

Abusive margin squeeze: An overview of European national case laws

Unilateral practices, Foreword, Abuse of dominant position, Margin squeeze, All business sectors

Introduction

An unlawful, abusive, margin squeeze typically occurs where a vertically integrated firm active in two related upstream and downstream markets supplies the upstream input to its downstream rivals, and charges prices that curtail the latter's ability to exercise an effective competitive constraint on this market. As a result of the "squeeze" of their profit margins, downstream rivals are no longer able to compete with the vertically integrated firm and may even be forced out of the market.

The purpose of this brief article is to introduce the reader to the national case-law on abusive margin squeezes that was commented in the e-competitions bulletin over the period 2003-2009. To this end, it seeks, to the extent possible, to analyze the 23 e-competitions case notes in relation to six items which are generally reviewed in margin squeeze cases, i.e., existence of an upstream input and a downstream product/service (1); indispensability of the upstream input (2); dominance in the upstream market and vertical integration (3); particularly aggressive downstream pricing policy (4); anticompetitive effects (5); absence of objective justifications (6). In addition, the present article reviews a seventh issue, namely sanctions and remedies (7), where national enforcement practices may again diverge/converge.

Prior to dealing with those issues, two clarifications are necessary. First, the vast majority of the cases reported in the e-competitions bulletin concern liberalized industries, formerly subject to exclusive rights and natural monopolies. In this regard, more than 70 % of the commented cases relate to the electronic communications sector. Second, most NCAs tend to consider that margin squeeze cases can be dealt with under the competition rules, regardless of the existence of sector specific legislation. This is because, in line with the EC approach (and in particular the Deutsche Telekom case-law) [1], NCAs consider that the existence of sector-specific regulation does not exhaust the applicability of competition rules, as long as the investigated firm enjoys autonomy in defining its commercial conduct [2].

1. Existence of an Upstream Input and a Downstream Product/Service

1.1. In essence, a margin squeeze practice necessarily involves two different, yet related products/services at two distinct levels of the value chain. A margin squeeze can indeed only occur in the presence of a downstream product/service requiring an upstream input.

Whilst this principle is virtually unchallenged at the national level, an issue has arisen in cases where the difference

between the two upstream and downstream products/services is not obvious. Some dominant companies have indeed claimed that the retail product was similar to the wholesale product supplied upstream to their competitors, so that there was no possible room for a squeeze to be found.

For instance, the UK NRA in charge of enforcing competition law in the water sector considered that no margin squeeze could occur where there is no material difference between the wholesale product supplied by the dominant firm and the downstream product offered to the end-customer. In both cases, it supplied the same input carried to the same location and incurred the same costs [3].

In France, the incumbent electricity supplier EDF also sought to argue that there was no possible margin squeeze between its wholesale electricity input price and its retail prices for professionals. EDF contended that the electricity supplied to its rivals on the wholesale market was in no way different from the product resold by its competitors to the end-consumers. Absent a distinct intermediary product or raw material, there could not be a margin squeeze.

The NCA dismissed EDF's argument. Relying on the EC Napier Brown/ British Sugar judgment, it stated that the form under which the incumbent supplied electricity at the wholesale level was different from the electricity supplied by alternative operator at the retail level. Therefore, two different products on two different markets could be delineated [4].

1.2. Finally, NCAs and NRAs' practice demonstrate that the actual selection of the relevant upstream and downstream products involved, as well as the determination of the relevant costs and revenues associated with those products, often triggers thorny practical discussions [5].

2. Objective Necessity of the Upstream Input

2.1. Quite intuitively again, a margin squeeze practice seems to imply that the upstream input is objectively necessary for downstream rivals to operate on the market. In the presence of competitive alternatives, the dominant firm cannot possibly harm downstream rivals.

In practice, the case law of competition enforcers on this issue appears particularly lax. First, at the EC level, the Commission simply views it as an enforcement priority criterion, leaving open the possibility to bring abusive margin squeeze charges in relation to non-indispensable upstream inputs. In the Guidance Communication on Article 82 EC, for instance, the Commission announces that it will "only focus on cases where the upstream product or service concerned is objectively necessary for competitors to be able to compete effectively on the downstream market" [6].

Second, in a majority of Member States, this condition does not seem to be systematically reviewed. In many reported cases, NCAs indeed had to deal with recently liberalized markets where the network controlled by the incumbent was ipso facto presumed objectively necessary for rivals to provide retail products/services, without further examination [7]. A notable exception to this can be found in France where the demonstration that the upstream product is objectively necessary is a key condition for reaching a determination on the existence of an abusive margin squeeze. In an electronic communications case, the Supreme Court ruled that a price squeeze practice is presumed to inflict losses on rivals, and thereby have anticompetitive effects, if, and only if, the supplies of the dominant firm to its competitors are indispensable to compete with that firm on the downstream market [8].

2.2. Against this background, a number of NCAs have attempted to define more accurately the criterion governing the qualification of an input as objectively necessary. In this regard, a relatively well-accepted criterion seems to imply the verification that downstream rivals cannot operate (and compete) on the downstream market without using the upstream firm's input. On this basis, for instance, the Lithuanian competition authority found that wholesale ADSL access, which represented 40% of the connections for national broadband internet markets, was an indispensable input for downstream competition [9].

Other competition authorities have further refined this analytical framework. The Hungarian competition authority has, for instance, held that an input could be deemed objectively necessary if, and only if, the input cost represents a sufficiently significant share of the service price provided in the retail market [10].

3. Presence of a Dominant Undertaking and Vertical Integration

3.1. The need to establish that the impugned conduct is adopted by a dominant firm certainly constitutes the most uncontroversial point regarding margin squeeze practices.

3.2. Yet, as pointed out by the UK NCA in the Genzyme case (a case involving pharmaceutical products), a finding of abusive margin squeeze does not require evidence of dominance at both the upstream and downstream levels. To squeeze its competitors' margin and, in turn, distort competition in the downstream market, the firm under investigation must certainly be dominant in the upstream market. However, it is not necessary for the NCA to wait until signs of dominance appear at the downstream market, on pain of precluding effective, preventive, ex ante competition enforcement (consumer harm might otherwise be affected) [11]. This is not to say, however, that downstream market power is irrelevant. For instance, the French NCA pointed out that the downstream market power may be taken into account when assessing the effects of the practice [12].

3.3. Interestingly, the Greek and French NCAs have indicated that the fact that the abusive conduct and the dominant position occur in different markets in no way disqualifies the applicability of Article 82 EC. Relying on the EC Tetra Pak case-law [13], both NCAs have held that Article 82 EC could be applied in so far as there is a nexus between the two markets. In this regard, because margin squeeze cases necessarily involve a "twin-track" commercial strategy at both upstream and downstream levels, the Tetra Pak nexus is likely to be met in all cases.

3.4. In addition, most NCAs seem to agree upon the fact that the dominant company must be a vertically integrated firm (active on both the upstream and the downstream markets). A large majority of the reported cases indeed involves upstream and downstream activities undertaken in the context of a single economic unit (one firm, or a parent and its fully-owned subsidiary [14]. Yet, some NCAs tend to consider that margin squeezes may occur in settings involving looser, less structural, forms of vertical linkage (i.e., a mere coordination between the upstream and the downstream activities) [15].

4. A Particularly Aggressive Pricing Policy

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4.1. A margin squeeze abuse invariably involves the existence of an aggressive pricing strategy at the downstream level. Yet, the decisional practice of NCAs reveals that it is uneasy to devise a uniform level at which the dominant firm's downstream prices can be deemed problematic.

4.2. Drawing inspiration from the 1998 EC Access Notice, several NCAs initially considered that a margin squeeze could occur either if (i) the dominant firm set a price that would squeeze its own downstream margin had it purchased the upstream input as the price charged to its competitors; or (ii) if, regarding the downstream costs of its competitors, no margin was possible for the latter [16].

4.1. Recently, however, NCAs have manifestly departed from this standard, and examined only the first limb of the previous test, which focuses on the downstream costs of the dominant firm. In line with the "as efficient as competitor" test that prevails now at the EC level [17], NCAs have endorsed the view that the fact that inefficient rivals could not meet the dominant firm's prices shall in no way lead to findings of abuses, on pain on sanctioning economic efficiency [18] and assisting inefficient entry. In addition, this standard is more sensible from a legal certainty perspective. Operators seeking to assess the legality of their behavior generally indeed do not, and should not, know their rivals' costs [19].

It stems from the more recent NCAs decisions that the authorities have largely adopted the latter test [20].

4.2. This notwithstanding, several NRAs occasionally scrutinize the downstream rivals' costs, and their ability to achieve profits. This standard, which is often referred to as the "reasonably efficient competitor" test, was in particular enforced in (i) cases where there was a perceived need to intervene urgently; (ii) newly liberalized markets; or (iii) in sectors with market failure [21].

5. Anticompetitive effects

5.1. Whilst the EC Commission has, at least officially, embraced a full economic approach under Article 82 EC which requires the proof of likely anticompetitive effects in order to reach a finding of abuse, the decisional practice of the NCAs in respect of anticompetitive effects of margin squeezes exhibits significant divergences.

5.2. In the UK, for instance, a demanding effects-based approach prevails. In the Genzyme case for instance, both the NCA and the Competition Appeals Tribunal sought assess the effects of the margin squeeze practice. Quite remarkably, in addition, the existence of likely anticompetitive effects was not only tested on the downstream market, but also on the upstream market [22].

5.3. By contrast, other jurisdictions have apparently endorsed a more formalistic approach, which borrows to the previous decisional practice of the Commission (in Deutsche Telekom, in particular), and pursuant to which "proving the existence of a margin squeeze [is]enough to establish the existence of an abuse of a dominant market position" [23]. In France, for instance, the proof of anticompetitive effects is not necessary where (i) there is a margin squeeze; (ii) the firm under investigation enjoys upstream market power; and (iii) the firm under investigation controls an indispensable input. In such

cases, anticompetitive effects are presumed [24]. It ought to be noted, however, that in several cases the French NCA sought to assess the concrete impact of the impugned practice and found that it had unlawful anticompetitive effects [25].

Similarly, in a decision adopted a few months ago in the Base/BMB case, the Belgian NCA expressly relied on recent EC judgments to hold that a finding of abuse was not conditional on the proof of actual anticompetitive effects [26].

6. Objective justifications

6.1. With the adoption of the Guidance Communication on Article 82 EC, it is now clear that under EC competition law, dominant firms can invoke objective justifications to escape a finding of abuse. However, in practice, most firms involved in margin squeeze proceedings have to date been unsuccessful in seeking to convince the Commission that their conduct was objectively justified [27].

6.2. As a matter of principle, most NCAs share a similar position. Dominant firms may invoke objective justifications in margin squeeze cases. In the Genzyme case, for instance, the UK Competition Appeals Tribunal made clear that the NCA had to consider the objective justifications put forward by the dominant company. In addition, both the Danish and the French NCAs analyzed the so-called "meeting competition defense" invoked by telecom operators [28]. In Belgium finally, the NCA even started its assessment with the analysis of the potential objective justification (a method which was latter quashed by the review court) [29].

6.3. In practice, however, the reported cases demonstrate that the "objective justification" defense was never fruitfully invoked.

7. Sanctions and Remedies

Because of case-specific features, sanctions and remedies probably constitute the foremost area of divergence amongst NCAs in margin squeeze cases. With this in mind, the case notes of the e-competitions database exhibit the following four trends.

7.1. First, amongst the reported margin squeeze cases, several decisions do not order remedies and follow a "fines-only" approach. This may be explained by the fact that in a number of cases, the period of infringement had already ended when the NCA dealt with the [30]. Moreover, difficulties to set adequate remedies and commitments may also explain, in some jurisdictions, the adoption of "fines-only" decisions [31].

7.2. Second, and regardless of whether the decision also imposes remedies, it is of note that the level of fines imposed on dominant firms for unlawful margin squeeze has been increasing [32]. This being said, a number of NCAs occasionally have considered the firm's conduct and commitments as mitigating factors when setting the amount of the fine [33].

7.3. Third, no structural remedy seems to have been imposed to date. Besides classic pricing remedies, NCAs have occasionally imposed other types of behavioral remedies. For instance, the Hungarian Competition Authority required the

incumbent to negotiate directly with its competitors in order to reach a mutually acceptable solution [34]. Similarly, the French NCA accepted France Telecom's commitment to ensure that local subsidiaries active in the overseas departments would comply with the competition rules [35].

Interestingly, some NCAs such as the UK competition authority have stressed the drawbacks of pricing remedies and, in particular, the fact that setting prices may constrain the free play of competitive forces and ultimately have a negative impact on the market [36]. This may in turn explain why some NCAs have promoted retail-minus and even cost-plus wholesale remedies rather than a predetermined price [37].

7.3. Fourth, NCAs decisions as regards remedies seem to be influenced by the interplay between sector-specific regulation and competition law. On the one hand, some NCAs, which seem eager to use their powers to achieve regulatory objectives, have applied intrusive, far reaching, remedies. For instance, in a French case concerning the electricity sector, where the impugned margin squeeze practice occurred in the market for small commercial and small industrial users, the undertaking's commitments consisted in offering a new long term basic electricity input on the wholesale market allowing the downstream competitors to effectively compete on all the retail markets, and not only in the small professional one [38].

On the other hand, some NCAs have displayed more reluctance to impose price-based remedies, on pain of performing a regulatory competence traditionally allocated to the sector-specific regulator. In Italy for instance, the NCA has refused to assess the suitability of two proposed price commitments, in view of the fact that the NRA would be better placed to assess their relevance [39].

[1] See in particular CFI, April 10th, 2008, *Deutsche Telekom v. Commission*, Case T-271/03, pts 70-152. See also Commission Decision of 4 July 2007 relating to a proceedings under Article 82 of the EC Treaty (*Case COMP/38.784 - Wanadoo España vs. Telefónica*), pts 665-685. And European Commission contribution, OECD, Working Party n° 2 on Competition and Regulation, Margin Squeeze, 19 October 2009, pt 17-19, available at <http://ec.europa.eu/competition/int....>

[2] See for instance, the *Telecom Italia* case, [Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato), 16 November 2004, Case n° A351, Telecom Italia. Michele Giannino, The Italian Competition Authority condemns abuse of dominant position in the markets for the provision of telecommunication services (Telecom Italia), *e-Competitions*, n° 20314. See also the *Hungarian Magyar* case, GVH, 22 January 2004, Decision n° Vj-100/2002/72, Magyar Távközlési Rt., Attila Kőmíves, Tünde Gönczöl, The Hungarian Competition Office fined telecom incumbent for margin squeeze in fixed telephone market (Magyar Telekom), *e-Competitions*, n° 14763. Ádám Mátyus, Eszter Ritter, The Hungarian Competition Office fines incumbent telecommunications service provider for price squeeze (Magyar Távközlési Rt.), *e-Competitions*, n° 25320. See the *Cypriot CYTA* case, CPC, 11.17.25/2004, 30 May 2005, CYTA. Antigoni Lykotrafiti, The Cypriot Competition Authority imposes a fine for price squeezing and excessive pricing on the Internet services market (CYTA), *e-Competitions*, n° 12125. See the *French EDF/Direct Energie* case, C. conc., Décision n° 07-MC-04, 28 June 2007 Direct Energie (EDF). See also C. conc., Décision n° 07-D-43, 10 December 2007, EDF. Olivier Fréget, Fleur Herrenschmidt, The French Competition Council imposes price regulation on the electricity market through interim measures (Direct Energie/EDF), *e-Competitions*, n° 14062; David Sevy, The French competition authority imposes an obligation upon the electricity incumbent to offer a wholesale contract to new entrants (Direct Energie/EDF), *e-Competitions*, n° 14000. See the *Bulgarian BTC/CPC* case, where the fine was almost the maximum fine that could be imposed. SAC, 9 January 2008, 254, BTC/CPC. Dessislava Fessenko, The Bulgarian Supreme Administrative Court upholds an NCA decision sanctioning the telecom incumbent for exerting margin squeeze on its competitors in the markets for fixed telephone services (BTC/CPC), *e-Competitions*, n° 15516.

[3] See OFWAT, CA98/01/2004, 26 May 2004, Albion Water against Dŵr Cymru, Case CA98/00/48. However, the

UK Competition Appeal Tribunal did not uphold that decision, considering that the dominant company would not provide the overall services associated with the water supply at the wholesale level, it provided at the retail one. See, CAT, 6 October 2006, *Albion Water Limited v. Director General of Water Services (Dwr Cymru/Shotton Paper)*, [2006] CAT 23, 1046/2/4/04, pts 861 et seq; Katerina Rainwood, *The UK Competition Appeal Tribunal considers the appropriate tests to apply in an interim decision regarding abuse of dominant position in pricing access to a water distribution channel in the context of the regulated UK water industry (Albion Water)*, e-Competitions, n° 435; Timothy Warren, *The UK Competition Appeal Tribunal makes an interim judgement in an appeal against a water industry regulator decision on alleged abuse of dominant position (Albion Water)*, e-Competitions, n° 448; Jenny Burrage, *The UK's Competition Appeal Tribunal overturns decision of water Regulator and rules that the price charged was excessive and amounted to a margin squeeze (Dwr Cymru/Albion Water)*, e-Competitions, n° 14067; Dominik Piotrowski, *The UK's Competition Appeal Tribunal concludes that a statutory water provider abused its dominant position by margin squeezing on the market for transportation and treatment of non-potable water (Albion Water)*, e-Competitions, n° 21095.

[4] See C. conc., *Décision n° 07-MC-04*, 28 June 2007 *Direct Energie (EDF)*. See also French Competition Council, *Décision n° 07-D-43*, 10 December 2007, EDF.

[5] See for instance the Hungarian *Magyar* case, GVH, 22 January 2004, *Decision n° Vj-100/2002/72*, *Magyar Távközlési Rt.* See the Danish TDC case, DCA, *Song Networks/TDC- SONOFON*, 28 April 2004, 3/1120-0100-0557/MHA/SEK. David Henry, *The Danish competition authority finds a mobile telephone company in violation of the Danish Competition law for operating a margin squeeze and an illegal bonus system (Song Networks/TDC-SONOFON)*, e-Competitions, n° 162. Jacob Borum, *The Danish Competition Appeal Tribunal annuled the NCA's decision condemning the telecommunications incumbent for abuse of dominance through margin squeeze (TDC)*, e-Competitions, n° 17420. See the *Telecom Italia* case, AGCM, A351, 16 novembre 2004, *Telecom Italia*. See the Spanish *Telefonica Móviles* case, TDC, 22 December 2004, 571/03, *Uni2/ Telefonica Móviles*. Pablo Ibáñez Colomo, *The Spanish competition authority adopts a prudent approach on alleged price squeeze and discriminatory practices by the telecommunications incumbent on interconnection and termination fees (Uni2-MCI WorldCom/Telefonica Móviles)*, e-Competitions, n° 187.

[6] See *Guidance on the Commission's enforcement priorities in applying Article 82 to abusive exclusionary conduct by dominant undertakings*, 9 February 2009, p. 23 et seq.. See European Commission contribution, OECD, Working Party n° 2 on Competition and Regulation, *Margin Squeeze*, 19 October 2009, pt 7, available at <http://ec.europa.eu/competition/int...> The European Commission also points out that, in certain specific circumstances, it will also assess cases where it can be assumed that the dominant firm and/or competitors' interests cannot be not affected. It expressly mentions situations where the dominant undertaking is under a sector-specific obligation to provide the upstream input or where the dominant undertaking holds such a position as a result of the protection of special or exclusive rights or the financing from state resources.

[7] See for example the UK *Albion Water* case, CAT, 6 October 2006, *Albion Water Limited v. Director General of Water Services (Dwr Cymru/Shotton Paper)*, [2006] CAT 23, 1046/2/4/04. See also the Portuguese *PT-ZON* case, ADC, 2nd September 2009, *PT-ZON*. Miguel Mendes Pereira, Myriam Ouaki, *The Portuguese Competition Authority fines two telecoms operators € 53 M euros for abuse of dominant position in the wholesale and retail broadband markets (Portugal Telecom and ZON)*, e-Competitions, n° 28306. Luís D. S. Morais, *The Portuguese Competition Authority adopts landmark decision concerning an abuse of dominant position case in the Internet broadband access markets (PT and ZON)*, e-Competitions, n° 29131. Information also available at <http://www.concurrecia.pt/en/Conte...>

[8] The NCA may have adopted that stance as well. See the French *France Télécom DOM* case, French Competition Authority, *Décision n° 09-D-24*, 28 July 2009 *France Télécom (DOM)*, pt 165. Joseph Vogel, *The French Competition Authority holds again that the main telecom operator had exploited its dominant position (France Télécom)*, e-Competitions, n° 29111.

[9] C.C., 5 October 2006, Nr. 2S-12, TEO. Sarunas Keserauskas, Lithuanian Competition Authority fines the former telecom incumbent for margin squeeze limiting access to ADSL broadband internet access service (Teo), *e-Competitions*, n° 12450.

[10] See the Hungarian Magyar case, GVH, 22 January 2004, Decision n° Vj-100/2002/72, Magyar Távközlési Rt.

[11] See OFT, n° CA98/3/03, 27 March 2003, Genzyme (Case CP/0488-01), Derek Ridyard, The UK OFT imposed a £ 6.8 M fine for abusive bundling and margin squeeze (Genzyme), *e-Competitions*, n° 22142, and CAT, Case n°1016/1/1/03, 11 March 2004, Genzyme limited/ OFT, [2004] CAT 4, Dominik Piotrowski, The UK's Competition Appeal Tribunal finds a pharmaceutical company guilty of margin squeeze but rejects the OFT's evidence on bundling (Genzyme), *e-Competitions*, n° 21099.

[12] See Rapport annuel de l'Autorité de la concurrence, 2008, Etudes Thématiques, Pratiques de ciseau tarifaire, p 158 et seq. See also the Greek National Regulator Authority OTE Decision, EETT, 23 February 2009, 512/63, OTE. Alexandros Papanikolaou, The Greek telecommunications regulator prohibits the incumbent's "Double-Play" bundled offering of unlimited international calls taking into account a risk of a margin squeeze of its competitors (OTE), *e-Competitions*, n° 26136.

[13] ECJ, November 14th, 1996, Tetra Pak v. Commission, Case C-333/94 P, [1996] ECR I-5951.

[14] See for instance, C.C., 5 October 2006, Nr. 2S-12, TEO.

[15] See for instance, AGCM, A365, 10 April 2006, Posta Elettronica Ibrida. However that case may be a discrimination case rather than a margin squeeze one. Pablo Ibáñez Colomo, The Italian NCA fines € 1.6 M the incumbent postal operator for exclusionary tariffs based on a national decree on the basis of Art. 10, 82 and 86 EC (Posta Ibrida), *e-Competitions*, n° 559. See French Competition Authority, Decision n° 04-D-48, 14 October 2004, France Télécom, SFR Cegetel et Bouygues Télécom (ETNA-TENOR). See also Rapport annuel de l'Autorité de la concurrence, 2008, Etudes Thématiques, Pratiques de ciseau tarifaire, p 163.

[16] See for instance the UK Genzyme case, OFT, n° CA98/3/03, 27 March 2003, Genzyme (Case CP/0488-01) and CAT, Case N°1016/1/1/03, 11 March 2004, Genzyme limited/ OFT, [2004] CAT 4. Derek Ridyard, The UK OFT imposed a £ 6.8 M fine for abusive bundling and margin squeeze (Genzyme), *e-Competitions*, n° 22142. Dominik Piotrowski, The UK's Competition Appeal Tribunal finds a pharmaceutical company guilty of margin squeeze but rejects the OFT's evidence on bundling (Genzyme), *e-Competitions*, n° 21099. Alex Potter, Alison Jones, The UK Competition Appeal Tribunal issues a key judgement on margin squeeze and rebates in the pharmaceuticals sector (Genzyme), *e-Competitions*, n° 400. Charles Balmain, James Johnson, The UK Competition Appeals Tribunal receive the first claims for damages based on abuse of dominant position (Healthcare at Home/Genzyme), *e-Competitions*, n° 1332. See also the Belgium Télé 2-Belgacom case, C.C., Décision n° 2006-V/M-13, 1st September 2006, M.B. 11 December 2006, p. 68891 - 68899 ; MEDE-V/M-05/0043 : Tele 2 SA / Belgacom SA. Bruxelles, 18 December 2007, RG 2006/MR/3 : Tele 2 SA / Belgacom SA de droit public. Dieter Gillis, The Belgian Competition Council dismisses request for interim measures against alleged margin squeeze from the telco incumbent on the market for telephone services provided at a fixed location for residential customers (Belgacom/Tele2), *e-Competitions*, n° 12700. Tim Van Emelen, The Brussels Court of Appeal annuls the interim decision of the President of the Competition Council on the telecom incumbent's bundled tariffs (Belgacom), *e-Competitions*, n° 15915.

[17] See in particular the Deutsche Telekom case (European Commission Decision 2003/707/CE, 21 may 2003, COMP/C-1/37.451, 37.578, 37.579, Deutsche Telekom AG; CFI, 10 April 2008, T-271/03 Deutsche Telekom c/

Commission) and the Telefonica case (European Commission Decision, COMP/38.784, 4 July 2007, Wanadoo España v Telefónica). See also Guidance on the Commission's enforcement priorities in applying Article 82 to abusive exclusionary conduct by dominant undertakings, 9 February 2009, pt 80. See also pt 24. See European Commission contribution, OECD, Working Party n° 2 on Competition and Regulation, Margin Squeeze, 19 October 2009.

[18] See for example, the Portuguese PT-ZON case, ADC, 2nd September 2009, PT-ZON. See for instance, the French EDF/Direct Energie case, French Competition Council, Décision n° 07-MC-04, 28 June 2007 Direct Energie (EDF). See also French Competition Council, Décision n° 07-D-43, 10 December 2007, EDF. See for example, the Belgium Base/BMB case, C.C., Décision n° 2009-P/K-10, 26 May 2009, CONC-P/K-05/0065, Base/BMB, Maarten Peeters, The Belgian Competition Council establishes abuse of dominant position in termination rates case (Base/BM), e-Competitions, n° 28404. See also, the Lithuanian TEO case, C.C., 5 October 2006, n° 2S-12, TEO.

[19] See for example, the Belgium Base/BMB case, C.C., Décision n° 2009-P/K-10, 26 May 2009, CONC-P/K-05/0065, Base/BMB.

[20] Nonetheless see the Finish NCA stance on its website: "An indication of a price-squeeze is the margin between the company's wholesale price and retail price when it is so small that a "relatively efficient competitor" cannot obtain a regular profit on the market" <http://www.kilpailuvirasto.fi/cgi-b...>

[21] See for instance, the UK Genzyme case, OFT, n° CA98/3/03, 27 March 2003, Genzyme (Case CP/0488- and CAT, Case N°1016/1/1/03, 11 March 2004, Genzyme limited/ OFT, [2004] CAT 4. See the Lithuanian TEO case, C.C., 5 October 2006, Nr. 2S-12, TEO. See the French EDF/Direct Energie case, French Competition Council, Décision n° 07-MC-04, 28 June 2007 Direct Energie (EDF). See also C. conc., Décision n° 07-D-43, 10 December 2007, EDF. See the Greek OTE case, EETT, 23 February 2009, 512/63, OTE. See also Guidance on the Commission's enforcement priorities in applying Article 82 to abusive exclusionary conduct by dominant undertakings, 9 February 2009, pt 24.

[22] See OFT, n° CA98/3/03, 27 March 2003, Genzyme (Case CP/0488-01) and CAT, Case N°1016/1/1/03, 11 March 2004, Genzyme limited/ OFT, [2004] CAT 4.

[23] See Commission Decision of 21 May 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 - Deutsche Telekom AG) (OJ L 263, 14 October 2003, p. 9-41), pt 180. See also CFI, April 10th, 2008, Deutsche Telekom v. Commission, Case T-271/03, pts 234-245. See also European Commission Decision, COMP/38.784, 4 July 2007, Wanadoo España v Telefónica, pt 543.

[24] French Supreme Commercial Court, 3 mars 2009, 08-14.435, 08-14.464, Tenor-Etna France - SFR, France Télécom. See the French France Télécom DOM case, French Competition Authority, Décision n° 09-D-24, 28 July 2009 France Télécom (DOM). See Rapport annuel de l'Autorité de la concurrence, 2008, Etudes Thématiques, Pratiques de ciseau tarifaire, p 147, 156.

[25] See Rapport annuel de l'Autorité de la concurrence, 2008, Etudes Thématiques, Pratiques de ciseau tarifaire, p 147,165-166.

[26] See for example, the Belgium Base/BMB case, C.C., Décision n° 2009-P/K-10, 26 May 2009, CONC-P/K-05/0065, Base/BMB.

[27] See European Commission Decision, COMP/38.784, 4 July 2007, Wanadoo España v Telefónica, pts 619 et seq

[28] See the UK Genzyme case, CAT, Case N°1016/1/1/03, 11 March 2004, Genzyme limited/ OFT, [2004] CAT 4. See

the Danish TDC case, DCA, Song Networks/TDC- SONOFON, 28 April 2004, 3/1120-0100-0557/MHA/SEK. See also that justification put forward by Cegetel in the French Etna-Tenor case, French Competition Council, Décision n° 04-D-48, 14 October 2004, France Télécom, SFR Cegetel et Bouygues Télécom.

[29] See C.C., Décision n° 2006-V/M-13, 1st September 2006, M.B. 11 December 2006, p. 68891 - 68899 ; MEDE-V/M-05/0043 : Tele 2 SA / Belgacom SA. Bruxelles, 18 December 2007, RG 2006/MR/3 : Tele 2 SA / Belgacom SA de droit public.

[30] See for instance the Hungarian Magyar case, GVH, 22 January 2004, Decision n° Vj-100/2002/72, Magyar Távközlési Rt. See for example the Finnish Lännen Puhelin case, FCA, 25 October 2004, Lännen Puhelin. Cédric Cédric Cheneviere, The Finnish competition authority proposes to the Market Court to impose a € 1 M fine to a telephone company for abuse of dominant position on the ADSL market consisting in refusal to grant access to its regional network on competitive conditions (Lännen Puhelin), e-Competitions, n° 175. See the French ETNA-TENOR (France Télécom - SFR) case, French Competition Council Décision n° 04-D-48, 14 October 2004, France Télécom, SFR Cegetel et Bouygues Télécom. See Rapport annuel de l'Autorité de la concurrence, 2008, Etudes Thématiques, Pratiques de ciseau tarifaire, p 163. See also the Belgium Base/BMB case, C.C., Décision n° 2009-P/K-10, 26 May 2009, CONC-P/K-05/0065, Base/BMB.

[31] See for example the Italian Vodafone case, AGCM, A357, 3 august 2007, Tele2/TIM- Vodafone-Wind. Pablo Ibáñez Colomo, The Italian competition authority opens proceedings against three mobile telecommunications operators for alleged excessive interconnection fees pursuant to Art. 81 and 82 EC (TIM-Vodafone-Wind/TELE2-TWC-Startel), e-Competitions, n° 266. Rossella Incardona, The Italian NCA accepts commitments in the mobile telephony market closing its investigation against the three mobile network operators under Art. 81 and 82 EC (Tele2/TIM-Vodafone-Wind), e-Competitions, n° 13970. Luciano Vasques, The Italian Competition Authority accepts commitments from the main mobile phone operators following investigations on alleged abuse of joint dominant position (Vodafone, TIM, Wind), e-Competitions, n° 14176. Michele Giannino, An Italian administrative Court clarifies some issues regarding the commitments procedure (Vodafone), e-Competitions, n° 20498. Francesca Morra, Lucio d'Amario, The Italian Antitrust Authority accepts for the first time commitments... but also impose fines in the same case (Vodafone/Tim/Wind), e-Competitions, n° 14318.

[32] See for instance, the Polish TP SA case, OCCP, 20 December 2007, DOK 2-411-9/04/PW Telekomunikacja Polska, Aldona Kwapisz, The Polish Competition Authority fines the largest telecom operator a record fine of € 20 M for abusing its dominant position on the Internet access market (TP S.A.), e-Competitions, n° 15528. See the Bulgarian BTC/CPC case, where the fine was almost the maximum fine that could be imposed. SAC, 9 January 2008, 254, BTC/CPC. See the Portuguese PT-ZON case, ADC, 2nd September 2009, PT-ZON. See also the Macedonian Telecom case, where the NCA fined the incumbent with an amount equal to 10% of its annual turnover, CPC, Decision n° 09-167/5, 1st July 2008, Macedonian Telekom. Alexandr Svetlicinii, The Macedonian Competition Authority prosecutes incumbent telecom operator for establishing high prices for its digital lines leased to the rival Internet providers (Macedonian Telekom), e-Competitions, n° 26128.

[33] See for example the Cypriot CYTA case, CPC, 11.17.25/2004, 30 May 2005, CYTA. Antigoni Lykotrafiti, The Cypriot Competition Authority imposes a fine for price squeezing and excessive pricing on the Internet services market (CYTA), e-Competitions, n° 12125. See also the French France Télécom DOM case, French Competition Authority, Décision n° 09-D-24, 28 July 2009 France Télécom (DOM).

[34] GVH, 6 September 2005, Magyar Telekom. Tarik Hennen, Alexandre Defossez, The Hungarian Competition Authority finds that the telecommunications incumbent abused its dominant position by setting excessively high wholesale prices for network access (Magyar Telekom), e-Competitions, n° 279.

[35] French Competition Authority, Décision n° 09-D-24, 28 July 2009 France Télécom (DOM).

[36] CAT, Case N°1016/1/1/03, 29 September 2005, Genzyme limited/ OFT, [2005] CAT 32.

[37] See for instance, the Lithuanian TEO case, C.C., 5 October 2006, Nr. 2S-12, TEO. See for example, the Macedonian Telecom case, CPC, Decision n° 09-167/5, 1st July 2008, Macedonian Telekom. See also the French EDF/Direct Energie case, French Competition Council, Décision n° 07-MC-04, 28 June 2007 Direct Energie (EDF). See also French Competition Council, Décision n° 07-D-43, 10 December 2007, EDF. Compare with the remedy imposed by the CAT, Case n°1016/1/1/03, 29 September 2005, Genzyme limited/ OFT, [2005] CAT 32.

[38] See the French EDF/Direct Energie case, French Competition Council, Décision n° 07-MC-04, 28 June 2007 Direct Energie (EDF). See also French Competition Council, Décision n° 07-D-43, 10 December 2007, EDF.

[39] See the Telecom Italia case, AGCM, A351, 16 novembre 2004, Telecom Italia. See also the Télé 2/Belgacom case, C.C., Décision n° 2006-V/M-13, 1st September 2006, M.B. 11 December 2006, p. 68891 - 68899 ; MEDE-V/M-05/0043 : Tele 2 SA / Belgacom SA. Bruxelles, 18 December 2007, RG 2006/MR/3 : Tele 2 SA / Belgacom SA de droit public.

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