

Margin Squeezes in the Telecommunications Industry under Antitrust Rules: A Comparative Analysis of the EC and US Approaches

Research Project

Investigator:

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Abstract:

The increase in competition that has resulted from a progressive opening up of telecommunications markets in the US and the EU has assumed advantages for consumers. The existence of a choice of operators has increased price competition, which has generally resulted in lower prices. Nonetheless, the benefits of enhanced competition in downstream markets may be jeopardized if a former monopolist supplies an input for its competitors at the upstream level. It may choose to charge competitors a higher price for that input, and this may have a knock-on impact on the price of the products offered in competitive downstream markets, as it may prevent competitors from achieving the desired profit. This practice is known as “margin squeezes”.

The US and the EC have adopted divergent approaches in respect of margin squeezes, and this divergence makes for a useful comparative analysis. This research project aims to explore the implications of margin squeezes for EC competition law and US antitrust, with a view to assessing the role antitrust policy should play in a heavily regulated industry such as the telecommunications sector. Importantly, the investigation focuses on those scenarios where the price charged by the incumbent in the upstream market is not predatory, and does not constitute a refusal to deal. In the EC, the Commission and the courts have considered that these practices would fall within the scope of Article 82 EC, as they have been regarded as abuses of a dominant position since they can impede the capability of rivals to compete in downstream markets. This more traditional position was recently confirmed by the CFI in its recent *Deutsche Telekom* judgment, where it upheld the Commission’s decision to fine the company for abusive margin squeezes. This decision is unfortunately based on potential threats to competition and squanders meticulous analysis of the actual effects on the market – a very common oversight of the European institutions in the application of competition law rules. The approach of the US courts appears to be divided since the Supreme Court’s *Trinko* decision. In this sense, the *LinkLine* case reflects the split in opinion between those who defend the legality of price squeezes where there is no duty to deal under *Trinko*, and those who argue that price squeezing should remain challengeable under Section 2 of the Sherman Act.

The research seeks to engage in a detailed economic analysis of the consequences of margin squeezes, in the firm belief that these are crucial for determining the correct response when comparing rival antitrust regimes. The purpose of the study is twofold: on the one hand, the priority is to critically explore and rationalize the disparate US positions; on the other hand, it is necessary to establish whether a uniform transatlantic approach is feasible. In short, can a system focused on prohibiting the “abuse of a dominant position” such as that prevailing in the EU be reconciled with the US position of prohibiting “illegal acquisition or maintenance of monopoly power”.