumbents’ local loop and broadband infrastructure on equitable terms.\(^6\)

Determining which access conditions and pricing policies are to be considered appropriate is a highly controversial issue which has led to fundamentally dissimilar responses in the United States and Europe.\(^7\) Influenced by the Chicago School’s reticence to interfere with price competition, the United States Supreme Court held that, absent an antitrust duty to deal or predatory


\(^5\) ICN Report, supra n. 3, at 6; Gual & Jódar-Rosell, supra n. 3, at 252.


pricing, an insufficient margin in itself was outside the reach of antitrust law and belonged to the sole sphere of regulation.\textsuperscript{8}

Europe’s Court of Justice, however, adopted a considerably more interventionist approach. Partly endorsing the Commission’s economics- and effects-based criteria of analysis, it held that margin squeeze was a stand-alone competition law claim even in cases when the dominant company was under no regulatory duty to deal.\textsuperscript{9}

This paper will explore the elements of the Commission’s economics-based approach to margin squeeze (chapter II); how it was gradually adopted by the decisional practice in the European Union and how other jurisdictions in Europe and the United States have dealt with margin squeeze cases (chapter III); what dimensions and contentious questions the use of economic models implies and how the application of competition law in a regulatory context can be justified (chapter IV); and finally, how the economics- and effects-based approach can become the right solution in the European context (chapter V).

2 THE COMMISSION’S MORE ECONOMICS-BASED APPROACH

2.1 INTRODUCTION

While the objectives of European competition law have long been manifold, recent competition policy papers have focused on one main and two derived goals: enhancing consumer welfare by protecting competition and allocative efficiency.\textsuperscript{10} In this same context, the Commission has introduced a new methodological approach, capable of putting these objectives into practice.\textsuperscript{11}

The economics- and effects-based approach analyses the actual and potential effects of dominant firms’ behaviour by relying on economic techniques and empirical evidence with a view to ensuring ‘that markets function properly and that consumers benefit from the efficiency and productivity which result from effective

\textsuperscript{8} Chapter III.4; Daniel A Crane, \textit{linkLine’s Institutional Suspicions}, 8 Cato S. Ct. Rev. 111, 113 (2009); Liza Lovdahl Gormsen, \textit{A Principled Approach to Abuse of Dominance in European Competition Law} 35f (CUP 2010).
\textsuperscript{9} Chapter III.1.
\textsuperscript{11} Lovdahl Gormsen, \textit{supra} n. 8, at 185; Marc Amstutz, \textit{Baüler Kommentar, Kartellgesetz}, Art. 7, para. 30 (Marc Amstutz & Mani Reinert eds., Helbing Lichtenhahn 2010).
competition between undertakings\(^{12}\). Its often interdependent objectives are (1) to apply Article 102 TFEU\(^ {13}\) consistently with competition law in other areas where economics had been influential already, (2) to increase the precision of assessments, (3) to avoid false positives and false negatives and (4) to protect competition, not inefficient competitors.\(^ {14}\)

Quite conversely, a form-based approach declares certain forms of conduct as per se abusive without regard to their possible pro-competitive effects.\(^ {15}\)

2.2 Before the publication of the Guidance Paper

In 2004, then Commissioner Monti declared that he wanted competition policy to become fully compatible with economic learning.\(^ {16}\) With regard to Article 102 TFEU, however, this process only really began with the submission of a report by the Economic Advisory Group on Competition Policy (EAGCP) in 2005.

The EAGCP report pointed out the weaknesses of a form-based approach and insisted that the notion of consumer welfare was key to the definition of competitive harm.\(^ {17}\) Yet, despite the report’s level of detail, margin squeeze was at best addressed implicitly.\(^ {18}\)

In the same year, the Directorate General for Competition published a Discussion Paper setting out its probable future approach to Article 102 TFEU.\(^ {19}\) While the Discussion Paper was generally considered to be less innovative than the


\(^{15}\) Paul K Gorecki, Form- versus Effects-Based Approaches to the Abuse of a Dominant Position: the Case of Ticketmaster Ireland, 2 J. Compet. L. & Econ. 533, 534, 547 (2006); Ioannis Lianos, Article 82 EC – Reflections on its Recent Evolution 20 (Ariel Ezrachi ed., Hart Publishing 2009).


\(^{18}\) EAGCP, supra n. 12, 26f, 43.

EAGCP report, it nevertheless reaffirmed the main pillars of an economics-based approach and led to the adoption of a Guidance Paper in 2008. The Discussion Paper mentioned margin squeeze cases but applied to them the methodology developed for constructive refusal to supply cases.

2.3 THE GUIDANCE PAPER

In the Guidance Paper, the Commission laid out its enforcement priorities regarding exclusionary practices under Article 102 TFEU and announced that it would ‘take into account the specific facts and circumstances of each case’ and ‘focus on those types of conduct that [were] most harmful to consumers’. A simultaneously published press release reassured the public that the Paper ‘[was setting] out an economic and effects-based approach’.

The following paragraphs outline the Commission’s analytical framework with a special focus on margin squeeze in the telecommunications sector. It is on the basis of ‘general’ and ‘specific’ factors that the Commission seeks to establish whether a dominant company forecloses competitors to the detriment of consumers.

The general factors used by the Commission make it clear that dominant telecommunications companies are in a difficult position: they commonly enjoy considerable strength on a significant part of the relevant market (position of the dominant undertaking, extent of the conduct), they benefit from scale and scope economies (market conditions) and their competitors generally struggle to gain ground in the market (position of competitors). Regrettably, the Commission adds that it will also take into account ‘any other factors’ it considers appropriate and that for certain forms of conduct the ‘anti-competitive effect may be inferred’.

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21 Discussion Paper, supra n. 19, paras 72, 220.


25 Guidance Paper, supra n. 12, para. 20.
without a detailed assessment, which is contrary to an economics-based approach.26

Next, the Commission will turn to the **specific factors** of margin squeeze cases: objective necessity of the input (indispensability), elimination of effective competition, consumer harm and efficiencies.27 Surprisingly, despite the existence of these criteria, paragraph 82 expresses that “[i]n certain specific cases’ antitrust intervention can be more easily justified if regulation has already proceeded to a balancing of the interests in question or where the dominant position is the result of special or exclusive rights.28 These (form-based) prerequisites are present in most liberalized telecommunications markets and it appears impossible for companies to draw any concrete conclusions from the vague formulation of this passage.

Given the apparent difficulty of an incumbent successfully arguing against an allegation of margin squeeze, the field where battles are lost and won will most often be the economic analysis of the price margins.29 As a general rule, the Commission will evaluate if a hypothetical rival as efficient as the incumbent’s downstream operations (*equally efficient competitor*) could trade profitably, assuming it incurs the latter’s long-run average incremental costs (*LRAIC*).30 But here again, the Commission states that ‘in certain circumstances’ the *LRAIC* of a less efficient competitor could be taken into account, which would make a finding of abuse more likely.31

Overall, while the Guidance Paper offers certain structures of analysis, it also creates considerable legal uncertainty through many imprecise exceptions and inconsistencies with case law.32 On the positive side, it does make two central points: (1) the Commission intends to apply modern economic models to margin squeeze cases; (2) effects on consumers form an integral part of the analysis.

Following the discussion of the theoretical underpinnings of the Commission’s methodological framework, the next chapter will focus on how courts and competition authorities have approached margin squeeze in practice. In

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27 Guidance Paper, n. 12; paras 21, 81. The Commission seems to apply the same analytical framework to refusals to supply and margin squeeze (para. 81: ‘these practices’); Temple Lang (2009b), supra n. 24, at 18.
28 See Telefónica, supra n. 6, para. 303; Rousseva, supra n. 14, 423; Temple Lang (2009b), supra n. 24, at 20f.
29 Chapter IV.
30 Guidance Paper, supra n. 12, paras 23, 25f; 80. See also TeleSoura, supra n. 1, para. 45.
31 Guidance Paper, supra n. 12, paras 24, 80 fn. 9.
Europe, there has been a clear trend towards a more economics- and effects-based approach. In the four other jurisdictions examined, three basic approaches can be discerned: (1) rejection of the margin squeeze doctrine (United States), (2) an economics- yet not effects-based approach (France, Switzerland) and (3) a well-developed economics- and effects-based approach (United Kingdom).

3 DECISIONAL PRACTICE

3.1 EUROPEAN UNION

3.1[a] The Early Decisions

Before the term ‘margin squeeze’ even came into use, the Commission and the General Court had availed themselves of the concept of margin squeeze. Although none of the early decisions contained analyses as detailed as in recent cases, they already focused on efficient competitors as a benchmark for abusive pricing.

In the National Carbonizing decision (1976), the National Coal Board (NCB) was dominant in the production of coal (upstream market) as well as, through its subsidiary, in the production of coke (downstream market). The National Carbonizing Company (NCC), which bought all its coal from the NCB, was only active in the downstream market, and after an upstream price rise without a corresponding rise in the retail price, the NCC could no longer trade profitably. The Commission considered this conduct abusive and ordered the NCB to reduce the price of coal supplied to the NCC to allow a sufficient margin for a reasonably efficient manufacturer.

In the Napier Brown decision (1988), British Sugar (BS) was dominant in both the production of industrial sugar (upstream market) and the repackaging and selling of retail sugar (downstream market). Napier Brown, which had only been active downstream, found it was a victim of abusive pricing. The Commission explicitly focused on the ‘repackaging margin’ and concluded that a company ‘equally efficient as BS’ would have been excluded from the retail market. In this case, however, margin squeezing was only one abuse among several.

The Industrie des Poudres Sphériques case, the first margin squeeze case to be decided by the General Court (2000), concerned a margin squeeze claim by a...
downstream firm less efficient than its upstream rival. Péchiney Électrométallurgie (PEM) was the sole Community producer of primary calcium metal (upstream market) as well as a seller of broken calcium metal (downstream market). Industrie des Poudres Sphériques (IPS) was only active downstream and, despite the fact that it required a specially manufactured version of the input product, considered the price charged by PEM abusively high when compared with PEM’s downstream price. Three findings were important in the Court’s rejection of the claim:

1. there were other suppliers of the input product available;
2. neither was the upstream price excessive nor the downstream price predatory;
3. IPS’s production method was inefficient, and it had failed to prove that an efficient competitor would have been eliminated from the retail market.

While an inefficient company could therefore have made a claim of predatory or excessive pricing, it could not – based on its own costs and revenues – allege that its margin was insufficient.

The early decisions revealed the European institutions’ willingness to recognize margin squeeze as form of abuse under Article 102 TFEU. However, it was only in the subsequent decisions in the telecommunications sector that the concept began to take shape.

3.1[b] The Decisions in the Telecommunications Sector

A direct analogy can be drawn from markets where non-integrated firms depend on supplies from raw material producers to markets where such firms rely on access to essential facilities controlled by ex-State firms. In the telecommunications sector, the majority of new entrants would have no prospect of flourishing without equitable access to the incumbents’ upstream inputs such as their network infrastructure (interconnection) or customer base (call termination).
3.2[a][i] Deutsche Telekom

Having led to the first explicit recognition of margin squeeze as a stand-alone category of abuse, the Deutsche Telekom case can be regarded as the leading case of European margin squeeze jurisprudence.\(^\text{46}\)

The allegations of margin squeeze were aimed at Deutsche Telekom (DT), which was dominant in both the provision of wholesales network access (upstream market) and the provision of retail internet access (downstream market).\(^\text{47}\) The regulatory context was as follows: at the wholesale level, charges had to be cost-oriented and were subject to authorization by the national regulatory authority; at the retail level, a price cap was applied to baskets of similar services with the exception of retail ADSL,\(^\text{48}\) which was not regulated.\(^\text{49}\) Despite these restraints, both the General Court and the Court of Justice (2008 and 2010 respectively) agreed with the Commission (2003) that DT would have had sufficient scope to adjust its retail prices to avoid a margin squeeze and considered it irrelevant that prices had been authorized and the existence of a margin squeeze denied by the national regulatory authority.\(^\text{50}\)

The Commission had based its margin squeeze calculations on an aggregated retail price (the weighted average price of a basket of services).\(^\text{51}\) By reference to the Community policy of ‘tariff rebalancing’, the Commission had further rejected DT’s argument that call services should have been taken into account when evaluating the downstream cash-flow despite the fact that, through the wholesale input, downstream rivals had also been enabled to offer such services.\(^\text{52}\)

The Union courts accepted both the aggregated approach to calculation and the exclusion of call services on regulatory grounds.\(^\text{53}\) They further found that the equally efficient competitor (EEC) test was compatible with their earlier Akzo\(^\text{54}\) and France Télécom\(^\text{55}\) judgments, holding that it would be contrary to legal certainty


\(^{47}\) Deutsche Telekom (Commission), supra n. 46, paras. 58, 96.


\(^{50}\) Deutsche Telekom (CJEU), supra n. 1, para 85; Deutsche Telekom (GC), supra n. 46, paras. 24, 105, 151; Deutsche Telekom (Commission), supra n. 46, paras. 163–175, 199.

\(^{51}\) Deutsche Telekom (CJEU), supra n. 46, paras. 116, 144–162.

\(^{52}\) Id. paras 117–120.

\(^{53}\) Deutsche Telekom (CJEU), supra n. 1, para. 226; Deutsche Telekom (GC), supra n. 46, paras 200, 206.


to expect dominant firms to know the cost structures of their competitors.\(^{56}\) Indeed, while the EEC test is based on the dominant company’s own financial situation, other tests, such as the reasonably efficient competitor (REC) test, would, at least implicitly, require access to sensitive data of competitors.

Regarding the need to prove effects on competition, the Commission’s approach was corrected by the Court of Justice. The Commission had thought that it was not under an obligation to demonstrate any exclusionary effects of the conduct in question (but nevertheless assessed the evolution of market shares and the state of competition).\(^{57}\) The Court of Justice began by stating that Article 102 TFEU aimed at protecting consumers through undistorted competition and that consumers may suffer because of reduced choice and higher prices in margin squeeze situations.\(^{58}\) When assessing whether there was an obligation to demonstrate effects, the court stated in an unclear way that:

> a pricing practice […] constitutes an abuse within the meaning of Article [102 TFEU] if it (1) has an exclusionary effect on competitors who are at least as efficient as the dominant undertaking itself by squeezing their margins and (2) is capable of making market entry more difficult or impossible for those competitors, (3) and thus of strengthening its dominant position on that market (4) to the detriment of consumers’ interests.\(^{59}\)

It can be deduced that a margin squeeze must (1) have an effect on competitors and (4) be detrimental to consumers. The Court went on to state that ‘the fact that the desired result [had not been] ultimately achieved [did] not alter its categorisation as abuse’ but that the ‘absence of any effect’ would not suffice.\(^{60}\) This can be interpreted to mean that some effect indicating exclusion must be shown but that a demonstration of the fact of exclusion (the ‘desired result’) is not necessary.

Significant as this judgment may be, only an interpretation considering the later TeliaSonera decision provides the full picture of the Union courts’ current approach to margin squeezing.

3.2[a][ii] **TeliaSonera**

The 2011 TeliaSonera case\(^{61}\) was triggered by a reference for a preliminary ruling by a Swedish court. The national competition authority had accused vertically integrated TeliaSonera of having squeezed the margin of its downstream competitors, to which TeliaSonera had been voluntarily providing wholesale ADSL

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\(^{56}\) Deutsche Telekom (CJEU), supra n. 1, paras 198, 200; Deutsche Telekom (GC), supra n. 46, paras 187–193.

\(^{57}\) Deutsche Telekom (Commission), supra n. 46, paras. 178–181.

\(^{58}\) Deutsche Telekom (CJEU), supra n. 1, paras. 180, 182.

\(^{59}\) Id. para. 253 (numbers added).

\(^{60}\) Id. para. 254.

\(^{61}\) TeliaSonera, supra n. 1.
In its decision, the Court of Justice relied heavily on Deutsche Telekom, citing it nearly twenty times. Four of the main findings in TeliaSonera are particularly relevant:

First, on the basis of case law, the court favoured the equally efficient competitor test. However, it added that it might be appropriate to refer to the costs of competitors not only where the dominant company’s cost structure was not identifiable, but also where the latter was in a ‘competitively advantageous situation’. Since dominant companies usually are in such a position, this passage might in future cases be relied upon in order to apply the reasonably efficient competitor test.

Secondly, the court stated that a margin squeeze could be committed even by dominant undertakings under no regulatory obligation to deal and that – since margin squeeze was a standalone case of abuse – the Bronner criteria for refusal to supply cases could not be decisive.

Thirdly, the court made a restrictive reading of the Deutsche Telekom decision regarding effects. It held that the assessment of effects only referred to the degree of competition (consumer harm was not mentioned at this stage) and that they did not have to be concrete. In the same context, the court stated – in an unnecessarily complicated formulation – that it could not be ruled out that indispensability was a necessary condition for an upstream input to be capable of producing exclusionary effects.

Fourthly, and most importantly, the judges in Luxembourg made clear that exclusionary effects ‘[could] be counterbalanced […] by advantages in terms of efficiency which also benefit the consumer’, thereby paving the way not only for objective justifications, but also for an effects analysis including consumer welfare considerations. However – contrary to Deutsche Telekom, where consumer considerations were part of the abuse analysis – TeliaSonera placed the burden of proof regarding consumer benefits on the undertaking by treating such benefits as objective justifications.

Finally, in response to further questions, the court stated that according to Tetra Pak II, dominance in only one market was sufficient as it could be

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62 Id. paras. 4–9.
63 Id. paras. 39–44, 112.
64 Id. para. 45.
66 TeliaSonera, supra n. 1, paras. 51–59.
67 Id. paras. 62–67.
68 Id. para. 72.
69 Id. para 75–77, 76, 112.
70 See DeutscheTelekom, supra n. 1, para. 253.
leverage into other markets, and that given sacrifice was no element of a margin squeeze, recoupment could not be either.\textsuperscript{72}

The court’s \textit{Deutsche Telekom} and \textit{TeliaSonera} decisions clearly constitute important endorsements of the more economics-based approach. The Commission, however, decided to go even further by demonstrating \textit{actual} exclusionary effects, a practice exemplified in the \textit{Telefónica} decision.

3.2[a][iii] Telefónica

Telefónica was the dominant provider of both national and regional broadband internet access in Spain (upstream market) and, through its subsidiaries, of retail broadband internet access (downstream market).\textsuperscript{73} Regulation required one of its subsidiaries to provide wholesale access to Telefónica’s network.\textsuperscript{74} When asked to analyse whether a margin squeeze had occurred, the Commission (2007) laid out an elaborate five-step framework, which in 2012 was upheld by the General Court.\textsuperscript{75}

First, the Commission chose to apply the equally efficient competitor test, aware that, due to Telefónica’s economies of scale and scope, the reasonably efficient competitor test would have been more beneficial to potential new entrants.\textsuperscript{76} Next, the Commission stated that the LRAIC test was the most appropriate for assessing margin squeezing.\textsuperscript{77} As to the relevant time frame, the Commission chose to rely on both a period-by-period and a forward-looking discounted cash flow (DCF) approach to reduce the chance of false positives.\textsuperscript{78} Finally, in steps four and five, the Commission applied an aggregated approach to Telefónica’s portfolio of retail products, while deciding, with regard to the wholesale market, to run the tests separately for the national and regional markets.\textsuperscript{79} The former choice would force entrants to adopt an equally profitable product range, while the latter choice recognized that operators entering the market would likely start at a small critical mass and that they had to be protected from abusive pricing at all levels of the market.\textsuperscript{80}

\begin{itemize}
\item \textsuperscript{72} \textit{TeliaSonera}, supra n. 1, paras. 84–89, 99f.
\item \textit{Telefónica}, supra n. 6, paras. 12, 36, 125–127.
\item Id. paras. 11, 119, 288.
\item \textit{Id.} para. 110; Case T–336/07 \textit{Telefónica v. Commission} [2012] unreported, see particularly paras 19, 135–143, 188–194, 212–232, 234–244.
\item \textit{Id.} paras. 311–315.
\item \textit{Id.} paras. 136–323.
\item \textit{Id.} paras. 325–349, particularly 332, 349.
\item \textit{Id.} paras. 388f.
\item \textit{Id.} paras. 388, 392.
\end{itemize}
The Commission found that Telefónica had squeezed its competitors’ margins on both the national and regional markets. The analysis of effects was equally clear: Telefónica’s conduct had kept competitors from entering the Spanish broadband market and developing their own infrastructure, which resulted in Spain’s having some of the highest prices and lowest broadband penetration rates in Europe. Telefónica’s claims regarding efficiencies and objective justification were rejected.

To conclude the section on decisional practice in Europe, it can be observed that case law has undergone a process of significant sophistication towards an economics-based approach. While validation from the highest court is still recent and incomplete, the telecommunications sector can be expected to continue to act as a motor of evolution in margin squeeze cases. The Telefónica case may have opened the road to an increasingly economics-savvy practice, similar to that analysed in the following section.

3.2 United Kingdom

In the UK, margin squeeze claims are explicitly recognized and have produced many decisions. Effects were already assessed at a time when the European Commission considered such an analysis unnecessary.

While two noteworthy cases, Genzyme and Albion Water, have led to successful allegations of margin squeezing, the following discussion focuses on four unsuccessful, but no less instructive, margin squeeze claims in the telecommunications sector. The Office of Fair Trading (OFT) and the Office of Communications (OFCOM) have concurrent jurisdiction in antitrust matters in this sector.

In the BSkyB case (2002), the company BSkyB was dominant in the markets for both the wholesale provision of premium television channels to distributors (upstream market) and the distribution of such channels to consumers.

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81 Id. paras. 397–542, particularly 464, 482, 533, 541.
82 Id. paras. 554, 557f, 592, 603.
83 Id. para. 664.
(downstream market) in competition with other distributors. When a margin squeeze was alleged, the OFT’s Director General embarked on an analysis of the conduct in question and, referring to section 60 of the Competition Act 1998, decided to apply an EEC test in conformity with European case law. Having further chosen an historical approach, he analysed in detail BSkyB’s downstream costs and revenues by assessing the return on turnover during comparable periods of several months. He found that BSkyB had indeed been unprofitable in some of the early periods, but that since these losses had been limited and the applied models were ‘subject to uncertainties’, no margin squeeze had been exercised.

The analysis of effects was even more clearly highlighted in the 2003 BT Openworld (Freeserve) decision, which concerned a margin squeeze allegation in relation to broadband services offered by British Telecommunications plc (BT). OFTEL chose a clearly structured, two-tier approach. First, it analysed whether there was a margin squeeze by using two tests to assess profitability: (1) a discounted cash flow test applied to the entire broadband business (in BSkyB, no future revenues were taken into account), and (2) a ‘cohort analysis’ of new customers over their expected subscriber lifetimes. After having found that an equally efficient competitor could have traded profitably on the downstream market concerned, OFTEL nevertheless engaged in an effects analysis, concluding that there had indeed been no margin squeeze. The fact that OFTEL analysed the effects despite having found no margin squeeze in the first place could be interpreted as an effort to weaken objections to the EEC test, which often constitutes too high a bar for new entrants.

In another 2003 decision, the effects analysis was to play an equally prominent role. The BT/UK-SPN case concerned access to a BT network named ‘UK-SPN’. Even though OFTEL had found that there was a margin squeeze, it denied the existence of abuse on the grounds that there was ‘no evidence to demonstrate that the UK-SPN service [had] had a material adverse effect on...

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89 Id. paras. 354–356.
90 Id. paras. 388–390, 413, 539.
91 Id. paras. 541, 546f.
92 Investigation by the Director General of Telecommunications (the ‘Director’) into alleged anti-competitive practices by British Telecommunications plc (‘BT’) in relation to BTOpenworld’s (‘BTOW’) consumer broadband products, OFTEL decision of Nov. 20, 2003, paras. 2.1–2.13.
93 Now OFCOM.
94 Id. paras. 5.6, 6.147–6.161.
95 Id. 5.6, 6.162, 7.1–7.21.
96 Investigation by the Director General of Telecommunications (The Director) into alleged anti-competitive pricing by British Telecommunications plc (BT) in relation to its UK-SPN calls service, OFTEL decision of May 23, 2003, para. 7f.
It should be underlined that a form-based approach would have reached a diametrically opposed result.

Finally, the 2004 BT Together decision concerned the market for calls to residential retail customers. This decision is notable because of the sheer number of test variations OFCOM applied. They can be summarized as follows:

- All tests were based first on the data of an EEC and then on the data of an REC in order to take into account the customer acquisition costs faced by BT’s downstream rivals.
- Two cost tests were applied: a fully allocated costs (FAC) test and a LRAIC test.
- Additionally, all tests were based on different combinations of local, national and international calls, including a combinatorial test.

BT’s prices passed all these tests, no margin squeeze was found.

While it can be observed that even the most elaborate analyses do not remove all uncertainties, they obviously improve the traceability and quality of decisions. The European Commission could clearly learn a lesson from the flexibility with which tests are applied by the UK authorities.

3.3 Further European Decisions

As in the United Kingdom, margin squeeze is a recognized stand-alone case of abuse in France and Switzerland. In both these jurisdictions (the latter of which is outside the European Union), competition authorities regularly refer to EU decisions in their economic analyses. However, so far they do not seem to have embraced a systematic analysis of effects.

The French case Tenor (2004) concerned a margin squeeze between the price of fixed-to-mobile calls which France Télécom (FT) charged its retail business customers (downstream market) and the wholesale price of calls to FT’s mobile division (call termination in the upstream market). While the upstream prices for call termination had been fixed by regulation, FT had over several months charged its customers downstream prices that would not have allowed an

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97 Id. paras. 41, 49.
98 Investigation against BT about potential anti-competitive exclusionary behaviour (Case CW/00760/03/04), OFCOM decision of July 12, 2004, para. 41.
99 Id. paras. 55, 108, 119, 121f.
100 Id. para. 109.
101 Id. paras. 65, 112f.
102 Id. paras. 111, 124f.
103 Pratiques mises en œuvre par France Télécom, SFR, Cogelel et Bouygues Télécom (Case No. 04-D-48) Conseil de la concurrence decision of Oct. 14, 2004 (hereinafter Tenor).
equally efficient competitor to recover its long-run incremental costs.\textsuperscript{104} In two instances, the Conseil de la concurrence\textsuperscript{105} quoted the Commission’s Deutsche Telekom decision: first, to state that competition law was applicable despite pre-existing regulatory rules and second, to make a point that proving the existence of a margin squeeze did not require demonstration of any effects on competition.\textsuperscript{106} This pattern of analysis, relying on a presumption of effects, was upheld by the Cour de Cassation in 2009.\textsuperscript{107} Nevertheless, two years later, the Cour d’Appel de Paris ordered all fines to be repaid because it found that the Conseil had failed to prove that the conduct ‘had [had] or could have [had] any restrictive or distortive effect on competition’.\textsuperscript{108}

Finally, in the 2010 Preispolitik Swisscom ADSL decision, the Swiss Competition Commission (COMCO) fined the incumbent Swisscom for having engaged in a margin squeeze between its prices for wholesale broadband internet access (upstream market) and its retail broadband prices (downstream market).\textsuperscript{109} COMCO calculated the admissible margin by applying a retail minus approach on the basis of a historical profitability test and found that neither an equally nor a reasonably efficient competitor could have traded profitably on the retail ADSL market.\textsuperscript{110} Notably, Swisscom had been under no regulatory duty to deal; however, COMCO observed that given Swisscom’s market power, this was irrelevant as an antitrust duty to deal would have existed.\textsuperscript{111}

Overall, in Europe there is a clear tendency towards an economics-based approach. While the UK authorities seem most at ease with handling economic models, the European Commission can be said to have made up much of the leeway in the Telefónica decision. The next section will contrast this approach with that of the United States.

\textsuperscript{104} Tenor, supra n. 103, paras. 18, 51, 54, 66–69. In addition, the regulated (upstream) price was above FT’s actual costs (para. 184).
\textsuperscript{105} Now Autorité de la concurrence.
\textsuperscript{108} Case SFR/France Télécom [2011] Cour d’Appel de Paris decision 2010/08945 of Jan. 27, 2011, 17 (‘avaient ou pouvaient avoir pour effet de restreindre ou de fausser le jeu de la concurrence’).
\textsuperscript{110} Id. paras. 223, 231, 264, 281; Alessandro Celli, Boris Wenger & Nicolas Diebold, The Public Competition Enforcement Review 410f (Shaun Goodman ed., Law Business Research 2010).
\textsuperscript{111} Preispolitik Swisscom ADSL, supra n. 109, paras. 192–197.
3.4 United States

The approach to margin squeeze cases chosen by the United States differs considerably from Europe’s. This divide can partly be explained by institutional differences. However, the discrepancy is also philosophical: the willingness of European antitrust authorities to intervene in already regulated markets has met with little acceptance in the US Supreme Court.

What the Deutsche Telekom and TeliaSonera decisions are to Europe, the linkLine decision (2009) is to the United States. AT&T, a vertically integrated company active and dominant in the markets of both wholesale and retail broadband internet access, had a regulatory duty to provide wholesale access to its network at prices no higher than its retail prices. The question before the Supreme Court was whether, absent an antitrust duty to deal, a price squeeze claim under section 2 of the Sherman Act was admissible.

Before turning to the court’s assessment, the relevant findings of four precedents will briefly be outlined:

- In the 1945 Alcoa judgment, a Circuit Court held it unlawful for a vertically integrated company to fix an upstream price higher than a ‘fair price’ if this resulted in a ‘squeeze’ of competitors’ profits.
- In Town of Concord (1990), it was held that a court being no ‘rate-setting regulatory agency’, it was in no position to determine what a ‘fair price’ was.
- In the Brooke Group decision (1993), the Supreme Court held that a company’s prices were predatory if they were (1) below its rivals’ costs, and (2) there was a dangerous probability of recoupment.
- Finally, in Trinko (2004), this court decided that regulatory duties did not create any new obligations under competition law and that in the absence of a (rare) special duty to deal, ‘insufficient assistance’ to competitors did not amount to an abuse.

The Supreme Court’s reasoning in the linkLine case consisted of three main steps: (1) given the District Court’s binding decision that AT&T had no antitrust duty to deal, it followed from Trinko that AT&T had even less of a duty to deal under

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112 Chapter IV.5.
113 Pacific Bell Telephone Co v linkLine Communications Inc 172 L Ed 2d 836 (2009).
114 linkLine, supra n. 113, 842.
115 Id. 844.
116 United States v. Aluminium Co of America 148 F2d 416 (2d Cir 1945), 438.
117 Town of Concord v. Boston Edison Company 915 F2d 17 (1st Cir 1990), 25.
terms favourable to downstream competitors;\textsuperscript{120} (2) retail prices could not be tested under \textit{Brooke Group} as the plaintiff had made no such claim;\textsuperscript{121} (3) the price squeeze doctrine in this context was ‘nothing more than an amalgamation of a meritless claim at the retail and a meritless claim at the wholesale level’.\textsuperscript{122} The Supreme Court stated that admitting such a doctrine could chill price competition and would ask courts to set prices which, as had been held in \textit{Town of Concord}, they were ill-suited to do.\textsuperscript{123} Considering therefore that margin squeeze belonged to the regulatory sphere, the court also rejected the \textit{Alcoa} decision by a vague reference to changes in economic theory and competition jurisprudence.\textsuperscript{124}

In a hardly noticeable statement, the court further rebuffed the EEC test as a means to determine a fair price as it lacked grounding in the court’s jurisprudence.\textsuperscript{125} Interestingly, in a 2008 report, the Department of Justice (DOJ) had declared this test to be preferred when assessing single-firm price conduct.\textsuperscript{126} However, this same report also endorsed the \textit{Trinko} approach on refusals to deal and omitted to recognize margin squeeze as a form of abuse.\textsuperscript{127} When the DOJ adopted this position in an amicus curiae brief for the \textit{linkLine} decision, the Federal Trade Commission chose to publicly disagree as it considered margin squeeze to have been part of the section 2 doctrine since \textit{Alcoa}.\textsuperscript{128}

While by no means uncontested in the United States,\textsuperscript{129} the Supreme Court’s decision spares antitrust authorities the hassle of engaging in uncertain price assessments, leaving this task to the regulators. However, it is notable that in Europe, and most markedly in the United Kingdom, the co-existence of regulatory and antitrust issues has led to no comparable institutional schism.

\begin{itemize}
\item \textsuperscript{120} \textit{linkLine}, supra n. 113, 842f, 846f.
\item \textsuperscript{121} Id. 847.
\item \textsuperscript{122} Id. 848.
\item \textsuperscript{123} Id. 847, 849.
\item \textsuperscript{124} Id. 848, fn. 3.
\item \textsuperscript{125} Id. 849.
\item \textsuperscript{127} Id. 119–129.
\item \textsuperscript{129} Aryeh Friedman & Joyce Choi, \textit{linkLine: Supreme Court Weighs Survival of Price-Squeeze Claims}, The Antitrust Source 1, 6 (2008).
\end{itemize}
4 A MORE ECONOMICS-BASED APPROACH TO MARGIN SQUEEZE ANALYSIS

The European model of margin squeeze analysis implies the use of economic models. Economic models help determine which competitors should be deemed efficient and therefore be able to trade profitably. Authorities applying such models should address four main dimensions: (1) which company is to be considered efficient, (2) which of its costs must be taken into account, (3) which time frame is relevant for the analysis and (4) which level of product aggregation is adequate. After the discussion of these issues, the analysis will turn to the fundamental question of how regulation and competition law can coexist (5).

4.1 WHOSE COSTS?: THE IMPUTATION TEST

The predominant view is that the vertically integrated firm should be the model of reference for an efficient company. The relevant margin is calculated by deducing this firm’s upstream access price from the downstream price charged to its consumers (equally efficient competitor/EEC test).130 The advantage of this standard is that the dominant firm is able to evaluate whether it is ‘squeezing the margin’ on the basis of its very own data.131

However, the EEC test is criticized on two main fronts. On the one hand, a new entrant without the incumbent’s economies of scale and scope might be unable to reach this level of efficiency;132 on the other hand, a competitor could be selling slightly differentiated products.133 Additionally, an assessment based on the dominant firm’s situation may even lead to false positives if the rival’s products are in fact more profitable or subject to less demand elasticity.134

Several authors have therefore advocated an approach which would ‘allow a reasonably efficient service provider in the downstream market to obtain a normal

132 TeliaSonera, supra n. 1, para. 45.
133 Damien Geradin & Robert O’Donoghue, The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector, 1 J. Compet. L. & Econ. 355, 393f (2005); Fernández, supra n. 130, at 260; Amory & Verheyden, supra n. 44, at 13; CEPS, supra n. 20, 82.
134 Geradin & O’Donoghue, supra n. 133, at 393f; Fernández, supra n. 130, at 260.
Having already been applied in regulatory contexts, the REC test is most often cited in relation to recently liberalized industries such as telecommunications.\footnote{Access Notice, supra n. 130, para. 118. See also Kavanagh, supra n. 1, at 193; Serge Clerckx & Laurent De Muynck, Price Squeeze Abuse in the EU Telecommunications Sector: A Reasonably or Equally Efficient Test?, GCP 1, 6 (2009); Feilla & Pardolesi, supra n. 44, at 276f.} While the downside of this approach would be the risk of protecting less efficient competitors, supporters argue that possible short-term losses would be offset by the long-term gains of more vigorous competition.\footnote{See supra n. 135; Oxera (2009), supra n. 131, 4.} However, the dominant firm’s inability to exactly calculate the relevant margin might lead to a situation of legal uncertainty hostile to vigorous price competition.\footnote{Kavanagh, supra n. 1, at 193; Oxera (2009), supra n. 131, 4.}

In Europe, the 1998 Access Notice prepared the ground for the two tests.\footnote{In Europe, the 1998 Access Notice prepared the ground for the two tests. The Discussion Paper, the Guidance Paper and most recently the TeliaSonera case endorsed the EEC test but reserved the right to base the analysis on data of less efficient operators.\footnote{Geradin & O’Donoghue, supra n. 133, at 392; Oxera (2009), supra n. 131, 4.} The Deutsche Telekom case, however, can be seen as an unequivocal statement in favour of the EEC test.\footnote{See supra n. 56.} Similarly, the majority of countries taking part in a 2010 OECD survey expressed preference for this test.\footnote{Autorité de la concurrence, supra n. 106, 148f; DOJ Report, supra n. 126, 43–45; OECD (2010), supra n. 87, 97 (France), 127f (Germany), 143 (Italy), 153 (Korea), 162 (Mexico), 182 (Norway), 185 (Poland), 193 (Portugal), 202 (Slovak Republic), 218 (Turkey).}

Nonetheless, the REC test has often been applied as a second test and led to the same outcome.\footnote{See the Genzyme, supra n. 85, BT Together, supra n. 98, and Preispolitik Swisscom ADSL, supra n. 109, cases.} The question is what would happen if a firm passed the EEC test but failed the REC test, while an automatic preference for the EEC test would make the second test look farcical, the REC test should only prevail where a competition authority can transparently show that the entry of a less efficient competitor will lead to positive effects on competition within a reasonable time horizon, according to antitrust standards of efficiency and consumer welfare.

### 4.2 Which Costs?: The Cost Test

Two main methods strive to answer the question of exactly which costs should be taken into account when applying an imputation test.

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\footnote{Access Notice, supra n. 130, para. 118. See also Kavanagh, supra n. 1, at 193; Serge Clerckx & Laurent De Muynck, Price Squeeze Abuse in the EU Telecommunications Sector: A Reasonably or Equally Efficient Test?, GCP 1, 6 (2009); Feilla & Pardolesi, supra n. 44, at 276f.}

\footnote{See supra n. 135; Oxera (2009), supra n. 131, 4.}

\footnote{Kavanagh, supra n. 1, at 193; Oxera (2009), supra n. 131, 4.}

\footnote{Geradin & O’Donoghue, supra n. 133, at 392; Oxera (2009), supra n. 131, 4.}

\footnote{Access Notice, supra n. 130, para. 117f.}

\footnote{TeliaSonera, supra n. 1, para. 45; Discussion Paper, supra n. 19, paras. 63, 67; Guidance Paper, supra n. 12, paras. 23f; Temple Lang (2009a), supra n. 32, 3.}

\footnote{See supra n. 56.}
Access pricing. The first method focuses on the access price charged by the incumbent. An incumbent who provides a bottleneck input incurs three sorts of costs: those for the input itself, those for providing the input and those regarding foregone profits because the incumbent does not sell the end product itself (opportunity costs). A common method to assess these costs is the efficient component pricing rule (ECPR) according to which upstream costs include incremental costs plus foregone profits; as this figure corresponds to the subtraction of the downstream costs from the downstream revenues (minus a profit margin), this approach is also called retail minus. While the merit of this approach is that it reflects conditions in a market environment, a clear disadvantage is that the incumbent’s price level is accepted as given. Furthermore, as a consequence of the inclusion of opportunity costs, only competitors that are more efficient than the incumbent will manage to trade profitably, which contradicts the EEC test.

LRAIC: The test most commonly applied in order to directly measure the downstream costs which an efficient rival is expected to cover is the long-run average incremental costs (LRAIC) test. It takes account of all product-specific variable and fixed costs incurred in relation to the relevant products, but as it is cost-based, it does not factor in foregone profits. LRAIC are similar to fully allocated costs (FAC) except when there are costs common to many products: common costs are included in FAC calculations, while this is only the case in LRAIC calculations when common costs are product-specific and would not have been incurred anyway. Several authorities and authors propose to consider a mark-up (LRAIC+) whenever the LRAIC test would lead to the exclusion of

\[144\] In practice, the access price is often regulated. See Crocioni & Veljanovski, supra n. 1, at 58; John Vickers, Competition Policy and Property Rights, 120 The Econ. J. 375, 379 (2010).


\[148\] Polo, supra n. 145, at 456; Crandall & Singer, supra n. 146, at 51.


\[150\] Geradin & O’Donoghue, supra n. 133, at 374; Rousseva, supra n. 14, at 375.

significant common costs in markets where variable costs are minimal.\textsuperscript{152} The fact that fixed costs are taken into consideration makes it more favourable to new entrants and forces the incumbent to remain competitive.\textsuperscript{153}

The European Commission has endorsed the LRAIC test in the \textit{Telefónica} decision and in the Guidance Paper.\textsuperscript{154} Furthermore, this methodology is frequently used at the international level.\textsuperscript{155} The US Federal Communications Commission even considered the ECPR test incompatible with the requirements of the 1996 Telecommunications Act.\textsuperscript{156}

Nevertheless, the fact that the LRAIC test is more favourable to competitors has led to concerns that it would discourage investment and innovation.\textsuperscript{157} In a case concerning the British broadband market, OFCOM applied the ECPR test after considering that it was more important not to discourage investment by the incumbent, given the uncertain evolution of competition.\textsuperscript{158}

To conclude, it should be noted that while the focus here has been on only two tests, agencies with sufficient resources and expertise are capable of applying an almost infinite variety of cost tests.\textsuperscript{159}

4.3 \textbf{Which temporal dimension?: the profitability test}

Two main tests answer the question of what time frame the economic models should focus on.

The static \textit{period-by-period} test (or historical test) measures costs and revenues during sequences of fixed periods, for instance accounting years.\textsuperscript{160} In stable and

\begin{footnotesize}
\begin{enumerate}
\item Direction to resolve a dispute between BT, Energis and Thus concerning xDSL interconnection at the ATM switch, OFTEL direction of June 21, 2002, para. 4.2; OFT 417, \textit{supra} n. 84, para. 7.6; Guidance Paper, \textit{supra} n. 12, para. 26 fn. 2; CEPS, \textit{supra} n. 20, 35f; Ferrari Bravo & Siciliani, \textit{supra} n. 145, 259; Oxera (2009), \textit{supra} n. 131, 5.
\item Rousseva, \textit{supra} n. 14, at 375.
\item \textit{Telefónica}, \textit{supra} n. 6, para. 318; Guidance Paper, \textit{supra} n. 12, para. 80.
\item \textit{BT Together}, \textit{supra} n. 98, para. 109; Tenor, \textit{supra} n. 103, para. 54; OFT 417, \textit{supra} n. 87, paras. 7.7–7.10; OECD (2010), \textit{supra} n. 87, 11; Gonçalves, \textit{supra} n. 146, 524.
\item Direction \textit{BT, Energis and Thus, supra} n. 152, para. 4.9f; Rousseva, \textit{supra} n. 14, 375; Gonçalves, \textit{supra} n 146, 527.
\item See \textit{Complaint from Energis Communications Ltd about BT’s charges for NTS call termination} (Case CW/00823/03/05), OFCOM decision of Aug. 1, 2008, paras. 6.511, 6.74–6.86.
\end{enumerate}
\end{footnotesize}
mature markets, this backward-looking method allows for an adequate assessment of profitability.\footnote{161}

In dynamic or immature markets, a static evaluation would risk ignoring the potential for future profits, particularly when applied to a period during which heavy investments were necessary.\footnote{162} The forward-looking \textit{discounted cash flow} (DCF) method seems more appropriate: the expected cash flow (revenues, costs) caused by an investment is forecast over a period of several years, then discounted back while taking into account the cost of capital, and finally added up to create a measure called \textit{net present value} (NPV).\footnote{163}

There are two problems with this latter method: first, initial losses can already be sufficient to cause efficient competitors to leave; second, profits are taken into account irrespective of whether they are earned as a consequence of exclusionary behaviour.\footnote{164} In spite of these flaws, a dynamic view will often be the more appropriate approach in the telecommunications sector.\footnote{165} However, in order to overcome the danger of inequitable outcomes, competition agencies should always engage in a proper effects analysis.\footnote{166}

\section{4.4 Which products?: the aggregation test}

In many cases, there will not be a ‘linear vertical chain of production’ between the upstream and downstream services; similarly, the dominant company and its rivals may sell different ranges of services, which may be offered in various bundles.\footnote{167} The choice of the level of aggregation (downstream market definition) will necessarily influence the outcome of a margin squeeze case.

If only part of a bundle of services offered by the incumbent is assessed because its rivals only sell smaller bundles, an exact allocation of costs (within the incumbent’s bundle) might be impossible.\footnote{168} Under such circumstances, it is certainly advisable to also run the tests on the basis of rivals’ data in order to strengthen the result’s credibility.\footnote{169}
In case the incumbent and its rivals offer comparable product ranges, an aggregated approach would allow the tests to be based on a presumably efficient structure.\textsuperscript{170} If there were a risk that a margin squeeze is overlooked, a combinatorial test would be appropriate, which would require that the ‘revenue of every product by itself, and the combined revenue of every combination of the firm’s products, […] be equal the corresponding average-incremental costs’.\textsuperscript{171}

\* With regard to economic models, one main lesson – highlighted in the BSkyB and BT/UK-SPN decisions – stands out: given the relative arbitrariness inherent in the choice and application of these models, a thorough effects analysis is required to make sure the outcome of an assessment harmonizes with the ultimate objectives of competition law.\textsuperscript{172}

The next section will deal with the delicate question of whether and how competition law should be applied in a regulatory environment.

4.5 The Regulatory Environment

Regulation can be seen as a ‘substitute for competitive market forces where those forces are weak or absent’.\textsuperscript{173} Despite incisive liberalization programmes, the European telecommunications market has so far failed to become truly competitive.\textsuperscript{174} The question is whether competition law can add some missing pieces to fragmentary regulatory frameworks.

It has often been argued that pre-existing regulation leaves no room for competition law because:

– competition law would be pursuing regulatory goals;
– there would be a risk of contradictory or inconsistent decisions;
– competition authorities would be unable to handle the complexity of technical questions;


\textsuperscript{171} Baumol & Sidak, *supra* n. 4, at 70f (emphasis omitted); OFT 417, *supra* n. 84, para. 7.11.

\textsuperscript{172} UK-SPN, *supra* n. 96, paras. 41–49; Genzyme, *supra* n. 85, para. 87; Forwood, *supra* n. 16, 3.

\textsuperscript{173} Baumol & Sidak, *supra* n. 4, at 5.

competition authorities could not appropriately monitor compliance with their decisions.\textsuperscript{175}

*Ex ante* regulation differs from the *ex post* application of competition law in several respects. Based on a detailed assessment of a particular sector, regulation normally has a much broader mandate than competition law, including policy goals such as environmental and social equality or the encouragement of investment.\textsuperscript{176} Regulation therefore promotes competition in more interventionist ways than would be allowed under antitrust provisions. This need not, however, exclude parallel application of regulation and competition law. What follows is a short examination of how two major jurisdictions have resolved this issue.

The US Supreme Court has taken a clear stance, holding in *Trinko* that where a regulatory structure exists, ‘the additional benefit to competition provided by antitrust enforcement will tend to be small’, an interpretation upheld in the *Credit Suisse* and *linkLine* decisions.\textsuperscript{177} The fact that the 1996 Telecommunications Act\textsuperscript{178} explicitly provides for the applicability of competition law was interpreted in *Trinko* to mean that while established antitrust standards would apply, no new competition law claims could be derived from that act.\textsuperscript{179} As a general rule, the court stated in *Credit Suisse* that ‘where regulatory statutes are silent in respect to antitrust, […] courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws’.\textsuperscript{180}

In contrast, Europe’s highest court favoured parallel application, provided that the firm’s infringement of competition law was not caused by its duty to comply with regulatory requirements.\textsuperscript{181}

Organizational differences may partly explain this divide: while in Europe competition law is enforced by specialist agencies, in the United States enforcement is primarily private, and it is feared that courts could interfere with regulators’ expert assessments.\textsuperscript{182}


\textsuperscript{176} Geradin & O’Donoghue, supra n. 133, at 362f; O’Donoghue & Padilla, supra n. 1, at 245 fn. 138; Temple Lang (2006), supra n. 32, 4; Temple Lang (2007), supra n. 175, 163; Cavaleri, supra n. 175, at 1111.

\textsuperscript{177} *Trinko*, supra n. 119, 412; *Credit Suisse Securities (USA) LLC fka Credit Suisse First Boston LLC v. Billing* 168 L Ed 2d 145 (2007), 160f; *linkLine*, supra n. 113, 846; Genevaz, supra n. 131, 34; Vickers (2010), supra n. 144, 391.

\textsuperscript{178} Section 601(b) Telecommunications Act 1996.

\textsuperscript{179} *Trinko*, supra n. 119, 407.

\textsuperscript{180} *Credit Suisse*, supra n. 177, 153.

\textsuperscript{181} Deutsche Telekom (CJEU), supra n. 1, para. 85; see also Case T–398/07 *Spain v. Commission* [2012] unreported, para. 71f.

\textsuperscript{182} Genevaz, supra n. 131, at 37; Sidak, supra n. 167, at 307.
Another point is that in the European Union competition law is primary law which prevails over the secondary law instruments containing the regulatory programmes, whereas in the United States antitrust and regulation are on equal footing. Commenting on the situation in Europe, Geradin and O’Donoghue argue that the Commission may simply choose not to intervene where sector-specific regulation exists. If regulation has adequately taken account of competition concerns and is effectively enforced by the responsible authority, this is certainly reasonable; but it should not be an option otherwise, since a lacunary regulatory regime cannot be an excuse for suspending the application of competition law.

Overall, and given that regulation and competition law have comparable objectives with regard to margin squeeze, it appears sensible to stress their complementary character. Indeed, both use similar microeconomic techniques to design measures intended to guide markets back to the avenue of efficiency. While Trinko correctly stated that regulation does not create any new antitrust claims, it seems right to apply competition law whenever a regulatory regime fails to adequately address antitrust concerns.

5 CONCLUSION

The treatment of margin squeeze by the Commission and the courts of the European Union has undergone a significant transformation from a barely conceptualized assessment in the early decisions to a progressively systematic analysis.

As its experience in assessing margin squeeze cases increased, the Commission – like other European competition authorities – began to rely on a more economics-based approach. Quite conversely, the US Supreme Court categorically rejected both the recognition of margin squeeze as a stand-alone case of abuse and the application of antitrust law in regulatory contexts.

While the European agencies’ approach is justified by their growing competence and expertise, the use of economic models implies considerable uncertainties. This calls for a transparent effects analysis ensuring that the application

183 Geradin & O’Donoghue, supra n. 133, at 418.
184 Geradin & O’Donoghue, supra n. 133, at 418. While the Commission is unlikely to be able to categorically rule out intervention in such cases, this would seem to be possible on a case-by-case basis, see Ezrachi (2009b), supra n. 14, 10.
185 Geradin & O’Donoghue, supra n. 133, at 418; Sidak, supra n. 167, at 282.
187 Baumol & Sidak, supra n. 4, at 26; O’Donoghue & Padilla, supra n. 1, at 345.
of these models ultimately leads to the promotion of competition, efficiency and consumer welfare.

Regrettably, the courts, while supporting the idea of an effects-based approach, seem to be satisfied with a demonstration of potential effects, which, furthermore, only have to relate to competition in the market, not to consumer welfare. While consumer detriment was clearly part of the abuse analysis after the Deutsche Telekom case, the TeliaSonera decision degraded it to the status of an objective justification, which has to be proven not by the Commission, but by the undertaking concerned.

It is crucial that the Commission continue to take consumer considerations into account when assessing a potential abuse and it is hoped that it does so not just by way of a simple reference to the apparently self-evident causality between distorted competition and consumer harm, but by specifically demonstrating effects on consumers with the help of economic evidence. Such an approach will allow the Commission to focus on truly harmful forms of conduct, thereby avoiding chilling competition.

While the latest margin squeeze cases are clearly among the European courts’ most progressive decisions on effects in the context of Article 102 TFEU, there is room for improvement. Generally, a look over the Channel and across the Atlantic will often prove instructive. First, with regard to the Commission, there is something to be said for the robustness of the economic analysis as it is practised in the United Kingdom. Second, with regard to the courts, the US Supreme Court’s systematic focus on consumer welfare would not only be in perfect harmony with European competition policy, it could also become a beacon in the windy waters of margin squeeze analysis.

If the European institutions consistently cling to the economics-based standards set in policy papers and recent court decisions, and if they require effects analyses to convincingly prove a ‘net negative economic effect’ on competition and consumers, then the normative force of quality could come to constitute the hallmark of decisions based on the more economics- and effects-based approach.

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190 Paraphrase of an expression in C-468/06 to C-478/06 Set Lelov gia Sia EE v GlaxoSmithKline [2008] ECR I-7139, Opinion of AG Ruiz-Jarabo Colomer, para. 79.