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Margin Squeeze after *Deutsche Telekom*

Simon Genevaz*

Margin squeeze practices occur in industries where incumbent companies operate at two levels of trade, both selling an input at wholesale and acting as retail suppliers. In these situations, because the upstream input sold by the incumbent is used to make the downstream product, the incumbent's customers at the upstream level are also its competitors at the downstream level. In instances where downstream rivals are unable to obtain viable alternatives to the incumbent's wholesale products, the vertically integrated firm can "squeeze" its rivals' profit margins by setting a high wholesale price and/or a low retail price.

In a series of cases involving these fact patterns, the European Commission (the "Commission") and the Court of First Instance (the "CFI") have considered that an insufficient spread between the price charged by a vertically integrated dominant firm for wholesale supplies of an input and that firm's own retail price could impede downstream rivals' ability to compete, and can therefore be considered abusive under Article 82 of the

* The author is a Case Officer at the French Competition Council. Opinions expressed in this article are entirely the author's own and do not represent the views of the Council. The author was involved in the *Direct Energie* cases discussed in this paper as Case Officer for the Council.

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EC Treaty.[1] Yet the determination of the precise circumstances in which such conduct, known as "margin squeeze," should give rise to antitrust liability raises two types of questions. The first type has to do with the definition of the applicable test. In essence, the competition authorities and courts ask when, exactly, does the spread become so small as to be considered exclusionary in the antitrust sense (i.e., to exclude competitors on some basis other than the dominant firm's merits)? The second type of questions relate to the fact that landmark margin squeeze cases have taken place in regulated industries. In this circumstance, the competition authorities and courts ask whether the concurrent application of a specific regulatory scheme leaves room for antitrust liability.

The CFI addressed these issues in *Deutsche Telekom*.[2] The judgment confirmed a 2003 decision in which the Commission held the German incumbent telecommunications operator liable under Article 82 EC for implementing a margin squeeze in markets for wholesale access to the incumbent's local network and retail access services.[3] The CFI confirmed the Commission's decision and ruled that the correct margin squeeze test is whether "the [dominant firm] itself, or an undertaking just as efficient as the [dominant firm] would have been in a position to offer retail services otherwise than at a loss if it had first been obliged to pay wholesale access charges as an internal transfer price,

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[1] Commission's interim measures decision of October 29, 1975, National Carbonizing, 1976 O.J. (L 35) 6 [hereinafter *National Carbonizing*]; Commission decision of Jul. 18, 1988, Napier Brown – British Sugar, 1988 O.J. (L 284) 41 [hereinafter *Napier Brown*]; and Case T-5/75, Industrie des poudres sphériques v. Commission, 2000 E.C.R. II-3755 [hereinafter *IPS*].

[2] Case T-271/03, Deutsche Telekom AG v. Commission (not yet reported) (judgment of Apr. 10, 2008) [hereinafter *Deutsche Telekom*].

[3] Commission decision of May 21, 2003, COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG, 2003 O.J. (L 263) 9 [hereinafter *Deutsche Telekom* (Commission's decision)].

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[…]."[4] If not, then the squeeze can be deemed abusive. The CFI also held that a dominant firm's pricing conduct that is subject to regulatory approval remains subject to antitrust scrutiny when the dominant firm has "genuine scope to fix its retail prices and, consequently, to reduce the margin squeeze by increasing those prices."[5]

Nevertheless, margin squeeze abuses remain contentious because they are perceived as flirting with the outer boundaries of competition law, sometimes trespassing into fields better left to ad hoc regulation. Certain commentators consider that margin squeeze abuses cannot further consumer welfare and have criticized the use made of margin squeeze theory by competition authorities in Europe.[6] These doctrinal debates have taken place in an area of scarce case law, margin squeeze allegations having been tested only once by the Community judicature before the *Deutsche Telekom* case.[7] This, however, has not prevented the Commission and the national competition authorities ("NCAs") from using margin squeeze theory to impose obligations on incumbents in strategic markets.

The purpose of this paper is to examine the lessons from *Deutsche Telekom* and the CFI's responses to the two types of questions raised in the preceding paragraphs. Section I of this paper shows that tackling margin squeeze abuses has proven a powerful liberalization tool in European telecommunications and energy sectors. The importance

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[4] *Deutsche Telekom*, *supra* note 2, at para. 194.

[5] *Id.* at para. 296.

[6] William J. Baumol et al., Brief of Amici Curiae Professors and Scholars in Law and Economics in Support of the Petitioners, Pacific Bell Telephone Co. v. linkLine Communications, Inc., No. 07-512 (Oct. 2007) [hereinafter *linkLine* amici curiae professors and scholars brief]; J. Gregory Sidak, Abolishing the Price Squeeze as a Theory of Antitrust Liability (mimeo, Criterion Economics) (Apr. 11, 2008), *available at* http://ssrn.com/abstract=1119308.

[7] *IPS*, *supra* note 1.

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of *Deutsche Telekom*-type analysis in proceedings brought since the Commission's decision shows how significant an impact this case has made in European competition law enforcement. Section II examines the test established in *Deutsche Telekom* for assessing whether a margin squeeze is exclusionary and argues that recent critics of European enforcement mischaracterize the state of the law. In addition, section II argues that while the CFI's judgment usefully confirmed important aspects of the case law, it also questionably relied on regulatory objectives in isolation from actual market conditions. Section III examines the test used by the CFI for determining whether the existence of price regulation under sector-specific rules precludes a margin squeeze claim under competition law. Section III explains that conservative approaches to antitrust enforcement understate the benefits of the parallel application of sector-specific regulation and competition law. Section IV concludes.

I. BACKGROUND: *DEUTSCHE TELEKOM'S* PROGENY AND CRITICS[8]

At the time it was issued, the Commission's decision in *Deutsche Telekom* broke new ground. Before the early 2000s, margin squeeze cases in Europe had been few and far between. The first three margin squeeze cases at the EC level arose in the coal, sugar, and calcium metal industries.[9] These cases involved conduct displaying the same basic four characteristics. First, they all concerned behavior by a vertically integrated company

[8] This section focuses on margin squeeze cases in France. For an overview of cases in other Member States, *see* Damien Geradin & Robert O'Donoghue, *The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector*, 1 J. COMPETITION L. & ECON. 355 (2005).

[9] *National Carbonizing*, *supra* note 1, at 7 (alleged abuse resulting from the insufficient spread between the price for coking coal and coke); *Napier Brown*, *supra* note 1, at para. 66 (abuse resulting from the reduction of the spread between industrial sugar and retail sugar prices); *IPS, supra* note 1, at paras. 177-79 (alleged abuse resulting from the insufficient spread between the price for low-oxygen primary calcium metal used to make broken calcium metal and the price for the derivative product (claim rejected)).

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active both as a wholesale supplier and in a retail market requiring the use of the wholesale product. Second, they concerned the supply of a wholesale product that was subsequently processed or repackaged downstream to manufacture the retail product. Third, the vertically integrated supplier held a dominant position on the upstream wholesale market. Fourth, the (alleged) abusive conduct consisted in the reduction of the spread between the dominant company's price for the wholesale product and the retail price for the downstream product to a level insufficient to enable efficient downstream rivals to compete.

A. The Commission's *Deutsche Telekom* Decision

The facts of the *Deutsche Telekom* case were original in three main respects. First, the case concerned access to the incumbent's telecommunications network, not a wholesale product destined to be used for further transformation. Second, the case concerned emerging markets. Access to Deutsche Telekom's local loop (i.e., the circuit connecting the end user's network termination point to the main distribution frame) allowed independent operators to compete on the retail markets for narrowband and broadband internet services, as well as call services. Third, the case concerned activities subject to specific regulation.

Three features of the applicable regulation are worth mentioning here. First, in principle, European telecommunications directives should have led telecommunications incumbents to rebalance their tariffs by 1998. Historically, telecommunications monopolies offered certain services at below-cost prices and offset losses by using

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revenues from other services provided at above-costs prices. Cross-subsidies between different activities formed an integral part of monopolies' business models. Liberalization directives therefore required that rates charged for different telecommunications services be adjusted to reflect costs. That requirement, known as "tariff rebalancing," was aimed at enabling competition from new entrants. However, in practice, it appeared that full tariff rebalancing had not been completed in time in Germany.

Second, under applicable German telecommunications laws, both Deutsche Telekom's wholesale and retail prices were regulated. Wholesale charges for access to the local loop were cost-oriented and submitted to ex ante regulatory approval; retail prices for baskets grouping different services were capped.

Third, the national regulatory authority ("NRA") had investigated the existence of a margin squeeze between the incumbent's wholesale access charges and retail access prices during the relevant period. Because full tariff rebalancing had not been completed at the time, telecommunications operators continued to rely on cross-subsidies. The NRA nevertheless did not oppose Deutsche Telekom's pricing structure. In the NRA's view, the existence of a negative spread between the incumbent's wholesale and retail prices was unproblematic precisely because independent rivals were deemed able to compete by offsetting losses on access services by revenues gained on call charges.

The Commission did not agree. Relying on EC case law holding that "the competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or

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distorts competition,"[10] the Commission opined that, under the applicable regulation, "DT has a commercial discretion which would allow it to restructure its tariffs further so as to reduce or indeed to put an end to the margin squeeze."[11] The Commission thus held that the incumbent's behavior could not be shielded from the application of competition law.

Margin squeeze calculations raised issues relating to the implementation of tariff rebalancing. The Commission considered that margin squeeze calculations should be limited to comparing Deutsche Telekom's wholesale access charges with its prices for retail access services. Margin squeeze calculations therefore did not take account of revenues from call traffic despite the fact that the provision of retail call services was also made possible by accessing Deutsche Telekom's local network. Echoing the German NRA, the incumbent argued that this was incorrect because "wholesale costs for the local loop are overheads for the provision of retail access and for telephone calls."[12] Deutsche Telekom thus contended that call revenues should be integrated in margin squeeze calculations and offset losses derived from the provision of access services. The Commission replied that the relevant EC directives provided that "[f]or purposes of cost-oriented pricing, access to local network lines and the offer of different categories of call are clearly separate services."[13] Thus, the Commission considered that:

> DT cannot invoke a calculation offsetting access and call charges against one another [because] [i]t cannot be assumed that all competitors have the same

[10] *Deutsche Telekom* (Commission decision), *supra* note 3, at para. 54.

[11] *Id.* at para. 57.

[12] *Id.* at para. 117.

[13] *Id*. at para. 120.

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> revenue structure as the established operator, and thus the same scope for offsetting one source of revenue against another.[14]

The Commission finally held that the margin squeeze, which had been tested by looking at retail access services in isolation, infringed Article 82 EC.

The *Deutsche Telekom* decision marked the beginning of an enforcement era in which margin squeeze cases brought by the Commission and NCAs would accompany major European liberalization laws. Liberalization occurred in sectors previously handled by legal, state-owned monopolies. As in *Deutsche Telekom*, incumbents in newly liberalized markets own networks or other assets that they were able to build using monopoly revenues or public funds during the time they were protected from competition. Access to these assets is now necessary to conduct downstream activities in a competitive environment. In sectors such as telecommunications or, more recently, energy, liberalization thus involves a radical shift in historical incumbents' business models. This explains why the Commission's decision in *Deutsche Telekom* rippled into Member States, where NCAs built on its rationale to tackle margin squeeze practices in other recently liberalized areas. The three examples discussed in the following sections can therefore be described as *Deutsche Telekom* progeny cases. There the French NCA and the Commission relied extensively on the Commission's *Deutsche Telekom* decision in dealing with two critical issues: the imputation test and the applicability of competition law in the presence of sector-specific regulation.

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[14] *Id*. at para. 128.

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1. France Telecom, SFR Cegetel, and Bouygues Telecom

The first example concerned call termination charges on the main French mobile telecommunications networks. Call termination is an upstream service used to compete on the fixed-to-mobile calls routing market: charges are paid by fixed telecommunications operators to mobile telecommunications operators for terminating calls on their respective networks. In a case issued in 2004, the French Competition Council (the "Council") imposed a EUR 18 million fine on France Telecom and a EUR 2 million fine on SFR for a margin squeeze on the fixed-to-mobile calls routing market.[15] The basic facts were as follows. France Telecom, SFR, and Bouygues Telecom were the three existing mobile operators in France during the relevant period. Each also competed with fixed telecommunications operators for the provision of fixed-to-mobile calls routing services to non-residential clients. The Council found that each mobile phone operator held a dominant position on the upstream market for call termination on their respective networks and determined the level of call termination charges independently. The Council also found that France Telecom's and SFR's retail prices for fixed-to-mobile calls did not cover incremental costs for the provision of such services by equally efficient operators, including call termination charges on France Telecom's and SFR Cegetel's respective networks.

As in *Deutsche Telekom*, the charges in questions were subject to sector-specific rules. At the wholesale level, regulation imposed that France Telecom's and SFR's call

[15] French Competition Council decision of Oct. 14, 2004, Case 04-D-48, *France Telecom, SFR Cegetel et Bouygues Telecom* [hereinafter *France Telecom et al.*] (confirmed by Cour de Cassation, May 10, 2006, *Etna France* [hereinafter *Etna*] and Paris Court of Appeals, April 2, 2008, *SFR et France Telecom*).

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termination charges be cost-oriented. During the relevant period, however, the French telecommunications regulator had decided that cost-orientation principles needed to be gradually implemented. At the retail level, France Telecom's prices were subject to Ministerial approval.

The decision drew from the Commission's *Deutsche Telekom* decision in two aspects. First, the Council relied on the Commission's decision to adopt the "equally efficient competitor test" and, therefore, evaluate the existence of a margin squeeze based on the dominant operators' own costs. Second, the Council adopted *Deutsche Telekom*-type analysis to rebut defendants' arguments pertaining to the inapplicability of competition law in view of the parallel application of sector-specific regulation to retail and wholesale prices. As regards wholesale prices, the Council rejected the defendants' claim that call termination charges were cost-oriented and that, therefore, they could not contribute to constituting a margin squeeze. The Council found that, in practice, call termination charges remained high compared to costs during the relevant period due to the fact that the charges orientation to costs was progressive over time. At the retail level, regulatory approval of France Telecom's prices did not restrict the operator's commercial freedom. The Council thus held that the pricing practices in question were subject to competition law and imposed fines.

2. Direct Energie-Interim Measures

The second example, a 2007 interim measures case, concerned access to wholesale electricity. The basic facts were as follows. Electricité de France ("EDF"), the

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French historical incumbent, retains the bulk of electricity production capacity in France, including all nuclear capacity. Nuclear power plants are used all the time to produce baseload electricity, which explains their high contribution to total production in France (78 percent). The Council found that this contributed to making EDF an indispensable producer, with a prima facie dominant position on the wholesale electricity market. In that context, the Council found evidence that the spread between the price charged by EDF for wholesale electricity supplies to an independent retailer (Direct Energie) and EDF's own retail prices on the free market was negative.[16] The Council held that this supported a prima facie margin squeeze case and adopted interim measures.

The particular interplay of competition law and regulation in that case is also worth mentioning. At the retail level, the case concerned supplies to non-resident customers connected to the low-voltage grid, a market open to competition since 2004. Even then, under French law, regulated tariffs for electricity supplied by a legal monopoly (EDF) were maintained. Non-residents could opt out of supplies under regulated tariffs and choose to be supplied on the liberalized market, at market price, by EDF or independent competitors. Therefore, two markets coexisted: one fully regulated and occupied by a legal monopoly, the other fully liberalized and open to competition. Neither wholesale nor retail prices were regulated on the free market.

Again, the Council relied on the Commission's *Deutsche Telekom* decision in two critical aspects. First the Council relied on *Deutsche Telekom*'s equally efficient competitor test and rejected the notion that a margin squeeze could depend on the fact

[16] French Competition Council Decision of Jun. 28, 2007, Case 07-MC-04, *Direct Energie (interim measures)* [hereinafter *Direct Energie (interim measures)*].

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that the incumbent's wholesale price could not only cover its own downstream costs but also its competitors'. Second, the Council rejected the notion that coexistence of regulated tariffs and free prices for the same customers immunized EDF's pricing behavior on the free market from antitrust liability. The incumbent argued that regulated tariffs worked as a cap on free market prices because retail suppliers on the free market had to provide a price-based incentive to customers supplied at regulated tariffs in order to gain business. EDF therefore argued that it did not have the freedom to determine retail prices on the free market because those prices had to at least match regulated tariffs. The margin squeeze, EDF argued, was thus only attributable to low regulated tariffs. The Council rejected that argument, finding that no legal impediment restricted the incumbent's pricing behavior on the free market, as evidenced by the incumbent's own recent retail price increases. The Council thus held that EDF's behavior enjoyed the requisite commercial freedom for the application of competition law. The Council ultimately imposed interim measures, resulting in commitments under which EDF auctioned wholesale electricity at non-squeezing prices.[17]

3. Telefónica

The third example is the Commission's 2007 *Telefónica* decision.[18] The case concerned access to the Spanish incumbent telecommunications operator's network through wholesale broadband access products. The Commission found that Telefónica held a dominant position on regional and national markets for wholesale broadband

[17] French Competition Council decision of Dec. 10, 2007, Case 07-D-43, *Direct Energie (commitments)*. An appeal is currently pending before the Paris Court of Appeals.

[18] Commission Decision of July 4, 2007, Case COMP/38.784 — Wanadoo España v. Telefónica, 2008 O.J. (C 83) 5 [hereinafter *Telefónica*], *available at* http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38784/dec_en.pdf.

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access. The decision also established the incumbent's dominance on the mass market for retail broadband access. The Commission found that Telefónica's retail prices for Internet access could not be replicated without incurring losses given the incumbent's wholesale charges and imposed a fine in excess of EUR 150 million.

Again, the decision relied extensively on the Commission's own *Deutsche Telekom* decision, although the case is interesting in several aspects which actually differentiate it from that precedent. First, the Commission relied on the "equally efficient competitor" test, albeit with less clarity than in previous examples. Although the Commission emphasized consistency with its own approach in *Deutsche Telekom* and *Napier Brown* it nevertheless left open, in dictum, the application of another test under which:

> [a] margin squeeze can also be demonstrated by showing that the margin between the price charged to competitors on the upstream market for access and the price which the downstream arm of the dominant operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit ("hypothetical reasonably efficient competitor test").[19]

However, in practice, the Commission used the "equally efficient competitor test," emphasizing that this approach was favorable to the incumbent because margin squeeze calculations would integrate Telefónica's economies of scale and scope (to the extent these economies were reflected in the incumbent's lower unit costs).

Second, as in *Deutsche Telekom*, the Commission rejected Telefónica's claim that the application of sector-specific regulation deprived it from its commercial autonomy. Holding that "[t]he key question is whether the undertaking subject to price regulation

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[19] *Id*. at para. 311.

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has the commercial discretion to avoid or end the margin squeeze on its own initiative,"[20] the Commission found that the incumbent's wholesale prices for national services had been free during the relevant period, while wholesale prices for regional services had been capped, leaving Telefónica free to reduce them. In addition, regulation applicable to certain retail products did not bar the incumbent from raising retail prices. The Commission thus held that nothing precluded Telefónica from putting an end to the margin squeeze.

The concurrent application of sector-specific regulation raised another question. Telefónica contended that it had provided access to its network as a result of a regulatory obligation imposed by Spanish law and would not have been obliged to do so under competition law standards. The incumbent therefore argued that it was wrong to consider that its pricing policy was nonetheless subject to Article 82 EC.

The Commission rejected the notion that a margin squeeze could only be found in circumstances that would also justify the imposition of an antitrust duty to deal. The Commission reasoned that:

> [The incumbent's legal duty to supply upstream access] results from a balancing by the public authorities of the incentives of Telefónica and its competitors to invest and innovate. This is because the need to promote downstream competition in the long term by imposing access to Telefónica's upstream inputs exceeds the need to preserve Telefónica's *ex ante* incentives to invest in and exploit the upstream infrastructure in question for its own benefit.[21]

The Commission also took account of the fact that the incumbent's network had been built at a time when Telefónica benefited from exclusive rights shielded from

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[20] *Id*. at para. 667.

[21] *Id*. at para. 303.

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competition, that Telefónica had continued to invest in its network despite mandatory access rules and that it had provided voluntary access in areas where it did not have a duty to do so. Finally, given the case's "specific factual, economic and legal context," and in view of "the fact that the former monopoly's *ex ante* incentives to invest in infrastructure are not [at] stake in the present case," the Commission held that "the legal test applied by the European Court of Justice in *Oscar Bronner* is not applicable in the present case."[22]

B. Critics

There is no consensus in the doctrine in favor of European margin squeeze law. As for most conduct examined under Article 82 EC, margin squeeze practices may, in certain circumstances, be the result of competition and, therefore, antitrust enforcement needs to be wary of deterring desirable conduct.[23] Yet critics of margin squeeze as a cause of action under competition law have recently reached new heights. In a brief to the U.S. Supreme Court in support of granting a petition for certiorari in the *linkLine* case,[24] a group of prominent antitrust scholars recently argued that "the price-squeeze theory is a regulatory undertaking, not an antitrust course of action."[25] In support of that argument, the scholars claim that European margin squeeze law favors competitor welfare over consumer welfare because:

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[22] *Id*. at para. 309. In Case C-7/97, *Oscar Bronner v. Mediaprint*, 1998 E.C.R. I-7791 [hereinafter *Bronner*], the Court held that showing that a refusal to provide access to a newspaper distribution system was abusive under Article 82 EC required, inter alia, proof that the service in question be indispensable to carry out the complainant's business.

[23] *See, e.g.*, David Spector, *Some Economics of Margin Squeeze*, 1 CONCURRENCES 21 (2008).

[24] linkLine Communications, Inc. v. SBC California, Inc., 503 F.3d 876 (9th Cir. 2007) [hereinafter *linkLine*].

[25] *linkLine* amici curiae professors and scholars brief, *supra* note 6, at 13.

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> [E]xperience with price-squeeze cases brought by national competition authorities in Europe under Article 82 of the Treaty of Rome reveals the economic and factual complexity of correctly implementing the imputation analysis in an antitrust case. It becomes necessary to hypothesize what an efficient competitor would be and then determine whether the defendant's wholesale and retail prices permit the efficient competitor to earn some level of profit deemed to be sufficient.[26]

In a paper expanding on that brief and citing the CFI's *Deutsche Telekom* judgment, Gregory Sidak calls the margin squeeze "doctrine" "ill-considered, obsolete, and pernicious"[27] and argues that European law views antitrust enforcement as "simply one more tool of industrial policy, and thus its application may permissibly compromise consumer welfare to advance the welfare of competitors."[28] Such stiff condemnation calls for an assessment of the state of EC margin squeeze law after the *Deutsche Telekom* judgment.

II. CONDITIONS FOR A MARGIN SQUEEZE AFTER *DEUTSCHE TELEKOM*

A number of conditions must be met for a margin squeeze to be considered abusive under Article 82 EC. The doctrine has been agonizing over a series of issues pertaining to the validity of margin squeeze abuses (e.g., the relevant imputation test, the costs used to implement that test, the necessity to prove restrictive effects, and the relevance of the case law on refusals to deal) which the *Deutsche Telekom* judgment addresses. The review of the Court's treatment of these questions invalidates certain claims made by U.S. scholars concerning the state of EC case law. It also shows that critical aspects of the case law remain unsettled.

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[26] *Id.* at 6-7.

[27] Sidak (2008), *supra* note 6, at 24.

[28] *Id.* at 14.

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A. What Test Should Be Used to Assess the Existence of a Margin Squeeze under Article 82 EC?

Adherence to the "equally efficient competitor test" (i.e., the idea that a margin squeeze is capable of being exclusionary if the dominant firm's own downstream operations could not survive if they paid the relevant upstream charge), probably needed clarification after *Telefónica*. The CFI's endorsement of that test in *Deutsche Telekom* went to an extent that makes the validity of any other test under Article 82 EC very doubtful. The Court was nevertheless surprisingly cautious in framing its response.

The CFI started uneasily by acknowledging that "although the Community judicature has not yet explicitly ruled on the method to be applied in determining the existence of a margin squeeze," previous case law showed that "the abusive nature of a dominant undertaking's pricing practices is determined in principle on the basis of its own situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors."[29] The CFI finally ruled that the test for a margin squeeze under Article 82 EC is whether a rival "just as efficient as" the dominant firm, but paying the wholesale price it charges to its competitors, would be able to provide retail services other than at a loss. The Court reasoned that the legality of a dominant firm's practice cannot be based on its competitors' costs, because information on rivals' costs is generally unknown to the dominant firm. Any rule threatening liability on the basis of other firms' conduct cannot be appropriate under competition law because

[29] *Deutsche Telekom*, *supra* note 2, at para. 188.

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the dominant firm would not be in a position to assess the lawfulness of its own conduct. This, said the CFI, would be contrary to the general principle of legal certainty.

This is certainly one reason. The relevant question, however, is whether the applicable margin squeeze test can lead to prohibiting conduct that is the result of the dominant firm's greater efficiency and, therefore, harm the competitive process by deterring desirable conduct. The CFI has been more assertive, in the past, in answering that question. In *IPS,* the Court rejected the notion that a dominant supplier's wholesale price could be deemed abusive solely because a wholesale customer competing downstream sold at a loss due to *its own* higher processing costs. There the Court clearly explained that a margin squeeze could not have exclusionary effects of the sort prohibited under competition law because the complainant's inability to compete was either due to its own inefficiency or its inability to meet demand.[30] For all its prudence, the Court in *Deutsche Telekom* therefore merely restates the consequence of the *IPS* holding (i.e., that a margin squeeze should be tested against the dominant firm's own costs).

The rationale behind *IPS* is that a rule with the effect of forcing dominant firms to compensate competitors for their higher costs would, indeed, disregard consumer welfare. Forcing dominant firms to subsidize rivals on a downstream market because they are less efficient would at best create incentives to keep retail prices up, and at worse deter dominant firms from vertically integrating at all. Thus, contrary to Sidak's and the *linkLine* amici curiae's claim, the CFI unambiguously held in *IPS* that Article 82 EC does not protect competitors from exclusion that is attributable to their own inefficiency or

[30] *IPS*, *supra* note 1, at paras. 179 & 185 (a rule imputing liability based on competitors' costs could potentially amount to an inappropriate duty to sell the wholesale input at a loss in cases where rivals' costs are higher than the dominant firm's).

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failure to meet demand. A margin squeeze test raising concerns when the dominant firm's *own* downstream operations could not trade profitably if they paid the dominant firm's *own* wholesale prices does not make it "necessary to hypothesize what an efficient competitor would be." That test is based on the assumption that conduct that would render an equally efficient competitor's activities uneconomic is capable of foreclosing market entry. By squeezing rivals' profit margins to an extent which the dominant company itself could not sustain, the dominant firm imposes efficiency constraints for market entry which its own operations do not have to assume. This impedes market entry and consolidates the dominant firm's downstream position by eliminating competition regardless of efficiency.

Finally, the "equally efficient competitor" aims at preserving incentives for vertical integration. As explained in *Telefónica*, testing the dominant firm's upstream charges against its own cost structure ensures that efficiency gains derived from vertical integration are reflected in the margin squeeze test. In that sense, margin squeeze abuses do not prohibit conduct attributable to the fact that the "primary-level monopolist [carries] out its second-level activities more efficiently than its independent competitors."[31] In doing so, the case law avoids deterring pricing that is pro-competitive albeit set at levels below viable thresholds from the perspective of less efficient competitors. This, in turn, requires that the right costs and revenue streams are taken into account.

[31] Town of Concord v. Boston Edison Co., 915 F.2d 17, 24 (1st Cir. 1990) [hereinafter *Town of Concord*] (argument that margin squeeze practices can bring about economic benefits (e.g., because the vertically integrated firm would be more efficient downstream than mere retailers)).

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B. Which of the Dominant Firm's Costs Should Be Taken into Account in Evaluating the Margin Squeeze?

This issue was (and arguably remains) one of the most disputed in *Deutsche Telekom*. In principle, the "equally efficient competitor" test requires that a margin squeeze be calculated by comparing the dominant firm's actual downstream cost structure to its own upstream price. This is easier said than done, and the CFI failed to provide useful guidance on that issue.

In *Deutsche Telekom*, the Court relied on regulatory objectives to justify the exclusion of certain revenues from margin squeeze calculations. As explained earlier in this paper, the Commission established the squeeze by comparing wholesale access charges to retail prices for access services. The Commission calculated whether those retail prices covered wholesale access charges, but ignored the impact of sales of other retail services even though these were made possible by accessing the incumbent's network. Deutsche Telekom argued that this was incorrect because retail call revenues were used to offset losses on retail access services and, therefore, helped cover wholesale charges.

The CFI rejected that argument on the ground that undistorted competition under the meaning of the EC Treaty warrants "equality of opportunity […] between the various economic operators."[32] Economic operators can only compete on equal footing, the Court held:

> [I]f the incumbent operator sets its retail prices at a level which enables [equally efficient] competitors to reflect all the wholesale costs in their retail prices.

[32] *Deutsche Telekom*, *supra* note 2, at para. 198.

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> However, if the incumbent operator does not adhere to that principle, new entrants can only offer access services to their end-users at a loss.[33]

In reality, what the incumbent had apparently failed to "adhere to" rather seemed to be the principle of tariff rebalancing (i.e., the readjustment of rates to reflect costs). The CFI, echoing the Commission, held that "separate consideration" of access and call charges was required because European telecommunications Directives distinguished access and call services to implement tariff rebalancing. The Court finally held that requiring that the calculation of the squeeze include the impact of revenues from call traffic shows that the incumbent "and its competitors are not on an equal footing as regards local network access, which is, however, a prerequisite for undistorted competition in the telephone calls market."[34]

The Court's reasoning on that issue is questionable for three reasons. First, the CFI's "equal opportunity" language seems to stray away from application of the "equally efficient competitor" test. Consider that, in excluding call traffic revenues from margin squeeze calculations, the Commission reasoned that "it cannot be assumed that all competitors have the same revenue structure as the established operator, and thus the same scope for offsetting one source of revenue against another."[35] But making such assumptions is the very meaning of the "equally efficient competitors" test. Holding that the legality of the dominant firm's pricing practices is determined on the basis of its own situation and then disregarding part of that situation on the basis that competitors have a different cost and revenue structure is contradictory.

[33] *Id*. at para. 199.

[34] *Id*. at para. 201.

[35] *Deutsche Telekom* (Commission decision), *supra* note 3, at para. 128.

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Second, there are also indications in the judgment that the CFI relied on rivals' pricing practices to justify the exclusion of call traffic revenues in margin squeeze calculations. For instance, the Court reasoned that, in any event, competitors may not have had sufficient scope to offset losses suffered on retail access services by using call revenues because Deutsche Telekom had reduced its own retail call charges during the relevant period. The CFI emphasized that:

> [Independent rivals that were] already at a competitive disadvantage by comparison with the [incumbent] in relation to local network access, had to apply even lower call charges than the [incumbent] in order to encourage potential customers to discontinue their subscription to the [incumbent] and subscribe to them instead.[36]

But how is that antitrust concern? Fierce competition is not evidence of "distorted competition." The fact that rivals have less revenues from call charges because they compete on retail prices is irrelevant—because it is immaterial to the dominant firm's own situation—and cannot justify excluding call charges from margin squeeze calculations—because, in the absence of other factors, lower rivals' revenues are the result of competition.

Third, the CFI's reliance on regulatory principles (i.e., tariff rebalancing and related distinctions between retail services) seems inappropriate because, by definition, unattained regulatory goals do not reflect real-life market conditions. In that regard, the fact that the legislator imposed tariff rebalancing and distinguished different retail services with a view to foster competition is irrelevant. What matters are actual market conditions. In reality, it is clear that the Commission and the CFI disapproved both of the

[36] *Deutsche Telekom*, *supra* note 2, at para. 202.

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German NRA's progressive tariffs rebalancing policy—because it was not fast enough—and of its authorizing Deutsche Telekom's prices—because its decision relied on cross-subsidy practices that European regulation purported to eliminate. There is probably much to commend these views. However, using regulatory purposes instead of actual market facts to conduct antitrust enforcement is not good policy because, as the CFI put elsewhere, sector-specific regulations "have objectives which differ from those of Community competition policy."[37]

This is not to say that there cannot be legitimate reasons for excluding certain retail revenues from a margin squeeze test. These reasons are simply not apparent in the *Deutsche Telekom* judgment. There, the CFI's "equal opportunity" language rested on irrelevant justifications and, at the end of the day, provides little useful guidance for future enforcement.

C. Does the Demonstration of an Abusive Margin Squeeze Also Require Proof that the Practice Had Restrictive Effects?

After *Deutsche Telekom*, it appears that effects must be shown, but can be inferred from the existence of the squeeze. The CFI did acknowledge that "the Commission is required to demonstrate [anticompetitive effects relating] to the possible barriers which the [dominant firm]'s pricing practices could have created for the growth of competition on that market,"[38] but the Court held that these anticompetitive effects derive "in principle"[39] from the existence of a margin squeeze. The Court did not stop

37 *Id*. at para. 113.

38 *Id*. at para. 235.

39 *Id*. at para. 237.

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there however and went on to review evidence of actual foreclosure effects on the relevant market.

This pragmatic approach leaves room for further development in the wake of recent policy efforts in favor of an effects-based approach to exclusionary conduct.[40] The *Deutsche Telekom* judgment remains very cautious and purports to safeguard the validity of evidence of likely effects based on the mere existence of a margin squeeze. The cases discussed in section I, however, show that the Commission's and NCAs' approach to evidence of effects in margin squeeze abuses has evolved significantly in recent years. Compare the Commission's approach in *Telefónica*, where 20 pages of detailed analysis are devoted to evidence of actual restrictive effects and consumer harm, to the mere three paragraphs on the subject in the Commission's *Deutsche Telekom* decision. Similarly, in the *France Telecom* case, the French Competition Council did not limit its analysis to the mere establishment of the squeeze, but also reviewed evidence of actual effects on the relevant market.[41] The *Direct Energie-interim measures* case is even more straightforward because the Council was required, as a matter of law, to demonstrate serious and immediate harm to the economy, the sector, consumers or the complainant in order to justify the adoption of interim measures.[42] In the end, competition authorities are

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[40] *See* EUROPEAN COMMISSION, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES (Dec. 2005) [hereinafter Discussion Paper], *available at* http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.

[41] *France Telecom et al.*, *supra* note 15, at paras. 240-50 (lack of new entry and evidence of foreclosure in the context of calls for tender).

[42] *Direct Energie (interim measures)*, *supra* note 16, at paras. 150-58 (harm to competitors and evidence of market foreclosure).

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boosting actual or potential effects analysis, regardless of whether they are, legally speaking, required to do so.

D. Are Margin Squeeze Practices Legal in Circumstances Where a Dominant Firm Is Free to Refuse to Deal?

The CFI did not address that question explicitly, but the correct answer under the existing case law is probably negative. Margin squeeze cases before *Deutsche Telekom* showed no indication that refusal-to-deal-type analysis was required to determine the existence of an illegal margin squeeze. In *Deutsche Telekom*, the incumbent was subject to mandatory network access rules and therefore was not free to refuse to deal with rivals. Although the CFI did take account of the fact that the dominant firm's wholesale services were "indispensable" for downstream competition in its assessment of the squeeze's effects,[43] this formed no part of the legal test. It follows that margin squeeze remains an independent abuse under Article 82 EC.

In reality, margin squeeze case law is less concerned with the "indispensable" nature of the relevant upstream input than with the existence of alternative upstream supplies at competitors' disposal that could allow them to compete. This may just be a difference of degree, but it is an important one. Commentators have argued that a dominant firm retaining the power to refuse to deal under competition law should also be permitted to deal on its own terms, provided they are not predatory.[44] This argument has been endorsed by certain courts in the United States. In *Covad,* for instance, the U.S. Court of Appeals for the DC Circuit relied on the Areeda & Hovenkamp (2002) argument

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[43] *Deutsche Telekom*, *supra* note 2, at para. 237.

[44] *See, e.g.,* Sidak (2008), *supra* note 6, at 6.

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that "it makes no sense to prohibit a predatory squeeze in circumstances where the integrated monopolist is free to refuse to deal."[45] This may also arguably be a question put to the U.S. Supreme Court, should it decide to grant certiorari in *linkLine*.[46]

However, the current state of European law gives no indication that a dominant firm with no antitrust duty to deal should be free to subject its competitors to a margin squeeze with impunity. In *Telefónica*, the Commission held that European case law on refusals to deal did not condition the legality of a margin squeeze by a regulated firm subject to mandatory access rules. There the Commission found it relevant that the regulatory duty to supply had been established with a view to promote competition and consumer welfare. The Commission found that the applicable regulation embodied a policy under which benefits expected from the growth of downstream competition through upstream access rules outweighed the need to preserve the dominant incumbent's ex ante incentives to invest. This is an interesting approach because the Commission, in rejecting application of the *Bronner* conditions to test the incumbent's conduct's legality, nevertheless reviewed the relevant facts using *Bronner*-type analysis. In *Bronner*, Advocate General Jacobs explained that interference with a dominant firm's freedom to contract required careful balancing of the pro-competitive effects of letting that firm exploit its own facilities against the adverse impact that facility sharing obligations may

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[45] Covad Communications Co. v. Bell Atlantic Co., 398 F3d 666, 673 (DC Cir. 2005) (quoting 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 767c3, at 129-30 (2d ed. 2002)).

[46] The real question in *linkLine* may be narrower (*see* J. Thomas Rosch, A Modest Proposal for Modest Antitrust Decisions at the Supreme Court, Speech Presented at the 56th Antitrust Law Spring Meeting, Washington, DC (Mar. 27, 2008), *available at* http://www.ftc.gov/speeches/rosch/080327modest.pdf).

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have on ex ante incentives to invest.[47] This concern, the Commission reasoned in *Telefónica*, does not apply to a vertically integrated dominant incumbent whose initial investments were undertaken in a context where it conducted its business as a legal monopoly, a rationale that finds profound resonance in margin squeeze cases in newly liberalized markets. In addition, the Commission found that further evidence showed that the incumbent's incentives to invest were not at stake because Telefónica had not been deterred from investing in its network despite prior knowledge of its duty to grant access.[48]

Parallel developments in Member States show that national courts are also unwilling to immunize margin squeeze practices in circumstances that would not otherwise suffice to justify an antitrust duty to deal. The French Supreme Court, for instance, held that showing exclusionary conduct in the form of a margin squeeze does not require evidence that there be no alternative available to the upstream input. In doing so, the Court implicitly suggested that indispensability is not part of the margin squeeze test and thereby confirmed that a margin squeeze could be deemed abusive provided competitors were unable to use alternative inputs to an extent significant enough for them to avoid the squeeze.[49]

[47] Opinion of Advocate General Jacobs of May 28, 1998, in *Bronner*, *supra* note 22, at para. 57.

[48] *Telefónica*, *supra* note 18, at para. 304-09.

[49] *France Telecom et al.*, *supra* note 15, at para. 199 and *Etna*, *supra* note 15.

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III. THE DEMARCATION BETWEEN ANTITRUST AND SECTOR-SPECIFIC REGULATION

The question whether antitrust liability applies in spite of sector-specific regulation is treated by the Community judicature as a variation of the state-action defense. Strictly speaking, only conduct that is compelled by Member States can be shielded from European competition law. This section shows that the CFI's strict interpretation of that test in *Deutsche Telekom* protects active antitrust enforcement in regulated areas and examines the benefits of doing so.

A. The Test in Theory

Recently liberalized industries are often subject to some form of regulation, may it consist in supervision, sector-specific dispute resolution or rate-setting under standards set by law. Sector-specific regulation thus restrains operators' freedom to a certain degree. The extent of that restriction is the controlling factor for excluding or maintaining the applicability of antitrust rules.

The issue is particularly critical when regulation directly applies to regulated firms' prices. In *Deutsche Telekom*, the CFI held that price regulation does not bar price-based liability under competition law. Immunity is conceivable only in cases of direct conflict between the regulatory regime and competition law (i.e., when the relevant "anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive practice on their part").[50] In order for this exception to apply, "the restrictive effects on

[50] *Deutsche Telekom*, *supra* note 2, at para. 86.

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competition must originate solely in the national law."[51] Therefore, it does not suffice that regulation concerns behavior that is also capable of constituting an infringement of competition law; rather, the infringement itself must originate from regulation for competition law to be declared inapplicable. That is the theory.

B. The Test in Practice

In practice, the extent to which the state-action test was stretched in *Deutsche Telekom* virtually precludes immunity from competition law under the vast majority of regulatory schemes, for two main reasons. First, the mere existence of regulatory supervision over prices does not suffice to infer antitrust immunity, even when that supervision includes some measure of competitive analysis, so long as regulated firms retain sufficient commercial discretion to avoid the illegal conduct under competition law. Consider that, in *Deutsche Telekom*, German law imposed that wholesale prices be cost-oriented and authorized ex ante, while retail prices were capped. In that context, both the Commission and the Court went at length to analyze the scope of discretion left to the dominant operator within the regulatory framework. Both held that the regulatory scheme did not repeal application of competition law because the regulated firm had sufficient commercial autonomy and scope to end the margin squeeze. This factor, and this factor alone, controlled the outcome of the analysis despite references to other elements (i.e., whether the NRA was also in charge of competition, whether its decisions included references to Article 82 EC, and so forth).

[51] *Id*. at para. 87.

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Interestingly, the Court rejected the notion that the German regulator's intervention should have implied repeal of competition law despite the fact that the regulator had investigated the existence of the margin squeeze and nevertheless authorized the relevant prices. As explained earlier in this paper, according to the NRA, restrictive effects on competition were alleviated by the fact that competitors could offset their losses by resorting to cross-subsidization using call traffic revenues. This led the CFI to hold that, in doing so, the German regulator either did not consider the relevant prices' compatibility with Article 82 EC, or incorrectly applied that law.[52] It is significant, in that regard, that the Court relied on case law holding that "the Commission cannot be bound by a decision taken by a national body pursuant to Article 82 EC."[53] Therefore, it does not matter that the NRA included competition law analysis in supervising the regulated activity.

Second, the CFI stretched the test even further and considered that the NRA's failure to act upon discovery of the margin squeeze did not remove the dominant firm's ability to correct its conduct in accordance with competition law. The CFI considered that "it is not inconceivable" that the German NRA's decision infringed EC law, thus giving the Commission cause for legal action.[54] Yet, this was not deemed relevant to the issue at hand which, again, turned solely on whether the incumbent retained sufficient discretion to remove the margin squeeze. Therefore, according to the Court, cause for action against a Member State for violation of EC law does not shield economic operators from the

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[52] *Id*. at para. 119.

[53] *Id*. at para. 120 (citing Case C-344/98, Masterfoods, 2000 E.C.R. I-11369, at para. 48).

[54] *Id*. at paras. 265 & 271.

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application of competition law even when their conduct was (seemingly) wrongly authorized. In addition, the CFI held that the regulator's reliance on competitors' ability to offset losses attributable to the margin squeeze on the retail access market by using revenues from the retail call market was further evidence of anticompetitive effects. Therefore, the Court held that the NRA's authorization was no basis for a legitimate expectation that the incumbent's pricing practice was compatible with Article 82 EC.

In *Deutsche Telekom*, the CFI therefore decided that in presence of a direct conflict between sector-specific regulation and EC competition law, the latter should prevail. This is in stark contrast with the approach adopted by U.S. courts which, in recent cases, tends to defer to regulation.

C. Contrast with Conservative Position in U.S. Case Law

Three cases illustrate the U.S. approach to antitrust enforcement in regulated sectors. The first example is *Town of Concord*, a margin squeeze case in the electricity sector, where the Court held that price squeeze practices should not receive similar treatment in unregulated and regulated industries. The Court reasoned that, whereas in unregulated markets margin squeeze practices can bring about economic benefits that "are rather evenly balanced"[55] with potential anticompetitive effects, "full price regulation […] significantly diminishes the likelihood of major antitrust harm"[56] and, therefore, "price squeeze in a fully regulated industry […] will not normally constitute 'exclusionary conduct'."[57]

[55] *Town of Concord*, *supra* note 31, at 23.

[56] *Id.* at 25.

[57] *Id.* at 28.

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More recently, in *Trinko*, a refusal-to-deal case, the Supreme Court held that a firm's reluctance to provide cost-oriented access to its network as required by applicable sector-specific regulation did not show exclusionary purpose under Section 2 of the Sherman Act.[58] The Court held that the defendant's "insufficient assistance in the provision of service to rivals is not a recognized antitrust claim."[59] With regard to the interplay of antitrust and regulation, the applicable regulatory regime included a "saving clause" preserving the applicability of antitrust laws to regulated firms and, therefore, barring "a finding of implied immunity."[60] The Court nevertheless found that "[o]ne factor of particular importance [in examining the antitrust claim] is the existence of a regulatory structure designed to deter and remedy anticompetitive harm."[61] The Court held that the applicable regulatory regime "was an effective steward of the antitrust function"[62] because it included mandatory access rules and provided remedies in case of infringement. The Court concluded that the "slight benefits of antitrust intervention" were outweighed by costs and risks inherent in judicial enforcement of "detailed sharing obligations."[63]

Finally, in *Credit Suisse*, a suit alleging anticompetitive practices in the context of an IPO, the Supreme Court "interpret[ed] the securities laws as implicitly precluding the

[58] Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) [hereinafter *Trinko*].

[59] *Id*. at 408.

[60] *Id*. at 403.

[61] *Id*. at 409.

[62] *Id*. at 411.

[63] *Id*. at 411-12.

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application of the antitrust laws to the conduct alleged in this case."[64] The Court held that immunity from antitrust rules was warranted in view of the following factors:

> (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct [and] (4) that […] the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.[65]

Again, the Court investigated not only whether concurrent application of antitrust and sector-specific rules created a risk of conflict, but also whether the regulatory regime made is "somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior."[66] According to the Court, the fact that "the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations" made it so.

D. Benefits of the European Approach

The comparative analysis shows that, beyond legal technicalities, applying antitrust rules in regulated markets is fundamentally a policy choice. This is explicit in the U.S. context, where the Supreme Court openly distinguishes areas in which antitrust enforcement is deemed "more necessary" than in areas where it is less so because anticompetitive conduct is already dealt with by some agency. This seems entirely reasonable at first sight. Yet such conservative approach to antitrust enforcement loses sight of the fact that the legislator's intent is to endow sector-specific regulatory agencies

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[64] Credit Suisse Securities LLP v. Billing, 127 S. Ct. 2383 (2007) [hereinafter *Credit Suisse*].

[65] *Id*. at 2397.

[66] *Id*. at 2400.

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with powers in furtherance of standards that are often unrelated or more limited than antitrust objectives. Commenting on *Credit Suisse*, Einer Elhauge argued that:

> It seems implausible that in such cases Congress really meant to oust antitrust review, or that doing so would be socially desirable. Instead, Congress may well have intended to express even more concern about the relevant conduct, by indicating it was undesirable not only under competition standards, but under other normative standards as well.[67]

Beyond specific legislative intent, there are four main reasons for the more "interventionist" approach validated by the CFI in *Deutsche Telekom*.[68] The first reason stems from the basic assumption that regulation should be limited. Indeed, "[i]f government regulation is applied to an activity or organization because the free market fails to work, it should be confined to those areas and decisions which competition cannot properly regulate. It should not be extended unnecessarily."[69] This is a broad policy claim, but it calls for caution in evaluating whether, absent express legislative intent, antitrust enforcement is "more" or "less" necessary. The Community judicature is unwilling to make that call and its strict state-action defense approach to the interplay of sector-specific regulation and general competition rules has the merit of not relying on uncertain assumptions about the merits of antitrust enforcement.

Furthermore, the conservative approach apparently adopted by the U.S. Supreme Court and advocated by leading scholars in the area of margin squeeze, leads to the unfortunate consequence that, as regulation progresses in modern economies, general

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[67] *See* Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, 3(2) COMPETITION POL'Y INT'L 59 (2007).

[68] This does not invalidate my earlier remarks on the questionable use of regulatory goals instead of antitrust analysis in setting the method to calculate the margin squeeze.

[69] James W. McKie, *Regulation and the Free Market: The Problem of Boundaries*, 1 BELL J. ECON. & MGMT SCI. 6 (1970).

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competition rules will regress. This is so because antitrust immunity effectively substitutes sector-specific competition rules to general antitrust laws. Again, this goes counter the notion that competition laws are more than mere default rules that are only applicable whenever legislators do not deem specific regulation necessary. In *Trinko*, the U.S. Supreme Court opined that "[t]he Sherman Act is indeed the 'Magna Carta of free enterprise,' […] but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[70] However, in situation where repeal of antitrust enforcement is *implied* by the courts, that statement assumes that judges have discretion to second guess the ways in which legislators decide to organize the economy.

Understandably, conservatives cannot be blamed for over-deterring desirable conduct. Yet the European position, for all its risks, has the merit of avoiding the development of an economy organized by a cluster of peculiar sector-based competition rules instead of general free market laws. Consider that the liberalization of major European industries remains, at this stage, a recent endeavor. Companies and consumers are adapting to free market rules in essential sectors such as telecommunications and energy. In that context, the notion that European competition authorities and courts should shy away from antitrust enforcement when acting in regulated industries does not strike a very good note. This does not mean that the impact of regulation should not be taken into account in the antitrust analysis, but simply that there is a strong policy argument for letting NCAs and antitrust Courts deal with it.

[70] *Trinko*, *supra* note 57, at 413.

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The second reason in support of the CFI's approach is EC-specific. The claim that the prohibition of margin squeeze practices is a "regulatory undertaking, not an antitrust cause of action" because "price-squeeze regulation […] cases are highly technical regulatory proceedings that are typically protracted and factually intensive,"[71] does not resonate as strongly in the European Community as it does in the United States. While most U.S. antitrust enforcement is the result of private enforcement by jury trials, the vast majority of European enforcement stems from proceedings brought by competition authorities. NCAs and the Commission are specialist agencies, with significant investigation powers. Thus, the notion that industry regulators are better placed to deal with complex cases is unconvincing.

The third reason is that the desirability of the generalization of sector-specific regulation to the detriment of antitrust enforcement is doubtful not just because both sets of rules pursue different goals. Even when sector-specific regulators and antitrust enforcers pursue similar objectives, parallel action can be beneficial because they have complementary albeit different approaches to regulation. Sector-specific regulation generally concerns itself with ex ante regulation. NRAs therefore rely on information available to them before the relevant behavior is adopted, in order to design forward-looking measures. Competition authorities, on the other hand, act ex post and can rely on additional data to evaluate past behavior. The interplay of both forms supervision can therefore reduce information asymmetries. Complementarities between NCAs and NRAs can thus be efficiently exploited by law. This is the case in France where certain NRAs

[71] *linkLine* Amici curiae professors and scholars brief, *supra* note 6, at 13 & 5.

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are endowed with power to file complaints with the NCA in case of suspicion of competition law infringements.[72] Alternatively, no legal action may be undertaken by the French Competition Council in a regulated market without referral to the relevant NRA.[73] NRAs therefore are associated, by law, to antitrust proceedings, contributing by way of written opinions, evidence, and expert testimony during oral hearings.

The fourth reason is that certain sector-specific regulatory schemes are deemed necessary either to guide markets towards full-liberalization, or only so long as the market failures they purport to correct exist. In certain industries, transitory ex ante regulation is meant to supplement competition law, because competition enforcement means are deemed insufficient or its deterrent effects alone inadequate to address specific and temporary market failures. In these circumstances, rather than excluding antitrust review, transitory regulation underscores its necessity, for complementary oversight and in anticipation for the time ex ante regulation is no longer deemed necessary.

IV. CONCLUSION

The *Deutsche Telekom* judgment will probably be the target of stiff criticism, not least of all for its intermingling of regulatory objectives and antitrust analysis. As explained in this paper, much of this criticism will not be unfounded. Yet, the *Deustche Telekom* regulatory conundrum is not representative of the existing relationships between NRAs and NCAs. Regulation and antitrust enforcement are complementary, not opposites. Sector-specific regulators are in an ideal position to blow the whistle and

[72] *See*, *e.g.*, French Postal and Electronic Communications Code, at art. 36-10.

[73] *See* French Commercial Code, at art. R. 463-9.

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inform antitrust proceedings. If anything, the stakes involved in margin squeeze cases cannot justify the retreat of antitrust enforcement.

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