Some aspects of price squeeze within the European Union: A case law analysis

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Introduction

A price squeeze, or margin squeeze, refers to an anti-competitive strategy of a vertically integrated undertaking, which sells upstream inputs to and at the same time competes with undertakings on the downstream market, to substantially narrow down the profit margin[1] of its downstream competitors, with the intention to exclude them out of the downstream market. This behaviour is subject to the review of art.102 of the Treaty on the Functioning of the European Union ("art.102"). Price squeeze is a close concept alongside with excessive price and predatory price since an obvious way to squeeze competitors' profit margin is either to raise the price on the upstream market,[2] and/or reduce the price on the related downstream market. Nevertheless, price squeeze is different from both in that a price squeeze must involve two markets whereas excessive pricing or predatory pricing takes place in only one market.

As a general principle competition law does not require undertakings to subsidise competitors. Therefore, dominant undertakings are not obliged to leave a sufficient margin for their competitors. Due to this recognition, price squeeze, since its very beginning, has been subject to fierce debate with regard to its viability in economics.[3] Correspondingly, the practice in the European Union is also underdeveloped with only five cases generated at the European level. Consequently, price squeeze remains one of the most controversial subjects within EU competition law.

This article does not aim to deliver a normative discussion on the viability of price squeeze, but to shed light on three most important legal aspects of that concept based on the case law generated by the European authorities, i.e. the European Commission ("Commission"), the European General Court ("GC", previously the Court of First Instance) and the European Court of Justice ("ECJ"). The three aspects that are scrutinised subsequently comprise: (i) the identity of the infringers of price squeeze; (ii) the nature of price squeeze, a stand-alone infringement or a value-added analysis; and (iii) the approach for the imputation test. The next three parts are dedicated to those three aspects respectively. Some conclusions will be given in the last part.

Who are the infringers?

A price squeeze is usually understood by legal practitioners as:

> "[A] situation where a vertically integrated company sets a high price for its upstream supply to downstream competitors while setting its own retail price so low as to exclude or significantly chill the downstream competition."[4]

While the core of the behaviour is clearly indicated in that definition, it is ambiguous whether all dominant undertakings, provided vertically integrated, have a duty to leave a sufficient profit margin for their downstream competitors. Before approaching the answer, it should be admitted that as a matter of fact there have been only five price-squeeze cases dealt with by the European authorities so far. The limited number of case law seems not to suggest that every vertically integrated dominant company could engage in price squeeze, but that only some can. If this speculation is correct, then answers to the following three sub-questions can contribute to identifying those infringers: (i) the extent to which the infringer is dominant on the upstream market; (ii) the necessity, or not, of the infringer to be dominant on the downstream market; and (iii) the relationship between the upstream and downstream market, more specifically whether the infringer should have an obligation to supply other undertakings.[5] This part will first examine all the five

[*] Special thanks are given to Professor Valcke and Professor Stuyck for their valuable comments. Nevertheless, all the mistakes remain the author's.

[1] In financial terms, profit margin is also defined as the ratio of profitability calculated by dividing gross profit by sales. Nevertheless, it is used in this article as a synonym to markup, i.e. the difference between the cost of a good or service and its selling price.

[2] Such excessive pricing may be exercised in a blatantly discriminatory way by maintaining a lower price for subsidiaries or affiliated partners at the same time. As an alternative, it may also be applied in a superficially non-discriminatory manner that all customers, including subsidiaries or affiliated partners, are priced in the same way. Nevertheless, a successful price squeeze requires the infringer to subsidise its subsidiaries or affiliated partners in one way or another in order to keep balanced the whole account, though in some cases it may be not noticeable. Therefore, both approaches are discriminatory in essence.

[3] See, e.g. Crocioni and Veljanovski, "Price Squeeze, Foreclosure and Competition Law: Principles and Guidelines" (2003) 4(1) *Journal of Network Industries* 28.

[4] Grout, "Defining a Price Squeeze in Competition Law" in Swedish Competition Authority (ed.), *The Pros and Cons of Low Prices* (2003), available at *http://www.konkurrensverket.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rap_pros_and_cons_low_prices.pdf* [Accessed October 17, 2010], p.71.

[5] The three sub-questions were inspired by Crocioni and Veljanovski, "Price Squeeze, Foreclosure and Competition Law" (2003) 4(1) *Journal of Network Industries* 28, 38–42.

cases with respect to the three sub-questions and then attempt to provide an answer to the main question in the end.

National Carbonising

The first price-squeeze case was *National Carbonising* where the Commission imposed an interim measure on National Coal Board (NCB), a monopoly on the upstream market for coal production and super-dominant[6] on the downstream market for coke (with 90 per cent market share). The Commission suspected NCB to have conducted price squeeze because NCB's increased price on the upstream market was in no proportion with the price increase downstream for the finished product. The Commission stated in the decision that:

> "[A]n undertaking which is dominant as regards production of a raw material … and is therefore able to control its price to independent manufacturers of derivatives … and which is itself producing the same derivatives in competition with these manufacturers, may abuse its dominant position if it acts in such a way as to eliminate the competition from these manufacturers in the market for these derivatives. From this general principle … the (dominant undertaking) may have an obligation to arrange its prices so as to allow a reasonably efficient manufacturer of the derivatives a margin sufficient to enable it to survive in the long term."[7]

With regard to market power, the suspected infringer was a monopoly on the upstream market and super-dominant on the downstream market. Concerning the relationship between the upstream and downstream market, the Commission observed that the upstream product was a raw material for the downstream production and the abuse may eliminate competition on the downstream market. This wording is comparable with that in *Commercial Solvents*, an early case of the "essential facilities doctrine",[8] where Commercial Solvents was required to supply its customers because it controlled a raw material and the refusal to supply could eliminate all the competition from its customers.[9] Although the Commission did not clarify that it was also a case of refusal to supply, its wording suggested the clear influence from *Commercial Solvents*. It thus can be concluded that the criteria within *Commercial Solvents* may also be fulfilled in this case. Consequently, NCB was very likely to be subject to an obligation to supply.

Napier Brown/British Sugar

Napier Brown/British Sugar was the second case.[10] British Sugar ("BS") was dominant in the United Kingdom for the wholesale and retail supply of raw and granulated sugar (about 60 per cent market share each), and Napier Brown ("NB") was a retailer. The Commission found that BS conducted a price squeeze by selling retail sugar at a price which no longer reflected its own production costs. This case was afterwards appealed to the GC[11] and was rejected by the latter.[12]

The infringer in this case was dominant both on the upstream market and on the downstream market. The 60 per cent market shares may imply that BS held less market power than the suspect in *National Carbonising*. However, there was a factor that could indicate BS's actual high market power. The sugar defined in this case included both beet sugar and cane sugar. British Sugar was a monopoly only on beet sugar. This explains the relatively "small" market share of British Sugar. More importantly, at the material time of the case the then EU price policy granted the production of beet sugar a cost advantage over cane sugar. This policy preference made the producer of cane sugar to enjoy only a small profit margin and to be always price followers.[13] As a price leader, BS had an actual market power far beyond what could be suggested by its relatively small market share. Furthermore, with regard to the relationship between the upstream and downstream market, the Commission concluded in the decision that British Sugar had an obligation to supply Napier Brown since the criteria established *Commercial Solvents* had been fulfilled.[14]

Industrie des Poudres Sphériques

The next case was *Industrie des Poudres Sphériques*.[15] Industrie des Poudres Sphériques ("IPS") applied before the GC to annul the Commission decision which rejected its request for a finding of price squeeze committed by Pechiney Electrometallugie ("PEM"). PEM was the sole European producer of primary calcium metal and also marketed broken calcium metal (a derivative of primary calcium metal). IPS competed with PEM in the derivative

[6] Four terms are used in this article to describe different degrees of dominant market power: (1) minimum dominance; (2) super dominance; (3) quasi-monopoly; and (4) monopoly. The degree of market power increases from the first to the last. The concept of super dominance was recognised by A.G. Fennelly in the Opinion of *Compagnie Maritime Belge Transports SA v Commission of the European Communities* (C-395/96P & C-396/96P) [2000] E.C.R. I-1365; [2000] 4 C.M.L.R. 1076 at [137]. Although the European courts themselves have never accepted super dominance, they referred several times to quasi or near monopoly in, e.g. *Tetra Pak International SA v Commission of the European Communities* (C-333/94P) [1996] E.C.R. I-5951; [1997] 4 C.M.L.R. 662 at [28]; and *Irish Sugar Plc v Commission of the European Communities* (T-228/97) [1999] E.C.R. II-2969; [1999] 5 C.M.L.R. 1300 at [226]. Nevertheless, this article does not intend to define the four terms.
[7] Decision adopting interim measures concerning National Coal Board, National Smokeless Fuels Ltd and National Carbonising Company Ltd [1976] OJ L35/6.
[8] For a more detailed discussion about the essential facilities doctrine, see, e.g. Subiotto, "Defining the scope of the duty of dominant firms to deal with existing customers under Article 82 EC" [2003] 24 (12) E.C.L.R. 683.
[9] *Istituto Chemioterapico Italiano SpA v Commission of the European Communities (Commercial Solvents)* (C-6–7/73) [1974] E.C.R. 223; [1974] 1 C.M.L.R. 309.
[10] Decision 88/518 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.178—Napier Brown-British Sugar) [1988] OJ L284/41.
[11] All GC judgments referred in this article were made before the adoption of the Treaty on the Functioning of the European Union. Thus, they were actually judged by the former Court of First Instance. Nevertheless, this article uses its current name, the European General Court.
[12] *Tate & Lyle Plc v Commission of the European Communities* (T-202/98, T-204/98 & T-207/98) [2001] E.C.R. II-2035; [2001] 5 C.M.L.R. 22.
[13] *Tate & Lyle Plc v Commission* [2001] E.C.R. II-2035; [2001] 5 C.M.L.R. 22 at [51].
[14] *Tate & Lyle Plc v Commission* [2001] E.C.R. II-2035; [2001] 5 C.M.L.R. 22 at [64].
[15] *Industrie des Poudres Sphériques SA v Council of the European Union* (T-5/97) [2000] E.C.R. II-3755; [2001] 4 C.M.L.R. 28.

market for broken calcium metal. IPS claimed that PEM engaged in price squeeze by setting the price of primary calcium metal abnormally high, which in combination with the very low price for broken calcium metal forced its competitors to sell at a loss if they were to remain in the market. The claim was not accepted by the GC because the applicant could not prove that PEM's behaviour met the imputation test.

With regard to market power, although PEM was the sole European producer of primary calcium metal, it was confronted with competition from producers in other continents. According to the data disclosed in the judgment, it could be concluded that PEM had about 50 per cent market share on the upstream market.[16] It may suggest that PEM just fulfilled the bottom line of the dominance test,[17] but in no case super-dominance. Furthermore, the judgment did not touch upon the market position of PEM on the downstream market. However, it maintained that PEM was not a price leader on the downstream market because the applicant, IPS, had the ability to charge prices 25 per cent above those of competing products.[18] This fact implied, at least, PEM's limited market power on the downstream market even if it could be considered dominant. In addition, as far as the relationship between the upstream and downstream market is concerned, the GC considered that PEM's upstream product was not essential to IPS's downstream production, as the latter may acquire inputs from alternative sources.[19] It is noteworthy that this was the only case where price squeeze concern was eliminated.

Deutsche Telekom

Deutsche Telekom became the fourth case. Deutsche Telekom ("DT"), the telecom incumbent in Germany, supplied unbundled local loop (an upstream product) to undertakings providing narrowband and broadband retail access services (two downstream products). The Commission condemned DT for engaging in a price squeeze.[20]DT brought the case before the GC and the GC rejected the application.[21]DT then appealed to the ECJ. For the time being this case is still pending.[22]

With regard to the three sub-questions, first, DT was a monopoly on the upstream market and, secondly, a quasi-monopoly on the two downstream markets (above 90 per cent on both). Thirdly, DT was under an obligation to serve downstream operators. This obligation nevertheless did not come from the "essential facilities doctrine" but from the then electronic communications regulation.

Telefónica

Telefónica was the last price-squeeze case so far. It shared some facts with *Deutsche Telekom* in that both cases took place in the electronic communications sector, and Telefónica was Spain's state telecommunications monopoly. The Commission found that Telefónica applied unfair tariffs in the form of disproportion between its wholesale and retail broadband access prices.[23] Telefónica appealed to the GC and this case is now pending there.[24]

The Commission defined two wholesale (upstream) markets, the market for wholesale broadband access for which traffic was delivered at the regional level and the market for wholesale broadband access for which traffic was delivered at one national hand-over point, and one retail (downstream) market for retail internet access. It observed that Telefónica was super-dominant on both markets, in particular with 100 per cent market share on the regional market and above 84 per cent market share on the national market.

With regard to the dominance on the retail (downstream) market, the Commission for the first time articulated that:

> "[I]t is not necessary under Article 82 (now Article 102) to demonstrate that Telefónica is dominant in the relevant retail market for proving the existence of an abuse of dominant position in the form of a margin squeeze."[25]

However, it is notable that the Commission did not stop its analysis of dominance immediately after making such a statement. Instead, it continued to carry out a detailed analysis on the competition on the retail market, and concluded that Telefónica was also dominant on the retail market based on factors, such as over 50 per cent market share stable over years,[26] enormous size compared with competitors,[27] strong pricing power.[28] In particular, the

[16] The GC in fact did not analyse whether PEM held a dominant position on the upstream market. Nevertheless, the judgment showed that the importation of primary calcium metal from Russia and China in 1996 was 155 tonnes, accounting for about 17.5% of European consumption (*Industrie des Poudres Sphériques* [2000] E.C.R. II-3755; [2001] 4 C.M.L.R. 28 at [56]); the import from Canada was 65.6 tonnes in 1996 (*Industrie des Poudres Sphériques* at [50]), and the US producer delivered 150 tonnes in 1994 (*Industrie des Poudres Sphériques* at [51]). Since those were the main sources of importation, it may be concluded that PEM had approximately 50% market share.
[17] According to the established case law, very large market shares, in excess of 50%, are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services [2002] OJ C165/6 para.75.
[18] *Industrie des Poudres Sphériques* [2000] E.C.R. II-3755; [2001] 4 C.M.L.R. 28 at [185].
[19] *Industrie des Poudres Sphériques* [2000] E.C.R. II-3755; [2001] 4 C.M.L.R. 28 at [57].
[20] Decision relating to a proceeding under Article 82 of the EC Treaty (COMP/C-1/37.451, 37.578, 37.579—Deutsche Telekom AG) [2003] OJ L263/9.
[21] *Deutsche Telekom AG v Commission of the European Communities* (T-271/03) [2008] E.C.R. II-477; [2008] 5 C.M.L.R. 9.
[22] *Deutsche Telekom v European Commission* (C-280/08 P) [2010] 5 C.M.L.R. 27. A.G. Mazák delivered his opinion on April 22, 2010.
[23] Decision relating to a proceeding under Article 82 of the EC Treaty (COMP/38.784—Wanadoo España v Telefónica) [2007] OJ C83/05.
[24] *Telefónica v Commission of the European Communities* (T-336/07) pending.
[25] Telefónica Decision [2007] OJ C83/05 para.243.
[26] Telefónica Decision [2007] OJ C83/05 para.245.
[27] Telefónica Decision [2007] OJ C83/05 para.246.
[28] Telefónica Decision [2007] OJ C83/05 paras 251–253.

Commission found that other competitors always aligned their prices with Telefónica's and no undertaking could raise prices above the latter.[29]

As far as the relationship between the upstream markets and downstream market is concerned, Telefónica claimed in the Commission decision that the Commission should have proved that the upstream product must be essential to the downstream service, as those cases applying the essential facilities doctrine.[30] However, the Commission pointed out that this case was different from those cases since Telefónica had a duty to supply the upstream inputs under the electronic communications regulation.[31]

Implications

The three sub-questions raised at the beginning of this part are: (1) to what extent the infringer should be dominant on the upstream market; (2) whether the infringer has to be dominant on the downstream market; and (3) whether the infringer must have an obligation to supply downstream competitors. These sub-questions are used to contribute to the identity of the infringer of price squeeze.

The first question is in effect closely related to the third question. The logic is rather straightforward. Within EU competition law, there is no general obligation on dominant undertakings to supply others. An obligation to supply takes place only where the three conditions within the essential facilities doctrine are fulfilled: (i) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market; (ii) the refusal is likely to lead to the elimination of effective competition on the downstream market; and (iii) the refusal is likely to lead to consumer harm.[32] Furthermore, the European authorities maintain a quite high standard of proof for those conditions. One of the most significant factors for evaluation is that no genuine substitute for the dominant undertaking's supply should be available on the upstream market.[33] Once there are no substitutes, it is conceivable that the undertaking concerned should be super-dominant or even quasi-monopoly, if not monopoly, on the upstream market. In addition, as a matter of fact all the undertakings that have been decided to have an obligation to supply, such as those in *Commercial Solvents*,[34] *Telemarketing*,[35] FAG,[36] *GVG*,[37] *Magill*[38] and Microsoft,[39] were either monopolists or quasi-monopolists.

In all of the five cases discussed in the above neither the courts nor the Commission have acknowledged that it is necessary to establish first a case of an obligation to supply and then to conclude the existence of price squeeze. Nevertheless, the Commission within its Guidance on Abusive Exclusionary Conduct includes price squeeze into the discussion of refusal to supply.[40] It may suggest that the Commission intends to consider price squeeze as one category of refusal to supply. In addition, when turning back to the five cases, an obligation to supply was indeed observed in *Napier Brown/British Sugar*, *Deutsche Telekom* and *Telefónica* where price squeeze was finally concluded. Even in *National Carbonising*, it may be argued that an obligation to supply could also be established. An obligation to supply was not found in Industrie des Poudres Sphériques. However, no price squeeze was discovered either. This may lead to the conclusion that vertical integrated undertakings should have an obligation to supply in order to engage in price squeeze. Should this conclusion be valid, it should also be inferred that that dominant company is super-dominant or a quasi-monopoly on the upstream market. As circumstantial evidence, Crocioni and Veljanovski admitted that:

> "[D]ominance for price squeeze is more akin to super dominance (position of dominance approaching a monopoly), which requires a market share of 80% or more."[41]

The second question, on whether the infringer should also be dominant on the secondary market, is more complex. The Commission insisted in *Telefónica* that it was not necessary to demonstrate that the infringer was dominant in the derivative market in order to prove the existence of a price squeeze. However, it may be argued that the Commission was arbitrary there. In Industrie des Poudres Sphériques the GC rejected the complaint of price squeeze partially because the complainant, IPS, had an ability to raise its price 25 per cent above its competitors. In other words, should the vertical integrated undertaking apply disproportionate prices the applicant could have raised downstream price to counter the effect of reduced profit margin. Infringers of price squeeze accordingly must anticipate no price increase from their downstream competitors in order to succeed in price squeeze. In most cases, it means that downstream competitors can only follow the downstream prices of those vertically

[29] Telefónica Decision [2007] OJ C83/05 para.274.
[30] Telefónica Decision [2007] OJ C83/05 paras 299–301.
[31] Telefónica Decision [2007] OJ C83/05 paras 302–303.
[32] Commission Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/7 (hereinafter, "the Guidance") para.80.
[33] *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* (C-7/97) [1998] E.C.R. I-7791; [1999] 4 C.M.L.R. 112 at [43]-[44].
[34] *Commercial Solvent* [1974] E.C.R. 223; [1974] 1 C.M.L.R. 309.
[35] *Centre Belge d'Études de Marché Télé-Marketing SA v Compagnie Luxembourgeoise de Télédiffusion SA* (311/84) [1985] E.C.R. 3261; [1986] 2 C.M.L.R. 558.
[36] Decision relating to a proceeding under Article 86 of the EC Treaty (IV/34.801—FAG/Flughafen Frankfurt/Main AG) [1998] OJ L72/30.
[37] Decision relating to a proceeding pursuant to Article 82 of the EC Treaty of (COMP/37.685—GVG/FS) [2004] OJ L11/17.
[38] *Radio Telefis Eireann v Commission of the European Communities*(C-241/91 P & C-242/91 P) [1995] E.C.R. I-743; [1995] 4 C.M.L.R. 718. It was an appeal from *Radio Telefis Eireann v Commission of the European Communities* (T-69/89) [1991] E.C.R. II-485; [1991] 4 C.M.L.R. 586.
[39] *Microsoft v Commission* (T-201/04) [2007] E.C.R. II-3601, appealed from Decision relating to a proceeding under Article 82 of the EC Treaty (COMP/C-3/37.792—Microsoft) Unreported, available at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf* [Accessed October 17, 2010].
[40] The Guidance para.79.
[41] Crocioni and Veljanovski, "Price Squeeze, Foreclosure and Competition Law" (2003) 4(1) *Journal of Network Industries* 28, 39.

integrated undertakings. However, it is not certain whether this would qualify that vertically integrated undertaking as having a dominant position on the downstream market. According to the definition given by the ECJ that a dominant position relates to a position of economic strength which enables the holder to prevent effective competition by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers,[42] those vertically-integrated undertakings seem to be dominant also on the downstream market as they can change prices independently of their competitors. This may explain why the Commission, though asserting no need to analyse the market position on the secondary market, continued to investigate whether Telefónica had dominance on the retail internet access market, and eventually found that Telefónica was in fact dominant and a price leader there. Furthermore, in two other cases, *Napier Brown/British Sugar* and *Deutsche Telekom*, where price squeeze was found, dominance on the derivative market was also present.

To sum up, not all vertically integrated undertakings, as long as they are dominant on the upstream market, can engage in price squeeze. Within the context of price squeeze under art.102, the vertically integrated undertaking may have to meet the following three conditions:

1. it has at least super-dominance or quasi-monopoly on the upstream market;
2. it should be under an obligation to supply downstream competitors. This obligation may either come from competition law (the "essential facilities doctrine") or sector-specific regulation, such as access obligations under the electronic communications regulation; and
3. it is questionable whether the vertical integrated undertaking should also be dominant on the downstream market. However, it is certain that the vertical integrated undertaking should have the ability to manipulate the price on the downstream market.

Stand alone or value added?

The second question is whether price squeeze represents a stand-alone anti-competitive behaviour, or only a value-added analysis for other antitrust infringements, notoriously excessive price or predatory price. The added value of price squeeze could be to mitigate the difficulty to prove excessive pricing or predatory pricing in relation to vertically integrated undertakings that normally do not keep separate accounts for its upstream and downstream production. This question may initially seem more academic than practical. Nevertheless, it has practical meaning in that if price squeeze could not constitute a stand-alone infringement it would be difficult to deal under the category of price squeeze with a case where neither the upstream price nor the downstream price individually infringes art.102 while the margin is insufficient to allow for the survival of competitors. The answer to this question was provided in the evolution of the relevant case law.

First, the Commission position is investigated. It should be noted that the Commission never articulated price squeeze as a separate infringement. Nevertheless, its practice was always based on such a position. Within the first price-squeeze case, *National Carbonising*, it stated that:

> "[T]he (dominant undertaking) may have an obligation to arrange its prices so as to allow a reasonably efficient manufacturer of the derivatives a margin sufficient to enable it to survive in the long term."[43]

This suggests that guaranteeing sufficient profit margin itself could constitute a separate antitrust obligation. Subsequently in the second case, *Napier Brown/British Sugar*, the Commission again placed its focus on the margin between the upstream and downstream price, without giving attention to the individual prices on the upstream or the downstream market.[44] Furthermore, such a position continued to be applied by the Commission in *Deutsche Telekom*[45] and *Telefónica*.[46]

By contrast, the European courts' view was not as consistent as the Commission. In *Industrie des Poudres Sphériques* the GC disaccorded with the Commission's position and held that:

> "In the absence of abusive prices being charged by PEM for the raw material, namely low-oxygen primary calcium metal, or of predatory pricing for the derived product, namely broken calcium metal, the fact that the applicant cannot, seemingly because of its higher processing costs, remain competitive in the sale of the derived product cannot justify characterising PEM's pricing policy as abusive."[47]

It seems that the GC attempted to process price squeeze cases either according to abusive prices on the upstream market, or predatory pricing on the downstream market. Therefore, it possibly did not considered price squeeze as a stand-alone infringement. However, this difference from the Commission's position may not be over-estimated as this case concerned a rejection of a complaint of price squeeze rather than a decision finding

[42] *United Brands Co v Commission of the European Communities* (27/76) [1978] E.C.R. 207; [1978] 1 C.M.L.R. 429 at [65].
[43] Decision adopting interim measures concerning National Coal Board, National Smokeless Fuels Ltd and National Carbonising Company Ltd [1976] OJ L35/6.
[44] Napier Brown/British Sugar Decision [1988] OJ L284/41 para.66.
[45] Deutsche Telekom Decision [2003] OJ L263/9 paras 102–105.
[46] Telefónica Decision [2007] OJ C83/05 paras 731–736.
[47] *Industrie des Poudres Sphériques* [2000] E.C.R. II-3755; [2001] 4 C.M.L.R. 28 at [179].

an abuse of a dominant position. Most importantly, the GC changed its view in the more recent case *Deutsche Telekom*:

> "[T]he abusive nature of the applicant's conduct is connected with the unfairness of the spread between its prices for wholesale access and its retail prices, which takes the form of a margin squeeze. Therefore, in view of the abuse found in the contested decision, the Commission was not required to demonstrate in that decision that the applicant's retail prices were, as such, abusive."[48]

It is clear here that individual price levels on the upstream market and on the downstream market are irrelevant to the analysis of price squeeze. It is the margin between the two markets that determines whether there is an abuse of a dominant position. Furthermore, although the appeal of that case is still pending before the ECJ, A.G. Mazák has delivered his opinion recently. He contended that price squeeze indeed constituted a stand-alone form of abuse.[49]

Consequently, it is concluded that price squeeze constitutes a stand-alone infringement. It may relate to excessive pricing on upstream markets or predatory pricing on downstream markets. However, it is different from both in that its focus is the margin between the prices on the two markets rather than the individual price level. Although price squeeze may be achieved by excessive price or predatory price, it is not necessary to prove that there are individual abusive prices on each of the two markets. It is thus possible that:

> "Even if neither the upstream nor downstream price is in itself abusive (i.e. excessive or predatory) the combination of the two (the squeeze) is contrary to Article 82 (now Article 102)."[50]

In addition, as a matter of fact the emergence of price squeeze did not replace the application of other abusive prices due to its superficial simplicity. For example, the Commission accused Wanadoo Interactive, a subsidiary of France Télécom, of applying predatory prices in 2003.[51]

The imputation test

In order to demonstrate the actual existence of price squeeze, competition authorities need to establish a method to prove the insufficient profit margin, which is called here the imputation test. As discussed in the last part, price squeeze places its focus on the profit margin between upstream price and downstream price. In theory, profit margin could be easily calculated through subtracting from downstream price upstream price and downstream operation costs. However, the practical implementation is complicated. Upstream price is usually uniform and available from the market itself as the infringer is the sole source of supply; downstream price is also relatively less complicated since the dominant undertaking must be the price leader there. Nevertheless, two difficulties still largely remain. First, it is difficult to calculate the downstream operation costs because those costs probably vary from one operator to another. Secondly, it is also uncertain of the appropriate way to determine a sufficient profit margin. This part investigates how those two issues have been dealt with by the European authorities.

In the first price-squeeze case, *National Carbonising*, the Commission did not shed much light on the imputation test, as it was a case of interim measure. However, the Commission noted that:

> "[T]he (dominant undertaking) may have an obligation to arrange its prices so as to allow a reasonably efficient manufacturer of the derivatives a margin sufficient to enable it to survive in the long term."[52]

This suggests that downstream operation costs should be based on a "reasonably efficient" competitor on the downstream market. Nevertheless, the Commission did not define a reasonably efficient competitor. Furthermore, although the Commission did not conduct an imputation test in this case, the wording that the sufficient margin should enable a reasonably efficient company to "survive in the long time" should mean that the profit margin must be at least more than zero.

By contrast, the Commission within the second case, *Napier Brown/British Sugar*, applied a different approach to test downstream operation costs, which was based on the cost of any competitor "equally efficient" as British Sugar on the downstream market.[53] In practice, the Commission relied on British Sugar's downstream operation costs for the imputation test. With regard to the margin, the Commission concluded that British Sugar's retail price would make an "equally efficient" company to obtain no profit.[54] The profit margin considered by the Commission was thus zero. In other words, the imputation test applied here only requires the downstream price of the dominant undertaking concerned to be equal to or less than the upstream price plus the downstream operation costs of that dominant undertaking.

[48] *Deutsche Telekom* [2008] E.C.R. II-477; [2008] 5 C.M.L.R. 9 at [167].
[49] *Deutsche Telekom* [2010] 5 C.M.L.R. 27, A.G. Opinion para.44.
[50] Faull and Nikpay, *The EC Law of Competition*, 2nd edn (Oxford University Press, 2007), p.380.
[51] Decision relating to a proceeding under Article 82 EC (COMP/38.233—Wanadoo Interactive) Unreported, available at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/38233/38233_87_1.pdf* [Accessed October 17, 2010]. France Télécom then contested the decision before the GC. The GC upheld the decision in *France Télécom SA (formerly Wanadoo Interactive SA) v Commission of the European Communities* (T-340/03) [2007] E.C.R. II-107; [2007] 4 C.M.L.R. 21. Afterwards France Télécom appealed to the ECJ and the latter dismissed the appeal in *France Télécom SA v Commission of the European Communities* (C-202/07 P) [2009] E.C.R. I-2369; [2009] 4 C.M.L.R. 25.
[52] Decision adopting interim measures concerning National Coal Board, National Smokeless Fuels Ltd and National Carbonising Company Ltd [1976] OJ L35/6.
[53] Napier Brown/British Sugar Decision [1988] OJ L 284/41 para.66.
[54] Napier Brown/British Sugar Decision [1988] OJ L 284/41 para.30.

Soon after the Commission decision in *Napier Brown/British Sugar*, these two approaches, i.e. a reasonably efficient competitor and an equally efficient competitor, were both included as appropriate methods to assess price squeeze in the Commission notice on the application of the competition rules to access agreements in the telecommunications sector. The Commission envisaged that a price squeeze could be demonstrated either by showing that,

> "the dominant company's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company,"[55]

or as an alternative, by showing that, "the margin … is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit".[56] It should be noted that the Commission indeed foresaw the difference between the two approaches in determining a sufficient profit margin: the "equally-efficient-competitor" approach requires zero profit margin whereas the "reasonably-efficient-competitor" approach allows for "a normal profit", apparently above zero. In addition, the Commission also provides a justification for price squeeze when tested under the reasonably-efficient-competitor approach: a price squeeze may be justified when the dominant undertaking can show that its downstream operation is exceptionally efficient.[57] Nevertheless, this justification has until now never been invoked.

Within the third case, *Industrie des Poudres Sphériques*, the GC compared the downstream price of the application (a downstream company) with the price of the upstream input. It found a margin of FRF 9 as the price for the upstream product was FRF 37 and the price for the derivative product was FRF 46.[58] The GC considered that margin as sufficient and thus rejected the application. The approach used by the GC could arguably be categorised as the "reasonably-efficient-competitor" approach. However, since this case concerned a rejection of a complaint of price squeeze rather than a decision finding an abuse of a dominant position it shed little light on the details of applying that approach.

Furthermore, despite the possibility claimed by the Commission to deal with price squeeze on the reasonable-efficient-competitor approach, it in the last two price-squeeze cases relied only upon the "equally efficient" approach.[59] In particular, in *Deutsche Telekom* the Commission developed a variant for that approach: when the difference between the downstream prices charged by a dominant undertaking and the upstream prices that it charges its competitors is negative a case of price squeeze can be immediately established with no need of examining the operation costs of that dominant undertaking.[60] Although it is not innovative, it does render convenience. The Commission concluded Deutsche Telekom's price squeeze between 1998 and 2001 based on this method.[61] However, when it is found that there is a positive spread, extra analysis should be conducted on the downstream cost of that dominant undertaking. A price squeeze only exists when there is a negative spread between the downstream price and the upstream price plus the downstream costs of that dominant undertaking, which was the case for Deutsche Telekom's price squeeze between 2002 and 2003.[62]

The reliance on the equally-efficient-competitor approach was disputed both by Deutsche Telekom and by Telefónica. Since *Telefónica* is still pending before the GC now, the discussion on this dispute will depend on the halfway finished *Deutsche Telekom*. Deutsche Telekom claimed before the GC that the costs of actual or potential competitors should be taken into account in the imputation test. However, the GC rejected that argument based on the reason that:

> "[A]lthough the Community judicature has not yet explicitly ruled on the method to be applied in determining the existence of a margin squeeze, it nevertheless follows clearly from the case-law that the abusive nature of a dominant undertaking's pricing practices is 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."[63]

Subsequently, the GC made a comment on the applicability of the reasonably-efficient-competitor approach. It held that if the existence of a price squeeze depended on competitors' costs a dominant undertaking would not be in a position to assess the lawfulness of its own activities as it would be punished by information that was generally not known to it.[64] An intriguing question can be raised here whether the GC would like to exclude the reasonably-efficient-competitor approach that has been heavily criticised by scholars.[65] Fortunately, this question was forwarded by Deutsche Telekom in the appeal to the ECJ. Although the appeal is still pending at

[55] Notice on the application of the competition rules to access agreements in the telecommunications sector: framework, relevant markets and principles [1998] OJ C265/2 para.117.
[56] Notice on the application of the competition rules to access agreements in the telecommunications sector [1998] OJ C265/2 para.118.
[57] Notice on the application of the competition rules to access agreements in the telecommunications sector para.118.
[58] *Industrie des Poudres Sphériques* [2000] E.C.R. II-3755; [2001] 4 C.M.L.R. 28 at [181].
[59] Deutsche Telekom [2003] OJ L263/9 paras 106–111; and Case COMP/38.784 Telefónica Decision [2007] OJ C83/05 paras 311–315.
[60] Deutsche Telekom [2003] OJ L263/9 para.107.
[61] Deutsche Telekom [2003] OJ L263/9 para.153.
[62] Deutsche Telekom [2003] OJ L263/9 para.160.
[63] *Deutsche Telekom* [2008] E.C.R. II-477; [2008] 5 C.M.L.R. 9 at [188].
[64] *Deutsche Telekom* [2008] E.C.R. II-477; [2008] 5 C.M.L.R. 9 at [192].
[65] A normative discussion of the equally-efficient-competitor approach goes beyond the scope of this article. For a detailed discussion in that respect, see, e.g. Geradin and O'Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector* (February 2005), GCLC Working Paper No.04/05, available at *http://ssrn.com/abstract=671804* [Accessed October 17, 2010], pp.37–38.

the time of drafting this article, A.G. Mazák delivered its opinion on April 22, 2010. In the opinion, he admitted, first, that the equally-efficient-competitor approach in general constituted an appropriate criterion; and secondly, the reasonably-efficient-competitor approach could indeed potentially infringe the principle of legal certainty. However, he also acknowledged that the GC did not totally rule out, as a matter of principle, the reasonably-efficient-competitor approach, and there may be other cases in which it is appropriate as, "a secondary and additional test".[66]

In conclusion, the appropriate approach for the imputation test is the equally-efficient-competitor approach based on the dominant undertaking's cost on the downstream market. The reasonably-efficient-competitor approach, while in theory also workable, is of limited use in practice. However, it should be kept into mind that the ECJ may not accept this interpretation in its final judgment.

Conclusions

Price squeeze is one of the least explored areas within EU competition law, in particular art.102. A major obstacle to grasp this concept lies in its "complication" with excessive pricing and/or predatory pricing, two older and nevertheless also not well-developed antitrust subjects. Furthermore, the limited number of case law also restrains a better understanding of this concept. After examining all the five price-squeeze cases taking place at the European level, this article attempts to clarify three important aspects of this concept.

First, price squeeze is a stand-alone antitrust infringement at the same level with excessive price and predatory price. It focuses on the margin left by a vertically integrated dominant undertaking to its downstream competitors. It is not necessary in a price-squeeze case to demonstrate that the price levels on the markets involved are abusive. Vertical integrated undertakings may commit price squeeze even if their individual prices are not accusable according to excessive pricing or predatory pricing.

Secondly, since price squeeze is not necessarily related to the price level on a certain market, it is seemingly a severer punishment than excessive pricing or predatory pricing. However, not every vertically-integrated undertaking, so long as it is dominant on an upstream market, could engage in price squeeze. Price squeeze within art.102 requires that the upstream product is essential to the downstream production, a concept comparable with the "essential facilities doctrine" in cases of refusal to supply. Given the fulfilment of the essential facilities doctrine, vertically-integrated undertaking should have at least super-dominance or even quasi-monopoly on the upstream market. Furthermore, it is uncertain whether it is necessary to demonstrate its dominance on the downstream market. Nevertheless, it should be noted that the vertically integrated undertaking must have the ability to undercut its downstream competitors, which may suggest its dominance on the downstream market.

Last but not least, two approaches have been established for the imputation test. The first is the so-called equally-efficient-competitor approach. This approach compares the downstream price of the dominant undertaking with the upstream prices it charges other undertakings plus the downstream operation costs of the dominant undertaking. No profit margin is taken into account in this approach. A variant of this approach is to compare the downstream price of the dominant undertaking with the upstream charge. If it is negative, it is not necessary to examine the downstream operation costs of the dominant undertaking, and price squeeze can be directly concluded.

The second approach is so-called the reasonably-efficient-competitor approach. It examines a hypothetically reasonably efficient competitor's costs on the downstream market instead of the dominant undertaking's, though the exact meaning of this approach still remain uncertain. In addition, a more than zero profit margin should be added into the calculation. However, the applicability of this approach is questionable. First, as pointed out by the GC and agreed by A.G. Mazák in *Deutsche Telekom*, this approach potentially infringes the principle of legal certainty as a dominant undertaking would be punished by the information it does not possess. Secondly, it has never been relied upon in any existing cases.

[66] *Deutsche Telekom* [2010] 5 C.M.L.R. 27, A.G. Opinion, para.49.