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MARGIN SQUEEZE AND THE ESSENTIAL FACILITIES DOCTRINE

Master thesis
30 credits

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Competition Law

Spring 2012

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Summary

Even though competition law will not regard dominance and monopoly as abusive *per se*, an undertaking with strong market power carries a certain responsibility not to engage in anti- competitive conducts on the market. When competition law is interfering in the conducts of dominators, it is important to take into account the underlying considerations of, on one hand, preservation of efficient competition and consumer welfare on the market, and, on the other hand, protection of the dominator`s freedom of operation and the maintenance of its incentives to innovate and invest.

Margin Squeeze, regarded as a competition law violation, shares many similarities with an abusive refusal to supply. Both conducts may be observed to occur in the same type of market structure and bring similar effects to the competitive climate on the market. However, whether these conducts should be considered under the same approach in terms of violations under competition law, is a disputed issue. In this question EU- and US competition law seems to have moved in opposite directions, whereas, US antitrust law applies a strict policy as it regards margin squeeze as a form or refusal to supply, while EU competition law considers margin squeeze as an abusive conduct in itself.

When considering margin squeeze as an abusive conduct independent from a refusal to supply, it is not obvious what elements that will be of importance for such determination, and to what an extent. As both conducts may occur in situations where the dominant undertaking is vertically integrated and controls an essential facility that is necessary in order to operate on the downstream market, the question of the importance of the indispensable input element is of certain interest. Since a refusal to supply will not be considered an abusive conduct if the product or service at issue is not indispensable, the question is if a similar assessment should be at hand in margin squeeze cases.

In recent EU case law, the refusal to supply criteria set out in the *Bronner*-case has been considered inapplicable to margin squeeze cases. However, it seems like similar criteria will still be of importance to such cases. In the *TeliaSonera*- case the indispensable input criteria was considered an important factor when determining the anti- competitive effects of the abuse, but it was not determined a necessary finding for such conduct to be considered abusive. It is hard to assess to what an extent CJEU considers the indispensable input element to be important. This will probably be a question for future case law to clarify and further determine. If margin squeeze as an abusive conduct is not considered under a narrow competition law approach, the risk of too far interference in this kind of cases is probable, which may result in unbalance regarding the underlying competition law considerations.

Sammanfattning

Även om monopol eller en dominerande ställning på marknaden i sig inte anses utgöra ett missbruk i konkurrensrättslig mening, bär ett företag med stark marknadsposition ett särskilt ansvar för att inte begå konkurrensbegränsande handlingar. När konkurrensrätten ingriper i ett dominerande förtags handlingar bör så ske med åtanke av de underliggande överväganden som ligger till grund för konkurrensrätten. Det vill säga, å ena sidan, bevarandet av effektiv konkurrens och konsumentnytta på marknaden, och, å andra sidan, skyddandet av företagets handlingsfrihet och incitament att skapa innovationer och göra investeringar.

Marginalklämning och leveransvägran delar många likheter, handlingarna förekommer under samma typ av marknadsstruktur och resulterar båda i liknande effekter på marknaden. Det är dock inte klart om de båda missbruken ska bedömas på samma vis konkurrensrättsligt. I frågan skiljer sig förhållningssättet i EU jämfört med USA. De två jurisdiktionerna kan sägas ha utvecklats i motstående riktning då EU- rätten erkänner marginalklämning som ett fristående missbruk medan man i Amerikansk rätt applicerar ett striktare förhållningssätt där marginalklämning ses som en konstruktiv form av leveransvägran.

När marginalklämning ses som ett fristående missbruk är det inte självklart vilka faktorer som är av betydelse för den konkurrensrättsliga bedömningen och till vilken grad. Eftersom både leveransvägran och marginalklämning kan uppkomma i situationer där ett vertikalt integrerat dominerande företag kontrollerar en nyttighet som är nödvändig för att kunna verka på nedströmsmarknaden, är det intressant hur oumbärlighetskravet för en sådan nyttighet ska bedömas. Då leveransvägran inte anses utgöra ett missbruk i de fall nyttigheten inte är oumbärlig, är frågan om samma bedömning gäller i fråga om marginalklämning.

I senaste EU- rättspraxis har konstaterats att de krav som i *Bronner*- fallet ansågs vara tillämpliga på leveransvägran, inte var tillämpliga på marginalklämningsfall. Trots detta verkar det dock som om liknande krav är av intresse vid bedömningen av marginalklämning. I *TeliaSonera*- fallet ansågs oumbärlighet för nyttigheten vara en viktig faktor i bedömningen av de konkurrensbegränsande effekter som marginalklämning kunde medföra, men oumbärlighet var inte ett krav för att sådana effekter skulle kunna uppstå. Det är svårt att avgöra i vilken omfattning EU- domstolen anser att en nödvändig nyttighet är en viktig faktor i bedömningen av marginalklämning som konkurrensbegränsande missbruk. Detta spörsmål kommer förmodligen bli en fråga för framtida rättspraxis att klargöra. Om ett missbruk i form av marginalklämning inte behandlas inom ramen för en strikt konkurrensrättslig bedömning, riskerar ett allt för långtgående ingripande av konkurrensrätten att vara sannolik, vilket kan resultera i obalans mellan underliggande konkurrensrättsliga överväganden.

Preface

First, I would like to thank Professor Hans Henrik Lidgard who has guided and supported me through the work of this thesis.

Second, I would like to express my gratitude towards my family and close friends who are always a great support and who have inspired me and believed in me during the time of my law schools studies.

Finally, I hope this thesis will provide some substantial reading for you with a certain interest in competition law and margin squeeze cases.

Katarina Peters

Stockholm, May 2012.

Abbreviations

ADSL	Asymmetric Digital Subscriber Line
CJEU	Court of Justice of the European Union
DSL	Digital Subscriber Line
ECJ	European Competition Journal
ECLR	European Competition Law Review
EU	European Union
ISP	Internet Service Provider
J. Comp. L. & Econ.	The Journal of Competition Law and Economics
J. Network Ind.	Journal of Network Industries
NCA	National Competition Authority
NRA	National Regulatory Authority
OECD	Organisation of Economic Cooperation and Development
TFEU	Treaty of the Functioning of the European Union
UK	United Kingdom
US	United States of America

1 Introduction

1.1 Background

Both EU competition law and US antitrust law aims to fight dominance and monopolisation that may have harmful effects to competition on the market. Monopolies and dominance can be considered to have both positive and negative effects on efficiency and consumer interest and may, therefor, not generally be condemned under competition regulation. To what an extent competition law should intervene to curb the conduct of dominators and monopolists, or if the market has the ability to correct itself, is, however, a disputed issue.[1]

Competition regulation regarding unilateral conducts is based on the thought that a dominant undertaking carries a certain responsibility not to engage in anti- competitive behaviour. This responsibility may result in that a certain conduct, not regarded as infringing competition when carried out by a non-dominant player, will be considered abusive when undertaken by a dominant firm.

However, even a dominant undertaking must have the ability to operate successfully on the market without being punished for its superior skills and successful work. On the other hand, it may not be realistic to expect for new entrants to start up when a strong player, with the ability to behave to a large extent independently on the market, is present. Insufficient competition regulation in these cases may instead result in consumers suffering due to high pricing and poor product quality. The balance between the ability for a dominator to operate efficiently on the market and the risk of anticompetitive effects is reflected upon in both EU competition law and US antitrust law.

1.2 Presentation of the subject

A vertically integrated undertaking that possesses a dominant position on the market is responsible not to engage in anti- competitive conduct. Actions by a dominator that have the effect of excluding competitors from the market will generally be regarded as harming competition.

Exclusionary abuses undertaken by a vertically integrated dominator may take various forms. For example, when vertically integrated, the dominator often controls an input, such as an essential product or network, to which access is of importance for competitors in order to carry out their business. If the dominator under these circumstances refuses to supply the essential

[1] E. Buttigieg, *Competition Law: Safeguarding the Consumer Interest,* Kluwer Law International, The Netherlands, 2009, p. 155.

input to its competitors, this may be regarded as an abuse of its dominant position. A dominant undertaking may also exclude competitors by charging prices for its essential inputs that makes it impossible for competitors to operate profitably on the market. When the spread of the prices charged by the vertically integrated dominator for its input on the wholesale- and resale market makes it impossible for competitors to carry on their business successfully, this is known as a margin squeeze abuse.

It is, in many cases, difficult to separate the problems arising from a margin squeeze offence from those raised by a refusal to supply, as both conducts includes the supply of an essential input to a downstream competitor. Margin squeeze is thus often regarded as a constructive way of refusal to supply. It is questionable how margin squeeze should be addressed from a competition law perspective. A chasm has emerged between the opinions on whether margin squeeze should be considered as a separate form of abuse, or if it should be viewed as a certain form of refusal to supply. A discussed issue is what elements that are of importance when determining a margin squeeze. A question arising is to what an extent the same considerations will be of relevance to a margin squeeze- as to a refusal to supply case.

When determining a refusal to supply case a vital element is if the input, which the dominator refuses to supply, is indispensable for carrying on the competitors´ business. If not, the dominators refusal will not be regarded as abusive. When concerning a margin squeeze as a form of refusal to supply the indispensable input element will be of importance for the determination of such a case. However, when regarded as a stand- alone abuse, the role of the essential input element is not as clear in margin squeeze cases.

In a recent EU margin squeeze case, the *TeliaSonera*- case, Advocate General Mázak in his opinion on September 2010 regarding this issue stated that:

"..if there is no regulatory obligation compatible with EU law on a dominant undertaking to supply the products in question or if those products are not indispensable then that undertaking should in principle not be charged with an abusive margin squeeze simply on the basis of the insufficient spread between wholesale and resale prices"[2]

This approach was, however, rejected by the CJEU[3] in its preliminary ruling where margin squeeze was regarded as an abuse in its own right. The CJEU`s approach to margin squeeze in this case also diverges from US antitrust law where a more rigid view appears.

It is not obvious and also debated if the element of an indispensable input is of importance when determining a margin squeeze case. Different

[2] Case C-52/09, *Opinion of Advocate General Mazák, Konkurrensverket v TeliaSonera AB,* 2 September 2010, not yet reported, para. 29.

[3] Before: The European Court of Justice (ECJ).

approaches appear on how margin squeeze should be treated as an offence from a competition law perspective.

1.3 Purpose and framing of questions

The purpose of this thesis is to examine the role of the essential facilities doctrine in margin squeeze cases and the importance of the indispensable input element when determining such cases.

In order to fulfil the purpose the following questions are to be especially analysed. First, what are the differences and similarities between margin squeeze and refusal to supply? Encompassing, what are the incentives to undertake such a conduct and what will be the effects of the action? Further, which are the considerations behind regarding margin squeeze as a form of refusal to supply and as a stand- alone abuse, respectively? And finally, is it important to consider the indispensable input element, such as an essential facility, in margin squeeze cases?

1.4 Material and Methodology

The purpose of this thesis will be investigated from a EU competition law perspective, but with a comparison to the approach in US antitrust law. The investigation will mainly consist of studies of case law and doctrine regarding margin squeeze and refusal to supply.

A legal dogmatic method will be applied in order to examine how a margin squeeze abuse should be considered from a competition law perspective and whether the indispensable input element is of importance when determining such a case. Since this method consists in presenting and interpreting applicable law within the given legal area in accordance with the hierarchy of the studied sources, it is a suitable method to use in the work of this thesis.

For the objective to investigate margin squeeze and the indispensable input element in a wider context, a comparison to the approach in US antitrust law will be made. Regarding this comparison, a comparative method will be used. This method aims on investigating and process similarities and dissimilarities, as well as, analysing connections and contradictions between the compared jurisdictions.

A law and economics perspective will be applied in order to assess the purpose for this thesis. This because the determination on how margin squeeze should be regarded as a competition law offence and what elements that are of importance, is also depending on the economical consequences it may bring. In this context the incentives to engage in a margin squeeze, as

well as, the effects of such a conduct, will be considered under the analysis and policy discussion of the thesis.

In the work of this thesis material including both EU- and US competition law sources will be used. Since the thesis investigates the purpose from a EU competition law perspective, the material will mainly consist of EU law sources. The sources primarily encompass case law, doctrine and commission's guidelines. Regarding the doctrine, this will, to a large extent, comprise of articles in legal and economical periodicals, providing in depth information on the purpose at issue. The fact that authors can have different legal and national background that may have impact on the formation of their work will be taken into consideration when working with these kinds of sources. Because this thesis investigates a developing field of EU law, it is necessary to primarily turn to sources in terms of case law, since there is not much up- to- date doctrine treating the subject. The case law to be investigated focuses on EU margin squeeze case law, whereas, the US comparison will mainly treat US Supreme Court cases on margin squeeze. Within the scope of the EU case law study, the Swedish judgment of the Stockholm District Court in the *TeliaSonera*- case will also be investigated, this since it applies the preliminary ruling of the CJEU and also forms an example on how the national courts may interpret it.

1.5 Delimitation

The work of this thesis is at large limited to investigate the given purpose, that is, to examine the role of the essential facilities doctrine in margin squeeze cases and whether the indispensable input element is of importance when determining such cases. The view of considering margin squeeze as a constructive form of refusal to supply will be further investigated, whereas, the relationship between margin squeeze and other kinds of abuses than refusal to supply will fall outside the scope of this thesis. The thesis is limited to focus on investigating the indispensable input element, such as essential facilities, in margin squeeze cases. Other elements of importance to margin squeeze- and refusal to supply cases will generally not be discussed.

The thesis will not further investigate the relationship between regulation and competition law in margin squeeze cases, it instead focuses on how margin squeeze should be assessed as an abuse under competition law, that is, in accordance to Article 102 TFEU and Section 2 in the Sherman Act respectively.

The work examines both EU competition law and US antitrust law, however, since the main object of the thesis is to investigate margin squeeze from a EU law perspective, US antitrust law will only be examined to the extent of the comparative purpose. The case- law studies will thus focus on recent EU case law and particularly on the *TeliaSonera*- case. National European case law will generally not be examined in this thesis, however, since *TeliaSonera* came to the CJEU as a reference case from Sweden, the

interpretation of the preliminary ruling in the judgment of Stockholm District Court will be investigated.

Regarding the investigation of the importance of the indispensable input element, this will encompass inputs such as essential networks and services, primarily within the telecom sector. The thesis is limited not to encompass the discussion on indispensable inputs and intellectual property rights.

The thesis is intended to address readers with a certain interest in EU competition law that possesses a good understanding of the legal area. According to this, the work is limited to not further process the basics of EU competition law.

1.6 Disposition

The disposition of this thesis is structured in the following way. After the introduction the thesis will start of with a descriptive part on the EU doctrine regarding the concepts of margin squeeze, refusal to supply and the indispensable input element and their relation. This part aims to encompass the theory and basic facts of the concepts and a short outline of the starting point of the EU approach on the subject.

The descriptive part is followed by a EU case law study concerning margin squeeze cases. Both recent and former cases will be investigated. The focus of this study is to investigate how margin squeeze has been regarded as an abusive conduct under competition law and if the indispensable input element has been of importance in the determination of the cases at issue.

After this a comparison regarding the approach to margin squeeze in US antitrust law will follow. This study will cover the basics of the US doctrine and important US case law regarding the matter, this in order to provide a comparative reference to EU law on the subject.

In the analysis and policy discussion the following questions will be processed with the objective to process the purpose of the thesis. First, what are the differences and similarities between margin squeeze and refusal to deal? Encompassing, what are the incentives to undertake such a conduct and what will be the effects of the action? Further, which are the considerations behind regarding margin squeeze as a form of refusal to supply and as a stand- alone abuse, respectively? And finally, is it important to consider the indispensable input element in margin squeeze cases?

The conclusion of the thesis aspires to conclude the analysis part and also, at short, includes the writer’s own thoughts and comments regarding the subject of the thesis.

2 Presentation of the EU doctrine

This section serves to give a short presentation of the concepts at issue for the investigation of this thesis. It focuses on describing how and when margin squeeze and refusal to supply will be regarded as abusive conducts under Article 102 TFEU.

2.1 Margin squeeze, a product of vertical integration

A margin squeeze undertaken by a dominant undertaking may be regarded as an infringement of Article 102 TFEU, and thus constitutes an abuse of such a position. A conduct of squeezing prices is likely to arise in situation were a vertically integrated dominant undertaking supplies the product or input of its upstream business to both its own downstream business and to competitors operating on the same downstream level. These circumstances are in many cases at hand in post-liberalised markets where former monopolists still possess large market shares and controls essential facilities that have often been developed by public means.[4] This is, for example, a typical scenario in the post- liberalised sector of telecoms where dominators still controls large networks, which are of importance for operating downstream. A margin squeeze will occur when the dominant operator increases its upstream prices and/or reduces its downstream prices, resulting in a price gap between the two that makes it impossible for other players to operate successfully on the market.[5]

The Commission in its Telecommunication Access Notice[6] stated the following regarding margin squeeze:

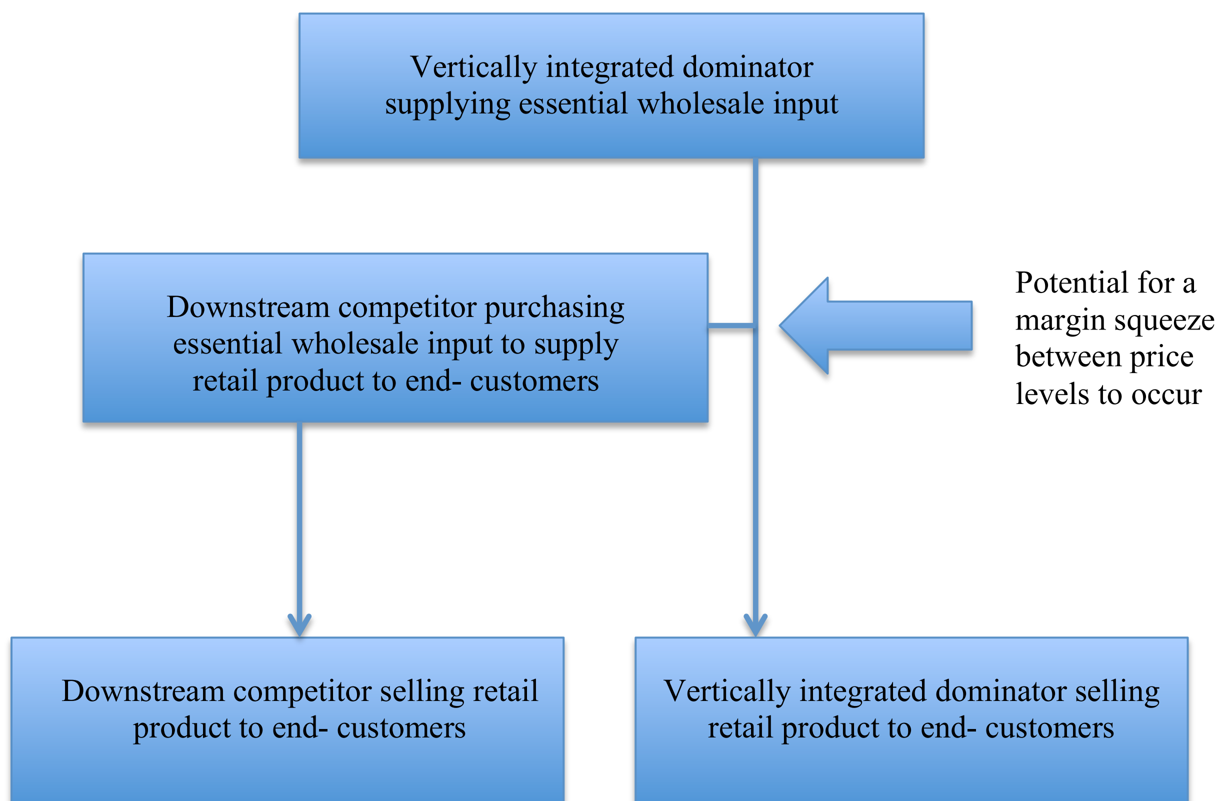
"A price squeeze could be demonstrated by showing that the dominant company`s own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company (...) In appropriate circumstances, a price squeeze could also be demonstrated by showing that the margin between the price charged to competitors on the downstream market (including the dominant company`s own downstream operations, if any) for access and the price which the network operator charges in the downstream

[4] D. Geradine (red.), *The Liberalization of State Monopolies in the European Union and Beyond,* Kluwer Law International, The Hague, 2000, pp. 181 ff.
[5] L. Garzaniti & M. O´Regan, *Telecommunications Broadcasting and the Internet EU Competition Law & Regulation,* 3rd Edition, Thomson Reuters, UK 2010, p. 468.
[6] *Notice on the application of the competition rules to access agreements in the sector, framework, relevant markets and principles*, OJ C 265, 22/8/1998, paras. 117 f.

market is inefficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit (unless the dominant company can show that its downstream operation is exceptionally efficient)".

A margin squeeze can take various forms, but there are mainly three types of squeezes:[7] first, a dominator may raise input prices so that rivals can no longer sustain downstream profit; second, the dominator may engage in below- cost selling in the downstream market and still maintain profit over all because sale of the upstream input; or, finally, it may raise prices for the upstream input and lower the price of the downstream product in order to create a margin on which the rivals cannot operate profitably.[8]

Illustration of margin squeeze:



The determination of a margin squeeze action starts with defining the relevant markets. The essential input or network will be seen as the relevant upstream market where the input supplier is dominant. In a margin squeeze case it is the market power on the upstream level that is of importance when

[7] P. Crocioni & C. Veljanovski´, *Price Squeezes, Foreclosure and Competition Law: Principles and Guidelines,* 4 J. Network Ind., 28, 2003, p. 31.
[8] 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 04/05, 2005, available at SSRN: http://ssrn.com/abstract=671804, accessed February 2012, p. 6.

determining the abusive conduct.[9] A margin squeeze in this sense concerns the leveraging of the dominators upstream market power to the downstream market.

An unusual circumstance in margin squeeze cases is the fact that the dominator`s competitors on the resale market will also be its customers on the wholesale market. As a margin squeeze may result in exclusionary effects, as forcing competitors out of the market, such action will also result in a decreased numbers of customers on the wholesale market. For a dominator to engage successfully in a margin squeeze, the reduction of sales to customers upstream must therefore be offset by the revenues of its downstream sales.[10] A margin squeeze action is possible to bring several harmful effects to competition on the market. An action excluding rivals from the downstream market will also reduce the competitive pressure on that level. Such exclusion of competitors may bring lost incitements for the integrated undertaking to maintain low prices and high product quality on the market, which results in harmful effects on end- consumers.

Scholars[11] consider some basic cumulative conditions to be required in order for a margin squeeze abuse to be present. First, a margin squeeze will only arise in situations of vertical integration. It thus involves two markets and rivals that are both customers and competitors of the dominant undertaking. Second, the input supplied by the dominant undertaking must in some sense be essential, that is, necessary in order for operators to compete on the downstream market. In situation when the input is not essential, i.e. if it is unnecessary or if there are available substitutes, the rivals will not have to buy it, at the price charged by the dominant undertaking, or at all. However, the importance of this condition may no longer be as clear in EU competition law due to developments in previous case law, this is an aspect that will be further investigated in the work of this thesis. Third, it is necessary that the input supplied by the dominator constitute a high, fixed proportion of the overall costs. If not, there will be hard for the dominator to interfere with the downstream competitors´ profitability. Fourth, the margin squeeze must be identified through some kind of legal test in order to determine if the prices charged by the dominator causes the downstream competitors to be uneconomic, i.e. either loss making or insufficient to operate profitably on the market. A frequently used test is whether the dominators' downstream operations could trade profitably on the basis of the wholesale price charged to competitors for the relevant input, i.e. the test of "as efficient competitors". Fifth, it is necessary to assess if the action of the dominant undertaking may be objectively justified. In this sense there are in fact many reasons why an undertaking

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[9] P. Crocioni & C. Veljanovski´, *Price Squeezes, Foreclosure and Competition Law: Principles and Guidelines,* 4 J. Network Ind., 28, 2003, p. 42.
[10] D. Geradine & R. O´Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector,* 1(2) J. Comp. L. & Econ. 355- 425, 2005, pp. 365 f.
[11] E.g. Ibid.

would set prices below its own costs for a limited period of time without having an exclusionary intent.[12]

Finally, when the conditions listed above are at hand, it must be assessed if the margin squeeze by the dominant undertaking has had anti- competitive effects on the market. This should be considered according to a number of factors, for example, the harmful effects on the market and towards competitors, as well as, the effects of increased prices and lack of product choices to the detriment of consumers. To what an extent it is necessary to show material anti- competitive effects regarding margin squeeze abuses has, however, been an area of controversy and has also been subject for development in recent EU case law.[13]

2.2 Refusal to supply and the essential facilities doctrine

A dominant undertaking`s refusal to supply a certain service or product to its competitors may under certain circumstances be regarded as an abuse of its position under Article 102 TFEU. Such conduct may have the consequences of excluding competitors as the dominator refuses them the tools they need in order to operate on the market. However, in order for an obligation to supply to occur, the input at issue must be indispensable for the ability to compete on the market, otherwise such obligation would unjustified infringe with the dominators freedom of operation.

These considerations are also the underlying rationale for the essential facilities doctrine, which has served as a conceptual ground for the Commission's policy of promoting effective competition by obliging dominators to grant third parties access to its essential facilities. The doctrine originally originates from US antitrust case law and is based on the applying and interpretation of Section 2 in the Sherman Act. The Commission and the European Courts have to a large extent adopted but also developed the doctrine in their work of determining refusal to supply cases. In EU competition law the essential facilities doctrine may be regarded as a subset of abusive refusal to supply cases under Article 102 TFEU.[14] The Commission referred to the essential facilities doctrine for the first time in *Sealink/ B&I Holyhead*[15]*,* however, it is possible to see the essential facilities rationale in earlier case law.[16] In the *Sealink*- case the

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[12]D. Geradine & R. O´Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector,* 1(2) J. Comp. L. & Econ. 355- 425, 2005. pp. 358 ff.
[13] Ibid. p. 360.
[14] L. Garzaniti & M. O´Regan, *Telecommunications, Broadcasting and the Internet EU Competition Law & Regulation,* 3rd Edition, Thomson Reuters, UK 2010, pp. 484 f.
[15] Commission Decision IV/34/174, *Sealink/ B&I Holyhead: Interim measures,* [1992] 5 CLMR 255.
[16] A. Jones and B. Sufrin, *EU Competition Law: Text, Cases, and Materials,* 4rth Edition, Oxford University Press, Great Britain 2011, pp. 487 f., e.g. Cases 6, 7/73, *Instituto*

dominator only granted access to its facility on less favourable terms to a competitor operating a competing service. The Commission in its decision defined an essential facility as:

"a facility or infrastructure, without access to which competitors cannot provide services to their customers".[17]

In many cases a refusal to supply occurs in a market where the dominator is vertically integrated and controls an input necessary to carry out business on the downstream market.[18] Such essential facilities are often present in former liberalised sectors and are the result of services once financed by public founds. It has been considered important to diverge these kind of circumstances from situations where the dominant undertaking have developed their facilities through their own means over a long period of time. The essential facilities concept must thus be treated with caution in the latter situation; not resulting in robbing firms of their fruits of investments and remove their incentives to innovate. The essential facilities doctrine encompasses a lot of issues to be regarded since it implies a limitation of the dominant undertaking`s right to deal and constitutes a major interference with the deep- stated notion of freedom of contracts, i.e. the freedom to choose the trading partner one wishes. Due to this interference in freedom, the definition of what should constitute an essential facility must, according to case law and doctrine, be narrowly defined. Such definition is not always an easy determination and once it is identified there are still remaining questions regarding, for example, which competitors that should be given access to the facility and on what terms.[19]

In the Commission`s Guidance[20] to Article 102 TFEU a fairly restrictive approach towards the essential facilities doctrine and refusal to supply emerges. In order for such conduct to be abusive the Commission in its guidance recognises that certain circumstances have to be present. It states that a refusal to supply only will be considered abusive under Article 102 TFEU if the following cumulative circumstances are at hand; (i) the refusal relates to a product or service that is objectively necessary for third parties to be able to compete effectively on the downstream market; (ii) it is likely that the refusal will lead to the elimination of effective competition on the

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Chemioterapico Italiano SpA and Commercial Solvents Corp v. Commission, [1974] ECR 223.

[17] Commission Decision IV/34/174, *Sealink/ B&I Holyhead: Interim measures,* [1992] 5 CLMR 255, para. 41.

[18] A. Jones and B. Sufrin, *EU Competition Law: Text, Cases, and Materials,* 4rth Edition, Oxford University Press, Great Britain 2011, p. 480.

[19] Ibid. pp. 487 ff.

[20] 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*, OJ C 45, 24/2/2009.

downstream market; and (iii) the refusal is likely to lead to consumer harm.[21]

In the case *European Night Services* the General Court referred to essential facilities and stressed that a facility will only be essential were there is no substitute, the mere advantage of the facility will thus not be enough to establish an obligation to supply.[22]

The CJEU has never used the expression "essential facility" explicitly, however, its discourse regarding refusal to supply appears to be shaped in terms of the essential facilities doctrine.[23] The CJEU has been rigid when determining refusal to supply cases and has further limited the scope of interference in such abusive conduct. In its preliminary ruling of the *Bronner*- case[24], which concerned access to a newspaper home delivery network, a refusal to supply abuse was held to be committed under circumstances where the dominant undertaking refused to supply a competitor in a neighbouring market it`s indispensable product. Such a behaviour was only considered to violate Article 102 TFEU if the following cumulative circumstances were present; (i) the refusal was likely to eliminate all competition on the market on the part of the person requesting the product; (ii) the refusal was incapable of being objectively justified; and (iii) the product or service was indispensable to carry on a business on the neighbouring market, in the sense that there was no realistic possibility to create a potential alternative to the product.[25] The *Bronner*- case clarified that the obligation to supply a certain input will only arise in exceptional circumstances.[26] The case is also notable for Advocate General Jacobs's opinion[27] which calls for a use of the essential facilities doctrine within strict limits. Jacobs highlighted that the purpose of Article 102 TFEU was the protection of consumers rather than the protection of competitors, which should also be an underlying consideration when determining refusal to supply cases.[28]

One of the criteria from the *Bronner*- case was that the product or service at issue must be considered indispensable in order to operate on the neighbouring market. An indispensable input was in the case described as being an input for which there is no actual or potential substitute. An input

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[21] 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*, OJ C 45, 24/2/2009, para. 81.
[22] Case T-374-5, 348, and 388/94, *European Night Services v Commission,* [1998] ECR II-3141.
[23] A. Jones and B. Sufrin, *EU Competition Law: Text, Cases, and Materials,* 4rth Edition, Oxford University Press, Great Britain 2011, p. 486.
[24] Case C- 7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint,* [1998] ECR I-7791.
[25] Ibid. para. 41.
[26] A. Jones and B. Sufrin, *EU Competition Law: Text, Cases, and Materials,* 4rth Edition, Oxford University Press, Great Britain 2011, p. 494.
[27] Case C-52/09, *Opinion of Advocate General Mazák, Konkurrensverket v TeliaSonera AB,* 2 September 2010, not yet reported, para. 58.
[28] Case C- 7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint,* [1998] ECR I-7791, para. 58.

would thus not be regarded indispensable if there were alternatives available, this even if such alternatives were less advantageous. It was held that in order for an input to be indispensable, technical, legal or economic obstacles, capable of making it impossible, or even unreasonably difficult to establish an alternative product or service, had to be present.[29] The CJEU in the *Bronner*- case stated that:

"For such access to be regarded as being indispensable, it would be necessary at the very least to establish (...) that it is not economically viable to create a second home- delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme".[30]

2.3 The relation between margin squeeze and refusal to supply

The relationship between margin squeeze and refusal to supply may be described as a close one. The former view of margin squeeze within EU competition law was actually that the abuse was to be regarded as a form of constructive refusal to supply. In its Guidance[31] the Commissions regards margin squeeze as a form of refusal to supply and also processes the two abuses under the same heading[32]. The Commission considered refusal to supply to include a wide range of conducts, such as, refusal to supply products to existing or new customers, refusal to license intellectual property rights and refusal to grant access to an essential facility or network.[33] Regarding margin squeeze the Commission stressed that:

" (...) instead of refusing to supply, a dominant undertaking may charge a prize for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a so called "margin squeeze") (...)"[34]

The Guidance thus adopts the same approach towards margin squeeze and refusal to supply and states that the same three circumstances[35] have to be present in order for the conducts to be regarded abusive.

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[29]Case C- 7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint,* [1998] ECR I-7791, para. 58, paras. 41-45.
[30] Ibid. para. 46.
[31] 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*, OJ C 45, 24/2/2009.
[32] Ibid. paras. 75-90.
[33] Ibid. para. 78.
[34] Ibid. para. 80.
[35]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*, OJ C 45, 24/2/2009, para. 81.

3 Margin squeeze in EU competition law

Margin squeeze allegations have only arisen in a limited number of cases before the Community institutions.[36] This part of the thesis examines how margin squeeze has been considered as an abusive conduct in EU case law. The case law study focuses on whether the EU- courts and the Commission have regarded margin squeeze as a form of refusal to supply or a distinct abuse and to what an extent the indispensable input element has been of importance in the determination of such cases.

3.1 National Carbonising

The first case before the Commission regarding margin squeeze was the *National Carbonising*- case[37]. The case concerned the undertaking National Carbonising that produced coke. National Carbonising bought the coal it needed for its production from the National Coal Board, which held a virtual monopoly on the coal market. National Smokeless Fuels Limited was a subsidiary of National Coal Board and competed with National Carbonising on producing industrial and domestic hard coke. Together with National Smokeless Fuels Limited, National Coal Board possessed 90 per cent of the market shares on the downstream market for coke production. As National Coal Board successively increased its prices for the raw material, National Carbonising`s production cost rose to the extent that it was unable to operate economically on the coke market. Therefore, National Carbonising sought an interim relief before the Commission. Since the case concerns an interim decision the Commission did not further go in to details regarding the legal principles to be applied in a margin squeeze case[38], it, however, stated that:

"An undertaking which is in a dominant position as regards the production of raw material (in this case, coking coal) and therefore able to control its price to independent manufactures of derivatives (in this case, coke) and which is itself producing the same derivatives in competition with this manufacturers, may abuse its dominant position if it acts in such a was as to eliminate the competition of these manufacturers in the market of its derivatives. From this general principle the services of the Commission deduced that the enterprise in a dominant position may have an obligation

[36] D. Geradine & R. O´Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector,* 1(2) J. Comp. L. & Econ. 355- 425, 2005, p. 378.

[37] Commission Decision 76/185/ECSC, *National Carbonising Company Limited,* [1976] OJ L 35/6.

[38] D. Geradine & R. O´Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector,* 1(2) J. Comp. L. & Econ. 355- 425, 2005, p. 379.

to arrange its prices so as to allow a reasonably efficient manufacturer of the derivatives a margin sufficient to enable it to survive in the long term."[39]

The case thus stated that a dominator may be obliged to supply a certain essential raw material to its competitors at a price level, which makes it possible for a reasonable efficient undertaking to operate and survive on a long-term basis.

3.2 Napier Brown- British Sugar

Margin squeeze was applied in a more detailed way by the Commission in the *Napier Brown- British Sugar-*[40] case. In this case the sole sugar beet producer in the UK, British Sugar, carried out a number of abusive conducts. The undertaking was dominant on both the market for the sale of granulated sugar in bulk quantities and the market for granulated sugar individually packaged for retail sale in the UK. The largest sugar merchant at the time in the UK, Napier Brown, wanted to enter into the market for individually packaged sugar for retail sale by buying sugar in bulk from British Sugar and packaging the sugar itself. British Sugar responded by engaging in a series of sales practices that prevented Napier Brown to establish itself on the downstream market e.g. refusal to supply, tying and fidelity rebates. British Sugar did also decrease its prices for retail packaged sugar, which implemented a squeeze between the wholesale price of its sugar in bulk and retail package sugar prices. The Commission held that British Sugar had engaged in a price cutting campaign that resulted in an insufficient margin for third parties to survive in the long run. Such a conduct would amount to an abuse of dominance when:

"The maintaining, by a dominant company, which is dominant in the markets for both a raw material and a corresponding derived product, of a margin between the price which it charges for the derive product, which is insufficient to reflect that dominant company`s own cost of transformation (in this case the margin maintained by British Sugar between its industrial and retail sugar prices compared to its own repackaging cost) with the result that competition in the derived product is restricted, is an abuse of dominant position. (...) It is clear from the facts set out above that should British Sugar have maintained this margin in the long term, Napier Brown, or any company equally efficient in repacking as British Sugar without a self produced source of industrial sugar would have been obliged to leave the United Kingdom retail sugar market."[41]

The Commission in this case established the "as efficient competitor- test" as a measurement for the finding of a squeeze. Taking into account the other

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[39]Commission Decision 76/185/ECSC, *National Carbonising Company Limited,* [1976] OJ L 35/6, p. 2.
[40] Commission Decision 88/518/EEC, *Napier Brown- British Sugar*, [1988] OJ L 284/41.
[41]Ibid. para. 66.

abuses British Sugar had committed and the result of exclusion of competitors from the market, the Commission held that the margin squeeze constituted an abuse of dominance.

The relevant downstream market was defined by the Commission as being the market for retail and industrial granulated sugar in the UK[42]. In such a market access to raw sugar is essential to compete downstream. Related products such as specialty sugar, liquid sugars and syrups, as well as, saccharin, cyclamates and aspartame were not considered to be substitutes to the granulated sugar.[43] Regarding imports of granulated sugar, this was considered by the Commission to be a complement to the British product, but did not serve as a fully competitive alternative.[44]

3.3 Industrie des Poudres Sphériqes

A margin squeeze abuse was assessed by the General Court[45] in the case *Industries des Poudres Sphériques* [46]. The case concerned the undertaking Industries des Poudres Sphériques that manufactured broken calcium metal from primary calcium metal. The manufacturer bought its raw material from the supplier Péchiney Électrometallurgi, which was also active on the downstream market for the broken calcium metal. Industries des Poudres Sphériques claimed that Péchiney Électrometallurgi`s pricing policy regarding its primary calcium metal- and broken calcium metal products constituted an abuse of its dominant position. While Péchiney Électrometallurgi was the only European producer of primary calcium, other suppliers in China, Russia, Canada and the US also produced the raw material.

The General Court defined a margin squeeze to occur according to the following:

"Price squeezing may be said to take place when an undertaking which is in a dominant position on the market for an unprocessed product and itself uses part of its production for the manufacture of a more processed product, while at the same time selling off surplus unprocessed product on the market, sets the price at which it sells the unprocessed product at such a level that those who purchase it do not have sufficient profit margin on the processing to remain competitive on the market for the processed product."[47]

[42] Commission Decision 88/518/EEC, *Napier Brown- British Sugar*, [1988] OJ L 284/41, para. 49.
[43] Ibid. para. 42.
[44] Ibid. para. 47.
[45] Before: the Court of First Instance (CFI).
[46] Case T- 5/97, *Industries des Poudres Sphériques v Commission,* [2000] ECR II-3755.
[47] Case T- 5/97, *Industries des Poudres Sphériques v Commission,* [2000] ECR II-3755, para. 178.

Industries des Poudres Sphériques stressed the importance of correctly assessing whether there were available alternative sources to the upstream input for downstream competitors.[48] However, the General Court held that *Industries des Poudres Sphériques* did have access to alternative inputs of supply from other countries and that the primary calcium supplied by Péchiney Électrometallurgi was not a necessary input in order for *Industries des Poudres Sphériques* to compete downstream:

" It follows that it was just as possible for IPS to obtain supplies from Russian and Chinese suppliers as it was for other producers (...) It must therefore be held that IPS had available to it alternative sources of supply other than PEM"[49]

The Court also determined that there were different kinds of inputs for the downstream market, i.e. primary calcium of different degree of purity. *Industries des Poudres Sphériques* was, according to the Court, not obliged to use a certain pure kind of primary calcium in order to produce its product, and was thus able to import its raw material from other producers.

Since the case concerned an appeal against a decision to reject a complaint, the conclusions regarding the nature and scope of margin squeeze by the General Court was, however, limited.

3.4 Deutsche Telecom

In the *Deutsche Telekom-* case the Commission determined a margin squeeze in the sector of telecoms for the premier time. Deutsche Telekom was a formerly state- owned incumbent in Germany, which still retained the control of the fixed telephone network. The German market was liberalized in 1996 and Deutsche Telekom had been subject to mandatory access requirements under national law since the liberalization. Deutsche Telekom provided both telecommunication services to end users and wholesale access to infrastructure services to non- integrated undertakings that competed with it on the downstream market. The circumstances of the case were that Deutsche Telekom was subject to regulation of the prices charged on the wholesale level, while on the retail level it was subject to a price cap for "baskets" of services. This enabled Deutsche Telekom to decide the pricing of individual component services within the basket on the retail market, but the basket was not permitted to exceed the fixed price.

In the Commission decision[50] in 2003 it was held that the margin between the wholesale- and retail prices charged by Deutsche Telekom for fully

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[48] Case T- 5/97, *Industries des Poudres Sphériques v Commission,* [2000] ECR II-3755, para. 43 and P. Crocioni & C. Veljanovski´, *Price Squeezes, Foreclosure and Competition Law: Principles and Guidelines,* 4 J. Network Ind. 28 2003, p. 46.
[49] Case T- 5/97, *Industries des Poudres Sphériques v Commission,* [2000] ECR II-3755, paras. 56 f.
[50] Commission Decision 2003/707/EC, *Deutsche Telekom AG*, [2003] OJ L 263/9.

unbundled access to its local loops amounted to an abusive margin squeeze. Deutsche Telekom was considered to possess a dominant position on both the retail- and wholesale level. In order to determine the existence of the squeeze the as- efficient competitor- test was applied. The test provided the result that the margin between the retail- and wholesale price had been negative since the local loop unbundling became a legal obligation in Germany. It was stated by the Commission that a squeeze would occur where the competing services were comparable and:

" (...) the spread between Deutsche Telekom`s retail and wholesale prices is either negative or at least insufficient to cover its downstream costs."[51]

In 2003 Deutsche Telekom appealed the decision to the General Court.[52] The General Court, to a large extent, agreed with the holdings of the Commission. In 2010 the judgment was further appealed to the CJEU[53] which dismissed Deutsche Telekom`s appeal in its entirety. The judgment of the CJEU essentially confirms the approach of the General Court; therefore the CJEU judgment will be referred to below.

In its judgment the CJEU confirmed that the unfairness for the purpose of Article 102 TFEU of Deutsche Telekom`s pricing policy was linked to the existence of the margin squeeze rather than the precise spread of it.[54] The absolute values of the wholesale- and retail price were therefore irrelevant, instead margin squeeze relates to the relationship between the absolute values.

It was further held that a margin squeeze might be considered an abusive conduct in itself under Article 102 TFEU, other exclusionary pricing abuses was thus not necessary to be present in order for the conduct to be abusive. The CJEU stated that:

"In those circumstances, in so far as the appellant has the scope to reduce or end such a margin squeeze,(...) by increasing its retail prices for end-user access services, the General Court correctly held (...) that margin squeeze is capable, in itself, of constituting an abuse within the meaning of Article 82 EC in view of the exclusionary effect that it can create for competitors who are at least as efficient as the appellant. The General Court was not, therefore, obliged to establish, additionally, that the wholesale prices for local loop access services or retail prices for end- user access services were in themselves abusive on account of their excessive or predatory nature, as the case may be."[55]

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[51] Commission Decision 2003/707/EC, *Deutsche Telekom AG*, [2003] OJ L 263/9, para. 102.
[52] Case T-271/03, *Deutsche Telekom AG v Commission,* [2008] ECR II-477.
[53] Case C-280.08 P, *Deutsche Telekom AG v Commission*, 14 October 2010, not yet reported.
[54] Ibid. para.167.
[55] Case C-280.08 P, *Deutsche Telekom AG v Commission*, 14 October 2010, not yet reported, para. 183.

In the absence of an alternative infrastructure the access to the local loop was considered by the CJEU to be indispensable for competitors who wanted to operate on the retail market for end- user access services.[56] As mentioned above, Deutsche Telecom was under a regulatory obligation to offer its input to competitors.

" Since the retail market for end- user access services constitutes a separate market, and wholesale local loop access services are indispensable to enabling competitors who are at least as efficient as the appellant to enter into effective competition on that market with an undertaking which, as in the appellant`s case, has a dominant position largely as a result of the legal monopoly it enjoyed before the liberalization of the telecommunications sector (...)".[57]

3.5 Telefónica

The Commission`s decision in *Telefónica*[58] concerns the Spanish incumbent Telefónica`s price structure on wholesale- and resale prices. In 2003 Wanadoo España submitted a complaint to the Commission on that Telefónica was engaging in margin squeeze on the Spanish broadband Internet access markets. At the time of the case Telefónica controlled the entire ADSL value chain in Spain and other operators who wished to provide retail broadband services had to contract wholesale broadband access products, which were all built on Telefónica`s local access network. Since it was uneconomically to duplicate the local access network, it was regarded a necessary input in order to compete on the market. Wholesale products built on alternative technologies were not considered available.[59]

The relevant markets were defined as the retail broadband "mass" market, the market for wholesale broadband access at regional level and the market for wholesale broadband access at national level,[60] Telefónica held a monopoly position on both of the wholesale markets. Telefónica was considered to have been squeezing margins, between its retail prices and the price for wholesale access at regional level, on one hand, and the margins between the retail prices and the price for wholesale access at national level, on the other hand.[61] The margin squeeze made it impossible for as efficient competitors as Telefónica to operate profitably on the downstream market.

In the case Telefónica held that margin squeeze should be considered as a constructive refusal to supply and that the Commission therefore had to

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[56] Case C-280.08 P, *Deutsche Telekom AG v Commission*, 14 October 2010, not yet reported, para. 231.
[57] Ibid. para. 234.
[58] Commission Decision COMP/38.784, *Wanadoo España v. Telefónica*, decision of 4 July 2007.
[59] Ibid. para. 687.
[60] Ibid. paras. 208, 686.
[61] Ibid. para. 691.

prove that the criteria applied in the *Bronner*- case were at hand.[62] The Commission, however, held that the factual, economic and legal circumstances in the case fundamentally differed from those in *Bronner*.[63] In particular the fact that the wholesale access on national and regional level had been mandated and the fact that Telefónica`s incentives to invest in infrastructure was not at stake in the case, did bring the conclusion that the legal test in *Bronner* was not considered applicable.[64]

"(...) Telefónica`s argument must also be rejected in so far as it misconstrues the Oscar Bronner judgment in interpreting the legal standard applicable to this case. Independently of whether Telefónica`s inputs are indispensable or not, it must be pointed out that the analysis of alternatives to local loop access in Deutsche Telekom was carried out for the purpose of market definition and that, in Napier Brown the Commission concluded to an abuse of a dominant position in the form of a margin squeeze while alternatives to the upstream product (beet sugar) provided by British Sugar, in the form of continental beet sugar and (British) Tate & Lyle cane sugar were available."[65]

Since Telefónica was obliged under Spanish regulation to provide wholesale access, the Commission considered that the obligation had been established through a balancing test by the Spanish authorities, weighting incentives to innovate and the need to promote downstream competition in the log run. The Commission also considered that Telefónica`s incentives to invest had never been at stake since the infrastructure it controlled to a large extent was the result of an investment prior the advent of broadband services in Spain.[66]

Because the margin squeeze by Telefónica was likely to foreclose competitors from the market, the action were restricting competition by imposing unsuitable losses on equally efficient competitors, the Commission held that this was likely to bring immediate harm to consumers.

When assessing the abuse the Commission considered Telefónica`s conduct to constitute a clear- cut abuse. It held that the *Deutsche Telekom*- case, considering margin squeeze as an abusive conduct in itself, was to be regarded as a clear precedent to margin squeeze cases and the fact that *Deutsche Telekom* was at the time under appeal did not mean that the methodology applied in the case could be ignored in *Telefónic*a.[67]

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[62] Commission Decision COMP/38.784, *Wanadoo España v. Telefónica*, decision of 4 July 2007. paras. 299 f.
[63] Ibid. para. 302.
[64] Ibid. para 309.
[65] Ibid. para. 734.
[66] Ibid. para. 632.
[67] Ibid. para. 735.

3.5.1 Cases T- 398/7 and T- 336/07

The Commission decision in Telefónica was appealed to the General Court by Telefónica and the Kingdom of Spain in the two recently determined cases, *T-398/7*[68] and *T-336/07*[69]. Both of the appellants, among other things, claimed that the Commission had made errors when assessing the margin squeeze abuse by Telefónica under Article 102 TFEU. The General Court, however, dismissed the appeals. The cases refer to and confirm what was held by the CJEU in its preliminary ruling of *TeliaSonera*, which will be referenced below.

The appellants in the cases again claimed that it was clear that the Commission in its decision had assessed margin squeeze as a form of refusal to supply, but that it had not applied the *Bronner* criteria to the case. According to this neither the criterion regarding the presence of an indispensable product or infrastructure, nor the criterion of if the refusal to supply was likely to eliminate all competition on the retail market, had been applied. The General Court, however, did not approve this argument. Contradictory to what was claimed by the appellants, the General Court stated that the Commission had not assessed the margin squeeze as a form of refusal to supply and that the criteria in *Bronner* were not applicable in the present case. The General Court held that it was instead necessary to examine all of the relevant circumstances when assessing whether Telefónica's pricing policy was abusive. Regarding the *Bronner* criteria these were not considered applicable since, according to the *TeliaSonera*-case and *Deutsche Telekom*, a margin squeeze is an abusive conduct in itself. If the *Bronner* criteria were to be applied in margin squeeze cases, this would instead result in a reduced effectiveness of Article 102 TFEU.[70]

The appellants claimed that, in order for a margin squeeze to be present, the wholesale product had to be indispensable for the provision of the retail service, which was not true in the present cases.[71] Regarding this claim the General court confirmed, according to what was held in the *TeliaSonera*-case, that the indispensability of the product or infrastructure may be of relevance when assessing the anti- competitive effects of a margin squeeze, but that indispensability is not a necessary circumstance in order for a margin squeeze to be at hand.[72]

In the light of the judgment in TeliaSonera, the appellants stressed that there was a regulatory obligation for Telefónica to supply the product at issue and that the reasoning of *TeliaSonera* would only apply were the wholesale

[68] Case T- 398/07, *Kingdom of Spain v Commission*, Judgment of the General Court of 29 March 2012, not yet reported.

[69] Case T- 336/07, *Telefónica SA and Telefónica de España SA v Commission*, Judgment of the General Court of 29 March 2012, not yet reported.

[70] Commission Decision COMP/38.784, *Wanadoo España v. Telefónica*, decision of 4 July 2007, paras. 178- 181 and Case T- 398/07, *Kingdom of Spain v Commission*, Judgment of the General Court of 29 March 2012, not yet reported, paras. 73-76.

[71] Ibid. para. 64.

[72] Ibid. paras. 76, 94.

product had been voluntarily placed on the market without any regulatory obligation.[73] The General Court rejected this claim and stated that, according to the *TeliaSonera*- case, Article 102 TFEU would only apply to anti- competitive conduct undertaken by undertakings on their own incentive, if the anti- competitive conduct was due to national legislation which eliminated all possibilities of competitive activity on the part of the undertakings, Article 102 TFEU would not apply. Due to the reasoning in *TeliaSonera* the General Court held that Article 102 TFEU would apply when, as in the present case, the national legislation preserves the possibility for undertakings to engage in autonomous conduct, which prevents, restricts or distorts competition. According to this, notwithstanding such legislation, if the dominator has the scope to adjust even its retail prices alone, the margin squeeze runs the risk of being considered abusive under Article 102 TFEU.[74]

3.6 TeliaSonera

3.6.1 Background

The *TeliaSonera*- case came to the CJEU as a reference case[75] from the Stockholm District Court[76]. The subject of the request was a series of questions[77] regarding the clarification of the margin squeeze concept. In the case the Swedish Competition Authority[78] claimed that TeliaSonera had abused its dominant position on the market by applying a price strategy that resulted in squeezed margins between the sales price for its wholesale products for ADSL and its resale price for its ADSL services to end- users.[79]

TeliaSonera has historically been the Swedish incumbent fixed telephone network operator. The undertaking has been a holder of exclusive rights and for a long time it was the owner of a local metallic access network to which almost all Swedish households were connected. In particular TeliaSonera owned the local loop, which was the part of the copper pairs telephone network which connected the telephone operator`s exchange to the subscriber's telephone.[80] TeliaSonera offered access to the local loop in two ways, unbundled access in accordance with its regulated obligations and, without being legally obliged to do so, it did also offer an ADSL product intended for wholesale users to different operators. At the same time

[73] Case T- 398/07, *Kingdom of Spain v Commission*, Judgment of the General Court of 29 March 2012, not yet reported, para. 65.
[74] Ibid. paras. 69 ff.
[75] Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported.
[76] In Swedish: Stockholms tingsrätt.
[77] Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, para. 12.
[78] In Swedish: Konkurrensverket.
[79]Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, para. 8.
[80] Ibid. para. 4.

TeliaSonera offered access on the wholesale level and was also active on the downstream market in terms of offering connection services directly to end-users.[81]

3.6.2 The Advocate General`s opinion

Prior the judgment of the CJEU General Advocate Mazák delivered an opinion[82] on the case. Mazák`s opinion is of interest since it provides a different view from the one held by the CJEU on how margin squeeze should be considered as a form of abusive conduct.

Mazák held that in order for a margin squeeze to be considered abusive it was either required that the dominant undertaking had a regulatory obligation to supply the input, or, that the input was considered indispensable for competing on the downstream market. If the input was not indispensable it could not be subject to an abusive margin squeeze since competitors did not need to acquire it, not at the price offered by the dominator, or at all.[83] Mazák referred to the *Deutsche Telekom* case where it was stated that a margin squeeze was present when the difference between the retail prices charged by the dominator and the wholesale prices charged by the same was negative or insufficient to cover the product specific costs of the undertaking for its retail products on the downstream market. He stated that:

"The abusive nature of such conduct derives from the unfair nature of the price spread and the fact that the dominant undertaking`s wholesale products are indispensable to enabling a competitor to enter into competition with the dominant undertaking on the downstream market (...)"[84]

However, Mazák concluded that the circumstances in *TeliaSonera* differed from *Deutsche Telekom* since there was no regulatory obligation on TeliaSonera to offer input products for ADSL connections.[85] Mazák further held that a margin squeeze actually constituted a constructive form of refusal to deal because of the similar consequences and effects of the abuses:

"(...) instead of refusing entirely to supply the essential/indispensable product in question, the dominant undertaking supplies the input to its competitors at the downstream market at a price which does not enable those competitors to compete effectively on the downstream market. EU

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[81] Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, paras. 5 f.

[82] Case C-52/09, *Opinion of Advocate General Mazák, Konkurrensverket v TeliaSonera AB,* 2 September 2010, not yet reported.

[83] Ibid. para. 11.

[84] Ibid. para. 12.

[85] Ibid. para.13.

case- law has established that the effect of an abusive refusal to supply is the elimination of competition on the downstream market and, in my view, the concern is precisely the same in margin squeeze cases. There is no independent competitive harm caused by the margin squeeze above and beyond the harm which would result from a duty- to- deal violation at the wholesale level."

Mazák`s also stated that it can be interfered from both the margin squeeze decisions in the *Deutsche Telekom*- case and the *Telefónica*- case that margin squeeze and refusal to supply have in fact the same rationale. Even if the application of the *Bronner* criteria were rejected in the latter case, due to the particular circumstances of the case, Mazák held that the Commission in Telefónica nevertheless reviewed the relevant facts using a *"Bronner- type analysis"*. It was also pointed out that, in both of the Commission decisions mentioned above, the obligation to deal with competitors had already been imposed by the relevant national regulation authorities. In addition to this, the Commission did in both cases consider that there was no valid available alternatives for the incumbent`s network.[86] Mazák concluded that it may be inferred from the judgment in *Bronner*, from his own opinion and the General Court´s judgment in *Deutsche Telekom*, from the Commission`s decision making and from the Guidance of Article 82 that:

"In those cases where there is no regulatory obligation to provide the input, such as here, a dominant undertaking which trough its pricing arrangements operates a margin squeeze will abuse its dominant position where that input is indispensable to enabling a competitor to enter into competition with it on the downstream market. Such arrangements constitute in my view a form f refusal to supply".[87]

Mazák stated that the considerations above were of certain importance to the *TeliaSonera*- case since there was both alternative technologies to provide end- users with broadband services and a possibility for competitors to replicate TeliaSonera`s network. Under such circumstances the dominant undertaking should not be charged with a margin squeeze abuse.[88]

In the *TeliaSonera*- case the Swedish Competition Authority and the Commission raised the argument that TeliaSonera had a special situation due to the fact that its upstream monopoly position had been developed under the protection of exclusive rights and was financed by State resources. Mazák under this argument referred to the case *KPN Telecom*[89] were it was held that a refusal to supply might amount to an abuse in the situation of a recently deregulated industry in which the essential inputs were controlled by a dominator as the result of its position as a former statutory monopolist, and were access to such inputs are not regulated by sector- specific

[86]Case C-52/09, *Opinion of Advocate General Mazák, Konkurrensverket v TeliaSonera AB,* 2 September 2010, not yet reported, para. 16.
[87] Ibid. paras. 17 f.
[88] Ibid. paras. 20 f.
[89] Case C-109/03, *KPN Telecom BV v OPTA,* [2004] ECR I- 9091.

regulation. The potentially harmful effects on investment and innovation due to an obligation to supply under these circumstances were considered minimal. Mazák stated that he did not disagree with the reasoning in *KPN Telecom* but that it was necessary to take into account the fact that the basic property rights in question affects incentives to make investments. He also highlighted the importance of a cautious approach towards refusal to supply under Article 102 TFEU and to recognize the underlying policy and welfare considerations. According to Mazák it was not clear why a public source of founding for property should lead to a stricter legal standard and that many former state- owned monopolies had been subject for significant improvements following privatization. Such infrastructure requires maintenance and the incumbent must also innovate in order to compete on the market.[90]

According to the reasoning above Mazák holds that a margin squeeze should not be considered to occur only because of the spread between the wholesale- and retail price without the demonstration of a negative impact on competition on the downstream market. This since the primary purpose of Article 102 TFEU is to protect competition and to safeguard the interest of consumers rather than the interest of competitors.[91]

3.6.3 The preliminary ruling of the CJEU

The CJEU´s in its preliminary ruling provides partly a different assessment of margin squeeze than what may be observed from the opinion of Advocate General Mazák, presented above.

The CJEU stated that a margin squeeze would be considered to have occurred when the spread between the wholesale prices for ADSL input services and the retail prices for broadband connection services to end users were either negative or insufficient for as effective competitors as TeliaSonera to operate on the market.[92] The CJEU confirmed, in accordance with the *Deutsche Telekom*- case[93], that a margin squeeze was to be regarded as an independent form of abuse, distinct from a refusal to deal:

“A margin squeeze, in view of the exclusionary effect which it may create for competitors who are at least as efficient as the dominant undertaking, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 102 TFEU”.[94]

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[90] Case C-52/09, *Opinion of Advocate General Mazák, Konkurrensverket v TeliaSonera AB,* 2 September 2010, not yet reported, paras. 25 ff.
[91] Ibid. para. 30.
[92] Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, para. 32.
[93] Case C- 280.08 P, *Deutsche Telekom AG v Commission*, 14 October 2010, not yet reported, para. 183.
[94] Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, para. 31.

Because TeliaSonera was not under any regulated obligation to supply ADSL input services to operators in the case, it maintained that it should be free to fix its own terms of trade, unless such terms were as disadvantageous for its contracts partners that those terms might be regarded, in the light of the criteria set out in the *Bronner*- case, as entailing a refusal to supply.[95] The CJEU held TeliaSonera`s view was an incorrect interpretation of previous case law and that it could not be concluded that the conditions to be met in order for a refusal to supply to be established also had to be at hand when determining a margin squeeze case. [96] If the conditions established in the *Bronner*- case were to be applied to margin squeeze cases this would, according to the CJEU, unduly reduce the effectiveness of Article 102 TFEU.[97]

In assessing whether TeliaSonera`s pricing practice was likely to hinder as efficient competitors to operate on the market the CJEU held that it was necessary for the referring court to take into consideration all the specific circumstances of the case.[98] In order for a margin squeeze to be regarded abusive, at least potential anti- competitive effects would have to be found. In order for the margin squeeze to be classified as an exclusionary practice, as efficient competitors penetration of the market had be, at least, more difficult due to the margin squeeze.[99]

The Court held that two factors were to be particularly considered when assessing the anti- competitive effects of the margin squeeze. First, the functional relationship between the wholesale- and resale product should be considered. In this assessment CJEU held that the question whether the product was indispensable may be of relevance.[100] It also stated that at least potentially anti- competitive effects of the margin squeeze were probable when access to the wholesale product was indispensable for the sale of the retail product.[101] However, it held that, taking into account the dominant position of the undertaking concerned, it could not be ruled out that, simply by the reason that the wholesale product was not indispensable; a margin squeeze was not able to produce any potential anti- competitive effect on the concerned markets.[102] Second, it was considered necessary to determine the level of the margin squeeze in relation to as efficient competitors. When the level of the squeeze was negative, the CJEU considered an exclusionary effect to be probable. This because, in such situation, an as efficient competitor, or even a more efficient competitor, may be compelled to operate at a loss. The CJEU stated that in the absence of a negative squeeze, anti- competitive effects could still be present. However, in case of positive margins it had to be demonstrated that the pricing practice was likely to

[95] Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, para. 54.
[96] Ibid. paras. 54 ff.
[97] Ibid. para. 58.
[98] Ibid. para. 68.
[99] Ibid. paras 66 f.
[100] Ibid. paras. 67 ff.
[101] Ibid. paras. 70 f.
[102] Ibid. para.72.

bring the consequence that it would be, at least, more difficult for the operators concerned to trade on the market.[103]

The CJEU further stressed that, even if anti- competitive effects were at hand, the dominator still possessed the liberty to demonstrate that it's pricing was objectively justified. This would be the case if the negative effects caused by the pricing practice were offset by advantages in terms of efficiency benefiting consumers.[104]

3.6.4 The judgment of the Stockholm District Court

The Stockholm District Court in its judgment[105] of 2 December 2011 applied the preliminary ruling from the CJEU when determining the circumstances of the *TeliaSonera*- case. The judgment by the Stockholm District Court has, at the time of writing, been appealed[106] to and is still pending in the Swedish Market Court[107].

When assessing the anti- competitive effects of the margin squeeze the Stockholm District Court made the following considerations. According to what had been held by the CJEU it stressed that the anti- competitive effects should relate to the possible barriers for competitors to enter the market. The anti- competitive effects did not have to be concrete, it was thus enough to show potential effects on as efficient competitors to be present. When assessing the anti- competitive effects on as efficient competitors due to the margin squeeze undertaken by TeliaSonera, all circumstances of the case were to be regarded.[108]

In cases where the upstream input was regarded indispensable for operation on the downstream market, an anti- competitive effect was considered probable.[109] Regarding this issue the Stockholm District Court held that the circumstances in the *TeliaSonera*- case pointed towards that the input at issue would be regarded as indispensable in the sense provided by the CJEU. In order to deliver services to end- users, access to certain infrastructure was necessary. Other alternative techniques to TeliaSonera`s infrastructure were not regarded to constitute credible, probable or effective substitutes for operating on the market. These circumstances were,

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[103] Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, paras. 73 f.

[104] Ibid. paras. 75 f.

[105] *TeliaSonera v Konkurrensverket, Tele 2 AB*, Case no. T 31862- 04, 2 December 2011.

[106] A 8/11, TeliaSonera AB v Konkurrensverket, 2011-12-29.

[107] In Swedish: Marknadsdomstolen.

[108] *TeliaSonera v Konkurrensverket, Tele 2 AB*, Case no. T 31862- 04, 2 December 2011, p. 78 and Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, paras. 62, 64 f., 67 f.

[109] *TeliaSonera v Konkurrensverket, Tele 2 AB*, Case no. T 31862- 04, 2 December 2011, p. 78 and Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, paras. 70 f.

according to the court, factors implying that the infrastructure at issue was to be regarded indispensable. However, the Stockholm District Court did not consider it necessary to further determine if the infrastructure was actually indispensable for operating on the downstream market, this according to the special circumstances of the case.[110] The Stockholm District Court stated that even if TeliaSonera`s infrastructure was not considered indispensable, anti- competitive effects were still able to be present in the case.[111]

The court held that it was necessary to assess the level of the margin squeeze to as efficient competitors. Where the margin was negative, anti-competitive effects were, according to the ruling of the CJEU, probable.[112] The Stockholm District Court found that it was established that the margin squeeze at issue created negative margins. Applying the CJEU- principle, it was thus considered probable for potential anti- competitive effects to be present. According to the court the evidentiary for the finding of a squeeze though had to be put at a higher level than what was held by the CJEU; a probable anti- competitive effect would thus not be enough. The court therefore valued the other evidence that had been put forward in the case in terms of anti- competitive effects.[113] The squeeze in the case was considered to also have created positive margins that made it impossible to cover the costs for as efficient competitors. Regarding the positive margins it was necessary that the pricing did, at least, make it more difficult for as efficient competitors to operate on the relevant market.[114]

When determining if there were concrete anti- competitive effects resulting from the squeeze, the Stockholm District Court made an assessment from two standing points. First, in terms of the effects the squeeze have had on the development of the market at large; and second, in terms of the specific information on how independent competitors ability to offer services on the market had been affected by the squeeze. The situation in the case was compared to a scenario were no margin squeeze had taken place on the market.[115] The court considered that there where convincing evidence proving the existence of concrete anti- competitive effects. The margin squeeze was not considered objectively justified in the sense that the anti-competitive effects were offset by efficiency benefitting customers.[116]

[110] *TeliaSonera v Konkurrensverket, Tele 2 AB*, Case no. T 31862- 04, 2 December 2011, pp. 78 f.
[111] Ibid. p. 79 and Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, para. 72.
[112] Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, para. 73.
[113] *TeliaSonera v Konkurrensverket, Tele 2 AB*, Case no. T 31862- 04, 2 December 2011, pp.78 f.
[114] Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, para. 74.
[115] *TeliaSonera v Konkurrensverket, Tele 2 AB*, Case no. T 31862- 04, 2 December 2011, p. 80.
[116] Ibid. pp. 84 f.

4 Margin squeeze and refusal to supply in US antitrust law

4.1 Unilateral conducts and monopolisation

Unilateral conducts may be assessed as anti- competitive under Section 2 in the Sherman Act, which declares that conducts consisting of monopolisation or the attempt to monopolise will be condemned. However, in order to violate the provision the monopoly undertaking must have engaged in:

"(...) the wilful acquisition or maintenance of (monopoly) power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident".[117]

In the *Copperweld Corp*- case[118] the Supreme Court further explained that because in may sometimes be hard to distinguish robust competition from conduct with long anti- competitive effects, the Sherman Act shall only condemn actions by firms that poses an authentic danger of monopolisation. When judging unilateral conducts in this manner, the risk of antitrust law dampening the competitive zeal of single aggressive entrepreneurs decreases. Condemning unilateral conducts under US antitrust law will thus only occur in a restricted manner, which encompasses the balance between safeguarding competition on the market and governing the dominator`s freedom and incentives to invest and innovate. The rationale behind this view in US law is that since a single producer may, due to its superior skill, be the survivor out of a group of competitors, the successful competitor, which has been forced to compete, should not be turned upon when it wins.[119]

Regarding monopolies US antitrust law may be described to focus on the structure of the market as it addresses market power and strives to inject greater efficiency and competition on the market. The antitrust goal is to bring greater consumer welfare by encroaching structural changes in the market and maintaining consumer choices by preventing excessive concentration due to anti- competitive acts.[120]

[117] US v Grinnell Corp 384 US 563, 570-71 (1966).
[118] Copperweld Corp v Independent Tube Corp 467 US 752 104 S Ct 2731 (1984).
[119] United States v Aluminium Co of Am, 148 F 2d 416 (2d Cir 1945), L. Hand, J.
[120] E. Buttigieg, *Competition Law: Safeguarding the Consumer Interest,* Kluwer Law International, The Netherlands, 2009, p. 157.

4.2 Important US case law

In US antitrust law margin squeeze was recognized as a stand-alone abuse for more than half a century, from the determination of the *Alcoa*- case until the recent judgment in *linkLine*. After the *linkLine* decision it does, however, no longer seem possible to regard margin squeeze as a stand-alone violation. Instead the criteria for refusal to supply- and predatory pricing abuses are applicable when determining margin squeeze cases and needs to be fulfilled in order for such an abuse to be present.

Regarding refusal to supply and the essential facilities doctrine, US antitrust law has treated refusal to supply with caution by putting the possibility to condemn such conduct within strict limits. In terms of the essential facilities doctrine, even if it was born within the US jurisprudence, the US Supreme Court has not recognised it. The current narrow approach towards refusal to supply and the essential facilities doctrine in US antitrust law follows from the judgment in the *Trinko*- case, which, together with other cases of importance to the US approach towards margin squeeze, will be further investigated below.

4.2.1 Alcoa

A margin squeeze action was recognised for the first time in 1945 by the judgment of the Court of Appeals for the Second Circuit in the *Alcoa*- case[121]. The case concerned Alcoa`s monopoly production of virgin aluminium ingot in the US. The virgin aluminium ingot was supplied to manufacturers that produced sheet aluminium, a downstream market where also Alcoa was present. It should be noted that the circumstances in this case show certain similarities to the EU- cases *Napier Brown*- and *Industries des Poudres Sphériques,* discussed above. In the present case, Alcoa was claimed to sell its ingot at a price so high that:

"(...) the "sheet rollers", who were forced to buy from it, could not pay the expenses of "rolling" the "sheet" and make a living profit out of the price at which Alcoa itself sold "sheet"."[122]

A margin squeeze was considered able to, in itself, constitute a monopoly offence under Section 2 in the Sherman Act in cases where there was evidence of intent. The Court stated that:

" (...) to set the price of "sheet" so low and hold the price of ingot so high, seems to us unquestionable, provided (...) that on this record the price of the ingot must be regarded higher than a "fair price"."[123]

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[121] United States v Aluminium Co of Am, 148 F 2d 416 (2d Cir 1945).
[122] Ibid. p. 437.
[123] Ibid. p. 438.

In the case it was thus held that a margin squeeze will constitute an infringement of Section 2 in the Sherman Act when: (i) the vertically integrated firm holds monopoly power on the upstream market; (ii) the upstream price is higher than a "fair price"; and (iii) the downstream price is so low that its competitors cannot match the price and still make a "living profit".[124]

At first the *Alcoa* judgment was accepted, but as commentators and courts later endorsed the view that the goal for antitrust law was the protection of consumers rather than, as was held in *Alcoa*, the preservation of "an organisation of industry in small units", the case was criticised for using concepts that were hard to reconcile with the goal on protection of consumer welfare, that is, a "fair price" and a "living profit" for competitors.[125]

The test that was put forward in *Alco*a may be considered to amount to a simplified form of the "as- efficient competitor test" in EU law, which has been refereed to as the "transfer price test" in US antitrust law".[126]

4.2.2 Trinko

Through the Supreme Court judgment of 2004 in the *Trinko*- case[127], a new way of critical review of margin squeezes was established.[128] *Trinko* concerned a refusal to supply action and not a margin squeeze claim, however, as will be seen in the *linkLine*- case below, the reasoning in *Trinko* was considered to also apply to margin squeeze cases. The case establishes a narrow concept of duty to supply were a refusal only would infringe anti trust law under exceptional circumstances.

In the present case, Trinko a local telecommunications service customer of AT & T, sued Verizon for raising the costs of AT & T, Verizon`s rival in the market for local telecommunications services. Of importance was that the case took place in the regulated telecommunications industry, where authority was already establishing the conditions under which the incumbent local telephone company had to share its network with new entrants. The Supreme Court determined that Section 2 of the Sherman Act would not represent a further source, in addition to what was regulated, of the dominators duty to supply its competitors. The Supreme Court stressed that:

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[124] United States v Aluminium Co of Am, 148 F 2d 416 (2d Cir 1945), pp. 437- 448.
[125] G. Faella & R. Pardolesi, *Squeezing Price Squeeze under EC Antitrust Law,* 6(1) ECJ, 255- 284, 2010, p. 260.
[126] E.N. Hovenkamp & H. Hovenkamp, *The Viability of Antitrust Price squeeze Claims,* 51 Arizona Law Review, 273, 2009, pp. 274 f. and Pacific Bell telephone Co. v. linkLine Communications, Inc. 555 U.S. 07-512 (2009), p. 14.
[127] Verizon Communications Inc, Petitioner v Law Offices of Curtis v Trinko, LLP, 540 US 398, 407 (2004).
[128] G. Faella & R. Pardolesi, *Squeezing Price Squeeze under EC Antitrust Law,* 6(1) ECJ, 255- 284, 2010, p. 260.

"Firms may acquire monopoly power by establishing an infrastructure that render them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law since, it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."[129]

In the light of the earlier case *Aspen Skiing*[130], the Supreme Court stated that an exemption to the principle of contractual freedom might only exist when there is a previous course of dealing and the dominant firm charges the terms of the relationship in a way that disadvantages its rival:

"the high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified (...) Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2."[131]

The Supreme Court avoided stating a broader interpretation of the *Aspen Skiing*- case and its requirements, which it claimed to set the outer boundary of Section 2 liability. In *Aspen Skiing* the following three circumstances were requirements for an obligation to supply to be present: (i) the termination of a previous business relationship; (ii) harm to competition as such; and (iii) absence of any business justification.[132]

The Supreme Court concluded that Verizon`s insufficient assistance in the service to rivals was not a recognized antitrust claim under the existing refusal to deal precedents. It was held that firms, which are under no antitrust duty to deal with its rivals, are under no obligation to provide those rivals with a "sufficient" level of service.[133] According to the Court, this conclusion would not change even if the "essential facilities" doctrine, crafted by the lower Courts, would be considered. The Supreme Court regarding the doctrine stated that:

"We have never recognized such a doctrine and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the "essential facilities"; where access exits, the doctrine serves no purpose."[134]

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[129] Verzion Communications Inc, Petitioner v Law Offices of Curtis v Trinko, LLP, 540 US 398, 407 (2004), pp. 7 f.

[130] Aspen Skiing Co. v. Aspen Highlands Skiining Corp., 472 U.S. 585 (1985). In the case the owner of three of four ski areas in Aspen made it less favourable for the owner of the fourth ski area to continue a joint lift ticket agreement, which amounted to a refusal to continue the joint venture.

[131] Verzion Communications Inc, Petitioner v Law Offices of Curtis v Trinko, LLP, 540 US 398, 407 (2004), p. 8.

[132] A. Candeub, *Trinko and Re- Grounding the Refusal to Deal Doctrine,* 66 University of Pittsburgh Law Review, 821, 2005, pp. 827 f.

[133] Ibid. p. 11.

[134] Ibid.

It was, according to the above stated, considered unnecessary to impose a judicial doctrine of forced access. An dominant undertaking would thus, according to the *Trinko* judgment, only be obliged to share its proprietary input if the following two conditions were met: (i) the market in question cannot be realistically capable of producing this input; (ii) the dominant firm had already full developed and marketed the claimed input.[135]

4.2.3 linkLine

Prior the *linkLine*- case[136] the US Courts of Appeals analysed a number of different margin squeeze claims in the sector of telecommunications. Even if the facts of the cases were similar, the Courts reached conflicting conclusions regarding the admissibility of price squeeze claims in cases where there was no antitrust duty to deal.[137] In this sense the *linkLine*- case provided the Supreme Court with the opportunity to clarify the law of price squeezes.[138] The circumstances *linkLine* shares many similarities with the EU- cases, *Deutsche Telekom*, *Telefónica* and *TeliaSonera*, as it relates to the local loop unbundling under the Telecommunications Act of 1996.[139]

In the case linkLine provided downstream retail DSL- services to end users and purchased DSL transport services from AT & T, which owned the local fixed telecommunications wholesale DSL network in California. Besides being the supplier of the wholesale product, AT & T was also a competitor of linkLine on the downstream market. AT &T was under a regulatory duty to deal with linkLine, enforced by the Federal Communications Commission. linkLine, along with three other ISPs claimed that AT & T had committed a violation of Section 2 of the Sherman Act by engaging in a margin squeeze that aimed at monopolising the DSL market in California.

The principal question to be determined by the Supreme Court in the case was whether a margin squeeze should be regarded as a stand-alone abuse and if it was possible to bring a price squeeze claim under Section 2 in the Sherman Act when the defendant had no antitrust duty to deal with the plaintiff. When determining the case the Supreme Court assessed the prices on the wholesale- and the retail market separately.

[135] B. Maggiolini, *Monopolists' Refusal to Deal in IP: US Courts and EU Institutions Line up along some Cultural and Jurisdictional Cleavages*, available at EPIP: www.epip.eu, accessed April 2012, p. 4.
[136] Pacific Bell Telephone Co. v. linkLine Communications, Inc. 555 U.S. 07-512 (2009).
[137] See Covad Communications Company v BellSouth Corp, 374 F 3d 1044 (11th Cir 2004); linkLine Commc´ns c Cal, Inc, 503 F 3d 876, 882-83 (9th Cir 2007); Covad Communications Company v Bell Atlantic Corp, 398 F 3d 666 (DC Cir 2005); Cavalier Telephone, LCC v Verzion Virginia, Inc, 330 F 3d 176, 190 (4th Cir 2003).
[138] G. Faella & R. Pardolesi, *Squeezing Price Squeeze under EC Antitrust Law,* 6(1) ECJ, 255- 284, 2010, p. 261.
[139] OECD, *Roundtable of Margin Squeeze,* DAF/COMP (2009) 36, available at OECD: www.oecd.org/dataoecd/30/17/46048803.pdf, accessed April 2012, p. 24.

Regarding the wholesale market the Court held, in the light of *Trinko*, that an integrated monopolist that has no obligation to deal on the wholesale market would be under no obligation to deal under terms and conditions favourable to its competitors.[140]

"If AT & T had simply stopped providing the DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act. Under these circumstances, AT & T was not required to offer this service at the wholesale prices the plaintiffs would have preferred."[141]

When assessing the price on the downstream market the Court held that, in the light of the *Brooke Group*- case[142], the price charged by an integrated monopolist will be considered unlawful only in circumstances when: (i) the price is below an appropriate cost measure; and (ii) there is a dangerous probability that the defendant will be able to recoup its losses caused by the below- cost pricing. The Supreme Court held:

"Recognizing a price squeeze claim where the defendant`s retail price remains above cost would invite the precise harm we sought to avoid in Brooke Group: Firm might raise their retail prices or refrain from aggressive price competition to avoid potential antitrust liability."[143]

It was concluded that just the spread between the wholesale and retail prices was not enough in order for a margin squeeze to be considered an anti-competitive violation.

"if (...) both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm`s wholesale price happens to be greater than or equal to its retail prices".[144]

In cases when the integrated monopolist was under no duty to supply at the wholesale level and there was no unfair pricing at the retail level, the undertaking would thus not be required to price both of its services in a manner that perceives its rivals' profit margins.[145] The Supreme Court stated that it was complicated enough just to assess an anti- competitive conduct on one level and held that:

"Recognizing price squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. And courts would be aiming at a moving target, since it is the interaction between these two prices that may result in a squeeze.

[140] Pacific Bell Telephone Co. v. linkLine Communications, Inc. 555 U.S. 07-512 (2009).
[141] Ibid. p. 10.
[142] Brooke Group Ltd. V. Brown & Williamsson Tobacco Corp, 509 U.S. 209 (1998), pp. 222 ff.
[143] Pacific Bell Telephone Co. v. linkLine Communications, Inc. 555 U.S. 07-512 (2009), p. 11.
[144] Ibid. p. 15.
[145] Ibid. p. 12.

Perhaps most troubling, firms that seek to void price squeeze liability will have no safe harbour for their pricing practices."[146]

To assess two price levels in relation to another was, according to this, considered to complicated and uncertain to be a subject of determination by the courts. An unfair or inadequate margin in itself was thus not considered to be able to violate Section 2 in the Sherman Act.

[146] Pacific Bell Telephone Co. v. linkLine Communications, Inc. 555 U.S. 07-512 (2009), p. 13.

5 Analysis and policy discussion

In this analysis and policy discussion, margin squeeze will be considered in relation to the following questions, first, the differences and similarities between margin squeeze and refusal to supply will be analysed. After this, the approaches of regarding margin squeeze as a form of constructive refusal to supply and an abusive conduct in itself, respectively, will be considered. Finally, the importance of the indispensable input element in margin squeezes cases will be discussed.

5.1 Differences and similarities between margin squeeze and refusal to supply

The rationale behind this part of the analysis is that similar subjects should be treated equally, whereas diverse subjects should be treated in different manners. To analyse how similar, or dissimilar, margin squeeze and refusal to deal are, will provide a tool for further discussion on whether the two conducts should be considered under the same antitrust assessment and if the same elements should be of importance when determining the conducts. This view corresponds with the holding that competition law should treat economically- equivalent action in an identical manner.[147] Primarily the goals of protection and the effects and incitements behind engaging in a refusal to supply and a margin squeeze, respectively, will be compared in this part of the analysis.

As a starting point, there is definitely a strong link between margin squeeze- and refusal to supply abuses. The conducts are likely to occur under similar circumstances where a vertically integrated dominant undertaking controls an input or product upstream, which is of importance for competitors' ability to operate downstream, for example, an essential facility. The two conducts though consists of different actions undertaken by the dominant undertaking, which are, refusing the supply of the input in its entirety, and squeezing the margins between the prices charged on different levels of production. For the competitors purchasing the input these actions may, however, amount to the same result, as both conducts will make it impossible, or harder, for competitors to offer their downstream products to customers on the retail market in a profitable way.

In brief, the goals behind competition law, as it prohibits and restricts certain exclusionary conducts, are the protection of effective competition on the market and the preservation of consumer welfare. These goals are

[147] OECD, *Roundtable on Margin Squeeze,* DAF/COMP(2009)36, available at OECD: www.oecd.org/dataoecd/30/17/46048803.pdf, accessed April 2012, p. 29.

present in both EU- and US competition law, but perhaps promoted in different ways. Both EU- and US law are primarily concerned with preserving competition on the merits within the market and a try to restrict conducts that prevent such beneficial competition. In EU competition law, attracting and keeping competitors in the market is important when protecting competition. The US approach, on the other hand, focuses more on protecting the incentives that the dominator itself has to compete effectively, for example, to invest in technology and infrastructure and to cut retail prices.[148] These different approaches result in diverse manners of treating margin squeeze as a competition law offence. In US law, the narrow application of refusal to supply will also limit the scope for margin squeeze violations, whereas, in EU law, the strict criteria for a refusal to supply will not necessarily apply to margin squeeze cases.

Both margin squeeze and refusal to supply may be claimed to create similar anti- competitive effects, which are the elimination or reduction of competition and competitors on the downstream market. Even if a margin squeeze will not always eliminate competitors from the downstream market, the squeeze will probably prevent them from improving their business due to lost revenues. Certainly, margin squeeze may hinder rivals from integrating upstream into the dominators primary market. This negative effect is of importance since, if competitors were able to develop their own upstream infrastructure through the means they gained from operating on the downstream market, the bottleneck problem would possibly disappear. The effects of a margin squeeze thus prevent competitors from gaining enough revenues and downstream market shares in order to make such investments, which brings the result of a *status quo*- situation.[149] The same rationale will probably also apply in refusal to deal cases, as lost revenues will decrease the possibilities for competitors' investments.

Both margin squeeze and refusal to supply also brings the effect of an over all reduced level of competition on the downstream market, which may result in high product prices and poor product quality to the detriment of consumers. Regarding this aspect it has been stressed that; when the maximisation of consumer welfare is the sole objective of competition law, just the reduction of competition on the market may not bee seen as a problem, as far as, it does not result in an overall reduction in consumer welfare.[150] This is a consideration certainly regarded in US antitrust law. On the other hand, which may be regarded to a larger extent within EU competition law, loss of competitors on the market will most likely impair

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[148] N. Dunne, *Margin Squeeze: Theory, Practice, Policy,* Prepared for EUSA Conference, 3- 5 March 2011, available at EUCE: http://euce.org/eusa/2011/browse.php?sort=author, accessed February 2012, p. 31.
[149] E.N. Hovenkamp & H. Hovenkamp, *The Viability of Antitrust Price Squeeze Claims,* 51 Arizona Law Review, 273, 2009, p. 287.
[150] OECD, *Roundtable on Margin Squeeze,* DAF/COMP(2009)36, available at OECD: www.oecd.org/dataoecd/30/17/46048803.pdf, accessed April 2012, p. 27.

the proper functioning of the market mechanism and will threaten the welfare of consumers.[151]

It has been claimed, especially in the US doctrine, that margin squeeze may not bring any harmful anti- competitive effects to the market and that it only possess the effect of diminishing competitors' profits. Sidak has criticised the view of margin squeeze being an antitrust violation as constituting an antitrust rule that punishes a firm from failing to ensure its competitors profitability.[152] The view of margin squeeze as not bringing harmful effects, but rather being a way of operating profitably on the market, is also present in US case law. In *linkLine* the Supreme Court stated that an undertaking must not be required to price both of its services in a manner that perceived its rivals' profit margins.[153] In the case it was though agreed that margin squeeze may give raise to effects that will harm competition, however, the Court held that it was not possible to identify any independent competitive harm caused by a margin squeeze above and beyond the harm that would result from a refusal to supply violation.[154] In his preliminary ruling in *TeliaSonera* Mazák, in line with the considerations above, held that EU-case law had established that the effect of an abusive refusal to supply was the elimination of competition in the downstream market and that precisely the same concern would arise in margin squeeze cases. No independent competitive harm caused by a margin squeeze, except that which would arise from a refusal to supply violation, was thus considered possible to occur.[155]

Whereas a margin squeeze may eliminate or reduce the number of competitors from the downstream market during an extracted process, a refusal to supply is probably possible to bring a more immediate effect on competitors since it stops the supply of the essential input in its entirety. The effect of the conducts in terms of reduction and exclusion of competitors may thus arise in a different way in margin squeeze- and refusal to deal cases, in the sense that a refusal to supply will be likely to bring anti-competitive effects in a more direct manner. According to the reasoning above, it is hard to imagine that a margin squeeze would be possible to result in more severe anti- competitive effects than a refusal to supply when undertaken under the same conditions.

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[151] N. Dunne, *Margin Squeeze: Theory, Practice, Policy,* Prepared for EUSA Conference, 3- 5 March 2011, available at EUCE: http://euce.org/eusa/2011/browse.php?sort=author, accessed February 2012, p. 4.
[152] J.G. Sidak, *Abolishing the Price Squeeze as a Theory of Antitrust Liability,* 4(2) J. Comp. & Econ. 279 2008, p. 294.
[153] Pacific Bell Telephone Co. v. linkLine Communications, Inc. 555 U.S. 07-512 (2009), p. 12.
[154] Ibid. p. 15.
[155] Case C-52/09, *Opinion of Advocate General Mazák, Konkurrensverket v TeliaSonera AB,* 2 September 2010, not yet reported, para. 16.

The issue on the incentives for a dominator to engage in a margin squeeze has not received much attention in decisional practice and case law.[156] However, the incentives to engage in a margin squeeze, as in a refusal to supply, will probably consist in the expected effect of such conduct, that is, the reduction or elimination of competitors and competition on the market, with the purpose to attain greater revenues from sales on the downstream level. The unusual feature of a margin squeeze is that the competitors of the dominator on the downstream level are also its customers on the upstream level. According to this structure it has been held that a margin squeeze is seldom a rationale strategy for an integrated undertaking to gain revenues, and that the incentives to engage in such conduct therefore are limited. Even in cases when a margin squeeze results in the gain of more customers on the retail level due to the exclusion of rivals, it will probably also result in lost profits on the wholesale level due to a reduced number of customers.[157] Whereas the incentives to engage in a margin squeeze may be reduced according to such consequences, this does not mean that it is always an irrational strategy. It is thus necessary to assess whether a margin squeeze strategy in a certain case is successful according to the market settings at issue.

The determining factor for if a dominant undertaking will have an economically rational incentive to engage in a squeeze is whether the reduction of demand for the dominant undertaking`s products upstream is off- set by additional volumes downstream.[158] The same rationale regarding the incentives will probably also apply to refusal to deal cases were the dominator is vertically integrated and its competitors on the downstream market is also its customers (or potential customers) on the wholesale market. However, since a refusal to supply is different in the manner that it stops the supply to the competitor in its entirety, more additional volumes downstream need to be generated in order to offset the reduced sales to customers of the upstream input. This will probably further reduce the incitements to engage in a refusal to supply under such conditions. But, as stated above, this will, in the end, depend on the structure of the market and the potential revenues of sales on each level respectively.

Another issue that has been stressed to constitute a disincentive for an undertaking to engage in a margin squeeze is the fear of regulation by authorities. When a dominator squeezes margins to a noticeable extent the risk of authorities regulating its behaviour will increase, since this may be a necessary implication in order to attain effective competition on the market. This threat thus serves as a disincentive for vertically integrated

[156] D. Geradine & R. O´Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector,* 1(2) J. Comp. L. & Econ. 355- 425, 2005, p. 363.
[157] DW. Carlton, *Should "Price Squeeze" be a Recognized form of Anticompetitive Conduct?,* 4(2) J. Comp. L. & Econ. 271, 2008, p. 275.
[158] D. Geradine & R. O´Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector,* 1(2) J. Comp. L. & Econ. 355- 425, 2005, p. 364.

undertakings to exploit its positions.[159] Because authorities may also regulate the terms of trade by imposing an obligation to supply on the dominator, this disincentive will also appear in refusal to supply cases.

The incentives to engage in a margin squeeze and a refusal to supply that occur in a situation when the dominator is vertically integrated will, according to the above stated, most likely be similar. However, since the incentives are depending on the effects of the conduct and the structure of the market, the certain conditions of the case will be decisive for the dominators strategy of operation. If the dominator has a greater incentive to engage in a margin squeeze or a refusal to supply respectively, thus depends on the possible revenues on each level and to what an extent these eventual incomes may be offset by the other. Since a margin squeeze is considered unlikely to bring more severe anti- competitive effects than a refusal to supply, it does seem unmotivated to restrict it to a greater extent. On the other hand, because it may create as anti- competitive effects and it is governed under the same goals of protection in competition law, it appears necessary to provide the ability to intervene in and restrict margin squeeze to the same extent as a refusal to supply abuse.

5.2 Margin squeeze, a form of refusal to supply or an abusive conduct in itself?

The approaches towards margin squeeze in EU- and US competition law are diverging. Whereas the CJEU acknowledge margin squeeze as a stand alone abuse independent from refusal to supply, the US Supreme Court only considers margin squeeze as an anti- competitive behaviour if there is both an obligation to supply at the wholesale level and anti- competitive pricing on the downstream level, thus the conducts on both levels have to be demonstrated to violate antitrust law individually.

Viewing margin squeeze as a form of refusal to supply is supported by the idea that a margin squeeze undertaken by a dominator in fact constitutes a constructive way of refusing competitors it`s input. The conducts in this sense thus represent two sides of the same coin. This view is definitely promoted in the *Trinko*- and *linkLine* judgments and is also in line with Advocate General Mazák`s opinion in the *TeliaSonera*- case. When assessing margin squeeze under this kind of refusal to supply analysis, the "unfair" spread between the costs on the wholesale- and resale level will not in itself be regarded sufficient in order to give rise to a competition law infringement. Since this view requires both the prices on the wholesale- and retail market to be independently incompatible with competition law, or/ and the criteria for a refusal to supply abuse to be present on the wholesale

[159] D. Geradine & R. O´Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector,* 1(2) J. Comp. L. & Econ. 355- 425, 2005, p. 364.

level, it creates a limited scope of antitrust intervention in margin squeeze cases.

However, a narrow application of antitrust intervention in margin squeeze cases seems to be in line with the prevailing concerns on implying a far-reaching approach towards refusal to supply. This concern springs from the view that, forcing an undertaking to supply a product to its competitors will conflict with the deep stated principle of freedom of contracts. Both EU- and US law acknowledge that the ability for competition law to intervene, in terms of implying an obligation to supply on a dominator, must be put within strict limits. Therefore a refusal to supply will, according to both jurisdictions, only be considered abusive if certain criteria are at hand. Because of the similarities between refusal to supply and margin squeeze, that have been stressed above, it seem illogical not to regard the latter within the same strict limits in terms of applying similar narrow criteria to it.

The view of a margin squeeze as an independent abuse distinct from a refusal to supply has been established and confirmed in recent EU- case law. The possibility of assessing margin squeeze as an abusive conduct in itself was put forward for the time in the *Deutsche Telekom-* case[160]. The rationale behind such reasoning is that the very existence of a price practice that leads to a squeeze of as efficient competitors and brings at least potential anti-competitive effects can constitute an abusive conduct.[161] Regarding margin squeeze as an independent form of abuse thus, not only makes it possible to assess each price level separately, but also to take into account the spread between the price levels and therefore encompass the dominant undertaking`s ability to engage in vertical leveraging.[162] The CJEU in its preliminary ruling of *TeliaSonera* stated that when regarding margin squeeze as a stand alone abuse, all circumstances in the case are do be investigated in order to determine if the practice causes anti- competitive effects, potential or concrete. It was particularly important to determine the functional relationship of the wholesale- and retail products, as well as, the level of margin squeeze for as efficient competitors as the dominator.[163]

In EU case law the "as efficient competitor test" has been the most used in order to assess the severity of a margin squeeze. However, to determine and measure if the spread between the wholesale- and retail prices is "unfair", "inappropriate" or "disproportionate" might be an issue, both in an

[160] Case C- 280.08 P, *Deutsche Telekom AG v Commission*, 14 October 2010, not yet reported, para. 183.
[161] Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, para. 61, 64 and Case C- 280.08 P, *Deutsche Telekom AG v Commission*, 14 October 2010, not yet reported, paras. 250 f.
[162] N. Economides, *Vertical Leverage and the Sacrifice Principle: Why the Supreme Court got Trinko Wrong,* 61 NYU Annual Serve of American Law, 379, 2005, p. 381.
[163] Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, paras. 68 ff.

objective- and efficient way.[164] The US Supreme Court in *linkLine* highlights the danger of attempting to assess a "moving target" i.e. the margin between the wholesale- and retail costs.[165] Such a determination was dismissed primarily since it was considered to cause administrative concerns, as well as, the problem of making a reliable assessment in such determination. On the other hand, though it concerns a complicated calculation, it may be necessary to have the ability to determine a margin squeeze abusive only because of the spread of the cost levels in order stop harmful effects on competition. A clear and consistent practice from case law regarding such calculation will probably restrict such difficulties and make it possible to accomplish a reliable assessment.

When margin squeeze is regarded a stand-alone abuse and the refusal to supply criteria are not applicable, a situation may arise were the dominant undertaking have to offer it`s input at a certain price but may, on the other hand, refuse the entire supply of the product without the risk of infringing competition. In such situation the criteria for a refusal to supply are not at hand, whereas, the less strict criteria in order for an abusive margin squeeze to be present, are fulfilled.[166] A further reaching antitrust intervention in margin squeeze cases than in refusal to deal cases may in this sense lead to increased incentives to instead stop supplying the input to other operators in its entirety, or even to exit the downstream market. To exit the downstream market in such a case may seem motivated for the dominant undertaking in order to avoid the exposure of margin squeeze claims.[167]

Some Scholars claims that it is too extensive to punish a dominant undertaking for having supplied an input under conditions that did not allow its rivals to operate profitably on the resale market.[168] Competition law intervening to a far extent in an undertakings freedom to set its own prices and terms of conditions may also be claimed to protect competitors rather than customers. This consideration was put forward as a crucial one by Jacobs in the *Bronner*- case. However, since refusal to supply is constructed narrowly in both EU- and US antitrust law, a margin squeeze regarded under the same rationale will be a restricted one. According to the CJEU in the *TeliaSonera*- case applying the refusal to supply criteria to margin squeeze cases would result in an unduly reduced effectiveness of competition law to intervene in such cases.[169] Non- effective competition

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[164] N. Dunne, *Margin Squeeze: Theory, Practice, Policy,* Prepared for EUSA Conference, 3- 5 March 2011, available at EUCE: http://euce.org/eusa/2011/browse.php?sort=author, accessed February 2012, p. 7.
[165] Pacific Bell Telephone Co. v. linkLine Communications, Inc. 555 U.S. 07-512 (2009), p. 18.
[166] Case C-52/09, *Opinion of Advocate General Mazák, Konkurrensverket v TeliaSonera AB,* 2 September 2010, not yet reported, para. 21.
[167] G. Faella & R. Pardolesi, *Squeezing Price Squeeze under EC Antitrust Law,* 6(1) ECJ, 255- 284, 2010, p. 265.
[168] I. a. R. O`Donoghue & AJ. Padilla, *The Law and Economics of Article 82 EC*, Oxford Hart Publishing 2006, pp. 326 f.
[169] Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, para. 58.

prohibitions may lead to problems in terms of the protection of consumer welfare and the preservation competition on the market.

The balance that has to be regarded when considering margin squeeze as an independent abuse and a form of refusal to supply respectively, is thus that a to far interference in undertakings` operation on the market may be regarded to protect competitors rather than consumers and reducing the incentives and freedom of dominators,[170] on the other hand the ability for competition law to intervene an prohibit and restrict exclusionary conducts is necessary in order to maintain efficient- and sound competition on the market.

5.3 The importance of the indispensable input element in margin squeeze cases

The element of an indispensable input, such as an essential facility, is indeed of importance when determining a refusal to supply case. Such finding is, as mentioned above, one of the cumulative criteria, set out in the *Bronner*- case*,* that have to be present in order for a refusal to supply to be regarded abusive. When considering margin squeeze as a constructive refusal to supply, the same cumulative criteria will also be essential when determining a margin squeeze case. However, since EU case law recognizes margin squeeze as an independent abuse from refusal to supply, the role of the *Bronner* criteria is not as clear in such kind of determination. The question is what elements that are of importance, and to what an extent, when regarding margin squeeze as an abusive conduct in itself. This part of the analysis thus focuses on discussing the importance of the indispensable input element in margin squeeze cases.

When looking at EU- case law it is recognisable that the view towards margin squeeze has changed from being considered as a form of refusal to supply to instead being considered as an independent abusive conduct in recent case law. In US antitrust law, the development has instead been the opposite. Under the US approach, according to the *linkLine* judgment, the same strict criteria that were of importance for a finding of a refusal to supply in the *Trinko*- case will also be applicable when determining a margin squeeze action. The scope under which a margin squeeze may be regarded as an antirust violation is thus a most narrow one.

The issue on whether the input on the wholesale market is necessary in order to operate on the downstream market has been considered, more or less explicitly, in all EU- cases on margin squeeze that has been subject for investigation in this thesis. The indispensable input element has though not been assessed in the same manner in all of those cases. After the point that EU- case law started to assess margin squeeze as an independent abuse, it may be observed that the assessment of the indispensable input element has

[170] J.G. Sidak, *Abolishing the Price Squeeze as a Theory of Antitrust Liability,* 4(2) J. Comp. & Econ. 279 2008, p. 294.

developed and changed. This tendency becomes clear when studying the *TeliaSonera*- case, were the CJEU held that the finding of an indispensable input was not a requirement for the presence of an abusive margin squeeze.[171] In EU margin squeeze cases prior *Deutsche Telekom*, *Telefónic*a and *TeliaSonera* it does not seem completely clear whether the vertically integrated firm must possess an indispensable input in order for the conduct to be abusive.[172] For example, in *Napier Brown* there were considered to be alternative sources of supply from imports, even if these were not considered fully competitive alternatives.[173] In the *National Carbonising*-case the dominator possessed a monopolistic position of the supply of coal, which was also the main raw material used in the downstream production. It is however not clear if a raw material was regarded as an indispensable product in the case.[174] In *Industries des Poudres Sphériques,* it was held that there were available alternatives to the input at issue and that competitors could operate using such alternatives. Even if the necessity of the input is put forward in the earlier cases, it is not obvious to what an extent the products were actually indispensable for competitors operating on the market.

When looking at the Commission Guidance[175] margin squeeze is regarded as a constructive refusal to deal. The guidance thus applies the same conditions to a margin squeeze as to a refusal to deal abuse. In para 81 of the Guidance the Commission considers a product or service that is objectively necessary to be able to compete effectively on a downstream market, to be a necessary criteria when determining the margin squeeze as abusive. This reasoning clearly differs from what was held in *Telefónica* and *TeliaSoner*a where the *Bronner*- criteria and the requirement of the presence of an indispensable product were not considered to apply to margin squeeze cases. The importance of the Guidance may thus have been altered in margin squeeze cases since it rather represents the old view of the abuse within EU law, than it coincides with recent EU case law.

In *Deutsche Telekom* the CJEU considered that there was no other infrastructure that could provide rivals with viable entry to the downstream market and that it was indispensable, however, the issue of the necessity of the finding of an indispensable input was not explicitly determined.[176] The *Deutsche Telecom*- case also differs from for example *TeliaSonera* since

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[171] Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, paras.70 ff.

[172] G. Faella & R. Pardolesi, *Squeezing Price Squeeze under EC Antitrust Law,* 6(1) ECJ, 255- 284, 2010, p. 268.

[173] Commission Decision 88/518/EEC, *Napier Brown- British Sugar*, [1988] OJ L 284/41, paras. 51 ff.

[174] Commission Decision 76/185/ECSC, *National Carbonising Company Limited,* [1976] OJ L 35/6, para. 24.

[175] 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*, OJ C 45, 24/2/2009.

[176] Case C- 280.08 P, *Deutsche Telekom AG v Commission*, 14 October 2010, not yet reported, para. 326- 327 and G. Faella & R. Pardolesi, *Squeezing Price Squeeze under EC Antitrust Law,* 6(1) ECJ, 255- 284, 2010, p. 268.

Deutsche Telekom was under a regulatory obligation to supply its input. The case is notable for stating that margin squeeze may be regarded as an abusive conduct in itself, independent from other exclusionary price abuses. It however seems like the margin squeeze in this case was to some extent assessed in terms of a refusal to supply analysis since the Bronner- criteria may be observed to be present (even if not explicitly mentioned). The same consideration may also apply to the Commission`s decision in the Telefónica case.

In *Telefónica* the Commission for the first time explicitly abandoned the view of margin squeeze being assessed under a refusal to supply approach. This change was claimed motivated due to particular circumstances in the *Telefónica*- case, which differed from the ones in *Bronner*.[177] The Commission in the case noted that the conduct would have been regarded incompatible with Article 102 TFEU regardless of the existence or non-existence of an essential facility.[178] However, though if it was not further assessed, it seems like the *Bronner* criteria were at hand in the Telefónica-case and since there was no serious alternative to Telefónica`s broadband network, it should probably have been assessed to constitute an indispensable input.[179] Even if the *Bronner* criteria were rejected in the *Telefónica*- case, Mazák in his opinion in *TeliaSonera* held that the Commission had used a kind of *Bronner*- analysis when assessing *Telefónica*.[180] According to this, even if the Bronner criteria were not considered to apply to the case at issue, the same criteria may, in any case, have been regarded. Since the court did not further assess the criteria it is hard to determine to what an extent they were playing an important role for the determination. The question is, as also seems to be the opinion of Mazák, whether the Commission took a "shortcut" when assessing *Telefónica* as it did not considered the Bronner criteria but still gave the criteria importance in the quiet.[181] This shortcut was probably regarded motivated since the Spanish competition regulator had already considered the balance of interests in the case when implying a regulatory obligation on Telefónica to supply it`s input. Under such circumstances it was obviously not considered necessary to further assess the indispensability of the input at issue. It is not clear whether the *Bronner* criteria would have been assessed if the special circumstances in Telefónica had not been at hand.

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[177] Commission Decision COMP/38.784, *Wanadoo España v. Telefónica*, decision of 4 July 2007, para.302 and F. Diez Estella, *Jurisprudence of the EUJC on margin squeeze: from Deutsche Telekom to TeliaSonera and beyond… to Telefónica!,* available at SSRN: http://ssrn.com/abstract=1851315, accessed February 2012, p. 15.
[178] Commission Decision COMP/38.784, *Wanadoo España v. Telefónica*, decision of 4 July 2007, para. 734.
[179] F. Diez Estella, *Jurisprudence of the EUJC on margin squeeze: from Deutsche Telekom to TeliaSonera and beyond… to Telefónica!*, *!,* available at SSRN: http://ssrn.com/abstract=1851315, accessed February 2012, p. 19.
[180] Case C-52/09, *Opinion of Advocate General Mazák, Konkurrensverket v TeliaSonera AB,* 2 September 2010, not yet reported, para. 16.
[181] F. Diez Estella, *Jurisprudence of the EUJC on margin squeeze: from Deutsche Telekom to TeliaSonera and beyond… to Telefónica!*, *!,* available at SSRN: http://ssrn.com/abstract=1851315, accessed February 2012, p. 16.

In the recent *TeliaSonera*- case the opinions on how to assess a margin squeeze has diverged at the different stages of process in the case. It should again be noted that, in contrast to the *Telefónica* and *Deutsche Telekom*- cases, TeliaSonera was under no regulatory obligation to supply its input. Advocate General Mazák in his opinion considered that a margin squeeze should be treated as a refusal to supply that would only arise if the supply was indispensable or if other kinds of abuses were also involved. Mazák thus concludes that indispensability needs to be established exempt where the dominator is subject to a regulatory obligation to supply.[182] The Commission and the NCA claimed that TeliaSonera`s situation was special, just like the one of Telefónica, due to the fact that its network on the wholesale market had been developed by public funds and were not the fruit of the dominators own investment. In this sense Mazák stressed that, in line with what was held by Jacobs in the *Bronner*- case, property rights will affect the incentives to innovate and that it is not clear why a former public property should lead to a stricter legal standard than a private property. Even public property may thus have been subject for improvements and investments by the dominator controlling it.[183] Forcing a dominator to supply such input at a certain price level is in this sense possible of robbing the fruits of the dominator`s investment. Mazák's reasoning in this sense seems to be in line with the view towards margin squeeze as an antitrust violation in the US Supreme Court judgment in *linkLine*. According to the above stated it seems that it is of great importance to asses indispensable input element on a case-to-case basis.

The CJEU in its preliminary ruling of *TeliaSonera*, on the other hand, held that margin squeeze was to be regarded as a stand alone abuse, since if margin squeeze were merely a form of constructive refusal to supply, the Commission would need to apply the stringent refusal to supply requirements each time assessing a margin squeeze- case.[184] Such assessment was considered to "unduly reduce the effectiveness of Article 102 TFEU".[185] However, it has been held in the doctrine that it is not possible to find a coherent explanation of the statement "unduly reduced effectiveness" in the judgment.[186] It is questionable to what an extent the effectiveness of Article 102 TFEU is desirable, and where the line of unduly reduced effectiveness is drawn. In this sense the underlying considerations, regarding competition law interfering in dominators conducts on the market, must be considered. This is of course not an easy act of balance between, mostly, opposing interests.

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[182] Case C-52/09, *Opinion of Advocate General Mazák, Konkurrensverket v TeliaSonera AB,* 2 September 2010, not yet reported, para. 58.
[183] Ibid. para. 27.
[184] F. Diez Estella, *Jurisprudence of the EUJC on margin squeeze: from Deutsche Telekom to TeliaSonera and beyond… to Telefónica!*, *!,* available at SSRN: http://ssrn.com/abstract=1851315, accessed February 2012, p. 8.
[185]Case C-52/9, *Konkurrensverket v TeliaSonera,* 17 February 2011, not yet reported, para. 58.
[186] F. Diez Estella, *Jurisprudence of the EUJC on margin squeeze: from Deutsche Telekom to TeliaSonera and beyond… to Telefónica*, *!,* available at SSRN: http://ssrn.com/abstract=1851315, accessed February 2012, p. 8.

Regarding the indispensable input element the CJEU in *TeliaSonera* considered that such element might be of importance when assessing the circumstances in the case, but that it was not necessary for the determination of a margin squeeze abuse, instead all circumstances in the case were to be considered in order to determine the anti- competitive effects.[187] The CJEU, however, held that in a case where the input is indispensable, at least potential anti- competitive effects on as efficient customers are probable.[188] Under circumstances when the input was not regarded indispensable, taking into account the dominant position of the dominator, a margin squeeze was considered to still be possible to be abusive since anti- competitive effects may be produced by the conduct.[189] According to the recent judgments of the *Telefónica* cases before the General Court, and also in line with CJEU`s judgment in *TeliaSonera,* Article 102 TFEU will apply also to margin squeeze in cases where the dominator is under a regulatory obligation to supply the input, as long as there is still a scope of determination left for the dominator regarding its terms of trade.[190] In cases were the dominator is under a regulatory obligation to supply on certain terms, as for example in *Deutsche Telekom* and *Telefónica*, it may be considered that the indispensability of the input at issue has, at least to some extent, already been assessed. This consideration may probably also be the rationale behind the Commissions “shortcut” in the *Telefónica*- case. Even if CJEU in it`s preliminary ruling in *TeliaSonera* held that indispensability for the input was not a requirement for the finding of a squeeze, it is obviously an important factor and, probably even more crucial to assess in a case where the dominator has not been subject for regulation. This since the importance of the input for the competitors’ ability to operate downstream has not earlier been assessed in cases where the dominator has voluntarily put its input on the market.

The Preliminary Ruling by the CJEU in *TeliaSonera* seems to have left some space of determination for the national courts regarding the issue on to what an extent the indispensable input element will be of importance when determining a margin squeeze. The Stockholm District Court in its judgment of *TeliaSonera* applied the principles set out by the CJEU in the preliminary ruling. It is, however, not yet clear whether the Stockholm District Court has interpreted the preliminary ruling in a sufficient way. At the time of writing, the judgment has been appealed to the Swedish Market Court and is pending for determination.

The Stockholm District Court in its judgment held that according to the circumstances of the case, it was not necessary to further determine whether the infrastructure at issue was indispensable. Even if it appears like the

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[187]Case C-52/9, *Konkurrensverket v TeliaSonera*, 17 February 2011, not yet reported, para. 72.

[188] Ibid, paras. 71 ff.

[189] Ibid, paras. 70 ff.

[190] Ibid. para. 13 and Case T- 398/07, *Kingdom of Spain v Commission*, Judgment of the General Court of 29 March 2012, not yet reported, paras. 69 ff.

negative margin, that was present in the case, in itself created noticeable and concrete anti- competitive effects to as efficient competitors, it is not obvious that it was not necessary for the court to also determine the indispensability of the infrastructure. This since CJEU in its ruling stated that such finding was relevant for the assessment of the case. Even if the CJEU stressed that, it could not be ruled out that the squeeze did not create anti- competitive effects just because the input was not indispensable, it still seems like the CJEU regarded the indispensability element to be one of the most important factors when determining a margin squeeze case. Though the investigation by the NCA concluded that TeliaSonera actually controlled an indispensable infrastructure, it appears important that the Stockholm District Court had determined that this was truly the case. Especially, since Mazák in his opinion held that there were a number of alternative technologies available to provide end users with broadband services and that he consider the ability for competitors to replicate TeliaSonera`s infrastructure.[191] The indispensability of TeliaSonera`s input can thus not be claimed an obvious fact.

If the infrastructure of TeliaSonera was not to be regarded indispensable in the case, but the anti- competitive effects of it was considered to amount to an abusive margin squeeze, TeliaSonera could instead of squeezing prices, in order to keep the end- user market for itself in the future, refuse to supply the access to its infrastructure in its entirety- without the risk of infringing competition law. It is questionable if this is a desired consequence of considering margin squeeze and refusal to supply under different approaches. Especially since the two conducts occurs in the same kind of market structure and brings similar effects to competition and customers on the market. The consequence of such assessment may thus amount to competition law intervening in margin squeeze abuses to a larger extent than in refusal to supply abuses. When margin squeeze is regarded as an abusive conduct in itself, it seems that it is still necessary to regard the indispensable input element as an important factor of determination. If the element is not paid the sufficient importance, competition law runs the risk of interfering in margin squeeze cases to a harmful extent and to alter the balance that has been considered most important in refusal to supply cases. The balance between the underlying considerations of competition law must obviously also be acknowledged in margin squeeze cases when considered as stand alone violations.

[191] Case C-52/09, *Opinion of Advocate General Mazák, Konkurrensverket v TeliaSonera AB,* 2 September 2010, not yet reported, para. 20.

6 Conclusion

It is necessary to establish a clear, consistent and predictable way of treating margin squeeze as a competition law offence. Due to the developments in recent EU- case law regarding the matter, this cannot yet be claimed to be the case in EU competition law. This uncertain stage may, however, be regarded important as it also brings legal development regarding the subject.

The diverging approaches towards margin squeeze in EU- and US competition law amounts in the consequence that a dominant undertaking operating within the EU will be exposed for a greater risk to be accused for an anti- competitive margin squeeze than a similar undertaking operating within the borders of the US. This even if the two jurisdictions seem to promote the same goals under competition law and also apply similar narrow approaches towards refusal to supply abuses.

Since margin squeeze shares many similarities with a refusal to supply it seems logical to assess it in the same manner. Especially, it is necessary to take into account the underlying considerations regarding competition law intervening and restricting certain exclusionary behaviours. Since a margin squeeze is not likely to cause more severe effects than a refusal to supply, a further reaching intervention by competition law in margin squeeze cases does not seem motivated. Advocate General Mazák in his opinion in the *TeliaSonera*- case, in accordance to this view, considers that:

"(...)If a dominant undertaking could lawfully have refused to provide the products in question, then it should not be reproached for providing those products at conditions which its competitors considers not advantageous. Indeed, it is difficult to see how in such a case the alleged insufficient margin could be anti- competitive."[192]

However, in the preliminary ruling of CJEU in *TeliaSonera*, margin squeeze is regarded as an independent abuse and is assessed under different considerations from a refusal to supply. When treating margin squeeze and refusal to supply under different criteria it seems important to, in any case, apply a narrow approach to both of the conducts. If not, the balance of the underlying considerations of competition law risks being altered or not properly assessed. There may, however, be some room of differentiation in the assessment of two, similar but not identical conducts, as long as it does not result in a difference in the level of competition law interference. This is of course not an easy determination, but the rationale is that, abuses with equally serious effects should be restricted and prohibited to the same extent.

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[192] Case C-52/09, *Opinion of Advocate General Mazák, Konkurrensverket v TeliaSonera AB,* 2 September 2010, not yet reported, para. 21.

Even if the CJEU has stated that the *Bronner* criteria are not applicable to margin squeeze cases, it is not obvious that it aspires margin squeeze to be considered under less strict criteria that would enable competition law to intervene in and restrict margin squeeze cases to a larger extent. Though a non-indispensable input in a margin squeeze case was not considered to rule out the possibility of anti- competitive effects, it does not mean that such finding is not important when determining the squeeze. The CJEU in its preliminary ruling of *TeliaSonera* certainly considered the functional relationship between the wholesale- and retail products, together with the level of the margin squeeze, to be the two important factors when determining the anti- competitive effects of the margin squeeze. Indispensability is, indeed, a most important consideration when assessing the former relationship.

In cases when the dominator is regulatory obliged to supply its input, the court`s assessment of whether the input at issue is indispensable, may not be equally important as in cases where the dominator has put the input on the market voluntarily. This because in cases where a regulatory obligation to supply the input is at hand, the necessity of such input in order to operate on the downstream market, has probably already been considered by the regulatory authority, whereas, the opposing interest in such a case has been balanced. This rationale has accordingly been put forward in *Telefónica* and is also further discussed in the doctrine. Since TeliaSonera was not under any regulatory restrictions supplying it`s input, it appears important that Stockholm District Court did actually assess if the input in the case was indispensable for competitors` successful operation on the downstream market. Otherwise, TeliaSonera may have been forced to share its input on too generous terms, which risks altering the balance of competition.

Exactly how important the role of the indispensable input element will be in margin squeeze cases and how this should be determined is, however, hard to assess. Since the case law of the CJEU in this aspect seems to leave some scope of determination for the national courts, this will probably be an issue for future case law to further determine. It is essential that this future development accomplish to regard the underlying goals of competition to the full extent, distinguishing between conducts producing anti- competitive effects on the market and actions which are rather forms of aggressive competition. Or, as Sidak would have put it:

"It is not possible to enhance consumer welfare with an antitrust rule that punishes a firm for failing to ensure its competitors' profitability. "[193]

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[193] J.G. Sidak, *Abolishing the Price Squeeze as a Theory of Antitrust Liability,* 4(2) J. Comp. & Econ. 279 2008, p. 294.

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