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Margin Squeeze Amid the Modernisation of Article 102 TFEU: Endorsement of the Effects-based Approach?

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Recent years have seen a notable increase in the number of leading EU Court judgments on margin squeeze, including *Deutsche Telekom*, *TeliaSonera* and *Telefónica*. One notable feature of the case law on margin squeeze is that for the first time, the EU Courts demanded an effects-based approach to an abusive practice under Article 102 TFEU even when the Commission was satisfied with its very existence in the absence of effects on competition. However, as the modernisation of Article 102 TFEU has shown, it was normally the Commission who was pushing for a more economics- and effects-based approach towards the interpretation of abuse of a dominant position. Mainly because the relevant case law on margin squeeze is shaped in the aftermath of the Guidance on the Commission's enforcement priorities and at the same time puts greater emphasis on the analysis of effects and on the use of the as efficient competitor test, one may be tempted to argue that the EU Courts have ultimately endorsed the effects-based approach of the Commission as encapsulated in the Guidance. Against this background, this article deals with one of the most questioned issues in the context of Article 102 TFEU following the publication of the Guidance: whether the leading judgments on margin squeeze can be taken as an evidence of the abandonment of the formalistic approach to Article 102 TFEU in favour of the effects-based approach and of the endorsement of the Guidance by the EU Courts.

1. AN OVERVIEW OF THE JUDGMENTS OF THE EU COURTS ON MARGIN SQUEEZE

A margin squeeze occurs where a vertically integrated firm with a dominant position in an upstream market sells an input that is used in a downstream market at a price which does not allow its downstream competitors to operate profitably vis-à-vis its downstream operations. It is one of the examples of unilateral conduct that falls into the scope of the prohibition of abuse of a dominant position in Article 102 TFEU. Although the text of Article 102 TFEU does not refer to margin squeeze as a form of an abuse in its non-exhaustive subparagraphs, it is clear from the judgments of the EU Courts that margin squeeze may amount to an abuse of a dominant position under certain circumstances. The case law on margin squeeze includes both appeals to Commission decisions (annulment actions) under Article 263 TFEU and preliminary rulings under Article 267 TFEU. The leading judgments of the EU Courts on margin

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squeeze include *Deutsche Telekom*,[1] *TeliaSonera*[2] and *Telefónica*.[3] In contrast to the earlier cases, these judgments are all concerned with margin squeezes of vertically integrated telecom operators in the telecommunications sector.[4]

It is interesting to note that in contrast to other forms of abusive conduct, margin squeeze is the first abusive conduct in the enforcement of Article 102 TFEU where the EU Courts raised objections to a Commission decision on the ground of a lack of analysis of the effects of the conduct in question. Although some judgments show a greater consideration of effects vis-à-vis the others in the case law on Article 102 TFEU, it is for the first time that the EU Courts demanded an effects-based approach to an abusive practice of a dominant firm even when the Commission was satisfied with its very existence in the absence of effects on competition.[5] The Commission stated that it had 'done enough' to establish the existence of an abuse of a dominant position by proving the existence of a margin squeeze.[6] Whereas, the Court of Justice clarified that effects need to be shown for a margin squeeze to amount to an abuse of a dominant position under Article 102 TFEU and held that:

> '[I]t must be held at the outset that ... the General Court correctly rejected the Commission's arguments to the effect that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors constitutes an abuse within the meaning of Article [102], and that it is not necessary for an anti-competitive effect to be demonstrated.'[7]

The judgments on margin squeeze also deserve mention for their coherency and high level of predictability. The treatment of most of the other forms of abusive conduct in EU competition law, including rebates, predatory pricing, refusal to licence intellectual property rights and tying, appears to be less predictable.[8] By contrast, the most

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1 Case T-271/03 *Deutsche Telekom AG v Commission* [2008] ECR II-0477 (*"Deutsche Telekom GC"*) upheld in Case C-280/08 *Deutsche Telekom AG v Commission* [2010] ECR I-9555 (*"Deutsche Telekom ECJ"*).

2 Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-0527 (*"TeliaSonera"*).

3 Case T-336/07 *Telefónica and Telefónica de España v Commission,* ECLI:EU:T:2012:172 (*"Telefónica GC"*) upheld in Case C-295/12 P *Telefónica SA and Telefónica de España SAU v European Commission,* ECLI:EU:C:2014:2062 (*"Telefónica ECJ"*).

4 The earlier cases on margin squeeze include Case 76/185/ECSC *National Carbonizing Company Limited* [1976] OJ L35/6, Case IV/30.178 *Napier Brown – British Sugar* [1998] OJ L284/41 and Case T-5/97 *Industries des Poudres Sphériques v Commission* [2000] ECR II-3755. An analysis of these cases shows that they only "touched upon" margin squeeze as a potential example of abuse of a dominant position and did not contain more than a few statements, the major part of which was only devoted to the definition of a margin squeeze. None of these earlier cases provides a satisfying discussion on the assessment of this conduct under Article 102 TFEU and thus did not offer as detailed assessments as those contained in the judgments in the telecommunications sector. It has been argued that the earlier cases included 'a barely conceptualized assessment' on margin squeeze and it was only in the subsequent decisions in the telecommunications sector that this conduct was subject to 'a progressively systematic analysis'. Gohari R.S. (2012) 'Margin Squeeze in the Telecommunications Sector: A More Economics-based Approach', *World Competition*, 35(2), 230.

5 See *infra* "2. Rethinking the Analysis of Effects in Margin Squeeze Cases".

6 Case COMP/C-1/37.451, 37.578, 37.579 *Deutsche Telekom AG* [2003] OJ L263/9, para.180.

7 *Deutsche Telekom ECJ*, n 1, para.250.

8 For example, *Hoffmann La Roche* condemned loyalty rebates of a dominant firm and suggested that rebates relate to volume or quantity fell outside the scope of Article 102 TFEU. Case 85/76 *Hoffmann-La Roche &*

coherent case law is perhaps available on margin squeeze. With the exception of one judgment which was also the first and the only judgment on margin squeeze before the abovementioned leading judgments,[9] margin squeeze has been recognised as a stand-alone abuse and the analysis of effects for this conduct is required by the EU Courts from the outset. Furthermore, as articulated in *Deutsche Telekom ECJ* and subsequently confirmed in *TeliaSonera*, the as efficient competitor (AEC) test is the legal test governing margin squeeze. According to the established case law, the following three cumulative conditions need to be met to demonstrate a margin squeeze abuse under Article 102 TFEU:

i. There must be a vertically integrated firm holding a dominant position in an upstream market and supplying non-indispensable input to a downstream market whereby its downstream operations compete with other undertakings,

ii. The difference between the wholesale prices charged for the input and the retail prices charged by the downstream operations for comparable services must be negative or insufficient to cover the costs of providing the retail product on the downstream market based on the vertically integrated dominant firm's own costs, and

iii. There must be adverse effects on competitors who are at least as efficient as the vertically integrated dominant firm itself but could not operate profitably in the downstream market as a result of the "squeeze" between their costs and prices.

No infringement decision on margin squeeze has been issued by the Commission after *Deutsche Telekom*. The Commission's investigation into *Slovak Telekom* concerning a possible margin squeeze is pending.[10] There has been one Article 9 Regulation 1/2003

Co. AG v Commission [1979] ECR 461. But the later *Michelin II* judgment created uncertainty in the area of rebates by confirming that quantity rebates could also be held as an abuse of a dominant position. Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission* [2003] ECR II-4071 ("*Michelin II*"). On predatory pricing, *AKZO* found that a dominant firm pricing below its average total costs (ATC) could be held contrary to Article 102 TFEU, implying a safe harbour for pricing above such costs. Case 62/86 *AKZO Chemie v Commission* [1991] ECR I-3359. However, in *Compagnie Maritime Belge*, the General Court took the view that even above cost pricing could trigger liability on the part of dominant firms. Joined Cases T-24/26 and 28/93 *Compagnie Maritime Belge Transports SA and Others v Commission* [1996] ECR II-1201. As for refusal to licence intellectual property rights (IPRs), the Court of Justice earlier listed one of the conditions of such refusal as preventing the appearance of a new product for which there is potential consumer demand. Joined *Cases C-241/91* P and C-242/91 P *RTE and ITP v Commission* (Magill) [1995] ECR I-0743 and Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039. Whereas, the later *Microsoft* judgment considerably relaxed this condition and although the refusal in question did not prevent the appearance of a new product, it was found as an abuse. Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601. Likewise, for tying to amount to an abuse, the condition of coercion was earlier discussed in Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439 and Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-0755, but the later *Microsoft* judgment deemed this condition as irrelevant for tying to amount to an abuse under Article 102 TFEU, at least not when tying is observed through technological means (technological tying).

9 *Industries des Poudres Sphériques v Commission,* n 4.

10 See Press Releases, "Antitrust: Commission opens formal proceedings against telecoms incumbents Telekomunikacja Polska and Slovak Telekom", MEMO/09/203, Brussels, 27 April 2009; "Antitrust: Commission sends statement of objections to Slovak Telekom and Deutsche Telekom", IP/12/462, Brussels 8 May 2012. The Commission's *Telekomunikacja Polska* decision could have been another case on margin squeeze in the telecommunications sector, but, as the Commission explained in its press release, the

commitment decision in the energy sector in recent years: in *RWE Gas Foreclosure*, the Commission took the preliminary view that the vertically integrated gas company, RWE, may have abused its dominant position in the gas transmission network within its grid area in Germany by way of a margin squeeze concerning its upstream gas transmission tariffs and downstream gas supply tariffs.[11] The case was closed without a finding of infringement and RWE committed to divest its gas transmission network. It has been observed that commitment decisions have been rarely appealed to the EU Courts so far. This means that there may be very few, or even no, further judgments on margin squeeze if the Commission pursues its recent trend of making increasing use of Article 9 Regulation 1/2003 commitments in this type of Article 102 TFEU case.

2. RETHINKING THE ANALYSIS OF EFFECTS IN MARGIN SQUEEZE CASES

It has been widely argued that the case law of the EU Courts on Article 102 TFEU is rather formalistic and not based on sound economics.[12] The language in some judgments suggests that some forms of abusive conduct have been condemned per se irrespective of the effects they generate on competition.[13] The concept of effects has given rise to some of the most contentious issues under Article 102 TFEU; in particular whether it is necessary to examine anti-competitive effects in all cases, what the standard for anti-competitive effects is or should be, and how the presence or absence

decisions only concerned a refusal to deal and a series of related practices such as proposing unreasonable conditions, delaying the negotiation processes, rejecting orders in an unjustifiable manner and refusing to provide reliable and accurate information to alternative operators. Case COMP/39.525 *Telekomunikacja Polska* [2011] OJ C324/7. See also "Antitrust: Commission fines Telekomunikacja Polska S.A € 127 million for abuse of dominant position", IP/11/771, Brussels, 22 June 2011.

[11] Case COMP/39.402 *RWE Gas Foreclosure* [2009] OJ C133/10. The Commission preliminary concluded that downstream margins of RWE's competitors' may have been squeezed as a result of RWE's strategy of artificially raising the prices for access to its transmission network. *ibid* at para.32.

[12] See generally, Geradin D. (2010) "Is the Guidance Paper on the Commission's Enforcement Priorities in Enforcing Article 102 TFEU Useful?", in Etro F. and Kokkoris I. (eds.), *Competition Law and the Enforcement of Article 102*, OUP, 39 ('Article 102 has been enforced very strictly by the Commission, which often took positions hard to reconcile with basic economics.'); Geradin D. and Petit N. (2010) 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment', TILEC Law and Economics Discussion Paper No 2011-008, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1698342> accessed 25/09/2014, 33 ('[The General Court] has adopted a conservative attitude in Article 102 decisions essentially relying on the formalistic – and poorly in line with economics – legal standards adopted by the ECJ.); Whish R. and Bailey D. (2012) *Competition Law*, 7th Edition, OUP, Great Britain, 208 ('[T]here has been much criticism that the law and policy of Article 102 has been insufficiently aligned with sound economic principles.'); and O'Donoghue R. and Padilla J. (2013) *The Law and Economics of Article 102 TFEU*, 2nd Edition, Hart Publishing, 267 ('One of the recurrent criticisms of the older decisional practice and case law under Article 102 TFEU is that abuses were made out on largely formalistic grounds, with little or no regard to any forensic demonstration of anticompetitive effects.').

[13] Many commentators have argued that loyalty rebates have been subject to a per se illegality treatment in case law. See Ridyard D. (2002) 'Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis', *European Competition Law Review*, 23(6), 302; and Kallaugher J. and Sher B. (2004) 'Rebates Revisited: Anti-competitive Effects and Exclusionary Abuse under Article 82', *European Competition Law Review*, 25(5), 266. Geradin and Petit insist that the case law on loyalty rebates 'not only is incongruent with effects-based reform, but truly plays against it by validating formalistic analyses.' Geradin and Petit, ibid, 38.

of such effects should be measured.[14] Mainly because of the criticisms levelled on the inconsistency, if not a lack, of analysis of effects in Article 102 TFEU cases, an effects-based approach to Article 102 TFEU is aimed by the modernisation of Article 102 TFEU in the last decade.[15] Within this context, the Guidance articulates an effects-based approach to abusive exclusionary conduct under Article 102 TFEU and is intended to contribute to the process of introducing a more economics-based approach in EU competition law.[16]

According to the judgments of the General Court, the effect referred to in the case law does not relate to the *actual* effect of the abusive conduct and it is thus not necessary to demonstrate that the abuse in question had a *concrete* effect on the markets concerned. The Court reiterated that that for the purposes of establishing an infringement of Article 102 TFEU, it is sufficient to show that the abusive conduct tends to restrict competition, or in other words it is capable of having that effect.[17] Establishing the anti-competitive object and the anti-competitive effect are one and the same thing for the purposes of applying Article 102 TFEU.[18] It follows that the proof of likely effects is sufficient and that there is no need to demonstrate actual effects. Given the fact that anti-competitive object and anti-competitive effect are thus disjunctive, likely effects will no longer be necessary either once an anti-competitive object is determined.

As for the analysis of effects in the leading judgments on margin squeeze, it has been shown that margin squeeze is the first abusive conduct in the enforcement of Article 102 TFEU where the EU Courts raised objections to a Commission decision on the ground of a lack of analysis of effects of the conduct in question. The judgments of the EU Courts on margin squeeze are often mentioned as an example for their high level of consideration of effects. According to some commentators, 'the latest margin squeeze

[14] O'Donoghue and Padilla, n 12, 262. The authors add that it is surprisingly unclear what types of anti-competitive effects are relevant under Article 102 TFEU and how they might be shown.

[15] The modernisation of Article 102 TFEU constitutes the last part of the reform of EU competition law towards a more economics- and effects-based approach which first began in the area of vertical agreements under Article 101 TFEU and proceeded with the issue of the new EU Merger Regulation. The modernisation of Article 102 TFEU began in June 2003 within the DG Comp. The earliest outcome was the "EAGCP Report" which advocates a more economics- and effects-based approach to Article 102 TFEU. Report by the EAGCP: An economic approach to Article 82, July 2005, <http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf> accessed 25/09/2014. Next, the Commission published the "Discussion Paper" in December 2005 which was the first substantive outcome of the modernisation and the first document that aims to widen the analytical framework of Article 102 TFEU. Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, Brussels December 2005, <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> accessed 25/09/2014. The Commission's efforts culminated in the issue of the Guidance in December 2008 which is yet the final formal step in this major policy review. Communication from the Commission: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7.

[16] See Press Release, "Antitrust: Guidance on Commission enforcement priorities in applying Article 82 to exclusionary conduct by dominant firms – frequently asked questions", MEMO/08/761, Brussels, 3 December 2008.

[17] *Michelin II*, n 8, para.239 and Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, para.293.

[18] Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969, para.170; *Michelin II*, n 8, para.241; and Case T-340/03 *France Télécom SA. v Commission* [2007] ECR II-0107, para.195.

cases are clearly among the European courts' most progressive decisions on effects in the context of Article 102 TFEU' and they 'clearly constitute *important endorsements of the more economics-based approach*'.[19] In addition, other commentators observe similarly that 'the application of Article 102 TFEU depends on the effects in concreto' on competition in margin squeeze judgments which seem to 'put greater emphasis on concrete anticompetitive effects'.[20] On the other hand, there are also commentators who find the leading judgments on margin squeeze not as effects-based as some commentators argue.[21]

In *Deutsche Telekom*, the Commission took the view that proving the existence of a margin squeeze was 'enough to establish the existence of an abuse' of a dominant position.[22] Deutsche Telekom appealed the Commission's Decision to the General Court and defended that that the Commission had failed to prove the actual effects of the conduct in question as it argued that the finding of a margin squeeze does not constitute an abuse per se.[23] The General Court rejected the appellant's plea that the Commission had not demonstrated that the margin squeeze had an effect on the market and found that the Commission had nevertheless examined effects in paras.181-183 of the Commission Decision.[24] According to the Court, the effect which must be established related to the 'possible barriers' that Deutsche Telekom's pricing practices could have created for the growth of competition in the market for retail access

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[19] Gohari, n 4, 216 and 231 (emphasis added).

[20] Colomo P.I. (2013) 'The Law on Abuses of Dominance and the System of Judicial Remedies', *Yearbook of European Law*, 32(1), 397-398 (emphasis added). See O'Donoghue and Padilla, n 12, 393 ('The decisional practice and case law have *undoubtedly imposed a higher burden* on competition authorities and claimants *in regard to the need to demonstrate anticompetitive effects in margin squeeze cases*. This is to be welcomed.') (emphasis added) and Gormsen L.L. (2013) 'Are Anti-competitive Effects Necessary for an Analysis under Article 102 TFEU?', *World Competition*, 36(2), 243 ('Following the judgments in *Deutsche Telekom, TeliaSonera* and *Post Danmark*, there is, in principle, judicial support for an effects-based approach in the form of an "as efficient competitor" test on exclusionary pricing practices...').

[21] Downing R. and Jones A. (2010) "Margin Squeezes in Telecommunications Markets", in Anderman S. and Ezrachi A. (eds.), *Intellectual Property and Competition Law, New Frontiers*, OUP, Great Britain, 221 ('A core criticism of the approach, which is apparent in ... *Deutsche Telekom* is that it is too formalistic. It does not allow for a consideration of the efficiencies which might flow from the conduct and does not require an assessment of whether, and if so how, the conduct harms competition and consumers – ie it does not require the demonstration of a coherent theory of harm.') and Osterud E. (2010) *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: the Spectrum of Tests*, Kluwer Law International, The Netherlands, 109 ('The margin-squeeze test is based on the assumption that when a dominant firm's margin between the upstream price and the price of the derived product is insufficient to cover the dominant firm's own costs of transformation, the effect is likely to be anti-competitive ... there is no need to conduct a more comprehensive analysis of market effects to establish the existence of an abuse.').

[22] *Deutsche Telekom AG,* n 6, para.180.

[23] *ibid* at para.225.

[24] In those paragraphs, the Commission stated that Deutsche Telekom restricted competition in the downstream market by raising barriers to the market entry of competitors and also provided some figures on the market shares of its competitors with a view to demonstrating the 'sluggish development' and '[in]discernible improvement' in the relevant market as a result of Deutsche Telekom's tariff structure.

services (downstream market) and therefore on the degree of competition in that market.[25]

The General Court considered it implicit that Deutsche Telekom's wholesale product (access to local loop) was indispensable for an alternative operator to enter into competition with the downstream operations of Deutsche Telekom and a margin squeeze would 'in principle' hinder the growth of competition in the downstream market. This is because 'a potential competitor who is just as efficient as [Deutsche Telekom] would not be able to enter the retail access services market without suffering losses.'[26] In a way, the Court inferred the anti-competitive effect of the margin squeeze from the existence of this conduct after it considered the indispensability of access to local loop a 'possible barrier' in itself for the growth of competition in the downstream market. In other words, once the product in the upstream market is indispensable, the existence of a spread between the wholesale prices and retail prices on the part of a dominant firm will result in an abusive margin squeeze. Therefore, there was no need to demonstrate the *actual* effects of the conduct in question.

The Court of Justice upheld the General Court's judgment in its entirety. According to the Court of Justice, the abusive nature of margin squeeze arises from 'the unfairness of the spread' between the wholesale prices of Deutsche Telekom and the retail prices of its downstream operations.[27] The Court found that a pricing practice constitutes an abuse within the meaning of Article 102 TFEU 'if it has an *exclusionary effect* on competitors who are at least as efficient as the dominant undertaking itself by squeezing their margins and is capable of making market entry more difficult or impossible for those competitors'.[28] The Court maintained that 'in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue cannot be classified as exclusionary if it does not make their market penetration any more difficult.'[29] Since Deutsche Telekom had not produced any evidence to rebut the finding of margin squeeze, the Court controversially concluded that its practices 'gave rise to *actual exclusionary effects*' on the as efficient competitors.[30]

Apparently, the General Court set out a very low threshold for establishing an abuse whereby it was sufficient for there to be 'possible' barriers that 'could have' affected the growth of competition in the downstream market.[31] The Court of Justice's assessment seems to be more effects-based as it went further so as to imply that 'where there is no effect, there is no abuse'. However, the assessment of the Court of Justice is inconsistent on two points. First, the Court's effects-based finding was weakened when it added that 'where a dominant undertaking actually implements a pricing practice

[25] *ibid* at para.235.

[26] *ibid* at para.237.

[27] *Deutsche Telekom ECJ*, n 1, para.167.

[28] *ibid* at para.253 (emphasis added).

[29] *ibid* at para.254.

[30] *ibid* at para.259 (emphasis added).

[31] Osterud (2010), n 21, 107.

resulting in a margin squeeze of its equally efficient competitors, with the purpose of driving them from the relevant market, the fact that the desired result is not ultimately achieved does not alter its categorisation as abuse'.[32] This statement is reminiscent of the form-based assessments made in some previous judgments in the case law.[33] In fact, the Court did not question the earlier formalistic judgments in *Deutsche Telekom*.

Second, the Court in fact did not set a high bar in terms of proving effects as can normally be expected from a seminal effects-based judgment. In an ordinary way, it pointed to the proof of likely effects; actual effects were not deemed as necessary for a finding of an abuse. At this point, *Deutsche Telekom* again does not radically differ from some earlier judgments that put greater emphasis on effects.[34] A critical analysis of the likely effects in *Deutsche Telekom* shows that such effects were in a way presumed once Deutsche Telekom's local loop was found to be indispensable. This fact was purported to be supported with a couple of market shares of competitors in the downstream market which were found to have only marginally increased as a result of the squeeze in their margins.[35] In addition, the Court observed that the margin squeeze had the effect that consumers suffer detriment as a result of a reduction in choice and in longer-term low retail prices.[36] However, this indirect consumer harm was linked to the elimination of competition exerted by the as efficient competitors in the judgment.[37]

TeliaSonera confirmed that in order to establish an abuse of a dominant position, margin squeeze 'must have an anti-competitive effect on the market' but 'the effect *does not necessarily have to be concrete*'; it is sufficient to demonstrate that 'there is an anti-

[32] *Deutsche Telekom ECJ*, n 1, para.54. See also *TeliaSonera*, n 2, para.65.

[33] See *Compagnie Maritime Belge Transports SA and Others v Commissio*n, n 8, para.149 ('...where one or more undertakings in a dominant position actually implement a practice whose aim is to remove a competitor, the fact that the result sought is not achieved is not enough to avoid the practice being characterized as an abuse…'); *Irish Sugar plc v Commission,* n 18, para.191 ('…where an undertaking in a dominant position actually implements a practice aimed at ousting a competitor, the fact that the result hoped for is not achieved is not sufficient to prevent that being an abuse of a dominant position…'); and *Michelin II*, n 8, para.245 ('When an undertaking actually implements practices with the aim of restricting competition, the fact that the result sought is not achieved is not enough to avoid the application of Article [102]…').

[34] See Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389; *RTE and ITP v Commission* (Magill), n 8; Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653; and *IMS Health v NDC Health*, n 8.

[35] '[T]he small market shares acquired by [Deutsche Telekom's] competitors in the retail access market since the market was liberalised… are evidence of the restrictions which [Deutsche Telekom's] pricing practices have imposed on the growth of competition in those markets.' *Deutsche Telekom GC*, n 1, para.239.

[36] *Deutsche Telekom ECJ*, n 1, para.182.

[37] The fact that exclusion of the as efficient competitors giving rise to consumer harm is in fact not a problem particular to margin squeeze; rather it is one of the criticisms that has been levelled against the AEC test itself. See CLF (2006) 'The Reform of Article 82: Comments on the DG-Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses', *European Competition Journal*, 2(1), 174 ('Reliance on a pass/fail "as efficient competitor" test, without consideration of the way in which consumers will ultimately be harmed places excessive reliance on uncertain modelling approaches, is too simplistic and is likely to lead to over-intervention.') and Korah V. (2007) *An Introductory Guide to EC Competition Law and Practice*, 9th Edition, Hart Publishing, Great Britain, 141 ('[T]he main concern of such test seems to be the impact of a particular conduct may have on [a dominant firm's] competitors rather than on consumer welfare.').

competitive effect which *may potentially* exclude' the as efficient competitors.[38] The Court of Justice stressed that 'in the absence of any effect on the competitive situation of competitors', a margin squeeze 'cannot be classified as an exclusionary practice'.[39] The Court also specified the effect to be demonstrated, as the margin squeeze, made the penetration of the as efficient competitors in the market difficult.[40] It maintained that the anti-competitive effect of a margin squeeze is 'probable' where the upstream product is indispensable, but even if it is not indispensable, 'the possibility cannot be ruled out' that a margin squeeze may be capable of having anti-competitive effects.[41] In contrast to *Deutsche Telekom ECJ*, no reference was made to consumers in *TeliaSonera.*[42]

In *Telefónica*, the Commission did not solely rely on the existence of the margin squeeze to establish an abuse as it did in *Deutsche Telekom.*[43] Instead, the Commission announced that it had applied an effects-based approach.[44] The Commission found that Telefónica's conduct was not only 'likely to restrict competition' in the downstream market but it also had 'an *actual impact* on the competitive structure' of that market and 'detrimental effects *directly* for consumers'.[45] It decided that Telefónica's conduct was 'likely to make the continued presence on the market of equally efficient competitors difficult to sustain',[46] *'likely* to raise significantly the costs of rivals and new entrants'[47] and '*likely* to delay the entry and growth of competitors, and the achievement by those operators of a level of economies of scale'.[48] Consumers were also found '*likely to have been harmed* by higher retail prices than would have prevailed in the absence of the margin squeeze'.[49] The Commission supported its findings with empirical evidence showing that the margin squeeze 'has had *concrete* foreclosure effects' and consumers were harmed as retail broadband prices in Spain were well above the EU average.[50]

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[38] *TeliaSonera*, n 2, para.64 (emphasis added). See also *Telefónica GC*, n 3, para.26.

[39] *TeliaSonera*, n 2, para.66 (emphasis added).

[40] *ibid.*

[41] *ibid* at paras.70-72.

[42] Some authors have argued that while consumer detriment was clearly part of the assessment after *Deutsche Telekom*, *TeliaSonera* degraded it to the status of objective justification which has to be proven not by the Commission, but by the undertaking concerned. Gohari, n 4, 231.

[43] Case COMP/C-1/37.451, 37.578, 37.579 *Deutsche Telekom AG* [2003] OJ L263/9, para.180.

[44] Press Release, "Antitrust: Guidance on Commission enforcement priorities in applying Article 82 to exclusionary conduct by dominant firms – frequently asked questions", MEMO/08/761, Brussels, 3 December 2008.

[45] Case COMP/38.784 *Wanadoo España vs Telefónica* [2008] OJ C83/05, paras.544-545 (emphasis added).

[46] *ibid* at para.549 (emphasis added).

[47] *ibid* at para.553 (emphasis added).

[48] *ibid* at para.554 (emphasis added) (citations omitted).

[49] *ibid* at para.558 (emphasis added). The Commission took the view that 'the competitiveness of the market was likely to be restricted relative to the situation that would have prevailed in the absence of the margin squeeze' and this '*inevitably* leads to *likely harm to consumers*.' *ibid* at para.557 (emphasis added). This theoretical finding could have been excessively formalistic, if it had not been supported with empirical evidence.

[50] *ibid* at paras.564-609 (emphasis added).

Consequently, compared to many other previous judgments on other types of potentially abusive conduct, the leading judgments on margin squeeze favour an analysis of effects and put the emphasis on the effects of this conduct. The abovementioned "effects-oriented" statements in these judgments give the impression that the EU Courts have identified the actual or concrete effects of margin squeeze and taken a radical step in the enforcement of Article 102 TFEU. However, these judgments are clear that the likely effects of a margin squeeze are deemed as sufficient to establish an abuse of a dominant position and do not require the actual effects to be demonstrated.[51] One can argue that if there is no need for actual effects, the likely effects can always be satisfied: if evidence of actual foreclosure or exclusion is not required, then in any case competitors are likely to be disadvantaged or to compete less aggressively as result of the squeeze in their margins. The judgments are also inconsistent on the effects on consumers with *TeliaSonera* having no reference to consumers and *Telefónica* showing empirical evidence on likely consumer harm. All in all, absent some of their "effects-oriented" statements, the leading judgments on margin squeeze do not *radically* differ from the rest of the existing case law.

3. MARGIN SQUEEZE VIS-À-VIS THE FORM-BASED APPROACH UNDER OTHER FORMS OF ABUSIVE CONDUCT: AN ANALOGY

In contrast to the other forms of potentially abusive conduct that are "the most common" in the Commission's experience such as predatory pricing, rebates and exclusive dealing, tying and bundling, and refusal to deal,[52] the most recent case law exists on margin squeeze. While the Commission has had the occasion in its recent Article 9 Regulation 1/2003 commitment decisions to consider seemingly "new forms" of abuses under Article 102 TFEU such as "abuse of standard-essential patents",[53] "long-term capacity bookings",[54] "strategic underinvestment",[55] "capacity hoarding"[56] and "manipulation of internet search results";[57] the case law on margin squeeze has been recently shaped with the leading judgments in the telecommunications sector. Because the relevant case law on margin squeeze is recent and at the same time puts greater emphasis on the analysis of effects, one may be tempted to argue that the EU Courts have endorsed the effects-based approach of the Commission with the modernisation of Article 102 TFEU and are expected to shape their future judgments on other forms of potentially abusive conduct in a similar way.

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[51] See Gohari (2012), n 4, 231 ('Regrettably, the courts, while supporting the idea of an effects-based approach, seem to be satisfied with a demonstration of *potential* effects, which, furthermore, only have to relate to competition in the market, not to consumer welfare.') (emphasis original).

[52] See Guidance, para.7.

[53] Case AT.39985 *Motorola – Enforcement of UMTS Standard Essential Patents* [2014] OJ C344/6; Case AT.39939 *Samsung – Enforcement of UMTS Standard Essential Patents* [2014] OJ C350/8.

[54] Case COMP/39.316 *Gaz de France* [2010] OJ C57/13; Case COMP/39.317 *E.ON Gas* [2010] OJ C278/9.

[55] Case COMP/39.315 *ENI* [2010] OJ C352/8.

[56] Case AT.39727 *CEZ* [2013] OJ C251/4.

[57] Press Release, "Antitrust: Commission obtains from Google comparable display of specialised search rivals", IP/14/116, Brussels, 5 February 2014.

It is true that the case law on margin squeeze has never been formalistic or, put another way, has always been concerned with the effects of the conduct in question. One reason for this is that the leading judgments which have shaped the relevant case law on margin squeeze were issued in the last decade during the modernisation process of Article 102 TFEU or, as with most of them, shortly after the official publication of the Guidance in February 2009. The General Court's *Deutsche Telekom* judgment was delivered in April 2008 during the modernisation and the Court of Justice's judgment was handed down in October 2010 after the publication of the Guidance. Also *TeliaSonera* came out in February 2011 and *Telefónica GC* in March 2012, which was upheld in *Telefónica ECJ* in July 2014. The Commission's *Deutsche Telekom* decision of 2003 was rather formalistic compared to these judgments as it satisfied with the existence of the conduct itself instead of proving its effects, but it should be noted that the decision was issued long before the Guidance, even before the Discussion Paper.

On the other hand, in the same timeframe, the EU Courts also issued judgments regarding other forms of potentially abusive conduct that have been found to be formalistic and not as effects-based as their judgments on margin squeeze.[58] In a series of judgments during the modernisation of Article 102 TFEU, the EU Courts upheld Commission decisions based more on formalistic legal appraisal standards and less on mainstream economic concepts: One study measured the degree of reliance of the General Court on old precedents in Article 102 TFEU cases and found that the most popular judgment in this respect was *Michelin II* which was almost unanimously described as a striking piece of formalism, devoid of any economic sense.[59] Even after the publication of the Guidance, the EU Courts continued to hand down formalistic judgments especially in the area of rebates that faithfully repeated the old controversial case law in this area.[60] This raises doubt as to whether the law can be form-based on some forms of conduct and effects-based on other forms of conduct at the same time. Logic and common sense suggest that if one judgment envisages an effects-based approach to a certain type of conduct, another judgment should at least not disregard the analysis of effects in its entirety.

It has been observed that the discussion and management of Article 102 TFEU cases are often organised by categories of conduct;[61] but since a number of practices fit into multiple categories, which could lead to different outcomes depending on how they happened to be categorised, there should be no overall difference in treatment between practices that broadly raise the same economic issues.[62] It has been argued that there

[58] *France Télécom SA. v Commission*, n 18; *Microsoft Corp. v Commission*, n 8; and *British Airways v Commission*, n 17.

[59] Geradin and Petit, n 12, 32. This study also found that the General Court was reluctant to accommodate mainstream economic concepts within the realm of the Article 102 TFEU case law and thus to embrace a modern economic approach in the area of abuse of a dominant position. *ibid* at 34.

[60] Case T-57/01 *Solvay SA v Commission* [2009] ECR II-4621, overturned on procedural grounds in Case C-109/10 P *Solvay SA v Commission* [2011] ECR I-10329; Case T-155/06 *Tomra Systems ASA v Commission* [2010] ECR II-0297, upheld in Case C-549/10 P *Tomra Systems and Others v Commission* ECLI:EU:C:2012:221; and Case T-286/09 *Intel Corp v Commission* ECLI:EU:T:2014:547.

[61] EAGCP Report, 5.

[62] O'Donoghue and Padilla, n 12, 239-240.

must be an overall coherent framework for the assessment of (exclusionary) abuses and within that framework, the operational rules that most accurately capture prior beliefs about the type of harm caused by a specific practice should be developed.[63] No single test is suitable to the assessment of all types of conduct that may be abusive, not even all types of exclusionary conduct.[64] Therefore, it is acceptable for different types of legal/economic tests to govern different forms of abusive conduct,[65] but the methodology under Article 102 TFEU should be the same for all types of abusive (exclusionary) conduct.

One notable difference in the methodology in this respect can be the proof of consumer harm in relation to different forms of abusive conduct. Before the modernisation, the proof of consumer harm was not paid much attention by the Commission and the EU Courts. The established view was that protection of competition ensures that the interests of consumers will be safeguarded.[66] The direct actual or potential effects on consumers were generally not considered.[67] However, it appears that consumer harm seems to have been considered as part of the analysis on some forms of exclusionary conduct,[68] while it is not a necessary condition for other forms of conduct. The explicit concern for consumer harm in the case law on refusal to licence IPRs has never been so apparent in the context of other forms of abusive conduct under Article 102 TFEU.[69] The case law envisages a 'more rigorous approach' in refusal to licence IPR cases.[70] Explaining this issue, Marsden and Whelan find that

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[63] *ibid.*

[64] Nazzini R. (2011) *The Foundations of European Union Competition Law: The Objective and Principles of Article 102*, OUP, United Kingdom, 56.

[65] The main tests include the AEC test, the profit sacrifice test, the no economic sense test, and consumer welfare balancing tests. For a discussion of these tests, see OECD (2005) Competition on the Merits, DAF/COMP(2005)27, <http://www.oecd.org/dataoecd/7/13/35911017.pdf> accessed 25/09/2014, and O'Donoghue and Padilla, n 12, 227-237.

[66] Marsden P. and Whelan P. (2006) "'Consumer Detriment" and Its Application in EC and UK Competition Law', *European Competition Law Review*, 27(10), 569.

[67] In the landmark *British Airways* judgment, the General Court held that Article 102 TFEU 'does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers' and maintained that the Article 'concentrates upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected'. *British Airways v Commission*, n 17, para.264.

[68] It should be noted that exploitative abuses, by their very nature, harm consumers directly, and therefore consumer harm is essential.

[69] The condition in question relates to such refusal preventing the appearance of a new product for which there is potential consumer demand, *RTE and ITP v Commission* (Magill), n 8, and *IMS Health v NDC Health,* n 8. As discussed above, the later *Microsoft* judgment considerably relaxed this condition and although the refusal in question did not prevent the appearance of a new product, it was found as an abuse, *Microsoft Corp. v Commission,* n 8. Coates argues that this "specific criterion" in *Magill* was brought in line with 'a more general understanding of consumer harm' by the Commission in the Guidance. Coates K. (2011) *Competition Law and Regulation of Technology Markets*, OUP, Great Britain, 225.

[70] Venit J.S. (2005) 'Article 82: The Last Frontier-Fighting Fire with Fire?', *28 Fordham Int'l L.J,* 1160. See also Osterud, n 21, 241 ('The test for the application of Article 102 TFEU to refusal to license IPRs requires a more comprehensive analysis of effects than any of the other tests developed in the case law under Article 102 TFEU.')

this difference in approach is due to particular form of this conduct itself rather than to any belief that consumer harm should be proven.[71]

If this argument is true, then the same can be said for margin squeeze as well. Arguably, the fact that the case law on margin squeeze puts greater emphasis on effects may not automatically translate into a general effects-based approach for other forms of potentially abusive conduct due to the particular form of the margin squeeze itself. First of all, as shown above, the leading judgments on margin squeeze put the emphasis on the effects of this conduct but, despite some of their "effects-oriented" statements, they did not radically differ from the rest of the case law since the likely effects of a margin squeeze were deemed as sufficient to establish an abuse within the meaning of Article 102 TFEU. Also, the effects of margin squeeze were presumed to be anti-competitive, if the input was indispensable for downstream competitors. Considering the fact that many of the wholesale products are indispensable in network industries such as telecommunications and energy, the focal point of the analysis is apparently the economic assessment of the margin itself, rather than its precise effects.

The calculation of the margin is, of course, not as easy as subtracting the upstream wholesale price from the downstream retail price and subsequently comparing this difference among the downstream operations of the vertically integrated firm and its competitors. In order to demonstrate the actual existence of a margin squeeze, competition authorities need to establish a method to prove the insufficient profit margin, the so-called "imputation test".[72] The imputation test identifies whether the margin is reasonable or sufficient for the downstream competitors to compete.[73] The method to be relied upon in imputing a margin squeeze and the calculation of the costs to be included in that method are of utmost significance. Analysing whether the margin is insufficient inevitably depends on the efficiency of the undertakings in the downstream market. All undertakings in this market, including the downstream operations, incur costs while processing the upstream input into a retail product. Efficient undertakings normally incur lower costs, while inefficient ones incur higher costs (these costs then determine whether there is a positive, zero or negative margin).

At this stage, the undertaking to be taken as the model of reference for an efficient undertaking makes a difference in the analysis. If the downstream operations can trade profitably based on the wholesale price charged to competitors, the fact that (inefficient) competitors cannot operate profitably because of their own high costs should not normally give rise to a margin squeeze claim.[74] On the other hand, if the downstream operations cannot trade profitably on the basis of the same wholesale price

[71] Marsden and Whelan (2006), n 66, 584.

[72] Hou L. (2011) 'Some Aspects of Price Squeeze within the EU: A Case Law Analysis', *European Competition Law Review*, 32(5), 255.

[73] Alvarez-Labrador M.F. (2006) 'Margin Squeeze in the Telecommunications Sector: An Economic Overview', *World Competition*, 29(2), 258.

[74] See *Industries des Poudres Sphériques v Commission*, n 4, para.179 ('In the absence of abusive prices being charged by [the dominant firm] for the [input]… or of predatory pricing for the [retail product]… the fact that the [competitor] cannot, seemingly because of its higher processing costs, remain competitive in the sale of the derived product cannot justify characterising [the dominant firm's] pricing policy as abusive.').

charged to competitors, then it is likely that competitors who are as efficient as the downstream operations will not earn a sufficient margin to operate profitably.[75] Therefore, the determination of the "efficiency" of undertakings is the core of the analysis. In addition, it should also be addressed as to which of its costs must be taken into account (average incremental costs or the "retail minus" system), which timeframe is relevant for the analysis of profitability (the "period-by-period" method or the "discounted cash flow" method) and lastly which level of product aggregation is adequate (single product or a portfolio).[76] The duration of the conduct is also decisive in that it should be non-transitory.[77]

Rendering competitors' margins unprofitable or their activities uneconomic constitutes the competitive harm in a margin squeeze abuse. This harm is established when the margin is calculated as insufficient or negative. So once the margin is determined, the proof of effects is often of secondary importance, since a finding of an insufficient or a negative margin itself reveals that competitive harm has already been caused. The practical implementation of the imputation test that will be used to determine the insufficiency of the margin is complex, and requires detailed economic analysis and cost calculation.[78] Whereas, the demonstration of effects is a relatively easy exercise:[79] The EU Courts held that the likely or potential effects of a margin squeeze are sufficient to establish an abuse under Article 102 TFEU. They made the task of proving effects even easier by presuming the anti-competitive effect in circumstances where the input is indispensable[80] or where the margin is negative.[81] It is reasonable to conclude that rather than an effects-based approach, an economics-based approach is adopted for margin squeeze since the analysis centred on whether there is a squeeze in the margin

[75] See *Deutsche Telekom ECJ*, n 1, para.187 ('In the present case, the margin squeeze is said to be abusive because the [dominant firm] itself would have been unable to offer its own retail services without incurring a loss if... it had had to pay the wholesale access price as an internal transfer price for its own retail operations... In those circumstances, competitors [who] are just as efficient as the applicant cannot offer retail access services at a competitive price unless they find additional efficiency gains...').

[76] Gohari (2012), n 4, 223-228. See O'Donoghue and Padilla (2013), n 12, 385 for a view that each of those methods has benefits and drawbacks, and they may each be better suited to particular market settings.

[77] If margin squeeze is not held for a sufficient period of time, it would only cause a transitory impact on the downstream competitors and this would be insufficient to have the alleged exclusionary effect. Alvarez-Labrador (2006), n 73, 251.

[78] It has been argued that testing for actual or likely anti-competitive effects helps minimise the welfare costs of wrongly finding an abuse due to the mere failure of a price to pass the relevant imputation test. Geradin D. and Padilla J. (2005) 'The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector', *Journal of Competition Law and Economics*, 1(2), 407.

[79] See Wiethaus L. and Nitsche R. (2014) "Margin squeeze: An Overview of EU and National Case Law", eCompetitions, No. 65283**,** **<**http://www.concurrences.com/Bulletin/Special-Issues/Margin-squeeze/Margin-squeeze-An-overview-of-EU?lang=en#nh34**>** accessed 25/09/2014, 10 ('…anti-competitive effects may in many instances be deduced as soon as the imputation test is satisfied. In practice it appears, in our view and experience, that the burden is put on the defendant to demonstrate that anti-competitive effects are actually unlikely…').

[80] *TeliaSonera*, n 2, para.71

[81] *ibid* at para.73.

from an economic perspective, rather than on how the squeeze in the margin generates anti-competitive effects on competition or on consumers.

4. MARGIN SQUEEZE AS THE EVIDENCE OF THE EU COURTS' ENDORSEMENT OF THE EFFECTS-BASED APPROACH?

Whether the EU Courts would endorse the effects-based principles in the Guidance or instead follow their old case law was one of the most questioned issues following the modernisation of Article 102 TFEU. Most of their past judgments were often based on more traditional legal rules rather than economic assessments, while the Guidance envisaged an effects-based and consumer welfare-oriented approach to Article 102 TFEU. Being a soft law instrument, the Guidance is primarily related to the Commission's own enforcement and is in no way binding on the EU Courts.[82] It was widely argued that any possibility of change depended on the Commission obtaining endorsement of its new approach from the EU Courts.[83] While the modernisation was ongoing, Advocate General Kokott warned the Commission that even if its administrative practice were to change, it would still have to act within the framework prescribed for it by Article 102 TFEU as interpreted by the Court of Justice.[84] Therefore, the EU Court's stance towards the Guidance was of utmost importance as its fate depended on its endorsement or rejection by the EU Courts.

The Guidance outlines an effects-based approach for the application of Article 102 TFEU to exclusionary abuses. As shown above, in *Deutsche Telekom ECJ*, the Court of Justice held that a margin squeeze cannot be classified as an abuse 'in the absence of any *effect* on the competitive situation of competitors'[85] and *TeliaSonera* further confirmed that in order to establish an abuse of a dominant position, margin squeeze 'must have an anti-competitive effect on the market'.[86] The Guidance adopts the AEC test for price-based exclusionary conduct[87] and all of the leading judgments on margin squeeze confirm the use of this test in the context of margin squeeze to determine whether margin squeeze amounts to an abuse under Article 102 TFEU.[88] Furthermore, the relevant case law on margin squeeze in the telecommunications sector, where this

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[82] See Guidance, para.3 ('This document is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article [102] by the Court of Justice or the [General Court]…'). This is hardly surprising considering the fact that the Guidance as a soft law instrument cannot interpret the law contrary to the EU Courts' case law.

[83] Goyder and Albors-Llorens (2009), *EC Competition Law*, 5th Edition, OUP, Great Britain, 650.

[84] Opinion of Advocate General Kokott in Case C-95/04 *British Airways v Commission* [2007] ECR I-2331, para.28.

[85] *Deutsche Telekom ECJ,* n 1, para.254 (emphasis added).

[86] *TeliaSonera*, n 2, para.64.

[87] Guidance, para.23 ('...the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.').

[88] It should be noted that in *Intel*, the General Court rejected the applicability of the AEC test in the context of loyalty (exclusivity) rebates. Case T-286/09 *Intel Corp v Commission*, n 60. The *Intel* judgment contrasts with the leading judgments on margin squeeze where the AEC test had been the core of the analysis. See *infra* "5. The Future of the Effects-based Approach to Article 102 TFEU".

conduct has been shaped, is recent; *Deutsche Telekom ECJ*, *TeliaSonera* and *Telefónica* came out right after the Guidance was issued. Taking all these into account, one may be tempted to argue that the EU Courts have eventually endorsed the Guidance.

In order to validate the finding that the leading judgments on margin squeeze indicate a willingness on the part of the EU Courts towards the endorsement of the Commission's new reading of Article 102 TFEU in the Guidance, it must be determined whether the apparent difference in margin squeeze cases, namely a clear emphasis on the analysis of effects and the use of the AEC test, does not stem from the particular form of this conduct itself. As for the analysis of effects, it was already shown above that the leading judgments on margin squeeze did not set a high bar in terms of proving effects of the conduct and deemed as sufficient the likely effects of margin squeeze.[89] The EU Courts did not require the proof of actual or concrete effects of margin squeeze, nor did they clearly refer to a need to prove consumer harm. Even likely effects were presumed under certain circumstances. Consequently, absent some of their "effects-oriented" statements, the leading judgments on margin squeeze in fact did not *radically* differ from the rest of the case law.

As for the AEC test in the leading judgments on margin squeeze, it must be stressed that the use of this test is due to the particular nature of the margin squeeze in determining the margin itself, rather than any belief that it complements the analysis of effects. This test, or its alternative,[90] has been primarily used in the identification or imputation of the insufficient profit margin, rather than in the analysis of the effects of the margin squeeze. When margin squeeze is treated as a stand-alone abuse, as is in EU competition law; the insufficiency of the margin (or the spread or the difference) between the upstream and downstream prices becomes central to the analysis as there will not be a need to prove either the upstream prices are excessive or, in the alternative, the downstream prices are predatory. This margin should not be sufficient for competitors to operate profitably at the downstream market. Then the obvious question as to whose costs should be covered comes into prominence.[91]

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89 See *supra* "2. Rethinking the Analysis of Effects in Margin Squeeze Cases".

90 It should be noted that there is an alternative test: The "reasonably efficient competitor" (REC) test is based on the costs of not the dominant firm, but of a reasonably efficient competitor, and analyses whether the margin is insufficient to allow a reasonably efficient competitor to obtain a normal profit. See Notice on the application of the competition rules to access agreements in the telecommunications sector [1998] OJ C265/02, para.118. Commentators have agreed on the superiority of the AEC test, but nevertheless stressed that the REC test may yield better results when downstream competitors' margins are different as a result of them offering differentiated products so that the comparison of the profitably thus becomes difficult. Alvarez-Labrador (2006), n 73, 260. Geradin and Padilla argue that the mechanical application of the AEC test may result in wrongly imputing a margin squeeze; therefore, the REC test may be an important cross-check in some cases. Geradin and Padilla (2005), n 78, 394. On this issue, *Deutsche Telekom ECJ* took the view that in general the costs of the dominant firm have to be taken into account because the dominant firm knows its own costs, and it cannot be assumed as a general rule that it knows the costs of its competitors. *Deutsche Telekom ECJ*, n 1, para.192. *TeliaSonera* endorsed the use of the AEC test, but still reserved the right to make use of the REC test. *TeliaSonera*, n 2, para.45.

91 Wiethaus and Nitsche (2014), n 79, 6.

In the leading judgments on margin squeeze, as well as in the literature,[92] the costs of the vertically integrated dominant firm are taken into account in the identification of a margin squeeze. The AEC test asks the question as to whether the dominant firm would be able to make a profit if it were to obtain the input in question at the same price as is available to its competitors (alternative operators). If it does not operate profitably when it obtains the input at the same price it charges to its competitors, then this shows that it is denying the as efficient competitors the ability to earn profits in the downstream market. Inefficient competitors *ipso facto* merit no protection,[93] since such protection would render the business of the dominant firm's downstream operations *de facto* unfeasible. In this case, the dominant firm would be better off, if it shuts down its downstream operations; otherwise it would have to deal with allegations of margin squeeze by every single downstream competitor, be it efficient or not.

The fact that the AEC test is central to the substantive assessment of the insufficient margin rather than that of the effects is well shown by the earlier cases on margin squeeze, which recognised the central role of efficiency in establishing the margin. In *National Carbonizing* (1976), the Commission decided that the dominant firm in question may have an obligation to arrange its prices so as to allow 'a reasonably efficient' downstream competitor to survive in the long term.[94] In *Napier Brown/British Sugar* (1998), the Commission observed that the dominant firm in question had engaged in a margin squeeze by leaving an insufficient margin for the competitor in question who was 'as efficient as' the dominant firm itself.[95] Lastly, in *Industries des Poudres Sphériques* (2000), the General Court rejected the competitor's plea that the wholesale price is such as to eliminate 'an efficient competitor' from the downstream market.[96] The fact that these earlier cases made references to "efficiency" long before the modernisation of Article 102 TFEU means that the use of the AEC test evidently stems from the particular form of this conduct rather than being an evidence of the EU Courts' endorsement of the effects-based approach or of the Guidance.

Evidently, the EU Courts already departed from the Guidance in terms of substantive assessment since they regarded margin squeeze as a stand-alone abuse distinct from any other type of abuse, an approach that differs from the Guidance which treats margin squeeze alongside refusal to deal. In the Guidance, the Commission has chosen to

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[92] Geradin and Padilla (2005), n 78, 359 ('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.'); Hou (2011), n 72, 257 ('[T]he appropriate approach for the imputation test is the equally-efficient competitor approach based on the dominant undertaking's cost on the downstream market.'); Gohari (2012), n 4, 223 ('The predominant view is that the vertically integrated firm should be the model of reference for an efficient company.'); and Wiethaus and Nitsche (2014), n 79, 6 ('...the test to be generally applied is the as efficient competitor test.').

[93] Geradin and Padilla (2005), n 78, 395 ('Applying a margin squeeze test in a manner that produces inefficient outcomes on a downstream market (i.e., higher prices, lower output, and sub-optimal common fixed-cost recovery) would violate a cardinal principle of competition law—that competitors should only be protected to the extent that it enhances consumer welfare.') (emphasis original).

[94] *National Carbonizing Company Limited*, n 4, para.14.

[95] *Napier Brown – British Sugar*, n 4, para.65.

[96] *Industries des Poudres Sphériques v Commission,* n 4, para.180.

interpret margin squeeze through the lens of refusal to deal and treated margin squeeze akin to a constructive refusal to deal. The practical consequence of such an approach is that margin squeeze will be subject to the same assessment on refusal to supply.[97] Whereas, the Court of Justice stressed in *Deutsche Telekom ECJ* that it was not necessary to establish that either the wholesale prices or retail prices were 'in themselves abusive on account of their excessive or predatory nature'.[98] The EU Courts took the view in both *TeliaSonera* and *Telefónica GC* that the application of the same substantive standards to both refusal to deal and margin squeeze 'would unduly reduce the effectiveness of Article 102 TFEU'.[99]

Taking everything into account, the relevant case law on margin squeeze has developed in a far more expansive way contrary to the Guidance's treatment of margin squeeze through the lens of refusal to deal. The EU Courts' leading judgments on margin squeeze are welcomed, but still they do not show a clear sign of the EU Courts' ultimate endorsement of the Commission's new reading of Article 102 TFEU in the Guidance.[100] It is hard to argue that the formalistic approach to Article 102 TFEU has been replaced with a more effects-based approach. There are good reasons to believe that the apparent effects-based approach in the leading judgments on margin squeeze is more likely to be an economics-based approach, which is in fact required by the particular form of margin squeeze in order to calculate the insufficient profit margin as the focal point in the substantive assessment. In establishing a market squeeze abuse

[97] Accordingly, the Commission will consider margin squeeze as an enforcement priority, if (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. Guidance, para.81. However, *TeliaSonera* is clear that neither indispensability, nor a regulatory duty to deal is required for margin squeeze to amount to an abuse under Article 102 TFEU as a result of this conduct not being treated as a form of refusal to deal. *TeliaSonera*, para.59. Indispensability is only relevant in the context of the analysis of the effects of margin squeeze. *TeliaSonera*, n 2, para.71; *Telefónica GC*, n 3, para.182.

[98] *Deutsche Telekom ECJ*, n 1, para.183. In the Commission's *Telefónica* decision which predated the Guidance, the Commission stated that 'a margin squeeze is a disproportion between an upstream and a downstream price' and therefore 'there is no need to demonstrate that either the wholesale price is excessive in itself or that the retail price is predatory in itself.' *Wanadoo España vs Telefónica*, n 45, para.283. Apparently, this change of reasoning on the part of the Commission in *Telefónica* did not survive into the Guidance.

[99] *TeliaSonera*, n 2, para.58; *Telefónica GC*, n 3, para.181. The Courts' reasoning seems to be justified in that if margin squeeze is interpreted as a constructive refusal to deal, then the right of choosing trading partners and disposing freely of property on the part of dominant firms may come to the fore in the assessment. After all, even dominant firms have the right to freely exercise their own independent discretion with whom they will deal. However, a stand-alone margin squeeze abuse would render this discussion irrelevant from the outset, thereby increasing the 'effectiveness' of Article 102 TFEU as the EU Courts pointed out.

[100] Some parts of the Guidance have nevertheless found support from the EU Courts, such as the use of long-run average incremental cost (LRAIC), which is a standard cost benchmark in the Guidance for price-based exclusionary conduct, as the appropriate cost benchmark in *Telefónica GC* (para.238) and the possibility that margin squeeze can be objectively justified on the basis of efficiencies in *TeliaSonera* (paras.75-76). O'Donoghue and Padilla claim that the use of LRAIC is almost certainly a function of the fact that virtually all margin squeeze findings have been made in the context of the telecommunications sector in which either the applicable legislation stipulates the use of LRAIC or regulators have routinely applied LRAIC to take account of the low variable network costs. O'Donoghue and Padilla (2013), n 12, 382. Providing an explanation to the partial endorsement of the Guidance, Gormsen observes that the EU Courts appear more supportive when the Guidance reflects the existing case law. Gormsen (2013), n 20, 240.

under Article 102 TFEU, extensive economic analyses of cost data and profitability appear to be more decisive than the effects of margin squeeze.

5. THE FUTURE OF THE EFFECTS-BASED APPROACH TO ARTICLE 102 TFEU

It is not the purpose of this article to determine how and when a clear change of direction on the part of the EU Courts towards an effects-based approach in Article 102 TFEU cases can eventually be demonstrated. Although the scope of this article is thus limited to margin squeeze and further research is needed on this point, it is nevertheless useful to shed light on the recent *Post Danmark*[101] and *Intel*[102] judgments which have implications for the apparent effects-based approach in the context of margin squeeze. As discussed above, even in the post-Guidance period, the EU Courts continued to hand down formalistic judgments, especially in the area of rebates, that faithfully repeated the old controversial case law in this area.[103] Among those judgments, *Tomra*[104] and *Solvay*[105] related to Commission decisions adopted before the issue of the Guidance which were in themselves formalistic. Although the EU Courts were technically correct to consider that the Guidance post-dated the relevant Commission decisions, some 'tentative favourable reaction' towards the effects-based approach would clearly have been useful and appropriate.[106]

Within this context, a "favourable reaction" is shown in *Post Danmark* which, according to some authors, has begun writing 'a new chapter in the epic tale of unilateral conduct control'.[107] *Post Danmark* is a preliminary reference under Article 267 TFEU where the Court of Justice was referred to some questions on predatory and selective pricing. The Court's responses were mostly in line with the principles in the Guidance: first, the Court accepted that 'not every exclusionary effect is necessarily detrimental to competition'.[108] Stressing the role of efficiency, the Court then stated that competitive process may lead to 'the marginalisation of competitors that are *less efficient* and so less attractive to consumers'.[109] Importantly, the Court upheld the use of the AEC test as

[101] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2012:172.

[102] *Intel Corp v Commission*, n 60.

[103] See *supra* "3. Margin Squeeze vis-à-vis the Form-based Approach under Other Forms of Abusive Conduct: An Analogy".

[104] *Tomra Systems ASA v Commission*, n 60, upheld in *Tomra Systems and Others v Commission*, n 60. This judgment confirmed that the analysis envisaged in the Guidance for loyalty rebates (conditional rebates) was found 'unacceptable' by the Court of Justice. Gormsen (2013), n 20, 243.

[105] Case T-57/01 *Solvay SA v Commission,* n 60, overturned on procedural grounds in Case C-109/10 *P Solvay SA v Commission*, n 60.

[106] O'Donoghue and Padilla (2013), n 12, 84. It has been argued that the EU Courts could have mentioned the relevant methodology laid down in the Guidance if they had felt that the suggested approach therein was sensible. Gormsen (2013), n 20, 238.

[107] Rousseva E. and Marquis M. (2013) 'Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU', Journal of European Competition Law & Practice, 4(1), 50.

[108] *Post Danmark A/S v Konkurrencerådet*, n 101, para.22.

[109] *ibid* (emphasis added).

the appropriate test for predatory pricing.[110] Lastly, the Court also took into account LRAIC of the dominant firm in question, which is the relevant cost benchmark under para.26 of the Guidance, in addition to ATC, which has been the relevant cost benchmark in the established case law on predatory pricing.[111] It was hoped that after *Post Danmark*, the Court of Justice's 'experiment with newer lines of thinking' and its 'ringing endorsement' of the AEC test would, or at least should, have spill-over effects in adjacent fields of the law on Article 102 TFEU.[112]

The *Intel* judgment represents, however, an "unfavourable reaction" to the effects-based approach on the part of the EU Courts and a 'major disappointment' for the proponents of the effects-based approach to Article 102 TFEU.[113] Since loyalty rebates had been historically condemned as almost per se in the case law and the Commission claimed that its decision was in line with the Guidance,[114] the *Intel* judgment could have been a good opportunity for the General Court to alleviate the concerns about whether the EU Courts would be willing to steer the enforcement of Article 102 TFEU towards an effects-based and consumer welfare-oriented approach. However, the General Court took the view that loyalty rebates (referred to as "exclusivity rebates" in the judgment), when granted by an undertaking in a dominant position, 'are *by their very nature*, capable of restricting competition' and 'foreclosing competitors'.[115] The Court held that the Commission was only required to show that rebates in question were 'capable of restricting competition' and it was therefore 'unnecessary to undertake an analysis of the actual effects of the rebates on competition'.[116] Against this background, the *Intel* judgment was mostly regarded as a 'serious step backwards'[117] and a 'major step in the wrong direction'.[118]

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[110] *ibid* at para.38.

[111] *ibid* at para.37. See *AKZO Chemie v Commission*, n 8. One detail in *Post Danmark* is that the Court of Justice noted the growth in the market share of one of the competitors of Post Danmark and its success in maintaining its distribution network vis-à-vis the allegedly abusive practices of *Post Danmark* (para.39). This can be taken to mean that the Court found no exclusionary effect arising out of these practices. Whereas in *British Airways*, the General Court dismissed the argument that the growth in the market shares of the competitors of British Airways mean that the practices of British Airways had no effect on competition. Such market shares, as the Court maintained, could have been greater in the absence of those practices, *British Airways v Commission*, n 17, para.298. Obviously, the Court's reasoning in *Post Danmark* involves a greater recognition of effects in line with the modernisation of Article 102 TFEU.

[112] Rousseva and Marquis (2012), n 107, 1 and 19.

[113] Wils W. (2014) 'The Judgment of the EU General Court in Intel and the so-called 'More Economic Approach' to Abuse of Dominance', World Competition, 37(4), 405-434.

[114] Case COMP/C-3/37.990 *Intel* [2009] OJ C227/07, para.916 ('[T]he Commission considers that the guidance paper does not apply to this case [since it initiated legal proceedings against Intel before the Guidance was published]. The Commission nevertheless takes the view that this Decision is in line with the orientations set out in the guidance paper.').

[115] *Intel Corp v Commission*, n 60, para.85-87 (emphasis added).

[116] *ibid* at para.103. The Court held that the proof of 'direct damage to consumers' was not required either. *ibid* at para.105.

[117] Venit J.S. (2014) 'Case T-286/09 Intel v Commission – The Judgment of the General Court: All Steps Backward and No Steps Forward', *European Competition Journal*, 10(2), 206 ('The *Intel* judgment represents a serious step backwards for the adoption of an effects-based approach to Article 102… the Court has firmly rejected an effects-based approach and the use of the Commission's as an efficient competitor test, and has

In sharp contrast to its *Deutsche Telekom* and *Telefónica* judgments, the General Court considered the AEC test irrelevant in *Intel*. Objecting to the use of this test in the context of loyalty rebates, the Court found that it was 'not essential to carry out an AEC test' and it was 'sufficient to demonstrate the existence of a loyalty mechanism'.[119] The Court took the view that a price and cost analysis was not attributable to such rebates, and it was the grant of the condition of exclusivity or quasi-exclusivity itself which made the conduct abusive.[120] The fact that the AEC test was used by the Commission in the decision was 'for the sake of completeness'.[121] In order to support its conclusions, the General Court relied heavily on the *Tomra* judgment of the Court of Justice, which articulated formalistic assessments on exclusivity and loyalty rebates, and added that *Tomra* 'post-dated' the earlier *TeliaSonera* and *Post Danmark* judgments.[122] All in all, the *Intel* judgment can be taken to mean that the Court continued to approach Article 102 TFEU cases under different categories of conduct at best (by applying the AEC test in the context of margin squeeze, while considering it irrelevant in the context of loyalty rebates), and rejected the effects-based approach at worst (by taking a clear negative stance against the AEC test which is presented as one of the fundamental premises of the modernisation of Article 102 TFEU in the Guidance by the Commission).

CONCLUSION

Margin squeeze is the first abusive conduct in the enforcement of Article 102 TFEU where the EU Courts raised objections to a Commission decision on the ground of a lack of analysis of the effects of the conduct in question. Mainly because the relevant case law on margin squeeze is recently shaped in the post-Guidance period and at the same time puts greater emphasis on the analysis of effects and on the use of the AEC test, one may be tempted to argue that the EU Courts have endorsed the effects-based approach of the Commission with the modernisation of Article 102 TFEU. This article argued that the EU Courts' leading judgments on margin squeeze are not conclusive enough to put forward the idea that the formalistic approach to Article 102 TFEU has been replaced with the effects-based approach and that the Guidance is ultimately endorsed by the EU Courts. It observed that absent some of their "effects-oriented" statements, these leading judgments in fact do not radically differ from the rest of the case law, and the focal point of the analysis in margin squeeze cases is apparently the assessment of the margin from an economic perspective, rather than the anti-competitive effects of the squeeze in the margin on competition or on consumers. Since determining the insufficiency of the margin is complex and requires extensive

instead reaffirmed and extended the restrictive pre-existing case law that the Commission had sought to move away from.').

[118] *ibid* at 230. Cf. Wils (2014), n 113, 33 ('The General Court and the Commission should be commended for having stood firm and having reaffirmed the EU case-law on abuse of dominance in the *Intel* case.').

[119] *Intel Corp v Commission*, n 60, paras.144-145.

[120] *ibid* at paras.150-153.

[121] *ibid* at para.159.

[122] *ibid* at para.153.

economic analysis and cost calculation, the apparent effects-based approach in these judgments can be best explained by the fact that it is more likely to be an economics-based approach. The "optimism" created by the leading judgments on margin squeeze with regard to the future of the effects-based approach in EU competition law seems to be, however, lost when the General Court took a clear negative stance against the use of the AEC test in *Intel* in the context of loyalty rebates.