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# Margin Squeezing as a Manifestation of Abuse of Dominant Position<sup>2</sup>

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## Abstract

Margin squeezing is an abuse of dominant position, which is not directly mentioned in Article 102 of the Treaty on the Functioning of the European Union (TFEU). It is the case law of the Court of Justice of the European Union (CJEU) and the European General Court that have recognised this practice as anti-competitive, initially treating it as anti-competitive refusal to supply. Given the many similarities between these practices, there are questions as to whether margin squeeze should be considered an separate manifestation of an abuse of dominant position. The aim of the article is to analyse the position of the European Commission in this regard and juxtapose it with the views contained in relevant judicial decisions, judgements, and rulings, as well as to compare it with the regulations adopted in the United States.

**Keywords:** margin squeeze, refusal to supply, abuse of dominant position.

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## Introduction

The EU legislature has not defined what an abuse of a dominant position actually is. Instead, Article 102 TFEU offers an open set of most common manifestations of abuse of a dominant position. The manifestations listed in this provision do not include the practice of margin squeezing. This type of practice has been recognised as anti-competitive in the judicial decisions of the CJEU and the European General Court. Also, the decisions whether or not an abuse of a dominant position has occurred in a particular case are being made on the basis of non-binding legal acts of the European Commission. When it comes to determining whether margin squeeze actually takes place, it may be helpful to refer to the Communication from the Commission – guidelines on the priorities to be followed by the Commission in applying Article 82 of the EC Treaty to harmful exclusionary practices by dominant companies,<sup>3</sup> which recognised this practice as a specific form of another anti-competitive practice – i.e. refusal to supply. However, this approach of the European Commission has changed, as in March 2023, the European Commission adopted an amendment to the aforementioned guidelines, in which said practice of margin squeeze was categorised as a practice independent of refusal to supply, which constitutes an abuse of a dominant position.

Margin squeeze is a practice similar in many ways to refusal to supply. First of all, both practices can take place with a similar market structure and both also lead to a similar exclusionary effect. Thus, there emerges a question as to whether this practice should be considered as an independent manifestation of abuse of dominant position.

The purpose of this article is to examine whether the European Commission's recognition of margin squeeze as an independent manifestation of dominance is reasonable and well-grounded. The research objective thus set requires reviewing the views of legal academics, scholars, and commentators on the essence of margin squeeze, the changes in the classification of this practice set forth in the European Commission's guidelines, and the judicial decisions issued by the CJEU and the European General Court. Since this practice has been the subject of research and many rulings and judgements in the United States, the paper offers also a comparison

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<sup>3</sup> OJ EU 2009 C 45/02.

of the solutions adopted in that country because the squeezing of margins there is recognised as a form of refusal to supply.

## The essence and characteristics of margin squeeze

Margin squeeze occurs when a dominant market player, operating simultaneously in the wholesale market and the retail market, sells its products in the retail market at a price that does not let its equally efficient competitors do business in a profitable manner. In this situation, the dominant market player uses retail prices that differ slightly from wholesale prices, so that its competitors operating in the retail market are unable to compete with it effectively – or even survive in the market. This practice may also consist in setting the wholesale price for competitors at a level close to or even higher than the prices charged by the dominant market player in the retail market.<sup>4</sup> It happens often in deregulated, liberal markets, where significant portions of the market belong to former monopolists operating simultaneously in the wholesale and retail markets.<sup>5</sup> An example of such a market could be the liquid fuels market, where a single entrepreneur owns both the refinery necessary to produce fuels and a network of petrol stations. It is also stressed that this practice usually occurs in those sectors where wholesale prices are regulated, but retail prices are not.<sup>6</sup>

Margin squeeze can be an exclusionary practice when it is undertaken by a dominant market player to eliminate its competitors from the retail market. In such a case, the dominant market player may charge high wholesale prices so that competitors are unable to compete with it in the retail market or offer prices below the cost of production in the retail market while still making profit in the wholesale market.<sup>7</sup> The practice can also be exploitative, which occurs when the dominant market player sets prices that it would not be able to achieve under conditions of effective competition.

The result of the prohibition of this practice may be for the dominant market player to reduce prices charged in the wholesale market or increase prices charged

<sup>4</sup> J. Krämer, D. Schnurr, *Margin squeeze regulation and infrastructure competition*, "Information Economics and Policy" 2018, 45, pp. 30–46.

<sup>5</sup> D. Geradine (ed.), *The Liberalization of State Monopolies in the European Union and Beyond*, The Hague 2000, p. 181.

<sup>6</sup> OECD, *Margin Squeeze*, DAF/COMP(2009)36, <https://www.oecd.org/daf/competition/46048803.pdf>, p. 7 (access: 2.09.2023).

<sup>7</sup> D. Geradine, R. O'Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector*, GCLC Working Paper Series 04/2005, p. 6.

in the retail market.<sup>8</sup> Thus, eliminating this practice has surely a positive effect on competition as the dominant market player's competitors no longer have to face exclusionary or exploitative practices, which allows them to remain in the market and compete with the dominant player. On the other hand, the effect of banning this practice may lead to an increase in retail prices, which – as a result – will be detrimental to consumers.<sup>9</sup> Legal academics, scholars, and commentators also argue that combating this practice leads to a situation where the benefits resulting from a company's vertical integration are passed on to downstream competitors without benefiting consumers.<sup>10</sup> Moreover, the dominant market player will not be interested in making investments that may lower the price of their products or services because such benefits would also have to be included in the prices charged to its competitors – who have not borne the necessary risks involved in such investments. This means that the dominant market player would have to transfer the benefits resulting from the investments made onto its competitors as well, which in turn questions the point of making these investments. It can even be argued that forcing the dominant market player to 'collaborate' with its downstream competitors on favourable terms is a form of subsidizing inefficient competitors to the detriment of consumers.<sup>11</sup> It is also claimed that competition law should deal only with those cases in which a downstream competitor of the dominant market player is an equally effective competitor.<sup>12</sup>

## Differences and similarities between margin squeeze and refusal to supply

As mentioned above, the European Commission has so far been of the opinion that margin squeezing is one form of refusal to supply. In the original guideline, the European Commission stipulated that instead of refusing to supply, a dominant market player may charge prices in the upstream market that, compared to the prices charged in the downstream market, do not enable an equally efficient competitor to do business profitably for an extended period of time. Thus, it was emphasised

<sup>8</sup> B. Jullien, P. Rey, C. Saavedra, *The Economics of Margin Squeeze*, CEPR Discussion Paper No. DP9905, March 2014, <https://ssrn.com/abstract=2444927> (access: 2.09.2023).

<sup>9</sup> J. Krämer, D. Schnurr, op. cit., pp. 30–46.

<sup>10</sup> N. Dunne, *Margin Squeeze: Theory, Practice, Policy, Part I*, "European Competition Law Review" 2012, 33, pp. 29–39.

<sup>11</sup> L. Kelly, T. van der Vijver, Less Is More: Senwes and the Concept of 'Margin Squeeze' in South African Competition Law, "The South African Law Journal" 2009, 2, p. 247.

<sup>12</sup> R. van den Bergh, P. Camesaca, *European Competition Law and Economics: a Comparative Perspective*, Sweet & Maxwell 2006, p. 277.

that margin squeezing is a form of refusal to supply, and thus the prerequisites for recognising these practices as an abuse of dominant position are the same. The outcome of both of these practices is restricted competition in the downstream market. When margins are squeezed, it may lead to high retail prices and poor quality of products and services offered, which strikes consumers first and foremost.

Margin squeezing and refusal to supply are very similar practices. They can occur when there is a vertically integrated dominant market player that offers an upstream input or product essential to its downstream competitors. Thus, both of these practices may limit – or even eliminate – the ability of the dominant player’s competitors to operate in the downstream market because either the competitors will not be able to offer products or services in general or it will be unprofitable for them to do so.

It should be emphasised, however, that an important difference between these practices stems also from the prerequisites for recognising a particular activity as a refusal to supply, as determined in the Bronner case. According to the case judgement, first, a refusal to supply makes it likely that effective competition in the downstream market will be impossible. Second, a refusal to supply is not justified by any objective circumstances. And third, access to a service or product is necessary for a competitor to do business if there is no other substitute in the market. The latter condition, which refers to indispensability, will not be met if there are other alternative ways in the market to gain access to the dominant market player’s products or services – even if this access is less favourable in economic terms.<sup>13</sup> This implies that a refusal to supply involves a complete lack of alternatives to the dominant market player’s services or products and thus the inability of its competitors to operate in the downstream market. On the other hand, these circumstances do not need to occur with regard to margin squeeze. When it comes to the latter, what matters is the comparison of the prices charged by the dominant player in the upstream and downstream markets.

## The EU competition law perspective

The European Commission first confronted the issue of margin squeezing in 1976 in the National Carbonising case,<sup>14</sup> although it did not determine that the existing dominant position was abused in that case. The case involved a coke producer

<sup>13</sup> K. Czapracka, *Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches*, Edward Edgar Publishing 2010, p. 18.

<sup>14</sup> Case 109-75 R National Carbonising Company, ECLI:EU:C:1975:133.

who purchased raw material for coke production from a monopolist operating simultaneously in the downstream market. The prices set by the latter were successively increased until their level made its competitor – National Carbonising – unable to operate in this market in a commercially viable manner. The European Commission found that the dominant market player may be subject to an obligation to design its prices in such a way as to enable an equally efficient downstream competitor to make a profit that would allow it to operate in that market for an extended period of time.<sup>15</sup> An important thing to stress here is that a test of long-term market viability of competitors was applied in said case. This test makes it possible to determine whether downstream competition is going to be eliminated as a result of margin squeeze. It can also be argued that the European Commission aimed in particular in its decision to protect the market structure by preserving existing competition.

It was not until the British Sugar/Napier-Brown case<sup>16</sup> that the European Commission analysed in more detail the activity of British Sugar which maintained a dominant position in both the upstream and downstream granulated sugar markets. One of British Sugar's practices was to set a margin for its downstream product that did not take into account its own expenses involved in the processing the products offered. The European Commission argued that the adoption of such margins in the long term would not make it possible for a competitor as effective as the dominant player to continue its operations in the market. As a result, a test of an equally effective competitor was developed in this case. The idea underlying the test was that margin squeeze would occur in a situation where the dominant player's downstream business would not be profitable if the dominant player had to compete with the same prices as those the dominant player uses when competing with its competitors in that market.<sup>17</sup> Thus, this test was not meant to examine whether competition could be at all possible despite the dominant player's practice, but it aimed to determine whether a competitor incurring similar costs to the dominant player in the downstream market would be able to remain in that market.

A change in approach to margin squeeze was expressed by the CJEU's decisions issued in two cases involving the telecommunications services market – Deutsche Telekom<sup>18</sup> and TeliaSonera.<sup>19</sup> The first of these cases involved a German fixed-line telephone network operator that offered wholesale access to the local loop to its competitors and direct access to end-user consumers. Deutsche Telekom's pricing was found to have given rise to an inappropriate difference between wholesale fees

<sup>15</sup> A. Pisarkiewicz, *Margin Squeeze in the Electronic Communications Sector*, Kluwer Law International 2018.

<sup>16</sup> Case no. IV/30.178 Napier Brown – British Sugar, OJ 1988, L 284, p. 41.

<sup>17</sup> G. Niels, H. Jenkins, J. Kavanagh, *Economics for Competition Lawyers*, Oxford 2011, p. 241.

<sup>18</sup> Case T-827/14 Deutsche Telekom, EU:T:2018:930.

<sup>19</sup> Case C-52/09 TeliaSonera, EU:C:2011:83.

for local loop access and retail charges for end-user services. The CJEU decided in the case in question that the margin squeeze test was to show whether the dominant market player or an equally successful competitor would be able to offer retail services other than at a loss if they were required to pay wholesale access fees as an internal transfer price. When examining the Deutsche Telekom case, the CJEU confirmed that it applied the equally efficient competitor test based solely on the dominant player's prices and costs – not on the situation of its actual or potential competitors.<sup>20</sup> A significant thing to add, however, is that the CJEU requires proving that a particular practice has or may have an anti-competitive impact on the retail market in order to qualify it as margin squeeze.

In the TeliaSonera case, the CJEU stated that in order to qualify margin squeeze as a practice that constitutes an abuse of dominance, it was necessary to demonstrate the anti-competitive effect of the practice in question. Such an effect can occur when the dominant market player charges both positive and negative margins. When it comes to negative margins, a potentially exclusionary effect is possible. Such a margin will occur when the wholesale price charged to the dominant player's competitors is higher than the retail price charged to end users; in such a situation, equally successful competitors would be forced to sell their products/services at a loss. On the other hand, if the margin is positive, it is necessary to demonstrate that the practice is likely to hinder the operations of the downstream competitors of the dominant market player.<sup>21</sup> Interestingly enough, in such a case, the abuse of a dominant position will occur even if equally efficient competitors are able to make a profit from their business activity.<sup>22</sup> This means that margin squeezing will be prohibited not only when it results in eliminating competitors from the market by making them incur losses, but also when the dominant player's practice harms competitors by depriving them of as much margin as they would have achieved under competitive conditions. Therefore, what is prohibited is the dominant market player's intentional action that leads to less competitive market conditions. This position should be agreed with because if a dominant market player limits its competitors' ability to make profit, it potentially limits their ability to make investments and thus compete effectively. When examining the TeliaSonera case, the CJEU held that the condition of necessary access to infrastructure developed in the Bronner case does not apply to practice involving the provision of services or the sale of goods on unfavourable terms or for which there may be no buyer.<sup>23</sup>

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<sup>20</sup> N. Dunne, *op. cit.*, p. 13.

<sup>21</sup> Case C-52/09 TeliaSonera, items 73 and 74.

<sup>22</sup> N. Petit, *Price Squeezes with Positive Margins in EU Competition Law: Economic and Legal Anatomy of a Zombie*, <https://ssrn.com/abstract=2506521> (access: 2.09.2023).

<sup>23</sup> Case C-52/09 TeliaSonera, item 55.

What is more, extending the rationale that emerged in the Bronner case to encompass the entirety of the practices of the dominant market player in terms of the trade conditions applied and followed by this player would result in a necessity to verify that the rationale exists, which would weaken the application of Article 102 TFEU.<sup>24</sup> In the ruling, the CJEU said that margin squeezing might constitute a form of abuse of dominance independent of a refusal to supply.

The position expressed in the TeliaSonera case has been solidified in many subsequent rulings. A good example is the Telefónica case,<sup>25</sup> in which the CJEU confirmed that margin squeezing was a form of abuse of dominance other than refusal to supply – and to which the criteria established in the Bronner case did not apply. The CJEU found that it was not necessary to show that the conditions developed in the Bronner case are met when a dominant market player is bound by a regulatory obligation to supply its inputs to downstream competitors, or when its market position in the upstream market is the result of special or exclusive rights granted or funded using state resources.<sup>26</sup>

Also worth mentioning in this context is the case of Slovak Telekom,<sup>27</sup> which concluded with the European Commission finding that the dominant player set unfavourable conditions for access to telecommunications infrastructure (local loops) and thus restricted the ability of its competitors to operate in the telecommunications services market. It was determined that Slovak Telekom's activity was an instance of exclusionary pricing and non-pricing practices. However, it was very important that the obligation to access telecommunications infrastructure was imposed under national legislation, which in turn meant that such practice could not be treated as a refusal to contract. In addition, access to the infrastructure owned by Slovak Telekom was not necessary to provide services in the downstream market due to the fact that there existed other technologies to ensure that competitors in the downstream market could offer their services.<sup>28</sup> As stems from the above, the criteria worked out in the Bronner case would not apply in the Slovak Telekom case and their application would even make it impossible to apply Article 102 TFEU to the pricing practices that took place. The CJEU found that the dominant market player's prices did not allow its competitors to operate in the downstream market without incurring losses. Thus, it was decided to apply the already-

<sup>24</sup> Ibidem, item 58.

<sup>25</sup> Case C-295/12 P Telefónica SA, ECLI:EU:C:2014:2062.

<sup>26</sup> D. Geardin, *Refusal to Supply and Margin Squeeze: A Discussion of Why the "Telefonica exceptions" Are Wrong*, TILEC Discussion Paper No. 2011/09, p. 6.

<sup>27</sup> Case T-851/14 Slovak Telekom, ECLI:EU:T:2018:929.

<sup>28</sup> D. Geradin, R. O'Donoghue, *Papering Over the Cracks: The GCEU Judgement in Case T-851/14 Slovak Telekom v Commission* (4.02.2019). <http://dx.doi.org/10.2139/ssrn.3328476>.



-developed equally efficient competitor test, which involves examining whether the dominant market player would make downstream profits on the basis of the wholesale prices offered to its competitors and its downstream retail prices. The case in question proved that margin squeezing is a practice separate from a refusal to supply, but also made it clear that recognising this practice as a form of refusal to supply would, in fact, make it impossible to counteract the abuse of dominant position.

## The US competition law perspective

In the United States, margin squeezing is not treated as an separate instance of abuse of dominance. The first trade margin squeeze case in the U.S. was the Alcoa case, in which it was determined that the dominant market player should charge fair prices that allow downstream competitors to make a real profit.<sup>29</sup> This decision were debatable, as it referred to the dominant player's obligation to ensure a fair profit to its competitors. Those against the ruling argued that it assumed that the purpose of competition law was to protect consumers.<sup>30</sup> It was also raised that there are difficulties in practice when it comes to determining what "fair profit" actually means. The court argued that this determination should be made by means of the so-called transfer pricing test. This test involves examining whether a dominant market player could make a profit if it were to purchase inputs at the prices charged by its downstream competitors. If the result of this test is negative, then the practice of the dominant market player should be considered an abuse of dominance.<sup>31</sup>

A different approach to determining whether margin squeezing occurs was established in the Trinko case.<sup>32</sup> Although the case involved a refusal to contract, legal academics, scholars, and commentators argue that the concluding ruling applies to margin squeezing. Thus, in this case, the US Supreme Court deal with a practice undertaken in the regulated telecommunications market, where the conditions for providing infrastructure to new competitors were determined by the regulator. The court stressed that companies can become monopolists by creating an infrastructure that makes them exceptionally well prepared and able to serve customers. This gives such companies competitive advantage, and forcing them

<sup>29</sup> United States v. Aluminum Co of Am, 148 F 2d 416 (2d Cir 1945).

<sup>30</sup> G. Faella, R. Pardolesi, *Squeezing Price Squeeze under EC Antitrust Law*, "European Competition Journal" 2010, 6, p. 260.

<sup>31</sup> J. Tirole, *The Teory of Industrial Organization*, MIT Press 1988, p. 1248.

<sup>32</sup> Case of Verizon Communications Inc., Petitioner v. Law Offices of Curtis v Trinko, LLP, 540 US 398, 407 (2004).

to share the source of their advantage with competitors can be seen as contradictory to the primary goal of competition law because it would reduce their willingness to make investments.<sup>33</sup>

The US Supreme Court set very strict requirements for establishing the antitrust duty to deal, emphasizing that, in principle, companies are free to decide whether to enter into business relationships. Nevertheless, by way of an exception, an obligation to supply may be imposed on them, especially if such a company has previously made a free decision to collaborate with its competitor and now sets the terms of the relationship in a way that is disadvantageous to its competitor. It seems reasonable to point out here that the Aspen Skiing case resulted in the following prerequisites for imposing an obligation to supply being specified: termination of business relations in the absence of economic justification and damage to competition.<sup>34</sup> Nevertheless, these conditions did not apply in the Trinko case because in the light of market regulation, the dominant market player was obliged to supply its competitors. For this reason, the US Supreme Court held that an integrated monopolist that is not obliged to make transactions in the wholesale market is not obliged to transact on terms favourable to its competitors. Only if there is no possibility to produce the input (product or service) offered by the dominant player (which the latter developed and marketed) under existing market conditions, it is possible to establish an obligation forcing the dominant player to share this input with competitors.<sup>35</sup> According to the US Supreme Court, if a company does not have an obligation to transact under antitrust law, it should not be held responsible for adopting high margins in the wholesale market compared to the retail market. Only if it is demonstrated that these margins lead to predatory pricing, such a practice may be qualified as an abuse of dominance.

It appears from the above that the Supreme Court found that setting unfair or inappropriate margins is not per se inconsistent with US competition law.<sup>36</sup> Making use of such a practice can therefore be considered as refusal to supply or predatory pricing if the criteria of either are met. It follows that the US Supreme Court did not recognise margin squeeze as an independent, separate practice constituting an act of abuse of dominance.

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<sup>33</sup> Ibidem.

<sup>34</sup> A. Candeub, *Trinko and Re- Grounding the Refusal to Deal Doctrine*, "University of Pittsburgh Law Review" 2005, 66, p. 827.

<sup>35</sup> G. Hay, K. McMahon, *The Diverging Approach to Price Squeezes in the United States and Europe*, "Journal of Competition Law & Economics" 2012, 2, p. 265.

<sup>36</sup> G. Gaudin, D. Mantzari, *Margin Squeeze: An Above-cost Predatory Pricing Approach*, "Journal of Competition Law & Economics" 2016, 12, pp. 151–179.

In another case – the Linkline case<sup>37</sup> – the US Supreme Court also dealt with a practice that occurred in the telecommunications market. The case involved operator AT&T, which was obligated by regulations to make its infrastructure available to downstream competitors. When referring to the Trinko case ruling, the US Supreme Court held that when the dominant market player (a monopolist in this case) is not under an obligation (imposed by competition law) to operate in the upstream market and does not engage in predatory pricing in the downstream market, then that market player is not obligated to set prices at both levels of trade in such a way as to make it possible for its competitors to make a profit. The US Supreme Court held that in order to determine that margin squeeze led to damage and loss, it was necessary to show that the dominant market player used a predatory pricing strategy in the downstream market.<sup>38</sup> In the course of the case it was emphasised that it is not in itself illegal for the dominant market player to compete with its competitor by using unfair or inappropriate margins.<sup>39</sup>

It seems important to point out that in its analysis, the court focused primarily on determining whether the dominant market player was obliged to supply to its competitors.<sup>40</sup> Only the exclusion of the existence of an obligation to contract opened the way to analysing the margins adopted. The US Supreme Court decided that the analysis of the margins used is performed using the rationale developed in the Brooke Group case, which is that the margins used by the dominant market player are not in line with competition law when the price set is below the relevant measure of costs and there is a real likelihood that the dominant player will be able to compensate for the loss of using prices that do not include costs.<sup>41</sup> Having ruled out that there was neither an obligation to supply nor predatory pricing in the case in question, the US Supreme Court found no threat to competition. It determined that if there was no obligation to transact at the wholesale level and no simultaneous predatory pricing at the retail level, the dominant player was not obliged to set prices in such a way as to make it possible for its competitors to make a profit. This means that there are no grounds for the antitrust authority to interfere when the wholesale prices set by a vertically integrated company is higher than or equal to the retail prices it offers.

Thus, the Linkline case ended with the US Supreme Court determining that margin squeezing is not a separate practice that constitutes an abuse of dominance.

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<sup>37</sup> Case Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc. 129 S. Ct. 1109, 1123 (2009).

<sup>38</sup> D. Yannelis, *Margin Squeeze in the US and The EU: Why They Differ?*, "European Scientific Journal" 2015, 11, p. 500.

<sup>39</sup> G. Gaudin, D. Mantzari, op. cit., p. 163.

<sup>40</sup> C. Rudaz, *Did Trinko Really Kill Antitrust Price Squeeze Claims?*, "Vanderbilt Law Review" 2010, 4, p. 1104.

<sup>41</sup> Case of Brooke Group Ltd. v. Brown & Williamson Tobacco Corp, 509 U.S. 209 (1998).

This opinion found support among the legal academics, scholars, and commentators. It was argued that if margin squeeze was considered an independent practice of abuse of dominance, dominant market players would limit the extent of their investment and innovation projects.<sup>42</sup> Still, there were also claims that the ruling ignores the role that a vertically integrated dominant market player plays as a supplier and competitor, meaning that it fails to take into account the economic reality of vertical integration.<sup>43</sup>

## Conclusion

EU and US competition law view and treat the practice of margin squeezing differently. In US competition law, this practice can be considered an abuse of dominance if it fulfils the criteria of refusal to supply or price predation. Therefore, it is a special form of other practices, and the rationale for recognising margin squeezing as an independent practice has not been established. In essence, US law focuses on the benefits gained by a dominant market player as a result of vertical integration and aims not to curb incentives for investment and innovation, which would occur if the dominant player had to share the profits made with its competitors. It can be argued that US competition law is therefore more conservative. An example can be the fact that the US Supreme Court has not recognised the practice of denying access to a key device as anti-competitive – a situation that EU law would approach differently.

The practice under consideration is classified differently under EU law. First of all, the approach of EU competition law towards this practice is to protect the structure of the market, i.e. it is to make sure that competitors are not eliminated from the market as a result of the activity of the dominant player. However, the European approach to margin squeezing seems to be more structured and organised in cases involving practices undertaken by dominant players operating in regulated sectors. In several cases, the European Commission examined whether a particular practice involved a refusal to supply, or whether it really caused the exclusionary effect – typical of that very practice – through margin squeezing.

Thus, it appears that the European Commission intentionally specified in the guidelines that margin squeezing is an independent practice in violation of Article 102 TFEU. Yet, the question that remains is why it was done only recently whereas

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<sup>42</sup> J. Sidak, *Abolishing the Price Squeeze as a Theory of Antitrust Liability*, "Journal of Competition Law & Economics" 2008, 2, pp. 279–309.

<sup>43</sup> B. Aburn, *Margin Squeezing: The Superfluous "Fancy Phrase" of New Zealand Competition Law*, "Auckland University Law Review" 2012, 18, p. 233.

the jurisprudence in this regard was established many years ago. This calls into question the point of the European Commission issuing non-binding guidelines that are misleading and cause confusion instead of making it easier to interpret the occurring anti-competitive practices.

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