THE ABUSE OF "MARGIN SQUEEZE" UNDER ARTICLE 82 OF THE EC TREATY AND ITS APPLICATION TO NEW AND EMERGING MARKETS

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Recent years have seen a marked increase of cases regarding abuse of dominance under Article 82 of the EC Treaty (or the corresponding national rules) brought by the European Commission and the National Competition Authorities (NCAs). One issue that has featured prominently in these cases is the so-called "margin squeeze", particularly in cases brought by NCAs acting in the telecommunications sector.

Despite an increase in related case law, many issues concerning the existence, interpretation and scope of margin squeeze remain unclear.

First and foremost, there have been for some time lengthy discussions amongst academics, lawyers and economists as to whether there is a separate form of abuse called 'margin squeeze' or whether this is nothing else but a refusal to deal, predation or excessive prices in cases of vertical integration. The recent DG Competition Discussion Paper[1] on the application of Article 82 to exclusionary abuses (hereinafter 'Discussion Paper') places margin squeeze in the section on refusal to supply. Notwithstanding the practice and the statements of competition authorities, there is still no judgement by the Court of First Instance (CFI) or the European Court of Justice (ECJ), which clearly acknowledges this as a distinct form of abuse (see infra the section on case law). The expected judgement in the *Deutsche Telekom* case, discussed later, might shed some light on this issue.

Additionally, the existing case law has produced divergent outcomes on several key issues, to such an extent that, as the law currently stands, it remains unclear how a dominant company should manage the relationship between the prices it charges upstream to its wholesale customers, and the prices it charges in the downstream market where it competes with its wholesale customers[2].

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The need for legal certainty has recently led to a lively debate on the issues raised by margin squeeze: however, numerous complex and controversial matters continue to be unresolved. Furthermore, the complexity of the issues increases when we deal with new and emerging markets where there are serious risks of undue regulatory intervention, which is likely to have a negative effect on the competitive process [3]. The Discussion Paper leaves many of these questions unanswered and raises some new ones.

Due to the increased importance given to these issues and the general lack of certainty surrounding them, this paper aims to:

- provide a short overview of the principal decisions and case law on margin squeeze in the EU and the UK;
- examine which principles can be derived from the case law;
- briefly discuss the relationship with other types of abuses such as predation;
- review the specific issues that arise when applying a margin squeeze test to new and emerging markets.

CASE LAW ON MARGIN SQUEEZE

The following section examines some of the most important case law by EC and UK courts as well as competition authorities in relation to margin squeeze.

<u>The old EU cases</u>

National Carbonising (1976) [4]

National Carbonising is the earliest case, concerning a complaint that was eventually rejected by the European Commission. National Carbonising Company (NCC) bought all of its coal from the National Coal Board (NCB), whose subsidiary (NSF) produced coke in competition with NCC. NCB held a virtual monopoly in coal production and through NSF almost 90% of the downstream market. The Commission found that NSF was also the price leader downstream (that is, a firm whose prices set a lead for other firms in the industry to follow) and there was no possibility for NCC to increase its prices above NSF's. As a result of successive increases in the cost of NCC's raw material sourced from NCB, NCB's costs of production rose by GB£10.39 per ton, whereas its subsidiary's downstream price for the finished product was only GB£6.70. NCC was therefore unable to operate economically and sought interim relief.

The Commission rejected NCC's complaint and therefore found no abuse but acknowledged that the conduct could constitute an abuse stating:

> *"An undertaking which is in a dominant position as regards the production of a raw material (in this case coking coal) and therefore able to control its price to independent manufactures of derivatives (in this case coke), and which is itself producing the same derivatives in competition with those manufactures, may abuse a dominant position if it acts in such a way as to eliminate competition from these manufactures in the market for derivatives. <u>From this general principle</u> the services of the Commission deduced that the enterprise in a dominant position may have an obligation to arrange its prices so as to allow a reasonably efficient manufacturer of the derivative a margin sufficient to enable it to survive in the long term."* [5] *(emphasis added).*

The Commission seems to make a clear distinction between the margin squeeze 'rule' and an underlying "general principle". Based on the general principle, this case is often placed in the case law dealing with refusal to supply [6].

British Sugar/Napier Brown (1988) [7]

In 1988 the Commission found British Sugar plc (BS) dominant in the UK market for the sale of bulk sugar and the derived product (retail sugar). Napier Brown was a buyer and reseller of sugar in competition with BS. The Commission found that there was an insufficient margin for a sugar merchant as efficient as BS to survive, based on BS's own costs, which showed it operating at a loss. In this case the margin squeeze was only one of a number of anti-competitive practices that were aimed at driving Napier Brown out of the market.

Industrie des Poudres Spheriques (1996) [8]

In 1996 the Commission rejected a complaint by Industrie des Poudres Spheriques (IPS) against Pechiney Electrometallurgie (PEM), the sole European Community producer of calcium metal, which also marketed its derivative, broken calcium metal. The complainant, IPS, was active in the derivative market and relied on supplies from PEM for the raw calcium metal. IPS complained that PEM had, inter alias, refused to deal and priced abusively. IPS applied to CFI for annulment of the Commission's decision.

In the proceedings, IPS claimed that the price set by PEM was abnormally high and therefore abusive. It also claimed that

> *"that price, combined with the very low price for the [derived product] sold by PEM on the market for the derived product, forces competitors to sell at a loss if they are to keep themselves in that market."* [9]

The CFI stated IPS' arguments as follows:

> *"The applicant therefore contends that PEM proceeded to apply what is known as price squeezing. Price squeezing may be said to take place when an undertaking which is in a dominant position on the market for the unprocessed product and itself uses part of its production for the manufacture of a more processed product, while at the same time selling off surplus unprocessed product on the market, sets the price at which it sells the unprocessed product at such a level that those who purchase it do not have a sufficient profit margin on the processing to remain competitive on the market for the processed product."* [10]

The CFI rejected the IPS appeal for a number of reasons including that IPS had alternative sources of the relevant raw material from China, Russia and North America. On the issue of prices, the CFI said:

> *"the applicant has failed to prove even the very premises on which its argument is predicated, namely, the existence of abusive pricing of the raw material. In the absence of abusive prices being charged by PEM for*

> *the raw material […] or of predatory pricing for the derived product […], 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."* [11]

It has been argued that in this judgement, the CFI has not set out the principle of margin squeeze; it is merely quoting IPS' arguments and the general point of when a margin squeeze *may* be occurring. The Court clearly stated that, in order to succeed, IPS should have proved either excessive prices or predation.

The more recent EU cases

The old EU cases cited above involve mature industries where one product was essential to the downstream product which was a direct derivative of the raw material. In these cases, it was relatively easy to determine the relationship between the upstream and the downstream products (and their relative prices).

The recent cases involve telecommunications markets, new and emerging markets and multi-product industries where one or more inputs are used to produce a variety of different products downstream.

Deutsche Telekom [12]

In 2003, the European Commission investigated Deutsche Telekom (DT). It found that DT was dominant in the upstream and downstream markets for access to local fixed networks (both wholesale and retail).

The Commission stated that

> *"a margin squeeze exists if the charges to be paid to DT for wholesale access… are so expensive that competitors are forced to charge their end users prices higher than the prices DT charges its own end users for similar services. If wholesale charges are higher than retail charges, DT's competitors, even if they are at least as efficient as DT, can never make a profit…"* [13]

and found DT in breach of Article 82. It is noteworthy that whilst the recitals of the decision discuss margin squeeze, the operative part has no mention of it and states, in article 1, that

> "*Deutsche Telekom AG has since 1998 infringed Article 82(a) of the EC Treaty by charging its competitors and end users <u>unfair</u> monthly and one-off <u>charges for access</u> to the local network, so significantly impeding competition on the market for access to the local network" (emphasis added).*

Interestingly, in this case the Commission stated that

> *"by proving the existence of a margin squeeze, the Commission has done enough to establish the existence of an abuse", without having to consider the effects on the market."* [14]

However, it went on to say that:

> *"But even if evidence of abuse could be furnished only by establishing that DT restricted competitors by raising barriers to the market entry of competitors, such barriers do exist…."* [15]

It is debatable whether this case creates a per se abuse under Article 82 of the EC Treaty. Although the Commission said it was sufficient to establish the existence of margin squeeze, it looked at DT's position in the market as well as its competitors' position and concluded that DT's conduct restricted competition. Despite first impressions, therefore, this case might not necessarily be inconsistent with the standard theory of competitive harm based on market exclusion. A per se abuse would be difficult to reconcile with the Discussion Paper which clearly requires, for margin squeeze, the condition that the conduct is likely to have negative effects on competition [16].

The case is currently on appeal to the CFI.

Wanadoo Interactive [17]

In 2003, the Commission decided that France Telecom's Internet access subsidiary, Wanadoo, had charged predatory prices for its consumer broadband internet access services. Like *Deutsche Telekom*, this case could have been treated by the Commission as one of margin squeeze but the Commission chose to address only predatory pricing in the retail market. The reasons for this may be because:

- Wanadoo at the time was not fully owned by France Telecom (during the period covered by the decision, France Telecom's shareholding in Wanadoo fluctuated between 70% and 72.2% and, therefore, there was not a clear case of vertical integration);

  And / or

- The conditions for predation appeared to be met, in particular:
  - Wanadoo was found dominant at the retail level;

- o Wanadoo was found to have priced below its average variable costs for a period; and the Commission found internal company documents which evidenced an anti-competitive strategy. On this specific point, the Commission stated that:

  > *"The Decision therefore finds fault with the company not so much for setting prices at the end of 2000 at a below-cost level as for subsequently maintaining those prices at that level as part of a wide ranging strategy of market pre-emption deployed at national level as from the beginning of March 2001."* [18]

It is interesting to note that the remedy was for France Telecom to reduce its wholesale prices rather than for Wanadoo, the company under investigation, to increase its retail prices.

This case is currently on appeal to the CFI.

The interest of this predation case in the context of margin squeeze cases lies primarily in the analysis that the Commission carried out of the losses made by Wanadoo.

Telefonica[19]

In February 2006, the European Commission sent Telefonica a statement of objections alleging that Telefonica has abused its dominant position in the broadband market access in Spain in view of a margin squeeze,

A few points might be of interest in this case:

- the Commission has used for its analysis the "hypothetical as efficient competitor test";
- the Commission argues that it is not necessary to demonstrate significant market power in the downstream market (although Telefonica's downstream market share seems to be high);
- the cost standard for analysing a margin squeeze in network industries is long-run average incremental costs (or "LRAIC");
- as in DT, the Commission stated that demonstrating the existence of a margin squeeze is sufficient proof of an abuse of dominant position.

An oral hearing has taken place before summer and the Commission is considering the next steps

<u>UK Cases</u>

The UK's national competition and regulatory authorities (the latter have competition law powers in their own right for the relevant sector) have been prolific on the subject of margin squeeze in recent years and there have been several cases, which are dealt with in chronological order below.

BSkyB [20]

In 2002, the UK's NCA, the OFT, examined whether BSkyB had acted abusively. Assuming BSkyB's input cost was the wholesale prices charged to its distributors, BSkyB was assessed to have made losses in its downstream service of providing pay-TV sports and premium film channels. Losses continued for over a year while recovering the costs of investing in a new platform. However, given BSkyB's return to profitability, and the irreducible uncertainties in modelling losses and profitability the NCA's assessment was that the case against BSkyB was not proven.

British Telecom [21]

In November 2003, Oftel (now Ofcom, the Office of Communications) decided that British Telecom (BT) had not infringed the Competition Act 1998 and that the margin between BT's residential broadband wholesale and retail prices was sufficient to allow a reasonably efficient operator to compete, by reference to BT's own costs. In addition, BT's declining broadband shares and lack of price leadership was consistent with there being no evidence of any material adverse effect on competition. Oftel considered that there was no substantive difference between applying a test of predation at downstream level, or a test of margin squeeze. The complainant, Wanadoo UK, appealed this decision to the Competition Appeal Tribunal in 2004. The appeal is currently suspended while a separate investigation on related matters by Ofcom is taking place. A decision on this separate investigation is anticipated for 2007.

Vodafone/02/Orange/T-Mobile [22]

In May 2004, Ofcom found that certain of the UK's four mobile phone operators, each dominant in termination for its own calls, made an insufficient margin between the wholesale termination charge and mobile prices to retail business customers. However Ofcom decided that this did not materially restrict competition from the other mobile operators or from mobile service providers nor in general, given high levels of competition, countervailing buyer power and low entry barriers.

Genzyme [23]

In this case, the complainant was a company operating in the home care market. It had been appointed by Genzyme, a pharmaceutical company, to provide home care services for one of Genzyme's drugs. Later, the pharmaceutical company terminated the distribution agreement in order to provide home care services itself. The home care provider was no longer able to compete because it was charged the same price at which the UK's national health service (NHS) was buying the drug, bundled with home care services, from Genzyme. As the complainant had to supply the additional home care services at its own expense, it would have made a loss on sales to the NHS.

The Competition Appeal Tribunal (CAT) upheld a finding of margin squeeze on the basis that:

- The home care provider was entirely dependent on obtaining the drug from Genzyme; and

- Genzyme's pricing policy was likely to eliminate all competition in relation to home care for the drug.

The CAT examined the relevant case law and stated that

> *"Cases such as Commercial Solvents, Télémarketing and Tetra Pak II demonstrate that it may well be an abuse for an undertaking which is dominant in one market to act without objective justification in a way which tends to monopolise a downstream, neighbouring or associated market. …. As the OFT points out at paragraphs 296 and 304 of the decision, the abuses found in the case law essentially involve a company which is dominant in one market extending its monopoly into a separate or related market to the exclusion of competitors who would otherwise be able to compete in that separate market. If the elimination of competition in the related market is not the result of competition on the merits, then an abuse may be found."* [24]

It also stated that

> "*A further particular example of the same general principle may occur where an undertaking that is dominant in an upstream market supplies an essential input to its competitors in a downstream market, on which the dominant company is also active, at a price which does not enable its competitors on the downstream market to remain competitive. Such a practice is called a "margin squeeze" or "price squeeze."* [25]

<u>Other cases</u>

There have also been cases of margin squeeze in several other jurisdictions, including Italy (*Telecom Italia*, A 351, provvedimento no. 13752 of 16 November 2004), France (*France Telecom/ SFR Cegetel/ Bouygues*, Decision no 04-D-48, 14 October 2004), Denmark (*Song Networks A/S /TDC/SDNO*FON, 27 April

2004) and Sweden (*TeliaSonera*, dnr 1135/2004, 22 December 2004). An exhaustive list would be outside the scope of this article.

Commission Policy Statements on Margin Squeeze

Apart from the cases already mentioned, there are a number of relevant policy statements from the European Commission and the NCAs.

In 1998, the Commission issued a notice on the application of the competition rules to access agreements in the telecommunications sector[26] where it suggested two tests for a price squeeze.

The first test states that

> *"a price squeeze could be demonstrated by showing that the dominant company's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the operating arm of the dominant company"* [27]

The Commission's second test is as follows:

> *In appropriate circumstances, a price squeeze could also be demonstrated by showing that the margin between the price charged to competitors on the downstream market (including the dominant company's own downstream operations, if any) for access and the price which the network operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit (unless the dominant company can show that its downstream operation is exceptionally efficient)."*

In its later ONP Committee document[28], however, the Commission appears to have merged the first and second test, since it confirms that it uses the dominant firm's costs as the benchmark for a reasonably efficient service provider:

> *"The suspicion of a "margin squeeze" arises when the spread between access and retail prices of the incumbent's corresponding access services is not wide enough to reflect the incumbent's own downstream costs. In such a situation, alternative carriers normally complain that their margins are being squeezed because this spread is too narrow for them to compete with the incumbent. [...] Provided access and retail services are strictly comparable, a situation of a margin squeeze occurs where the incumbent's price of access combined with its downstream costs are higher than its corresponding retail price." (p. 5)*

DG Competition Discussion Paper

The Discussion Paper puts margin squeeze in the section on refusal to supply, and more specifically in the part dealing with termination of an existing supply relationship.

The 'Discussion Paper' states that [29]:

> ***"****A particular behaviour, which can amount to a termination, is a "margin" or "price squeeze". This may occur when the upstream input owner is integrated downstream and thus competing with the actual or potential buyers of the input, and the margin between the price for the upstream input charged to competitors on the downstream market and the downstream price charged by the input owner is insufficient to allow a reasonably efficient competitor to obtain a normal profit. The typical benchmark for a reasonably efficient competitor is the integrated input owner. A margin squeeze could therefore be demonstrated by showing that the input owner's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by its upstream operating arm".*

The Discussion Paper also clarifies that:

- *"the following four conditions normally have to be fulfilled for (the conduct to be found) abusive (i) the behaviour can be properly characterises as termination; (ii) the refusing undertaking is dominant; (iii) the refusal is likely to have a negative effect on competition; (iv) the refusal is not justified objectively or by efficiencies"[30].*

- *"as far as specific issues of access to networks in the electronic communications sector are concerned, the principles laid down in the relevant notice on the application of the competition rules should be applied"[31].*

UK Authorities' statements

The OFT Guidelines on the application of the Competition Act 1998 to the telecommunications sector [32] define margin squeeze as

> *"Where a vertically integrated undertaking is dominant in an upstream market and supplies a key input to undertakings that compete with it in a downstream market, there is scope for it to abuse its dominance in the upstream market. The vertically integrated undertaking could subject its competitors to a price or margin squeeze by raising the cost of the key*

input…and/or by lowering its prices in the downstream market. The integrated undertaking's total revenue may remain unchanged. The effect would be to reduce the gross margin available to its competitors, which might well make them unprofitable."

The recent OFT Draft competition law Guidelines on Assessment of Conduct (OFT414a, April 2004) state that

> *"a margin squeeze may occur in an industry where a vertically integrated undertaking is dominant in the supply of an important input for a downstream market in which it also operates. The vertically integrated undertaking could then harm competition by setting such a low margin between its input price (e.g. wholesale price) and the price it sets in the downstream market (e.g. retail price) that an efficient downstream competitor is forced to exit the market or is unable to compete effectively."*[33]

In a subsequent investigation into an alleged margin squeeze by BT in the supply of retail broadband services, Oftel took the unusual step of publishing in August 2003 a detailed analytical framework setting out its current thinking on margin squeeze abuses and how they relate to other forms of exclusionary pricing. It is not clear what status this paper has but it is interesting to note that the Analytical Framework states that a margin squeeze generally arises where a firm:

- *is vertically integrated, i.e., operates in both upstream and downstream markets;*
- *is dominant in the upstream market, so that downstream competitors have a degree of reliance upon the firm upstream input;*
- *sets a margin between its downstream retail price and upstream wholesale charge (paid by downstream competitors) that is insufficient to cover its downstream costs;*
- *on an 'end-to-end' basis, i.e., aggregating across the firm's upstream and downstream activities, the firm maybe profitable;*
- *but an equally (or more) efficient downstream competitor could be unable to compete, because, in effect, it is being charged a higher price for the upstream input than its competitor, the vertically integrated firm's own downstream arm."* [34]

A 'MARGIN SQUEEZE' ABUSE?

A margin squeeze may arise when a dominant firm, which is vertically integrated, supplies an essential input to its wholesale customers, which are also its competitors in a downstream market.

If that input is essential for downstream competitors, the dominant firm can, in effect, "squeeze" its downstream competitors in the retail market by charging them an excessive upstream price, charging an unprofitable downstream price, or a combination of the two.

The dominant firm could therefore squeeze downstream competitors in several different ways:

- it could raise the upstream price to levels at which equally efficient downstream competitors could not longer make a profit;

- it could sell below cost downstream while still making a profit in the sale of the upstream product;

- it could raise the price of the upstream input and reduce the price of the downstream retail product to create a margin between them at which competitors could not be profitable.

The description above might give the impression that defining margin squeeze is a straightforward exercise. However, as seen by examining the various precedents, there are several fundamental issues that have yet to be addressed by the Commission, the Courts and the NCAs.

The European Courts still have to clarify whether margin squeeze is a separate form of abuse or, as the Discussion Paper suggests, a refusal to deal. At the national level there are several decisions by NCAs dealing with margin squeeze and not all of them can be easily reconciled. The recent Discussion Paper raises more issues than answers.

Following Regulation 1/2003 and the concurrent application of Article 82 by the European Commission and the NCAs, the different authorities are trying to find a solution to the legal issues which a possible margin squeeze creates. The interest in such a possible form of abuse is due primarily to the liberalisation of the telecommunications market where new entrants compete at the downstream level with the incumbent and simultaneously may need an upstream input from it.

It is important that those authorities should not lose sight of the key principles, especially as formulated in *Hoffman-La Roche v Commission* [35] and refined in *Michelin I* [36] which define abuses as

> *"Practices which are likely to affect the structure of the market where, as a direct result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on traders' performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market."* [37]

From this it can be deduced that abuse is a practice involving 'recourse to methods different from those governing normal competition in products or services based on traders' performance' and which has an effect on the market.

Accordingly, it would be important to avoid mechanistic price/cost rules, which fail to distinguish adequately legitimate price competition from exclusionary pricing (e.g., distinguish legitimate start-up losses from illegitimate losses).

KEY ISSUES SURROUNDING A POSSIBLE MARGIN SQUEEZE ABUSE.

In this area of law, there are crucial issues that still remain unanswered. This paper touches the more significant ones and shows the difficulties in defining what margin squeeze might be.

In particular:

- vertical integration;
- Is upstream dominance sufficient or is there an additional need for the input to be 'essential' or 'key' to downstream competitors?
- What is the test? Equally efficient or reasonably efficient operator?
- Is it necessary for the vertically integrated company to control upstream and downstream prices?
- Is it necessary or not to show anti-competitive effects?
- What costs and revenues should be taken into account?
- Objective justification

The subsequent sections will deal with each key issue in turn.

The dominant firm is vertically integrated

Margin squeeze issues arise only in situations of vertical integration, where firm A, dominant on a market for an upstream input, supplies such input to rival firm B, operating on a downstream market where firm A is also active. All price squeeze cases involve two markets and downstream rivals which are both customers and competitors of the dominant firm.

Is upstream dominance sufficient or is there an additional need for input to be "essential" or "key" to downstream competitors?

A frequently argued issue in margin squeeze cases is whether upstream dominance is sufficient for a potential finding of abuse or whether there is a need for something further. For example, some cases have not only found upstream dominance but also that the upstream input to downstream competitors was 'essential' or 'key'.

For example, in *Genzyme*, the CAT described a price squeeze abuse as a further example of abusive leveraging, where

> "*an undertaking that is dominant in an upstream market supplies an <u>essential input</u> to its competitors in a downstream market, on which the dominant company is also active, at a price which does not enable its competitors on the downstream market to remain competitive*" [38]

The OFT has described the input as ‘key’[39] or ‘important’[40].

The Discussion Paper explicitly excludes ‘indispensability’ as a requirement for a finding that a termination of an existing supply relationship (which includes margin squeeze) is abusive. Such requirements is however part of the test for finding that a refusal to start supplying an input is abusive. The rationale for excluding indispensability in a margin squeeze is not clear. The Commission should clarify this point as many of the statements on ‘indispensability’, such as the ones below, could well apply to margin squeeze:

- *To be an abuse, the input must be indispensable to carry on normal economic activity in the downstream market. Without this input companies cannot manufacture their products or provide their usual service levels*[41]

;

- *When real or potential substitutes exist in the market the input of the dominant company is not indispensable* [42]*;*

- *A facility is an indispensable input only when duplication of the existing facility is impossible or extremely difficult, either because it is physically or legally impossible to duplicate, or because a second facility is not economically viable in the sense that it would not generate enough revenues to cover its costs*[43]*.*

What is the test? Equally efficient or reasonably efficient operator?

It has been argued that margin squeeze might arise as the result of the dominant firm’s upstream price, downstream price or the combination of both which would not allow an efficient downstream rival to make a reasonable profit.

In an effort to find a legal test for margin squeeze, NCAs have approached the issue in different ways.

The most frequently applied test is whether the dominant firm’s downstream operations could trade profitably on the basis of the wholesale price charged to third parties for the relevant input. In this case, if the downstream arm of the vertically integrated company is able to make a profit based on the price charged to downstream competitors, there could not be a margin squeeze as an equally efficient operator to the vertically integrated company should be able to make a profit as well.

However, as discussed above, the European Commission’s Access Notice suggests a second test which looks at whether a reasonably efficient service provider can obtain a normal profit.

This second test has been heavily criticised as a competition law test for the following reasons:

- It is vague, since it provides no way of calculating what the downstream costs of a hypothetical "reasonably efficient" entrant would be;

- it is inconsistent with the use of the dominant firm's costs (i.e., the first test) which is in fact which has always in fact been used by the European Commission and the Community Courts;

- it does not assist in cases where the dominant company is unusually efficient, or some of its rivals are clearly more efficient than others;

- it seems contrary to legal certainty and the rule of law; the law must provide a precise test or tests which a dominant company can apply
  - without the need for confidential information about its downstream competitors' costs; and
  - before it adopts the pricing policy the lawfulness of which is under consideration.

The Discussion Paper in assessing a possible abusive conduct refers to the benchmark as that of the "as efficient competitor".

> "*The more detailed principles described in this paper for assessing alleged price based exclusionary conduct are based on the premise that in general only conduct which would exclude a hypothetical "as efficient competitor is abusive. The 'as efficient' competitor is a hypothetical competitor having the same costs as the dominant company".*[44]

On the other hand, when describing margin squeeze, the Discussion Paper talks about a "reasonably efficient operator" although it continues to say that the benchmark will, in any case, be the integrated input owner.

Is it necessary for the vertically integrated company to control both upstream and downstream prices?

Another much-debated issue is whether the vertically integrated firm should also have downstream dominance (in addition to upstream dominance). In practice, in nearly all cases in which a margin squeeze has been found, the company was also dominant downstream. In *Genzyme*, the investigated company was not dominant in the relevant downstream market at the commencement of the period of the abuse, but the CAT accepted that the effect of its pricing was to "monopolise" the downstream market and to "eliminate any competition" from this market. [45]

However, certain commentators and NCAs argue that a margin squeeze can occur in the absence of dominance in the downstream market (that is, the vertically-integrated company which has upstream dominance can leverage this dominance to improve its position on the downstream market in a manner other than competition on the merits)[46]. This latter argument does raise a number of issues, for example:

- The question of proof - what evidence, if any, of actual or likely exclusion would be required?

- is it possible to be certain that a "squeeze" is caused by the wholesale price, given that the company under investigation has no control over the retail price in the market?

Is it necessary or not to show anti-competitive effects?

A further uncertainty arising from the case law concerns whether there is a need to show actual or likely anti-competitive effects or whether the mere failure to pass the relevant price/cost test is a 'per se' abuse.

As we mentioned above when discussing *Deutsche Telecom* in detail, the Commission asserted that

> *"By proving the existence of a margin squeeze, the Commission has therefore done enough to establish the existence of an abuse of a dominant market position."* [47]

However, in paragraph 181 of the decision, the Commission still undertook some analysis of the likely effects and looked at the market conditions. It concluded that the limited market share held by competitors in Germany showed that DT pricing structure had created barriers to entry to competitors and, therefore, had had an effect.

The Commission seems to have followed the same approach in *Telefonica.*

In *France Telecom/SFR Cegetel/Bouygues*, the French Competition Council applied *Deutsche Telekom* but still found that although Bouygues was dominant and was pricing below costs, it was only a small competitor and not in a position to distort competition downstream. In *Telecom Italia*, the Italian Antitrust Authority condemned Telecom Italia charges as part of a strategy to exclude competitors.

Other cases on abuse of dominance, however, seem to suggest that it is necessary to carry out a detailed analysis of effects. This approach seems more in line with the Commission increasing emphasis on an economics-based approach and with the Discussion Paper (which requires a finding that the conduct has or is likely to have negative effects on competition). In any case, analysing actual or probable effects in a margin squeeze case also has a pragmatic appeal given the degree of uncertainty on many of the major elements of this abuse.[48]

What costs and revenues should be taken into account?

Whilst dealing with margin squeeze cases, NCAs have usually carried out a detailed analysis of costs and revenues. Both raise some difficulties.

a) Costs

The first issue NCAs have to deal with is what costs must be taken into account. It is common for a vertically integrated company to carry out its activities in a way which does not make easy an allocation of costs across different services.

For example in *Deutsche Telekom*, the upstream input was common to various downstream services (analogue, ISDN, ADSL) and therefore the Commission calculated an averaged weighted price for these retail services and compared them with the wholesale price for LLU.

In the Discussion Paper, the Commission recognises that

> *"In case of multi-product companies, it may be difficult to calculate ATC because of certain common costs, which are fixed costs that are necessary for the production of more than one product and where it is difficult to allocate these costs to the different products. Where necessary to apply a cost benchmark based on ATC, the Commission will allocate common costs in proportion to the turnover achieved by the different products unless other cost allocation methods are for good reasons standard in the sector in question or in case the abuse biases the allocation based on turnover"* [49].

The second issue is how to calculate costs. There are various methodologies such as LRIC (long run incremental), FAC (fully allocated), AVC ('average variable cost' - short run), historical or forward-looking.

In the Discussion Paper the Commission has moved away from the AVC test in the Akzo case to suggest a different test, e.g. AAC (average avoidable costs). AAC includes variable costs plus any fixed costs that are not sunk. These are the costs that the firm avoids if it stops carrying out a particular activity. The difference between AAC and AVC will typically be small unless there are substantial avoidable costs.

b) Revenues

Another area of contention is the type of revenues to take into account in a margin squeeze case. In *Deutsche Telekom* for example, DT argued that the relevant end-user price should include access revenue and revenue from call.

> *"The decisive consideration, according to DT, is the point of view of the end-user, and seen from that point of view access to the local network and the calls carried on that network form a single bundle of products. For competitors, access to the local loop is only a necessary prerequisite for the provision of further telecommunications services, and so revenue from those telecommunications services, and especially from telephone calls, must be included in the calculation of DT's revenue on the retail side. DT argues that it takes account of this aspect by offsetting revenues to arrive at its retail charges. In DT's view the wholesale costs for the local loop are overheads both for the provision of retail access and for telephone calls, so that any attempt to allocate costs to individual services in order to investigate the possibility of below-cost selling makes no economic sense and is consequently arbitrary."* [50]

The Commission rejected this argument on the basis of requirements of community directives of telecommunications liberalisation (where access to the network is a separate product) and economic consideration.

In relation to the economic consideration, the Commission stated that:

> *"… it is reasonable and legitimate to apply the margin squeeze test by looking at DT's revenue from access charges in isolation, and to exclude revenue from call traffic. …. The margin squeeze test seeks to compare charges for two particular services at different commercial levels. The comparison would be distorted if revenue from call traffic were to be included, because call services, which are additional to access services, cannot also be included in the calculation on the wholesale side."* [51]

And

> *"The method used to determine whether there is a margin squeeze in this case is based on the principle that the established operator's tariff structure must enable competitors to compete with that operator effectively, and at least to replicate the established operator's customer pattern. It must not be assumed that the competitors' customer structure and range of services will necessarily be more profitable than those of the incumbent. The primary consideration here is the effect on market entry by*

competitors, and not the question whether the end-user regards access services and calls as a single bundle of products." [52] [53]

Objective Justification

Article 82 of the EC Treaty lists possible forms of abuse. But core to Article 82 is the concept of objective justification. If there is an objective justification, generally there will not be an abuse.

In margin squeeze, the most common occurrence is that a vertically integrated company, dominant upstream, makes losses downstream.

It is crucial that NCAs look at all the issues and the circumstances together because there might be an objective justification or explanation for the dominant company making a loss downstream (based on the wholesale input cost it charges to third parties) and therefore no abuse. An analysis of losses on its own would not be sufficient for the purpose of establishing an abuse.

There are legitimate reasons why a company may price below its own costs for a period of time:

- Market conditions may be temporarily bad but expected to improve;
- the company may be setting low prices as a temporary marketing initiative;
- it may have introduced a new product and currently has low volumes, but expects volumes to increase;
- a competitor may be charging unsustainable prices but will probably exit the market or revise its strategy;
- the market may be in decline and some market participants are expected to exit;
- the company may have misjudged and entered the market on too large a scale;
- it may be inefficient but believes it may be able to improve its performance or its products; and so on.

Although in the Discussion Paper margin squeeze is placed under refusal to supply, its analysis (and in particular its analysis of losses) is closer to predation. It is interesting that, in the context of Predatory pricing, in its Discussion Paper the Commission gives a very limited role to objective justifications and efficiencies in cases where a dominant company prices below the relevant measure of cost. In summary, the Paper lists some possible objective justifications:

- *"…the dominant company is minimising its losses in the short run…. This could be for instance the case where there is an issue of re-start up costs or strong learning effects. ..This justification is unlikely for pricing below AAC";*

- *"Above the AAC benchmark, the company may show that its low price is actually a short run loss minimising response to changed conditions in the market, such as resulting from a dramatic fall in demand leading to excess capacity. This could also be the case where there is a need to sell off perishable inventory or phased out or obsolete products or where the costs of storage have become prohibitive"* [54]

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- *"in case the rival is asking a price lower than the dominant company, the dominant company may invoke the meeting competition defence, to the extent that this is the response that minimises its short run losses… The meeting competition defence will only apply if it is shown that the response is suitable, indispensable and proportionate… In case the pricing abuse concerns pricing below AAC, the meeting competition defence can normally not be applied"* [55].

The dominant company may also wish to show that, although the price is below the relevant cost benchmark, for clear-cut reasons the dominant company's pricing behaviour should not be considered predatory pricing because there is no possibility that it could have an exclusionary effect on rivals. This may for instance be the case where the low price is part of a one-off temporary promotion campaign to introduce a new product and where the duration and extent of the campaign are such that exclusionary effects are excluded [56].

In addition an efficiency defence can in general not be applied to predatory pricing[57].

RELATIONSHIP BETWEEN MARGIN SQUEEZE AND PREDATION

The OFT Competition Act Guidelines define predation as

> *"strategic behaviour where an undertaking deliberately incurs short term losses in order to eliminate a competitor so as to be able to charge excessive prices in the future."* [58]

The Discussion Paper gives a much wider definition when it says that this is

> *"the practice where a dominant company lowers its price and thereby deliberately incurs losses or foregoes profits in the short run so as to enable it to eliminate or discipline one or more rivals or to prevent entry by one or more potential rivals thereby hinder the maintenance or the degree of competition still existing in the market or the growth of that competition"[59].*

The most important differences between a price squeeze and "classical" predation cases seems to be as follows:

- In a predation case the competition authority looks at all the relevant costs of the dominant company. In a price squeeze case, it looks only at the costs in the downstream market, including as a cost the upstream price.

- In a price squeeze the dominant company might not necessarily be losing money overall. It might be taking its profit upstream rather than downstream.

- In predation cases there is no need to consider whether or not the alleged predator would benefit from successfully excluding rivals – it always will to some extent. In contrast, in a price squeeze case, a vertically integrated company's incentives to exclude rivals from a downstream market are considerably reduced, since the competitor will also be an upstream customer. A vertically integrated dominant company might lose more by losing upstream customers than it could gain as a result of their withdrawal from the downstream market. Competition Authorities should therefore consider whether market conditions are such that a company has any incentive to exclude. Without such incentives, any failure to pass a price-cost test is more likely to be the result of a reasonable and temporary business strategy than a deliberate attempt to exclude.

- A price squeeze does not necessarily benefit consumers, whereas a predatory price does, at least in the short-term. In a classic predation case the dominant company is deliberately sacrificing short-term profits, for long-term exclusionary reasons. In the short term customers benefit from low prices and are not damaged by the exit of competitors from the market. The damage arises when the dominant company later exploits its increased market power and charges high prices. In a price squeeze it is not necessarily sacrificing short-term profits, although in practice the prices which are most effective in excluding rivals will be downstream prices which do not maximise short run profits, in which case consumers do benefit. In addition, a margin squeeze does not necessarily lead to excessive prices in the future.

NEW AND EMERGING MARKETS

The previous sections have examined the uncertainties and difficulties that might arise in margin squeeze cases. These seem to indicate that, at present, it is unclear what the correct approach under EC law should be.

In new and emerging markets the possible application of the margin squeeze theory creates several additional difficulties. This is due not only to the uncertainties and the specific characteristics of the market but also because of the lack of useful precedents.

As the Competition Appeal Tribunal stated in case 1007/2/3/02, *Freeserve v Director General of Telecommunications*:

> *"there are as yet no decided cases as to whether a dominant undertaking may price below LRIC or AVC for a period on the grounds that it is launching a new product, and if so what the period might be."* [60]

It is also unclear how competition authorities could distinguish anti-competitive conduct from dynamic pricing or other strategies such as special offers or penetration pricing which are all designed to attract customers to a new market.

In a ruling of 18 March 2005 by the Competition Appeal Tribunal in the UK in the *British Telecom* case, the Tribunal raised the question, in paragraph 7:

> *"What is the proper approach by a dominant firm to pricing of a new product in a new market by what is called loosely "penetration pricing? Behind that question is an issue of real public importance, which is the extent to which the Regulator can intervene on an ex ante basis in a case of alleged predation and, if the Regulator does so, on what basis should predation be judged in the very early stages of development of a new market? In particular, should any alleged predatory conduct be assessed on the basis of business or economic projections of what the business may reasonably have known or foreseen at that time, or should the matter be judged on the basis of such historical cost information that is then available, or subsequently becomes available to the Regulator in the course of investigating the complaint and the decision is taken?"*

Normal market characteristics or exclusion?

In the *AKZO* case [61] the European Court of Justice held, first, that prices below average variable costs are presumed to be predatory, since

> *"a dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its*

> *prices by taking advantage of its monopolistic position since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced"*

Second, prices above average variable cost but below average total cost are predatory where they are part of a plan by a dominant firm to eliminate a competitor.

In my view the first part of the *AKZO* test should not be applied mechanically and the Discussion Paper does not go far enough in clarifying the test for new and emerging markets.

As Advocate General Fennelly said in *Compagnie Maritime Belge*[62]:

> *"Apparently, therefore, sales below average variable (or short-run margin; AKZO, paragraph 70) costs are in effect presumed to be abusive. While it is usually rational to sell above average variable costs, because that permits some return on capital, where the market will not bear a higher price, it is not usually rational to sell below average variable costs. Marginal costs need not be incurred and business has no interest in incurring them so as to make a loss. <u>A dominant firm would be permitted, however, to rebut this presumption by showing that such pricing was not part of a plan to eliminate its competitor</u>" (emphasis added)*[63]

Moreover, a strict interpretation would create several additional issues in new and emerging markets.

When a company enters a new market, it normally incurs significant early on-going costs, which may well reduce once the company becomes more established. These higher early costs include marketing costs and early learning costs (as the company acquires greater knowledge of customer demands etc, its efficiency is likely to increase and costs should fall). The company's costs are also likely to fall as it increases output towards an efficient scale.

A rational company, which is not engaged in exclusionary pricing, may well choose to "forward-price", i.e. price on the basis of the future cost-base it expects to achieve in due course, rather than its initial, higher, cost-base. This approach to pricing should encourage take-up of the company's product and assist it to reach an efficient scale of production more quickly. The difficulty a competition authority faces is distinguishing this rational and non-exclusionary pricing (which may involve pricing below average variable costs) from abusive exclusionary pricing.

The Commission in the *Wanadoo* case addressed this issue as follows:

"Instead of simply examining costs and revenue as entered in the company's account as the Akzo judgement suggests it might do, the Commission has spread customer acquisition costs [which were deemed to be variable costs] over 48 month, treating as it were these costs as a commercial investment to be written off over a customer's realistic lifetime." [64]

An alternative approach was outlined in the famous 1975 article by Professors Areeda and Turner [65]:

"… a new producer with a monopoly on an entirely new product might also find it rational to set an initial price below the high marginal costs incurred at early low outputs. But no defence is needed for these declining costs cases. They can be taken care of by a sensible interpretation of the rule that a monopolist is entitled to price at or above ***reasonably anticipated*** *marginal costs. In other words, to establish predatory pricing, it should be necessary to show that a monopolist has priced both below immediate marginal costs and below the marginal cost at the output which he reasonably anticipated he would attain within a reasonable period of time."*[66]

In *BSkyB*, the OFT noted that losses were made by *BSkyB*'s retail arm for most of the period of review, but:

"they were not large, they were temporary, they were associated with the launch of BSkyB's digital platform, and they contained the irreducible element of uncertainty inherent in any model." [67]

In new and emerging markets it is considerably more difficult to determine the difference between normal market pricing and anticompetitive exclusion by pricing.

When (and if) to intervene

The first dilemma faced by competition authorities is to determine when it is proper to intervene.

Competition law requires an assessment ex post and sometimes this might not be well suited to dealing with markets characterised by rapid evolution of technology and business models.

However, as the Commission stated in *Wanadoo*:

"…nothing in Article 82 of the Treaty or in the Community case law on [predation] provides for an exception to the application of the competition rules to sectors which are not yet fully mature or which are considered to

be emerging markets. To subordinate the application of the competition rules to a complete stabilisation of the market would be to deprive the competition authorities of the power to act in time before the abuses established have exerted their full effect and the position unduly acquired have thus been finally consolidated. It follows, on the contrary, from the case-law that it must be possible to penalise predatory pricing whenever there is a risk that competition will be eliminated, as the aim pursued by the Treaty, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competition." [68]

To wait?

NCAs could wait until the market has matured and stabilised. However, if an abuse is being practiced and the NCA waits before intervening, it might be too late and competition might have already been weakened or destroyed.

NCAs are therefore concerned that by not acting at an early stage, if an abuse were being committed, this would lead to a market development very different from the one that would have occurred as a result of competition.

To act?

NCAs could also intervene at an early stage when the market has not yet developed. There are some issues that arise here

- When an NCA intervenes early, it might not have a sufficient body of accounting data upon which to base a finding;

- Because of the characterists of new markets, it might conclude that there is an abuse where there is none;

- It might affect negatively the competitive process. If competition authorities intervene prematurely, they may deter investments in the market. In addition, an incorrect finding of abuse will result in remedies imposed on the company which are likely to affect negatively the market and encourage inefficient entry.

It is difficult to distinguish abusive pricing behaviour from normal competitive methods in new markets, given that the effects of legitimate vigorous competition can quite easily be mistaken for those of predation. Consequently, there is an ever present and significant danger that an NCA could find itself protecting an inefficient competitor at the expense of its more efficient rival, and thereby damaging both the latter as well as the very consumer that the NCA is seeking to protect.

On this point of chilling effect, the US Supreme Court, in stressing that it is vital to distinguish between pro-competitive price cutting and anticompetitive predatory pricing stated that:

> *"cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences are especially costly, because they chill the very conduct the antitrust laws are designed to protect. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behaviour ends up by discouraging legitimate pricing competition."*[69]

The practical result may well be that, absent clear proof of anticompetitive intent, it is only in very rare and very clear cases that abusive conduct based on pricing behaviour can be detected and halted at an early stage in the development of a new market.

The relevance of the company's business case

One of the main difficulties in new and emerging markets is that there is not enough accounting information available on costs and revenue and therefore the only evidence available to assess the rationale of the company's prices may be the company's business case and the reasonableness on its projections as to future profitability.

The question then becomes whether (and, if so, in what circumstances) a competition authority could base a finding of abuse on the investigated company's forecasts.

We have already seen that competition authorities have been trying to establish some methodologies for testing companies' forecasts. However, such analyses might rely on replacing the company's own assessment with the regulator's own forecasts. These forecasts, being speculative and based on assumptions (which may be no more reliable or reasonable that the company's own assumptions), might not be sufficient to prove an abuse to the sufficient standard of proof required by the Courts.

As stated by the European Courts, the required standard of proof would not be met if there is an alternative and legitimate explanation of the facts in question which "*cannot be ruled out"*[70] or which *"casts the facts established by the Commission in a different light".*[71]

An added complication is that regulators are faced with an inherent contradiction. If the company's business case shows that initial losses are balanced out by an expectation of profits, these may be the results of successful exclusion. However, if the business plan shows that profitability might not be attained for some time, this may be the result of a competitive market (albeit one in which a possible, competitive shakeout of players is the outcome). This poses severe practical problems in assessing the plausibility of business plans on a forward-looking basis.

It seems, therefore, that there is no simple test to apply.

In this context, the Guidelines on the application of the Competition Act in the telecommunications sector para 7.23 state:

> *"it will not always be possible for an undertaking to meet all the targets set out in its business plan. Evidence of an abuse of dominance may be provided however where a business case is based on **unjustified and implausible** assumptions or where there has been a failure by the undertaking to take remedial action once it became apparent that it would not meet the targets". (emphasis added)*

It seems to us that if the conduct of a company is to be judged on the basis of a business plan it has adopted, this can only be done by applying a standard which looks at the knowledge (actual or imputed) of the decision-taker at the time when the decision is made and not with the benefit of hindsight (which the company could not have had).

This approach appears to be in line with the approach outlined by Professor Will Baumol in a paper to the Swedish Competition Authority[72]. Although Professor Baumol was specifically commenting on predatory pricing, his comments regarding "legitimate business practice" are relevant for present purposes. He notes:

> *"a legitimate business act must, first, be one that can reasonably be expected ultimately to add to net earnings, though it may or may not entail some initial profit sacrifice. Second, that act's promise of profit must not be contingent upon the elimination of an actual or prospective rival; it must be likely to pay off even if no rival exits of fails to materialise."* [73]

And

> *"How then one does infer whether a pricing decision constitutes legitimate business practice? The answer, as already suggested, is that there is no generally effective way. The best one can hope for is the recorded judgement of a qualified and personally uninvolved observer, expressed at the time the decision was arrived at, indicating that it was a reasonable decision that promised to contribute to the long-run well being of the firm, even if no entry was prevented and no rival was forced to exit."*[74]

THE FUTURE FOR MARGIN SQUEEZE: CONCLUSION

The issue of what margin squeeze is and whether there is such an abuse has enormous practical importance for vertically integrated firms that supply downstream rivals with essential inputs.

As we have seen in this paper, despite the dramatic increase in margin squeeze decisions at EC and national level, a surprising number of key legal and economic issues remain to be resolved. There is a lack of clear legal principles in the existing case law. Given the obvious importance of pricing decisions, these difficulties have created uncertainty for vertically integrated firms and their legal advisors. Put simply, many of the legal rules established in the decisional practice and case law are not easily capable of ex ante application at the time when the pricing decision is taken.

In the case of new and emerging markets the central issue is how to distinguish normal start-up losses from anti-competitive pricing. This paper has highlighted some of the issues.

In these circumstances, it is hoped that the appeals currently pending before the CFI in *Deutsche Telekom* and *Wanadoo* will help clarifying the law and assist in setting up clear and workable legal and economic principles. The public consultation this year on the Discussion Paper and next year on the proposed Draft Guidelines on Article 82 may also assist in clarifying the law.

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[1] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, published in December 2005.
[2] The terms 'wholesale' and upstream' are used interchangeably in this article, as are the terms 'downstream' and 'retail'.
[3] The terms 'wholesale' and upstream' are used interchangeably in this article, as are the terms 'downstream' and 'retail'.
[4] 0J 1976 L35/6
[5] Paragraph quoted in the Commission's subsequent interim measures decision at paragraph 14.
[6] See John Kallaugher, "The Margin Squeeze under article 82 : searching for limiting principles", presented at a conference on Margin Squeeze organised by BT and the Global Competition Law Centre of Bruges in London on 10th December 2004.
[7] Commission Decision of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty, case no. IV/30.178 Napier Brown – British Sugar, Official Journal L284, 19/10/1988, p41-59.
[8] Judgement of the Court of First Instance of 30 November 2000, Case T- 5/97 [2000], ECR II-3755
[9] Paragraph 177
[10] Paragraph 178
[11] Paragraph 179
[12] 0J 2003 L263/9
[13] Paragraph 102
[14] Paragraph 180
[15] Paragraph 181
[16] Paragraph 218

[17] COMP/38.233 Wanadoo Interactive, Commission Decision of 16 July 2003.
[18] Paragraph 331
[19] Case COMP/C-1/38.784, Wanadoo Espana contra Telefonica
[20] CA98/20/2002 dated 17 December 2002
[21] Case CW/00613/04/03, 20 November 2003
[22] Case CW/0061 5/05/03, 21 May 2004
[23] Genzyme [2004] CAT 4, 11 March 2004
[24] Paragraph 489 of the CAT decision
[25] paragraph 7, Genzyme [2004] CAT 4, 11 March 2004
[26] Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ 1998 C 265/2
[27] Paragraph 117
[28] ONPCOM 01-17
[29] Paragraph 220
[30] Paragraph 218
[31] Paragraph 216
[32] The Application of the Competition Act 1998 in the Telecommunications Sector, OFT 417. The same definition is at para. 6.1 of the OFT's Draft competition law guideline, Assessment of Conduct, OFT 414a.
[33] Paragrah 6.1
[34] Analytical framework for the new Freeserve case, August 2003, page 11
[35] [1979] ECR 403, 541
[36] [1983] ECR 3461
[37] Paragraph 70
[38] Paragraph 7, Genzyme [2004] CAT 4, 11 March 2004
[39] The OFT Guidelines on the application of the Competition Act 1998 to the telecommunications sector
[40] OFT Draft competition law Guidelines on Assessment of Conduct (OFT414a, April 2004)
[41] Paragraph 228
[42] Paragraph 228
[43] Paragraph 229
[44] Paragraph 63
[45] Paragraph 554
[46] See for example the British Telecoms case and the Telefonica statement of objections.
[47] Paragraph 180
[48] In Michelin II and British Airways, the CFI ruled that the Commission does not need to prove actual anticompetitive effects to establish an abuse but that it is only necessary that the conduct has the potential to have an anticompetitive effect. This seems to indicate that it is still necessary for the Commission and the NCA to show that harm could occur or is reasonably likely to occur.
[49] Paragraph 65
[50] Paragraph 117
[51] Paragraph 126
[52] Paragraph 127
[53] Interestingly here the Commission considers as a primary consideration the elimination of barriers to entry to new competitors, a more regulatory concept than a proper competition law concept. It also does not explain why an equally efficient operator could not replicate DT’s bundle of access and calls charges.
[54] Paragraph 131
[55] Paragraph 132
[56] Paragraph 110
[57] Paragraph 133. The Commission considers that it is highly unlikely that clear efficiencies from predation can be shown and even when they exist that predation is the least restrictive way to achieve them. In addition, it is similarly unlikely that, in the case that such benefits arise, that in the longer run some of these benefits are passed on to the customers and that these benefits outweigh the loss of competition brought about by the predation.

[58] Paragraph 4.1 OFT Guideline 414 Assessment of Individual Agreements and Conduct, September 1999. The same definition is contained at Assessment of Conduct – Draft Competition Law guideline for consultation (April 2004 OFT 414a paragraph 4.1)
[59] Paragraph 94
[60] Paragraph 220
[61] ECS/AKZO (1985 OJ L 374/1), on appeal Case C-62/86 AKZO v Commission [1991] ECRI-3359.
[62] Joined cases C-395/96P and C-396/96P Compagnie Maritime Belge NV and Dafra-Lines v Commission.
[63] Paragraph 127
[64] Paragraph 262
[65] Phillip Areeda & Donald F.Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975).
[66] p.715
[67] ibid, at Paragraph 160
[68] Paragraph 301
[69] Matsushita Elec. Indus. Co. v Zenith Radio Corp., 475 U.S. 574, 594 (1986) (alterations in original).
[70] Cases 40/73 etc., Suiker Unie [1975] ECR 1633, at Paragraph 354.
[71] Cases 29 and 30/83, CRAM & Rheinzink v. Commission, [1984] ECR 1679 at para. 16 (p. 1702) and paras. 32-36 (p.1705-6).
[72] “Principles relevant to predatory pricing”, paper by professor William J. Baumol, included in “The pros and cons of low prices”. Swedish Competition Authority, October 2003, pp 15-38.
[73] Ibid. at p.23
[74] Ibid. at p.25