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EDITORIAL MESSAGE

In line with the GAR's commitment to provide a forum for academic debate on matters of international competition law and policy, the 2020 volume consists of contributions discussing a diverse selection of prominent and controversial topics.

This volume has two interesting articles. The first article focuses on the controversy surrounding the need for merger control in developing countries and its triggering factors, and argues that Ethiopia, as a small economy, motivated by some competition and industrial policy considerations, has enforced a merger control system which is at the fore front of the operational concern of its anti-trust regime. The article states that, despite a noticeable foreign influence on the regime, the country's merger control legal framework is riddled with numerous deficiencies. The second article scrutinises the evolution of margin squeeze under EU law, with a focus on the indispensability element. The article examines the role of the indispensability element in a margin squeeze, the nature of the margin squeeze abuse and the consequences of rendering indispensability non-essential.

The journal is also complemented by an enlightening essay. The essay provides a critical analysis of bilateral cooperation in the field of competition law and policy and considers its advantages and disadvantages in achieving convergence between national competition authorities. This essay examines two highly effective bilateral agreements that have entered into force over the last decades.

As always, we would like to specifically thank Professor Eyad Maher Dabbah, the director of the ICC, for his time, guidance and endless support.

We hope you will enjoy this volume, and we already look forward to receiving excellent contributions from all interested young scholars for the next one.

Editors

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MERGER CONTROL UNDER THE ETHIOPIAN ANTI-TRUST LEGAL REGIME: A COMPARATIVE ANALYSIS

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Notwithstanding the controversy surrounding the need for merger control in developing countries and its triggering factors, Ethiopia, as a small economy, motivated by some competition and industrial policy considerations, has enforced a merger control system which is at the fore front of the operational concern of its anti-trust regime. This article argues that, despite a noticeable foreign influence on the regime, the country's merger control legal framework is riddled with numerous deficiencies. These deficiencies need to be addressed promptly for achievement of the very goals of merger control and implementation of effective enforcement require a well-designed set of rules. It will be argued that, the deficiencies, if not properly dealt, could continue to affect certainty of transactions and ease of doing business and result in unnecessary administrative burden on the competition authority. This article attempts to make a comparative analysis of deficiencies surrounding the legal regime and recommend legal reform.

Keywords: *competition law, merger control, Ethiopia, South Africa, Zambia*

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1. Introduction

In recent times, antitrust laws have been adopted in many developing countries, as part of market-oriented reforms during the 1990's, based on the sound economic principle that enforcement of antitrust policy would enhance economic efficiency, improve consumer welfare and spur economic growth.[1] In respect of the thematic scope of these laws, merger control tended to attract the attention of most competition policy makers in consideration of the result mergers could lead into in terms of altering an existent market structure[2] and creating or strengthening market power.[3] Nonetheless, some developing countries developed a qualm for merger control believing that the creation of domestic dominant firms would enhance economies of scale and in return help international competitiveness.[4] Ethiopia, as one of small economies, with a view to maintain competitive markets that lead to better outcomes for consumers in addition to preventing future abuses of dominant firms, has adopted a merger control system as an important element of its anti-trust regime since 2010. Such form of control has tended to come into existence as a result of subsequent internal and external developments that happened in the country's economy in the mid 2000's[5] though there are equally competing view that merger control is deemed to have been motivated by factors external to the state.[6]

As it stands, the country, motivated by some competition and industrial policy considerations, has developed a merger control mechanism in its anti-trust law, namely the Trade Competition and Consumers' Proclamation (TCCPP)

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[1] UNCTAD, 'Merger Control In Developing Countries: Lesson from the Brazilian Experience' (2002), 1 <https://unctad.org/en/Docs/ditcclpmisc24_en.pdf> accessed 10/10/2019.
[2] Alison Jones and Brenda Sufrin, *Eu competition law* (6th edn, Oxford University Press 2016) 1085.
[3] ibid 1087.
[4] Ratnakar Adhikari and Malathy Knight-John, 'What Type of Competition Policy and Law Should a Developing Country Have?' (2004) 5 *South Asia Economic Journal*, 6-7.
[5] See below (n 8).
[6] See below (n 27 & 28).

no. 813/2013. The proclamation has dedicated a relatively wide coverage for merger control by providing substantive and procedural rules dealing with merger review. Despite a noticeable foreign influence on the legal regime, there are still serious shortfalls and lacuna in the country's merger control legislations that are left unaddressed and can negatively impact effective enforcement of the system. This article therefore attempts to review the major loopholes and deficiencies surrounding the legal regime regulating merger control in the country by way of a comparative analysis. In so doing, the author deemed relevant to consider, as a benchmark, the merger legislations of South Africa (as embodied under the South African Competition Act, 1998 as amended) and Zambia (as embodied under the Zambian Competition and Consumer Protection Act 2010), which are the most advanced African competition regimes and also highly suitable for comparison given the socio-economic situation of the country under examination. Accordingly, a brief appreciation of the background to the Ethiopian competition regime and a subsequent perusal of the merger control legal regime will serve as stepping stones to comparative analysis of some of the major deficiencies surrounding the Ethiopian merger control legal regime. The article concludes with the possible legal reform measures that should be resorted to.

2. Brief Review of the Ethiopian Anti- Trust regime

Regulation of competition is a recent phenomenon in Ethiopia as the economic policy of the country was not based on the ideals of free market before 1991. The key motive for the regulation of competition, which is market failure in a free market, were absent from the outset. Since 2000, as part of the move towards liberalized and free market economy, different restructuring works has been put in place in the country, which can be understood as part of the broad competition policy framework.[7] This mainly

[7] Hailegabriel G. Feyisa, 'European Influence in the Ethiopian Anti- Trust Regime: A Comparative and Functional Analysis of Major Problems' (2009) Vol 3 No.2, *Mizan Law Review*, 271- 272.

includes measures relating to reducing the role of government in business, encouraging private sector development, privatizing national public enterprises, liberalization of foreign trade, promulgation of a liberal investment law and integrating the Ethiopian economy with the global economy.[8] These different schemes of liberalization, though they are far from complete, have enhanced the role of the private sector in the Ethiopian economy. Nonetheless, as Hailegabriel noted, neither privatization of nationalized industries nor opening of previously closed markets, were able to guarantee smooth competition in the actual market as there have been structural barriers inherited from the previous system which created monopolies and restrictive business practices in various sectors which could only be dealt with appropriately if competition is regulated.[9]

Noting this fact, in April 2003, the Ethiopian Government announced the Trade Practice Proclamation (No329/2003) as its first ever competition law to promote competition in the domestic market. This proclamation, however, was found to be inadequate in certain respect, particularly, in terms of its thematic scope, as it did not include merger control provisions. As a result, the Trade Practice and Consumers' Protection Proclamation (No. 685/2010) repealed and replaced the Proclamation No.329/2003. Proclamation no. 685/2010 met many of the shortcomings of the repealed Proclamation, one aspect of which is inclusion of merger control provisions.

This Proclamation was further amended in March 2014, comprehensively addressing anti-competitive practices and consumer protection which resulted in the adoption of the Trade Competition and Consumer Protection Proclamation (No. 813/2013), which is the current competition legislation in Ethiopia. Though it is explicitly stated in the proclamation that subsidiary

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[8] Solomon Abay, 'Designing the Regulatory Roles of Government in Business: The Lessons from Theory, International Practice And Ethiopia's Policy Path' (2209) Vol XXIII No 2, *Journal of Ethiopian Law*, 119.

[9] Hailegebriel (n 7) 272.

legislations are to be enacted for the proper implementation of its provisions, no Regulation and Directive has been enacted so far except for the merger control provisions, which will be discussed in the following sections. The objective of the proclamation is to protect the business community from anticompetitive and unfair market practices, and to establish a system which is conducive for the promotion of competitive free market.[10] The proclamation is applicable to any commercial activity or transaction in goods or services conducted or having effect within Ethiopia.[11] The proclamation, as anti- competitive trade practices, has provided provisions relating to abuse of dominant position, anti-competitive agreements, and acts of unfair competition.[12]

With respect to the institutional framework, the proclamation has established, as an autonomous federal government body, an institution responsible for enforcing the competition law provisions of the country, namely, the Trade Competition and Consumer Protection Authority (TCCPA).[13] The TCCPA is endowed with investigation, prosecution and judicial functions (with its administrative adjudicative tribunal) in relation to anti-competitive practices enshrined under the proclamation.[14]Apart from this, the proclamation has also established a Federal Trade Competition and Consumer Protection Appellate Tribunal (TCCPAT) with powers of hearing and deciding on appeals against decisions of the adjudicative bench and other administrative decisions of the Authority.[15] Equally important, merger control, which is the focus of this article, is a core operational concern of the Proclamation, which seeks to prevent merger operations that would adversely affect competition by

[10] FDRE, Federal Trade Competition and Consumer Protection Proclamation, Proclamation No 813/2013, Fed Neg Gaz, 9thYear No 28, Article 3 .
[11] Ibid, Article 4.
[12] Ibid, Part 2.
[13] Ibid, Article 27.
[14] Ibid, Part 4.
[15] Ibid, Article 33.

mandatorily requiring them to pass through a review process. This will lead us to the discussion of the Ethiopian merger control regime.

3. Overview of Ethiopian Merger Control

As noted earlier, merger control is an important third component of the Ethiopian competition system. And, the purpose behind the regulation should be understood within the broad conceptual and theoretical framework underpinning merger control in any jurisdiction. Consequently, the purpose behind merger control in such jurisdiction is to enable the competition authority to regulate permanent and lasting changes in a market structure resulting from merger operations.[16] Merger control is also said to be tended to prevent the creation or strengthening of market power before it occurs ('*ex ante* control'), which can result in future abuses, and maintain competitive markets that can lead to better outcomes for consumers.[17]

Furthermore, the control is also intended to prevent acts of evading competition laws by enterprises using the merger route to achieve a conclusion of an anti- competitive agreement.[18] In a nut shell, though mergers are not anti- competitive per se and have numerous advantages as a means of corporate restructuring,[19]the basic principle considered for exercising merger control in the regime is based on the fact that mergers could normally lead to concentration of market power, by reducing the number of business entities operating in a market and increasing the market share controlled by the merged entity that may create risk of abuse of dominance, which could in turn negatively impact competition and harm consumer welfare. Setting aside the

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[16] Jones and Sufrin (n 2).
[17] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 860.
[18] Neeraj Tiwari, 'Merger Under the Regime of Competition Law: A Comparative Study of Indian Legal Framework with EC AND UK' (2011), Vol. 23, *Bond Law Review*, 118.
[19] Whish and Bailey has rightly discussed some of the beneficial effects of mergers, which includes, but not limited to, efficiency and achievement of economies of scale and scope, Whish and Bailey (n 17) 860.

theoretical perspective, it is very important to discuss, at this juncture, the actual motivating factors that have triggered merger control in the country. In this respect, it is very relevant to mention the subsequent internal developments that had occurred following the different restructuring works that took place in the economy, in the mid 2000's, towards opening several sectors of the economy to competition.[20]

Externally, the actual and desired growth in merger transactions at a regional and international level following the opening of the market for a private sector investment and the flourishment of Foreign Direct Investment (FDI) in some sectors posit a case for merger control regime to equip the country with the tools to deal with the increased market power of multinational companies and their possible abuse of dominance. Nonetheless, there is also equally competing argument that claims Ethiopia's involvement in the Common Market for Eastern and Southern Africa (COMESA) coupled with its status in the accession process of the World Trade Organization (WTO) claimed to have been the triggering factor.[21] Likewise, the pressure and conditioning of funds from international funding agencies like International Monetary Fund (IMF) and World Bank (WB) on a range of liberalization issues which include the adoption of different competition policies, is the other likely reason for the adoption of the merger control regime.[22]

In any case, the growing consensus that merger control law is not a luxury, but a necessity, to developing free market states, that are not of course invulnerable to abusive conducts and coordinated practices, coupled with the significant rise in domestic and cross border mergers, has been one of the main driving forces behind the growing interest in Ethiopia in merger regulation. These competition and industrial policy considerations have

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[20] United States Agency for International Development, Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic, (January 2007), 59.
[21] Hailegebriel (n 7) 272.
[22] ibid.

therefore motivated the country to develop a merger control framework. The system of merger control was for the first time introduced when the Trade Practice and Consumers Protection Proclamation no 685/2010 came in to force as explicit merger control regulations were absent in the Trade Practice Proclamation no 329/2003. Currently the merger control rules are embodied in the TCCPP No. 813/2013, which has not truly made a significant change in terms of merger control compared to the previously enacted proclamation. The proclamation has exclusively devoted a chapter dealing with the substantive and procedural rules governing merger control, which is Section 2 of Part two of the proclamation. The scope of application of the provisions dealing with merger control is extended to apply to any commercial activity or transaction in goods or services conducted or having effect within the country.

Despite this, the Council of Ministers of the government may specify by regulation those trade activities it deems vital in facilitating economic development to be exempted from the application of the provisions.[23] The proclamation, as a guiding principle for merger control, explicitly provides a prohibition on business persons not to enter into an agreement or arrangement of merger that causes or is likely to cause a significant adverse effect on trade competition.[24] To enforce this provision, the proclamation has prescribed a mandatory pre-merger notification system which works *ex ante* and requires firms to notify their intention to merge to the authority and wait for its implementation until assessment is made and decision is given by TCCPA, which implies the suspensory nature of the regime.

In addition to the Proclamation, which is the main body of law in relation to merger control, the Ministry of Trade has issued a Merger Directive, Merger

[23] Proclamation no 813/2013 (n 10) article 4.
[24] ibid, Article 9(2).

Directive No.1/2016[25] which does not, however, address many of the substantial and procedural elements of merger review. Though the Directive in many cases simply restates what is provided under the proclamation and does not provide a very detailed guidance for the application of merger control rules embodied under the proclamation, it could be considered to reflect the merger review practice of the authority. Also, in terms of cross border mergers involving Ethiopia, the merger control rules provided under the COMESA Competition Regulations might be of importance since Ethiopia is subjected to the regional competition policy as one of the member states to COMESA.

4. Analysis of the Legal Framework

In general terms, merger control legislations encompass the specific process and broad procedural framework of a merger review, which include substantive and procedural rules relating to definition of mergers, requirement of notification, substantive assessment of notified mergers, and remedies and sanctions that could be taken by competition authorities. In this respect, the article in subsequent discussions, tries to review, by way of a comparative analysis, how merger is construed under the Ethiopian regime, followed by analysis of the rule relating to pre-merger notification and substantive assessment, and finalize with examination of rules pertaining to remedies and sanctions, which also include the issue of appeal and judicial review.

[25] Ethiopia is a Civil Law country which does not rely on case laws. In the hierarchy of Ethiopian legislations, Directive is in the lowest level of hierarchy. They describe how Regulations (detailed description of rules to supplement Proclamation) should be implemented and are usually developed by a ministry or a department within a ministry. As Directives are not published in the official legislation gazette of the country, the Merger Directive is not publicized under the Official Gazette. Here, one might also question the appropriateness of the issuance of the Directive before the enactment of a Regulation, which is in the second level of legislation hierarchy.

4.1. What Constitutes Merger?

The first step of any merger review process requires a determination of whether a transaction in question constitutes a merger. It is generally agreed that a true merger (merger proper) involves two separate undertakings merging entirely into a new entity.[26] However, the term merger in competition law is used in a broad sense covering combinations of enterprises in various forms which includes, but not limited to, amalgamations, acquisition of shares, voting rights or assets, or establishing a joint venture company.[27]The question of what constitutes a merger, however, depends on the definition adopted in a given jurisdiction. Therefore, it is important to look at how merger is construed in the Ethiopian merger control legislation. TCCPP, instead of providing a formal definition of a merger, has prescribed situations under which mergers transactions could occur. Article 9(3) of the proclamation reads as follows;

> "*For the purpose of applying the provisions of this article merger shall deemed to have occurred*
>
> *a) when two or more businesses organizations previously having independent existence amalgamate or when such business organizations pool the whole or part of their resources for the purpose of carrying on a certain commercial purpose; or*
> *b) by directly or indirectly acquiring shares, securities or assets of a business organization or taking control of the management of the business of another person by a person or group of persons through purchase or any other means*

The definition adopted in the law seems to encompass all the merger related corporate transactions, which include, amalgamation or combination of enterprises, joint venture agreements or acquisition of interest in another enterprise (acquisition of shares, assets or securities). The definition is also

[26] Whish & Bailey (n 17) 853.
[27] ibid, 854.

outlined to include all types of mergers, i.e, horizontal mergers, vertical mergers and conglomerate mergers.[28] It is also important to note from the definition that acquisition of interest over another could be achieved either directly or indirectly and exercised by a single undertaking (sole) or two or more undertakings (joint) though there are no clear legal guidelines as to their application. Having said this, the article deemed necessary to identify some of the shortfalls of the definition incorporated under the proclamation.

4.1.1 The Issue of Control

It has been stated earlier that the main purpose of regulating mergers is based up on the premise that mergers can naturally create changes in market structure. Therefore, the central issue, for the purpose of merger control, is to determine whether there is a change in the quality of control resulting from a given merger operation. Control could either be sole control (where one undertaking acquire the possibility of exercising decisive influence over another undertaking) or joint control (where two or more undertakings come under common control and have the possibility of exercising decisive influence over another).[29]

Consequently, merger control legislations in almost all jurisdictions apply to operations leading to change in quality of control.[30] Looking at the South African merger control legislation, for purposes of the Competition Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm, whether such control is achieved as a result of the purchase or lease of the shares, an interest or assets of the other firm, by amalgamation or

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[28] A horizontal merger is one which occurs between undertakings operating at the same level of the economy. A vertical merger is one concluded between firms at different levels of production in the economy. Conglomerate mergers are mergers which have no horizontal or vertical effect.
[29] Whish and Bailey (n 17) 853-854.
[30] Jones and Sufrin (n 16) 1097-98.

any other means.'[31] The Act further sets out ways in which control may be achieved, which are referred to as instances of 'bright line' and 'catch all' control that includes, but not limited to, the ability to materially influence the policy of the firm, vote a majority of the votes that may be cast at a general meeting of the firm and appoint or veto the appointment of a majority of the directors of the firm.[32]

Similarly, Looking at the Zambian merger control regime, for the purpose of its Competition Act, a merger is said to be occurred where an enterprise, directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses.[33] A person or an entity will be considered to have control over an enterprise if that person, among other things, has the ability to materially influence the policy of the enterprise or the ability to veto strategic decisions of the enterprise such as the appointment of directors and other strategic decisions which may affect the operations of the enterprise.[34]

Thus, in both systems, it is the acquisition of control (both de facto and legal) which is of importance and any acquisition of interest would constitute mergers if it leads to acquisition of control. This is not, however, true in the Ethiopian merger control legal regime. A careful examination of the provision of the proclamation defining a merger reveals that a lasting change in control of an enterprise seems to be immaterial for an acquisition of interests (either in the form of shares or assets or securities) to be construed as a merger. The provision does not require acquirers to have the ability to exercise controlling

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[31] South African Competition Act 89 of 1998 (as amended), Section 12(1).
[32] ibid, Section 12(2).
[33] Zambian Competition and Consumer Protection Proclamation Act 24 of 2010, Section 24(1) & (2).
[34] ibid, Section 24(3).

interests or decisive influence over another for an operation to be regarded as a merger. And hence, for the purpose of the proclamation, a mere acquisition of an interest (be it a minority or nonvoting securities), which does not confer the possibility of exercising decisive influence over another undertaking, could still be considered as a merger. Similarly, the act of pooling of resources as provided under paragraph (a) of the provision could again be considered as a merger, even if the previously independent businesses do not come under common control.

Besides, there is no clear rule (in terms of objective numerical thresholds) defining what types of share acquisitions are within the scope of the proclamation. The law does not also clearly define in what circumstances asset acquisitions are considered sufficiently material to merit inclusion within the scope of the proclamation as opposed to asset acquisitions that are unlikely to affect competition. Here, one might otherwise argue that the element of control has been recognized under the same provision defining mergers, particularly in paragraph (b) of article 8 (2) of the proclamation which includes a phrase "*…taking control of the management of the business…*" I do not however agree with this assertion for the following two major reasons. Firstly, it should be clearly noted that the phrase in paragraph (b) of the stated article is provided as one of the criterion or instances where by mergers can be contemplated and should not be read cumulatively (as similar transactions) with other forms of acquisitions provided under the same paragraph, for a conjunction 'or' is used to distinguish between the phrase "taking control of the management" and other forms of acquisitions. Secondly, the phrase stated under the paragraph, though there seems to be overlap, refers to and apply for means of acquisitions of control other than the common means of acquiring control (acquisition of shares, assets or

securities), the best example of which is acquiring control based on contractual basis.[35]

Therefore, it can be safely concluded that the term 'taking control' in the paragraph does not apply to transactions relating to acquisition of shares and assets, which means that any kind of acquisition of shares, securities or assets will automatically fall under the definition of a merger for the purpose of the proclamation, without a need to prove the existence of change in control or whether the operation has conferred the acquirer the possibility of exercising decisive influence over the target. Despite the fact that the proclamation does not rely on the concept of 'control', the Merger Directive issued by the Ministry has tried to consider the concept in the sense that issue of control is one of the factors to be taken in to account in the course of merger assessment.[36] This does not still, however, address the concern as the directive included the concept as something that should be considered at the stage of substantive assessment as opposed to the stage of notification in general and defining mergers in particular.

4.1.2 The Treatment of Joint Venture

The other essential point that should be examined under the issue of what constitutes a merger is the question of how Joint Venture (JV) is treated under the proclamation. In general terms, JV is a joint commercial arrangement whereby two or more parties co-operate in order to run a business or to achieve a commercial objective retaining their distinct identities. Some joint ventures involve the integration of parts of the business activities of the undertakings to the joint venture, which can result in a reduction or elimination of competition between the undertakings to the joint venture in the joint venture's field of activity. Whether it does so, however, depends on

[35] The EC in its Jurisdictional Notice udder Merger Regulation, paragraph 18 provides the possibility of control to be acquired on a contractual basis.
[36] Ministry of Trade, Merger Directive, Section 7.2.

the relative permanence of the joint venture and the degree of autonomy it enjoys from its parent companies.[37] As a result, many jurisdictions treat some forms of JV as mergers while some of JV agreements can still be dealt under provisions dealing with anti- competitive agreements. Looking at the Zambian Act, JV's are specifically addressed under the definition part of the Act which considers a JV between two or more independent enterprises as one of the ways in which a merger may be achieved.[38]

However, not all JVs are subject to merger control under the regime. The Commission's Merger Guideline of 2015 distinguish between "full function" joint ventures (which require merger approval) and "auxiliary" joint ventures (which do not require merger approval) and explain that only a full-function joint venture, performing on a lasting basis all the functions of an autonomous economic entity, shall constitute mergers within the meaning of the Act.[39] Looking at the South African regime, although the legislation does not specifically refer to JV agreements, it can easily be inferred from article 12 (1)a of the Act that all transactions including JV that result in the sole or joint acquisition of control over another would constitute mergers. This interpretation is consistent with the approach adopted by the Commission.

The Commission has published a practitioners' note to help determine whether a joint venture should be notified, and it described in the practical note that only "concentrative (full function) joint ventures" could bring about a lasting change in the structure of the undertakings concerned and be considered as mergers.[40] Coming to the Ethiopian merger control rules, unlike the case of Zambia, there is no explicit reference in the proclamation as to whether a JV could be considered as mergers. It could, however, be argued

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[37] COMESA Merger Assessment Guideline of 2004, Section 2.11.
[38] Zambian Competition Act (n 33) article 24(2)c.
[39] Zambian Competition and Consumer Protection Commission Guidelines for Merger Regulations, 2015, Section 10
[40] The Practical Note is found in the Commission's website. See http://www.compcom.co.za/practice-notes, accessed 10/10/2019.

that the concept of JV is implicit and can easily be inferred from paragraph (a) of article 12 of the proclamation which clearly provides that one of the ways in which mergers can be achieved is pooling of resources, i.e, when such business organizations pool the whole or part of their resources for the purpose of carrying on a certain commercial purpose.

Apart from this, what is important to note here, however, is that, given the absence of subsidiary legislations addressing the matter in question, there is no clear and predictable criteria to distinguish those JV transactions that are subject to merger review from those that are not. The requirement of common control and full functionality are not recognized under the legislations (both in the proclamation and directive), which may imply that any kind of JV arrangement would automatically fall under the definition of a merger.

4.1.3 Parties to a Merger

It is a matter of general fact that mergers are corporate transactions occurring between two or more business entities in an economy. It follows therefore naturally that parties to a merger are business entities which could be organized in different forms. Looking at merger control legislations around the world, terminologies like 'undertakings', 'firms', 'enterprises', 'company' or 'cooperation' are used to denote what could be parties to a given merger. While the Zambian Act used the term "enterprises" to describe parties to a certain merger operation, the South African legislation preferred to use the expression 'firms'.

Looking at TCCPP, unlike the two regimes, the proclamation has used a different terminology in that a merger, for the purpose of the proclamation, is a transaction that occurs between what is known as "persons." Though terminologies used to name parties to a merger do not really matter, it could be strongly otherwise argued that the nomenclature used under the proclamation could certainly create a controversy and call up on an

interpretation which may lead to unintended result. The issue is essentially related to the question of what is meant by 'persons' and whether the term is exclusively referring to 'business persons.' Article 2 (16) of the proclamation defines the term as it refers to a 'natural' or 'artificial person', which does not have to be a business person.

The cumulative reading of article 2(16) and article 12 of the proclamation delivers a meaning that acquisition of interest by any person (which does not have to be a business person and includes a mere individual person) over another firm could fall under the definition of mergers. This implies, therefore, that, for the purpose of the proclamation, acquisition of interests, for instance, by an individual private investor who had not previously been in a business operation but would like to acquire an interest on a certain enterprise, would be construed as a merger. Also, the terminology used may lead to the inclusion of group-internal or intra-person restructuring, which has no effect on market structure, within the scope of merger review. It is not very clear why the proclamation opts for using the term 'persons' instead of 'business persons'[41]while this is not the case on the provisions dealing with abuse of dominance and anti- competitive agreements.[42] This will certainly cause ambiguity in practice and could lead to the inclusion of transactions which are not mergers by their nature and has no competition concern.

[41] Article 2(5) of the Proclamation defines 'business persons' as any person (natural or artificial) who professionally and for gain carries on any of the activities specified under Article 5 of the Commercial Code, or who dispenses services or carries on those commercial activities designated as such by law.

[42] If we look at Article 5 of the proclamation, it states that no 'business person' could carry out commercial activities by abusing the dominance he has in the market. Article 7 of the proclamation provides that an agreement between 'business persons' that can prevent, significantly lessens competition shall be prohibited.

5. Pre- Merger Notification

Once a certain transaction falls under the scope of the definition of merger provided under the proclamation, the next step in a merger review process is related to notification. Many States, in controlling mergers, have established a system of notification prior to consummation of mergers. Some countries have retained a mandatory system of notification after consummation of the merger and a few countries have submitted merger control only to a voluntary notification process. For most countries, notification is mandatory only when the enterprises concerned have, or are likely to acquire, a certain level of concentration.[43] The Ethiopian legal regime has adopted a mandatory pre-merger notification mechanism considering that mergers are more efficiently dealt with prior to their occurrence.

The proclamation imposes an obligation on any business person who proposes to enter into an agreement or arrangement of merger to give a notice to the authority by disclosing the details of the proposed merger in a form and manner prescribed by the authority.[44] The notification requirement is further reinforced by other provision of the proclamation which sets out an obligation on government registration offices to require the presentation of authority's clearance before registering a merger in the commercial register.[45] Also, the proclamation has adopted a suspensory regime in that a merger shall not be implemented either before its notification or until it has been approved by the authority by explicitly stating that no agreement or arrangement of merger may come into effect before obtaining approval from the Authority.[46] And parties cannot get their mergers cleared or authorized other than through this

[43]UNCTAD 'Model Law on Competition' (2007) 50 <https://unctad.org/en/Docs/tdrbpconf5d7rev3_en.pdf> accessed on 12/10/2019.
[44] Proclamation 813/2013 (n 10) Article 10(1).
[45] Ibid, Article 12.
[46] Ibid, Article 9(2).

route. The policy consideration behind the suspensory nature of the regime is that standstill obligation will mitigate the implementation risks for deals raising substantial competition issues that would otherwise have been caused if there is no suspension. In terms of procedural rules relating to notification, the directive has provided some procedural rules in respect of the form and manner of filing notifications.

In terms of who should notify, any party to the transaction or the parties' appointed representatives can notify the authority. Regarding notification timing, the proclamation does not impose deadlines for filing given the jurisdiction is a suspensory regime. And, there is no filing fee provided for notifications under the system. And there is no system that offers merging parties the opportunity to have pre-notification discussions of whether their transaction will be subject to notification and on the scope of the information to be submitted. Having said this, it is important here to note a few aspects that warrant further attention.

5.1. Threshold Limits

It is very common to see threshold limits, in terms of assets or turnover, set out in merger control provisions of competition statutes to determine which merger, acquisition or joint venture will be required to be notified or may be reviewed by the competition authority. The rationale for limiting the notification requirement for mergers valued above certain monetary thresholds is to lessen the administrative burden for competition authorities. Threshold limit also aims at enabling competition authorities to identify and focus upon mergers which are most likely to be of concern.[47]Consequently, many merger control regimes impose a notification requirement for mergers of a certain size. Looking at the case of South Africa, the Competition Act establishes three categories of mergers which are determined with reference

[47] Alan H Goldberg (Vinod Dhall 'ed') *Competition Law Today: Concepts, Issues and the Law in Practice* (1st ed, Oxford University Press 2007) 96.

to turnover or assets, as 'small', 'intermediate' and 'large' mergers. And only intermediate and large mergers normally require prior notification and approval. [48] As per these classifications, for a merger to be subjected to the mandatory notification requirement must be an intermediate merger, which means that the combined assets or annual turnover of the acquiring and the target firm must equal or exceed 600 million Rand and also the target firm's assets or annual turnover shall equal or exceed 100 million Rand.[49]

If the proposed transaction does not meet the prescribed threshold criteria of intermediate, it will be categorized as 'small merger' which are not in the ordinary course subject to mandatory notification requirement. In the case of Zambian merger control regime, a merger transaction requires authorization by the Commission in any instance where the combined turnover or assets, whichever is higher, of the merging parties in Zambia, is at least 50 million fee units (i.e. 15 million Kwacha).[50] Like the case of South Africa, there are circumstances, however, in which transactions falling below the above thresholds may be required to be notified where the Commission has reasonable grounds to believe that the merger has a substantial competition concern.

Looking at the Ethiopian regime, unlike those two jurisdictions, parties to a merger transaction need to notify their mergers and acquire an approval from the Authority irrespective of the financial magnitude of the transaction constituting the merger. There has been no threshold set by the Proclamation or implementing regulations which served as a criterion to exempt small transactions from the mandatory notification requirement. On the contrary, the law is enacted in such a way that all kinds of merger arrangements are

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[48] The South African Competition Act (n 31), Section 13(A).

[49] South African Ministry of Trade and Industry, Determination of Merger Thresholds and Methods of Calculation Notice No 216 of 2009 (Government Gazette No 31957) as amended, 2007, Section 2.

[50] Zambian Competition and Consumer protection Proclamation (General) Regulations 97/2011, Section 8(1)

mandatorily required to be notified to the authority irrespective of their size.[51] Unlike the case of South Africa and Zambia[52], where the respective trade ministries are explicitly mandated under the Act to set out thresholds for merger notifications, there is no explicit provision in the proclamation that stipulates the possibility where by threshold limits can be prescribed by the concerned body under a subsidiary legislation.

Despite this, the Merger Directive, out of blue, has set out what it considers to be the minimum threshold limit for merger notifications, i.e., the combined asset or turnover or capital of 30,000,000 Ethiopian Birr (783, 695.94 GBP)[53]. It is very interesting to note three serious pitfalls here. Firstly, the legality of the directive setting forth threshold limits is disputable as it is not legally acceptable to set out a threshold limit under a lowest subsidiary legislation in a situation where there is no explicit permission to do so under the proclamation, as it is in the case of south Africa and Zambia. Furthermore, as it did in the case of the issue of control, the directive provided a threshold limit as something to be considered at the stage of substantive assessment as opposed to the stage of notification[54]. Lastly, prescribing a threshold in an instrument which is not required to be publicized, and lacks clarity in many respects is against the International Competition Network (ICN) recommendation which dictates threshold to be clear, understandable (which includes providing publicly available written guidance on the application of

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[51] Article 10(1) of the proclamation reads as follows; "any business person who proposes to enter into an agreement or arrangement of merger shall give notice to the Authority by disclosing the details of the proposed merger".

[52] The thresholds under South African regime are set out by the Ministry of Trade and Industry by the power granted to it under Section 11(4) of the Competition Act. Similarly, the Zambian Minster prescribed thresholds limits as per the power conferred to it by Section 26(5) of the Competition Act.

[53] There is no appropriate guidance as to the method of calculation and criterion used to determine the threshold. For example, the question "Is the threshold value for the acquiring firm or target firm or both?" is left an answered. Further, it is not clear how capital of merging parties is used as a criterion to determine threshold.

[54] The Directive under Section 16 provides that those transactions which are below the prescribed threshold will be exempted from investigation and automatically be considered as if they are allowed by the authority to be implemented.

their merger notification thresholds), based on objectively quantifiable criteria and on information that is readily accessible to the merging parties.[55]

5.2. Local Nexus Provision

It is widely accepted practice that notification should not be required unless the merger transaction has a material nexus to the reviewing jurisdiction. This criterion may be satisfied if each of at least two parties to the transaction have significant local activities. Alternatively, this criterion may be satisfied if the acquired business has a significant presence in the local territory, such as significant local assets or sales in or into the reviewing jurisdiction.[56] Looking at the Zambian regime, an enterprise in Zambia that comes within the control of a foreign enterprise will be subject to notification and reviewed as far as the operation affects competition in Zambia.

Nonetheless, where the control of a Zambian enterprise comes about purely as a result of a merger or acquisition involving enterprises wholly domiciled outside Zambia, the Commission should only be notified if the merger has a local nexus or connection. The Commission will only, therefore, assert jurisdiction over those transactions if the foreign enterprise has a local nexus of sufficient materiality, such as having subsidiaries in Zambia or having made 10% of its sales in Zambia over the last three years.[57]Likewise, in the case of South Africa, "foreign-to-foreign" mergers are captured by South African merger control provided that there is an effect in South African territory. Such an effect will be manifest where the target has assets or turnover in or into South Africa. If the target business has no assets and turnover in or into South Africa, there is no need to notify.[58]Coming to the case of Ethiopia, unlike those jurisdictions, the legal regime does not have a

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[55] ICN, Recommended Practices for Merger Notifications and Review (2017) 5-7, https://www.internationalcomp...er-np-recommended-practices accessed on 22/10/2019.
[56] ibid 4.
[57] Zambian Guidelines for Merger Regulation (n38), Section 15& Section 16.
[58] Notice No 216 2017 (as amended) (n 48).

local nexus provision which requires certain minimum part of the assets of the acquiring or target company to be within the territorial limits of the country.

Examination of the provision dealing with scope of application of the proclamation reveals that foreign mergers which have a direct or indirect effect on the structure of local markets are notifiable through the application of 'effects Doctrine' principle. However, the question of when and under what circumstances do the merger control rules apply on a given foreign merger is not addressed under the legislations (the proclamation and directive), which means that every foreign merger will automatically be subjected to review by the competition authority irrespective of its material nexus.

6. Merger Analysis

Once competition authorities received notifications from parties to a merger, they should immediately begin substantive investigation process to assess the effects of notified mergers on competition. And the core component of any merger control regime is the assessment of proposed mergers to determine whether a merger will result in competition being prevented or substantially reduced, to the detriment of consumers, which involves the examination of various factors. Looking at the Ethiopian merger control rules regulating substantive analysis of mergers, the relevant provision of the proclamation is article 10(2) and 10(3) which explicitly stipulates that, up on receipt of notification, the authority shall investigate the possible adverse effect of the proposed merger.

In the course of investigating the possible effects of a proposed merger, TCCPA is empowered, where deemed necessary, to require the parties to the merger to submit additional information or document within a specified period.[59] Apart from this, the authority, as part of its merger review process,

[59] Proclamation No. 813/2013 (n 10), Article 10(3)a.

may also invite, by a notice published on a newspaper having wide circulation, any business person who is likely to be affected by the said merger, to submit his written objections, if any, within 15 days from the date of publication of the notice.[60] Subsequently, a number of legal loopholes, associated with substantive analysis of mergers, are considered.

6.1. Time Limit for Review

Given merger transactions are always time sensitive, merger reviews by competition authorities should be completed within a reasonable time frame. Specially in jurisdictions where there is a suspensive regime, the law needs to set timely review periods for parties are barred from proceeding with the transaction during the pendency of the agency's review.[61] The primary rationale behind prescribing time limits is essentially based up on the premise that the absence of legally binding reasonable time limit for merger investigations will negatively affect certainty of deals and transactions raising no substantial competition concerns. Consequently, many merger control regimes set out timeframes within which competition authorities are expected to complete their merger investigations.

Looking at the Zambian regime, under the Competition Act, the Commission is required to complete its assessment of a proposed merger and issue its determination within 90 days of the date of the application with the possibility of an extension of 30 days. Where the Commission does not issue its determination regarding a proposed merger, within the period specified, the proposed merger shall be deemed to be approved.[62] Looking at the South African regime, the time limit for review is provided under the Act based on the type of mergers under consideration. For small and intermediate mergers,

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[60] Ibid, Article 10(2)b.
[61] ICN (n 53), 11.
[62] Zambian Competition and Competition Act (n 33), Section 32.

the maximum period for consideration is 60 business days.[63] For large mergers, the Commission has an initial period of 40 business days to consider and refer a large merger to the Tribunal with a possibility of an extension of 15 days. Within 10 business days of the hearing, the Tribunal must approve or prohibit the merger. On expiry of the initial period (if not extended) or the extended period, the Commission must render a decision to approve (with or without conditions) or prohibit the merger, failing which the merger is deemed to have been approved.[64] Coming to the Ethiopian merger control rules, unlike the two regimes, the proclamation does not prescribe a time limit within which a decision on notifications has to be given.

The previous proclamation, which was Proclamation no. 685/2010, had a provision which sets out an obligation on the authority to immediately communicate to the applicant in writing of its decision, either to grant or deny its permission. This provision, though vague in nature, speaks in terms of timing for review. On the contrary, the current proclamation is silent as to the time limit within which TCCPA must complete its investigation and issue a determination, which could lead to the conclusion that the authority can take any time long to finalize its merger review process. The absence of legally binding shorter time limit coupled with the suspensory nature of regime will negatively affect certainty of deals and transactions raising no substantial competition concerns. Despite this, the directive has tried to specify some sort of recommended time limits for a practical purpose.

As per the directive, the maximum period for merger consideration is 30 working days with a possibility of extension for 15 days. Here, it should be noted that, unlike the two regimes, where failure to comply with the time limit specified results in the proposed merger to be deemed to have been approved, the directive does not set out a clear legal remedy for failure to render decision

[63] South African Competition Act (n32), Section 13 and Section 14.
[64] Ibid, Section 17.

within the specified time limit, for the time limit in the directive is stipulated in a way it could serve as a practical guidance for the authority as opposed to a strong legally binding time frame.[65]

6.2. Substantive Test and Criteria of Assessment

The substantive assessment of mergers normally involves the identification of a relevant market and assessment of the proposed merger as per the substantive test set out in the respective laws, in consideration of various factors and criteria. It is widely agreed that prior to looking into the impacts of a merger, the primary task should be defining the relevant market which frequently determines whether a merger is judged anti-competitive and unlawful.[66]

A. Relevant Market Definition

Looking at the South African regime, it is implied from many of the provisions of the Act that, when determining whether a merger is likely to substantially prevent or lessen competition, the Commission or the Tribunal must assess the strength of competition within the confines of the identified 'relevant market' or 'market' that may be affected.[67]Similarly, if we look at the Zambian merger control legislations, the Act under article 30 and other provisions sets out that the Commission shall consider the likely and actual factors that affect competition in a 'defined market' in considering a proposed merger. Therefore, under both systems, the market or markets to be affected by the merger accordingly need to be identified. Coming to the Ethiopian

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[65] Looking at the framing of the directive setting out time limits, Section 22 of the directive reads that "the time limit for a merger review could possibly take 30 days with a possibility of extension for 15 days" which implies the permissive nature of the provision. Note also that the directive is not publicized in an official legal *gazette*.

[66] OECD/ World Bank, A Framework for the Design and Implementation of Competition Policy and Law, 46 (1999), available at: http://www.oecd.org/dataoecd/10/30/27122278.pdf (accessed 10/10/2019).

[67] South African Competition Act (n 31) Section 12(1).

merger control rules, the proclamation does not imply the need to define a relevant market in assessing the possible effects of mergers.

Unlike the case of abuse of dominance, where it explicitly acknowledges the relevance of defining relevant market for the determination of dominance[68], TCCPP does not consider the specific market on which merger investigations should be restricted as a major integral part of merger assessment process. Though it might be argued that defining a relevant market is conceptually apparent in any assessment of mergers, the relevance should either be implicit in the proclamation or the directive issued or any other guidelines to be issued. Also, there are no detailed guidelines (including market definition guideline) in the regime on how to define a relevant market in the context of mergers.

B. Substantive Test

Every system of merger control sets out a substantive test to determine whether a merger ought to be blocked and must decide upon a standard of proof required before a competition authority can block a merger.[69] While the terminology used in the context of the substantive test in different jurisdictions might differ, what is essentially examined under the assessment is whether and to what extent the proposed merger negatively impacts competition. Many jurisdictions require the impact to be substantial if any action is to be taken by the competition authority.[70] Looking at the case of South Africa, the overall reading of the Act reveals that the Commission adopts the substantial lessening of competition (SLC) test[71] while the Zambian regime seems to include the dominance test in determining the issue

[68] Proclamation no. 813/2013 (n 10).
[69] Whish and Bailey (n 17) 788.
[70] Neeraj (n 18) 135.
[71] The Commission is there to determine whether a merger will result in competition being *substantially prevented or reduced*, to the detriment of consumers.

of whether the merger in question will lead to substantial lessening of competition.[72]

In the case of Ethiopia, neither the proclamation nor the directive clearly dictates the substantive test to be applied by the Authority in assessing effects of a given merger on competition. The provision dealing with investigation of proposed mergers, which is article 10(2), provides that 'the authority upon receipt of the notification of merger, shall investigate the possible adverse effect of the proposed merger on trade competition.' This provision is deficient not only because it does not require the adverse effect on competition to be substantial, but also does not imply the substantive element or test (whether it is a SLC or Significant Impediment to Effective Competition or Dominance Test) used to determine the existence of adverse effect on competition. Therefore, the substantive test to be applied to determine whether a merger should be approved or prohibited is not clearly articulated both in the proclamation and the directive.

C. Criteria of Assessment

The substantive analysis of a proposed merger involves the assessment of various quantitative and qualitative factors to determine the effects of the proposed transaction on competition. Thus, Competition authorities employ numerous criteria for the analysis of the impacts of proposed mergers on competition, depending upon the type of merger involved in the case.[73] A substantive test usually involves the examination of various factors such as pre and post-merger market shares, market concentration, barriers to entry, extent of effective competition, etc., among others to assess whether the proposed merger will negatively impact competition.[74] Considering the case

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[72] The dominance test could be implied from article 27 and article 30(2)h of the Competition Act.
[73] Neeraj (n 18) 136.
[74] ibid 17.

of Zambia, three major assessments should be carried out. Firstly, the Commission shall carry out market assessment, which simply seeks to determine the likely effects of the proposed merger in the relevant market, on trade and the economy in general.[75] Secondly, the Commission shall assess whether the merger is likely to prevent or substantially lessen competition in a market in Zambia (Competition Assessment) by taking into account factors including, but not limited to, the levels of concentration, barriers to market entry, the level of imports, countervailing buyer or supplier power, and the risk of abuse of dominance.[76]Thirdly, the Commission shall consider any factor which bears up on public interest in the proposed merger (Public Interest Assessment).[77]

In the assessment of mergers, the Commission generally considers the basic theories of harm, namely unilateral or monopolization effects, coordinated effects and non-horizontal (foreclosure) effects. In the case of South Africa, the Commission, in evaluating a merger, first considers whether the merger is likely to substantially prevent or lessen competition by looking at factors including, but not limited to history of collusion, the dynamic characteristics of the market, the nature and extent of vertical integration and whether the merger will result in the removal of an effective competitor. Also, in considering all mergers, including pro-competitive mergers, the Commission considers the effect the merger will have on the public interest. In terms of theory of harm, the Commission more generally considers the potential horizontal, vertical, unilateral and coordinated effects of the merger.[78]

Coming to the Ethiopian legal regime, unlike the two regimes, the proclamation does not clearly specify the criteria and factors to be considered for the analysis of effects of proposed mergers on competition. It does not

[75] Zambian Competition Act (n 33) Section 29.
[76] Ibid, Section 30(2).
[77] Ibid, Section 31.
[78] South African Competition Act (n 31) Section 12(A).

prescribe the competition related assessment factors and basic theories of harm that should be considered in the course of investigating competition concerns of a given merger. In this connection, it is worth to discuss some of the rules reflected under the Directive. It is provided under the Directive issued that the authority, in the course of investigation of mergers, may take in to account some substantive assessment considerations which are related to market, competition and public interest, which resembles to what is adopted under the Zambian regime. However, two issues need serious consideration here. Firstly, the assessment factors which are assumed to be considered under the directive, more particularly, the market and public interest assessment considerations, cannot be considered as legally binding considerations for it is not legally acceptable to introduce assessment factors (by a directive) which are not recognized under the proclamation. Secondly, the legal regime does not have a detailed guideline that clearly defines the assessment factors that should be considered, and theory of harms that should be investigated in the course of assessment of mergers, as it is clearly provided under the South African and Zambian regimes.

D. Public Interest Considerations

One of the basic questions in any merger control regime is the question of to what extent non- competition factors are relevant in a review process of mergers. Despite the controversy, most domestic merger control regimes continue to reserve the role of non- competition factors, particularly, public interest criteria on the perceived inability of competition to respond to short-term public interest concerns which, if left unaddressed, may have lasting implications on fundamental interests such as employment. In this respect, if we take the case of Zambia, the Commission applies the public interest criteria in almost all merger evaluations and the criteria is said to include the extent to which the proposed merger is likely to result in a benefit to the public that would outweigh any detriment attributable to a substantial lessening of

competition. The Commission may, in considering a proposed merger, take into account any factor which bears upon the public interest in the proposed merger, including but not limited to the extent to which the proposed merger shall maintain or promote exports from Zambia or employment in Zambia; the extent to which the proposed merger may protect the interests, of micro and small business enterprises in Zambia, the extent to which the proposed merger may affect the ability of national industries to compete in international markets and any socio economic factor as may be appropriate.[79]

In the case of South Africa, the Commission should determine whether the merger can or cannot be justified on substantial public interest grounds. The Commission, in considering all mergers, considers the effect the merger will have on the public interest, with specific reference to its effect on a particular industrial sector or region; employment; the ability of small and black business to become competitive; and the ability of national industries to compete internationally. A merger with no anticompetitive effect could in principle be prohibited if, for instance, it will result in substantial job losses or an impact on local procurement. Public interest issues are often championed by the Minister of Economic Development, who has a statutory right to participate in proceedings from a public interest perspective.[80]

Coming to the Ethiopian merger control rules, unlike the two systems, the proclamation has not adopted a public interest assessment criterion as one of merger assessment considerations. Though Ethiopia, as a small economy, needs to concern itself with the issue of unemployment and competitive ability of its small national industries, non-competition factors more importantly, public interest considerations, are not the integral part of the merger investigation process. The authority is not, therefore, authorized to

[79] Zambian Competition Act (n 33) Section 31.
[80] South African Competition Act (n 31) Section 12(A) 3.

apply public interest test in merger evaluations and mergers cannot be justified or prohibited on substantive public interest grounds.

6.3. Defences

It is believed that the purpose of merger assessment is to identify and prohibit mergers that can adversely impact competition that any benefits resulting from them are outweighed. Merger control rules, therefore, require competition authorities to ensure that beneficial mergers are permitted to proceed and are not unduly hampered which require a delicate balancing act of prohibition and permission in merger control. And hence, most merger control regimes set out defences that may be raised in the context of prohibition of mergers. There are two common 'defences' that may be raised in the context of the prohibition of mergers namely the efficiencies defence and the failing firm defence.

The efficiencies that result from a merger may be considered to offset the negative impacts where the benefits are shown to flow to the ultimate consumers. Also, where the undertakings being acquired are in a condition that without the takeover, it would be forced to exit the market, the 'merger' may be permitted irrespective of its negative impacts.[81] Looking at the South African regime, two sets of defences are provided in the Act. Firstly, if the Commission finds that a merger is likely to have an anti-competitive effect, it may still find the merger to be justifiable based on efficiency, technology or other pro-competitive gains that are shown to outweigh any anti-competitive effect and would not likely be obtained if the merger is prevented. Secondly, if it appears that the merger is likely to substantially prevent or lessen competition, the Commission shall determine whether the merger can or

[81] Neeraj (n 18) 133.

cannot be justified on substantial public interest grounds by assessing the factors set out in the Act.[82]

Apart from this, the Commission, when determining whether or not a merger is likely to substantially prevent or lessen competition, should assess whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail[83], which indicates that the regime has integrated assessment of failing firm defence in investigation of mergers. In the case of Zambian merger control regime, the Commission, in considering a proposed merger, may take into account the extent to which the proposed merger is likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition. It should also consider the extent to which the proposed merger would, or is likely to, promote technical or economic progress and the transfer of skills, or otherwise improve the production or distribution of goods or the provision of services in Zambia. The saving of a failing firm is also another factor the Commission should take into account in considering a proposed merger.[84]

Examining the Ethiopian merger control legislation in the context of defence, the relevant provision of the proclamation is article 11(2) of the proclamation which essentially stipulates an efficiency defence. As per the provision, the authority may approve a merger proposal (which is likely to have a significant adverse effect on trade competition) where the merger is likely to result in technological, efficiency or other pro-competitive gain that outweigh the significant adverse effects of the merger on competition, and such gain may not otherwise be obtained if the merger is prohibited. Unlike the two regimes, however, the fact that one of the merging parties has failed or is likely to fail

[82] South African Competition Act (n 31) Section 12(A).
[83] ibid.
[84] Zambian Competition Act (n 33) Section 31.

could not be taken as a ground justifying a merger which is likely to have anti- competitive effects.

Similarly, mergers cannot be justified on substantial public interest grounds. So far, an examination of the Ethiopian merger control rules regulating merger notifications and substantive assessment has been made. In the following sub section, the article tries to address the rules relating to the last stage of the merger review process, i.e., remedy on merger notifications.

7. Remedies, Appeal and Enforcement

7.1. Remedies and Appeals

After scrutiny of proposed mergers, competition authorities in any merger control regime may authorize the merger conditionally or unconditionally or prohibit it. It is quite often the case that most aspects of a merger give rise to no competition concern. And when there are certain parts of the businesses of merging parties that overlap horizontally, competition authorities, instead of prohibiting the whole transaction, may look for a remedy whereby its competition concern is assuaged, and the rest of the deal can proceed.[85]

Looking at the Ethiopian merger control rules in relation to the power of the authority on a proposed merger, the proclamation has provided three possibilities. The authority, after having investigated a proposed merger, approves the merger, if it is of the opinion that the merger is not likely to have any significant adverse effect on trade competition. It can also prohibit the merger if it is of the opinion that the merger is likely to have a significant adverse effect on trade competition. It has also a power to approve the merger subject to certain conditions, if it is of the opinion that the likely significant

[85] Whish and Bailey (n 17) 867.

adverse effect of the merger on trade competition can be eliminated by complying with certain conditions attached.[86]

The proclamation has also introduced the concept of revocation of in the sense that the authority is authorized to revoke a merger approval when it discovers that the approval was obtained based on the presentation of false and fraudulent evidence or where the conditions based on which the approval has been obtained are not fulfilled. And the authority is required, following the revocation of a merger approval, to inform the concerned government office to cancel the merger from the commercial register.[87] Apart from this, the regime has provided opportunities for appeal and judicial review of a decision in respect of a merger that the parties are dissatisfied with. Any person or an enterprise that is aggrieved by an order of TCCPA may appeal to the Appellate Tribunal within 30 days of the order.

Also, any party wishing to appeal against a decision of the Appellate Tribunal claiming the existence of mistake on question of law, may appeal to the Federal Supreme Court within 30 days of the Tribunal's determination.[88] It is interesting here to note three serious pitfalls. Firstly, neither the proclamation nor the directive oblige the authority to justify its decision in a written form or issue written reasons when it has decided either to prohibit or conditionally approves a proposed merger. Unlike the case of South African and Zambian legislations, where explicit obligation is provided on the Commission to inform the parties of its decision and provide a reason thereof[89], there is no rule under the Ethiopian regime that requires the authority to provide a written justifications for any of its decision, more importantly where it prohibits or conditionally approves mergers. Secondly, though the regime has adopted a

[86] Proclamation No. 813/2013 (n 10), Article 11(1).
[87] ibid, Article 13.
[88] ibid, Article 39.
[89] Zambian Competition Act (n 33) Section 34(2), and South African Competition Act (n 31), Section 14.

judicial review mechanism of merger decisions, the appeal rights to courts is only limited to claims relating to errors committed by the Appellate Tribunal on question of law. Unlike the regime of South Africa and Zambia, where the decisions of tribunal may be taken on review to courts irrespective of the error in question, (whether it is question of law or question of fact), any party that is aggrieved by the decision of the Ethiopian Appellate Tribunal can only make an appeal on errors committed by tribunals relating to question of law.[90] Thirdly, the authority, when it proposes to revoke an approved merger, is not required under the law to provide a notice of the proposed merger to the parties so that they will have the opportunity to express their views.

If we look at the Zambian regime, the commission, where it proposes to revoke an approved merger, is required to give notice to every party to a merger and to any other person who is likely to have an interest in the matter and call upon such party or person to submit to the Commission, within thirty days of the receipt of the notice, any representations which they may wish to make on the proposed revocation.[91] Unlike the Zambian Act, we do not find the same rule in the Ethiopian regime that tries to ensure procedural fairness by requiring the authority to give notice of the proposed action to the parties to a merger and call up any representation on the proposed revocation.

7.2. Enforcement

It is common to see merger legislations envisaging sanctions on those who fail to comply with merger control rules. More particularly, they prescribe sanctions mostly in the form of fine on those entities that fails to make pre-merger notifications or implement mergers before obtaining merger clearance or in any way violate provisions of merger control. Looking at the Zambian

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[90] Under the proclamation, courts assume appellate jurisdiction only on error of the Appellate Tribunal relating to the specific application of the rules. They do not assume jurisdiction on question of factual issues.

[91] Zambian Competition Act (n 33) Section 35(2).

system, an enterprise which intentionally or negligently implements a merger that is reviewable by the Commission without the approval of the Commission or implements a merger that is rejected by the Commission or fails to comply with conditions stated in a determination or with undertakings given as a condition of a merger approval commits an offence and is liable to a fine not exceeding ten percent of its annual turnover.[92]

In the case of South African regime, implementing a notifiable merger prior to approval being obtained or failing to notify the Commission of a merger is a contravention of the Act and exposes the parties to administrative penalties of up to 10% of turnover payable by each of the parties to the merger (target, acquirer and seller), as well as potential injunctions on implementation. Coming back to the Ethiopian regime, the proclamation has provided a legal consequence for engaging in a merger transaction in violation of the merger control rules. A business person who participates in a merger in violation of the merger control rules provided in the Proclamation (which can include the three forms of violations stated under the Zambian Act) shall be punished with a fine from 5% up to 10% of his annual turnover.

Apart from this no agreement or arrangement of merger may come into effect before obtaining approval from the Authority pursuant the provision of the proclamation.[93] Here, there are few aspects that warrant further attention. To begin with, the proclamation is not clear as to whether the liability for fine is several or joint or joint and several liability. Secondly, unlike the two regimes, where the fine for violations of the rules is imposed by the Commission itself based up on the facts and evidences presented, the sanctions to be imposed under the Ethiopian regime require a very long process for its implementation as sanctions under the system can only be imposed by the Tribunal (not the

[92] Zambian Competition Act (n 33) Section 37.
[93] Proclamation No. 813/2013 (n 10) article 42(4).

Authority) after passing through the regular hearing process which requires institution of cases before the tribunal.[94]

8. Concluding Remarks

The article has examined the major deficiencies surrounding the legal regime regulating merger control in Ethiopia. As discussed in the preceding lines, the country, motivated by competition and industrial policy considerations, has enacted a merger control legislation as part of its anti-trust regime. The merger control provisions are designed to prevent mergers that are likely to have an adverse effect on competition. To this end, the law has adopted a mandatory pre- notification mechanism having a suspensory effect. In so doing, the legislation has provided some basic substantive and procedural rules regulating to what constitutes mergers, notification of mergers, substantive assessment of notified mergers, and remedies and sanctions (which includes the issue of appeal and judicial review). From this point of view, it can generally be said that the Ethiopian legal regime is inline and consistent with the best practices and approaches of merger control and it shares some common positive features with most foreign merger control legislations, more importantly the South African and Zambian legal regimes. Despite this, a closer comparative examination of the Ethiopian merger control legal regime in light of the Zambian and South African counterparts (the major advanced African competition regimes adopting best practices and approaches of merger review, at the same time reflecting the economic reality in Africa) reveals that the legal regime is riddled with numerous deficiencies and shortfalls that must be addressed in order that the law can effectively deal with mergers.

[94] Looking at article 36, 37, and 38 of the proclamation clearly indicates that the enforcement of competition laws under Ethiopian competition regime requires investigation of cases by Investigators under the authority followed by institution of legal cases by Prosecutors before the Tribunal and finally judgment of the tribunal after conducting a formal hearing between the authority and defendant firm.

In terms of the rules relating to what constitutes mergers, the proclamation, should be amended in a way it should explicitly and clearly incorporate the concept of 'control' within the scope of the definition of mergers for a merger legislation should only concern itself with transactions which are likely to materially change market structure. The legal regime should then set out an inclusive definition of control either in the proclamation or regulations to be issued. The law should also provide clear rule (in terms of objective numerical thresholds) that defines what types of share acquisitions and asset acquisitions are sufficiently material to fall within the scope of merger rules as opposed to shares and asset acquisitions that are unlikely to affect competition. Apart from this, the definition provided in the proclamation is unclear whether JV agreements, if they meet the elements of the definition set out under Article 9, would constitute mergers. The legal regime should, therefore, provide clear and predictable criteria to distinguish those JV transactions that are subject to merger review from those that are not. Lastly, the terminology in the proclamation used to denote parties to a merger, i.e., 'persons' should be amended and replaced by the term 'business persons' to avoid ambiguity which could lead to an inclusion of transactions which has no competition concern within the scope of the definition.

In terms of the rules relating to notification of mergers, the legal regime, as one of the biggest concerns, should set out a clear and objectively quantifiable notification threshold limit so that the authority can focus on mergers which are most likely to have a competition concern, which in turn lessens its administrative burden. The proclamation should either stipulate the threshold limits or provide a possibility whereby threshold limits could be prescribed under subsidiary legislations. Besides, the legal regime should incorporate a local nexus provision to screen out transactions that are unlikely to result in appreciable competition effects within its territory.

In terms of the rules relating to substantive assessment of mergers, the legal regime, as a serious concern, should provide either in the proclamation or regulations to be issued, a strict and legally binding reasonable time frame within which merger review should be completed since parties are barred from proceeding with the transaction during the pendency of the authority's review. And in terms of the substantive test applied in the system, the legal regime should firstly acknowledge the relevancy of defining a relevant market in assessing the possible effects of mergers and adopt detailed guideline for market definition in the context of mergers so that investigations could be restricted to the specific market of concern. The legal regime should also clearly define the substantive test applied in assessing the possible effects of mergers. More importantly, the legal regime (either in the proclamation or regulation to be issued) should have a detailed guideline that clearly outlines the qualitative and quantitative factors that should be considered, and theory of harms that should be investigated in the course of analysing impacts of proposed mergers. Furthermore, I suggest the adoption of a clearly articulated public interest criterion as one of merger assessment considerations, at least as a defence, for the country, as a developing country, should also concern itself to the short-term public interest issues. Lastly, failing defence should for stronger reason be taken as a ground of defence under the law.

In terms of the rules relating to remedies and sanctions, the law should firstly provide an obligation on the authority to justify and reason out its decision in a written form when it has decided either to prohibit or conditionally approve a proposed merger. Besides, the regime should reconsider the judicial review system in such a way that decisions of the Appellate Tribunal should be reviewed by courts irrespective of the error in question. In respect of revocation of orders, the law should ensure procedural fairness by requiring the authority to provide notice of the proposed action to the merging parties and call up any representation on the proposed revocation. There are also

some aspects that needs clarification in the law in relation to sanctions. The law should be clear as to whether the liability for fine is several or joint or joint and several liability. And in terms of enforcing sanctions, I suggest that the law should be reconsidered in the sense that the authority should be authorized under the law to impose fine on offenders relating to mergers, without a need to take the case to the Tribunal by prosecutors, which will be of course subjected to the right of appeal and judicial review.

In the process of addressing the deficiencies outlined above, it should also be noted that the legal regime not only requires amendment of current legislations in many respects, but also need to have detailed subsidiary legislations and merger guidelines that provides many of the substantive and procedural aspects of merger review, more particularly, rules and guidance on various issues relating to the stages, specific processes and broad procedural framework of a merger review, which essentially calls for legal reform measures.

To sum up, for a smooth and effective functioning of the merger control system, the abovementioned issues should be resolved at an early stage. If not, not only it will be difficult to effectively deal with merger related issues of concern, but also to achieve the very goals of merger control in the system. Besides, some of the deficiencies, if not rectified, will continue to result in creating unnecessary obstacles and hinderances to transactions and affecting certainty of deals which might have an adverse implication on ease of doing business in the country, which is one of the current concerns of the country as a developing economy. Furthermore, some of the deficiencies if not properly dealt, will continue to impose unnecessary administrative burden and work load on the competition authority.

THE ELEMENT OF INDISPENSABILITY IN MARGIN SQUEEZE: IS IT A MUST?

Dr. Christopher Buhagiar

The European Commission's initial position with respect to margin squeeze was that it constitutes a constructive refusal to supply and as such acquires an abusive character on condition that the Bronner criteria, including the indispensability element, are fulfilled. Eventually, the Court of Justice departed from this original stance, affirming that margin squeeze constitutes a self-standing abuse. At first, the indispensability element retained its mandatory status, however, in furtherance of the effectiveness of Article 102 TFEU, it was subsequently demoted to an in-essential requirement. Was this decision a reasonable one? Does it truly promote the effectiveness of Article 102 TFEU?

Keywords: *Bronner Criteria, Indispensability, Effectiveness.*

1. Introduction

Under European Union ("EU") competition law, margin squeeze constitutes a stand-alone abuse which arises whenever the vertically integrated undertaking retains a dominant position on the upstream market[1] and the two-fold margin squeeze test, which consists of the as-efficient competitor test and the potential anti-competitive effects test, is satisfied.[2]

Nevertheless, it is undisputable that margin squeeze is economically equivalent to refusal to supply, i.e., the two exclusionary practices yield the same result. In light of the foregoing, there is a strong argument that margin squeeze should be viewed as a constructive refusal to supply and as such acquire an abusive character if and only if the vertically integrated undertaking has a prior antitrust duty to supply its input. This actually constitutes the European Commission's ("Commission") initial position.[3]

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[1] Case T-336/07 *Telefónica SA v Telefónica Espana SA v European Commission* [2012], para 146.
[2] R Whish and D Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 773.
[3] Commission's Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC [now Article 102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings ("Guidance Paper").

A dominant undertaking is not invariably burdened with an antitrust duty to supply to all undertakings requesting it to do so.[4] In *Oscar Bronner*,[5] the Court of Justice ("CJ") established that a refusal to supply acquires an abusive character exceptionally, i.e., whenever the following conditions, commonly known as the *Bronner* criteria, are cumulatively fulfilled: (i) the input is indispensable, in the sense that there is no actual or potential substitute for it; (ii) the refusal is likely to eliminate all competition from the undertaking being refused supply; and (iii) the refusal may not be objectively justified.[6]

The CJ put great emphasis on the indispensability requirement, acknowledging that it is of paramount importance.[7] It explained that an input is characterised as indispensable whenever:

(i) There are no available alternative inputs. Inputs offered at less advantageous conditions constitute suitable alternatives.[8]

(ii) It is not economically viable for downstream competitors to duplicate the input. The extent of the investments and/or the time required render duplication uneconomic. The argument that it would be more economically opportune for downstream competitors to have access to the input rather than duplicate it, does not suffice.[9] Advocate General ("AG") Jacobs declares that duplication must "[deter] any prudent undertaking from entering the market".[10]

Therefore, EU competition law considers margin squeeze a self-standing abuse. Yet, in view of the economical equivalence of margin squeeze and refusal to supply, several legal and economic academics argue that margin squeeze should be considered abusive on condition that the *Bronner* criteria are fulfilled.

It is not the purpose of this article to determine whether margin squeeze should be analysed as a constructive refusal to supply or a stand-alone abuse. Whilst the nature of the abuse will be considered thoroughly in the third section of the article, the author acknowledges that there

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[4] A Jones and B Sufrin, *EU Competition Law: Text, Cases and Materials* (6th edn, Oxford University Press 2016), 496; Guidance Paper (n 3) para 75.
[5] Case C-7/97 *Oscar Bronner GMbH & Co KG v Mediaprint* [1998] ECR I-7791.
[6] ibid para 41.
[7] R Whish and D Bailey (n 2) 719; A Jones and B Sufrin (n 4) 506.
[8] *Oscar Bronner* (n 5) para 43.
[9] ibid para 44; R O'Donoghue and J Padilla, *The Law and Economics of Article 82 EC* (1st edn, Hart Publishing 2006), 440-442.
[10] *Case C-7/97 Oscar Bronner GMbH & Co KG v Mediaprint [1998] ECR I-7791*, opinion of AG Jacobs, para 66.

is strong merit in analysing margin squeeze as a stand-alone abuse and that nowadays, this is the definitive position under EU competition law. This article will establish whether the indispensability of the input, one of the *Bronner* criteria, should constitute an essential pre-requisite for the stand-alone abuse of margin squeeze. Regulated margin squeeze will be touched upon when analysing contemporary jurisprudence, however, the focus of this article is the indispensability element under EU competition law rules.

The article is organised as follows. It first scrutinises the evolution of margin squeeze under EU law, with a focus on the indispensability element. In light of the present position, it then examines the role of the indispensability element in a margin squeeze, the nature of the margin squeeze abuse and the consequences of rendering indispensability non-essential. In this respect, the author, *inter alia*, looks at the economics of margin squeeze. This basic economic analysis does not delve deeper than necessary into economic principles but serves the purpose of highlighting the significance of the indispensability element in a margin squeeze. Finally, in view of the aforementioned considerations, the author concludes whether indispensability should acquire a mandatory status for the stand-alone abuse of margin squeeze.

2. The development of EU competition law on margin squeeze

The indispensability of the input was alluded to for the first time in *National Carbonising.*[11] Indeed, the wording used in the margin squeeze definition resembles the one used in the previous refusal to supply case, *Commercial Solvents*.[12] In light of this, several academics, including Hou, conclude that the Commission indirectly recognized indispensability as an essential pre-requisite for the abuse of margin squeeze.[13] Indispensability was directly established as an essential pre-requisite for abusive margin squeeze 25 years later in *Industrie des Poudres Spheriques*.[14] At the time, however, margin squeeze was still in its embryonic stage. In fact, in the latter case, for the first and only time, an EU court tied abusive margin squeeze to excessive pricing and predatory pricing. The abuse of margin squeeze substantially

[11] Case 109/75 R National Carbonising Company Limited v Commission [1975] ECR 1193 and National Coal Board, National Smokeless Fuels Limited and the National Carbonizing Company Limited, Commission Decision 76/185/ECSC [1976] OJ L35/6.
[12] Joined Cases C-6-7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* [1974] ECR 223.
[13] L Hou 'Some aspects of price squeeze within the EU: a case law analysis' (2011)32(5) *European Competition Law Review* 250, 251.
[14] Case T-5/97 *Industrie des Poudres Spheriques v Commission of the European Communities* [2000] ECR II-3755.

evolved in the following years, with the liberalisation of the telecommunications sector having a fundamental role in this respect.

A. Commission Guidance Paper

The Guidance Paper[15] lays down the initial position vis-à-vis margin squeeze. An important preliminary remark is that the Guidance Paper is not a legally binding instrument. However, as AG Mazák declared in his opinion to the *TeliaSonera* preliminary reference, it still constitutes a "useful point of reference".[16]

In the Guidance Paper, as it had already done in the earlier Discussion Paper,[17] the Commission tied margin squeeze to refusal to supply. Indeed, it established that margin squeeze and refusal to supply are to be considered abusive whenever the same three conditions are satisfied: (i) the input is indispensable; (ii) refusal is likely to give rise to elimination of effective competition; (iii) refusal is likely to give rise to consumer harm.[18]

These conditions mirror the *Bronner* criteria. They strike a balance between the vertically integrated undertaking's fundamental right to property and effective competition on the downstream market. Moreover, in doing so, they ensure that a dominant undertaking is incentivised to invest and innovate. A vertically integrated dominant undertaking which is invariably required to grant access to its property, will undoubtedly be disincentivised from investing and innovating, thereby leading to consumer harm.[19]

The Commission provided exceptions to fulfilment of these three conditions. It established that in any of the following cases, the dominant undertaking's incentives to invest and innovate are not at risk and as such, a margin squeeze acquires an abusive character notwithstanding that the aforementioned three conditions are not met: (i) the dominant undertaking is subject to a regulatory obligation to supply; (ii) its upstream dominance has

[15] Guidance Paper (n 3).
[16] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, opinion of AG Mazák, n. 21.
[17] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005), para 72.
[18] Guidance Paper (n 3) para 80, 81.
[19] ibid para 75.

been developed under the protection of special/exclusive rights or financed by state resources.[20]

Therefore, this paper illustrates that the Commission's original position was that margin squeeze constitutes a constructive refusal to supply. As a general rule, it acquired an abusive character if and only if the input supplied was indispensable for downstream competitors.

B. Contemporary jurisprudence

(i) Deutsche Telekom[21]

Deutsche Telekom ("DT"), the former state-owned monopoly for telecommunications services in Germany, enjoyed a dominant position on both the upstream and downstream markets, i.e., on the access services for competitors market and the access services for customers market, respectively. The national regulatory authority ("NRA"), an independent body set up under EU law, obliged DT to grant its downstream competitors access to its local loop, fixed the wholesale price at which access must be granted and imposed a price ceiling for the retail price it charges its end-users.

DT's downstream competitors complained to the Commission that the vertically integrated dominant undertaking had unlawfully squeezed their profit margins. The Commission established that:

> there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market.[22]

[20] ibid para 82. These exceptions are commonly known as the 'Telefónica exceptions'.
[21] Case C-280/08 P *Deutsche Telekom v European Commission* [2010] ECR I-9555.
[22] *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579) Commission Decision 2003/707/EC [2003], OJ L263/9, para 107.

It found that from 1998 – 2002, DT's wholesale prices were higher than its retail prices. In 2002, DT raised its retail prices, however, the difference between the retail and wholesale prices was still insufficient to cover its own costs.[23] Therefore, since it squeezed the profit margins of as-efficient competitors, the Commission concluded that DT had abused of its dominant position. This decision was confirmed by both the General Court ("GC") and the CJ.

One of the main arguments DT brought forward on appeal was that for margin squeeze to be considered abusive, it must be tied to excessive pricing and/or predatory pricing. The CJ agreed with the GC and completely shot down this argument. Margin squeeze is a **stand-alone abuse** which arises whenever there is an unfair spread between the wholesale and retail prices, i.e., whenever the difference between the retail and wholesale prices is either negative or insufficient to cover the dominant undertaking's own costs.[24] At the same time, however, the CJ still retained that indispensability of the input is a fundamental pre-requisite for the stand-alone abuse of margin squeeze.[25]

Apart from that, the CJ also definitively confirmed that the appropriate margin squeeze test is the as-efficient competitor test. This test gives rise to two fundamental advantages. First of all, as O'Donoghue and Padilla assert, it is perfectly in line with the main objective of Article 102 of the Treaty on the Functioning of the European Union ("TFEU"), i.e., protection of effective competition for the benefit of consumers. This is because, it rewards efficient competitors, forces the less efficient ones to leave the market and thereby ensures the enhancement of consumer welfare in the long run.[26] Secondly, as both Courts insisted, this test grants legal certainty. It allows the dominant undertaking, which is generally aware of its own costs and not of the costs of its competitors, to be able to assess whether its pricing practices may lead to an abuse.[27]

The Commission believed that once the as-efficient competitor test is satisfied, margin squeeze acquires an abusive character. Anti-competitive effects need not be assessed. The GC

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[23] ibid paras 152, 160, 161.
[24] *Deutsche Telekom* (n 21) paras 167, 183.
[25] ibid para 234.
[26] R O'Donoghue and J Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013), 381.
[27] *Deutsche Telekom* (n 21) paras 200-202.

declared and the CJ confirmed that this is erroneous. The margin squeeze test is a two-fold test. Unless the Commission proves that margin squeeze leads to potential anti-competitive effects on the downstream market, it may not be declared abusive. Put differently, in order for a margin squeeze to be declared unlawful, the Commission must also prove that it was at least capable of creating barriers to growth of competition on the downstream market and consequently strengthening the position of the vertically integrated dominant undertaking.[28]

The anti-competitive effects requirement is not explicitly prescribed in Article 102 TFEU. Therefore, traditionally, identification of exclusionary conduct such as margin squeeze led to an abuse of dominance.[29] The Commission adopted this form-based approach in its decision. However, by time, EU competition law developed an effects-based approach. The GC and CJ endorsed it, claiming that a margin squeeze may only be considered unlawful once the Commission proves that it was capable of creating anti-competitive effects.

In determining that DT's pricing practices were capable of doing so, the Courts mainly relied on two factors, the negligible market share DT's competitors gained following the liberalization of the telecommunications sector and the indispensability of the input.[30] Indispensability was very relevant here. As-efficient competitors were forced to buy from the dominant undertaking, i.e., they were forced to operate at a loss. Therefore, in principle, the margin squeeze was capable of hindering the growth of competition on the downstream market.[31]

A rather controversial aspect of this judgement is the concurrent application of sector specific regulation and competition law. The NRA obliged DT to supply its input, set its wholesale price and provided a price cap for its retail price. DT abided by the regulatory requirements. Moreover, in several decisions, the NRA confirmed that DT's pricing complied with Article 102 TFEU. Yet, subsequently, the Commission still found it guilty of engaging in an abusive margin squeeze.

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[28] Case T-271/03 *Deutsche Telekom AG v Commission of the European Communities* [2008] ECR II-477, paras 234-235; *Deutsche Telekom* (n 21) paras 250-255.
[29] Whish and Bailey (n 2) 205.
[30] *Deutsche Telekom* (n 28) paras 237, 239; *Deutsche Telekom* (n 21) paras 255-257.
[31] *Deutsche Telekom* (n 21) para 255.

The CJ explained that competition law supplements, by means of an *ex post* review, sector specific regulation.[32] A regulatory framework renders competition law inapplicable if and only if the dominant undertaking has no commercial discretion to avoid committing the abusive conduct. In contrast, if the regulation merely encourages autonomous anti-competitive conduct, competition law rules are pertinent. In this case, the CJ affirmed that DT had the possibility to avoid the abuse of margin squeeze by requesting the regulatory authority to raise its retail prices. Therefore, Article 102 TFEU was applicable.[33]

Nevertheless, what the CJ seems to have failed to realise is that its decision places regulated undertakings in a position of legal uncertainty. They must abide by regulatory requirements and competition law simultaneously notwithstanding that the objectives of these two legal regimes overlap and are not entirely compatible.[34] Therefore, as O'Donoghue and Padilla convincingly argue, whilst a regulatory duty should not automatically set aside competition law rules, "significant caution should be exercised before intervention is considered".[35]

In this case, since the high wholesale price was the main factor which led to an abusive margin squeeze, it would have been more logical and reasonable to vary the wholesale price, without finding DT liable for an infringement of Article 102 TFEU.[36] The CJ had a convincing argument to that effect; the conduct was not autonomous. By establishing that DT had the commercial discretion to avoid the margin squeeze, when it merely had the limited scope to vary the retail prices, the CJ lowered the autonomous conduct threshold to an absurd level.[37]

(ii) TeliaSonera[38]

After liberalisation of the telecommunications sector in Sweden, TeliaSonera, the former exclusive provider of telecommunications services, maintained ownership of the local loop. It **voluntarily** granted its downstream competitors access to the local loop, allowing them to

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[32] ibid para 92.
[33] ibid paras 80-85.
[34] N Dunne, 'Margin Squeeze: From Broken Regulation to Legal Uncertainty' (2011) 70(1) *The Cambridge Law Journal* 34, 36.
[35] O'Donoghue and Padilla (n 26), 418.
[36] Dunne, (n 34) 34, 36.
[37] N Dunne, 'Margin Squeeze: Theory, Practice, Policy – Part 2' (2012) 33(2) *European Competition Law Review* 61, 63.
[38] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527.

provide broadband connection services, and at the same time, provided such services to end users itself. TeliaSonera's situation differs from DT's in two crucial ways: (i) TeliaSonera was not under the regulatory duty to supply the input to its downstream competitors; and (ii) the said input was not indispensable.

Konkurrensverket (the Swedish Competition Authority) brought an action before the Swedish Courts alleging that the spread between the wholesale and retail prices charged by the dominant undertaking was not sufficient to cover the costs the dominant undertaking itself had to incur when providing retail services to end-users. The Swedish Court decided to stay proceedings and refer some questions to the CJ. The CJ's most significant answers relate to the applicable margin squeeze test and the elements which distinguished *TeliaSonera* from *Deutsche Telekom*.

In relation to the appropriate margin squeeze test, the CJ established an exception to the rule. It asserted that whenever the as-efficient competitor test may not be executed, the Commission must resort to the reasonably efficient competitor test.[39] However, it is crucial to point out that this is a rare exception. This test is not perfectly in line with the primary objective of Article 102 TFEU. This is because, as O'Donoghue and Padilla affirm, it protects less efficient competitors and in so doing reduces the competitors' incentives to become efficient.[40]

With respect to the distinguishing elements, TeliaSonera believed that margin squeeze constitutes a constructive refusal to supply. Therefore, it argued that once it was under no regulatory duty to supply its input, margin squeeze could be considered abusive if and only if the *Bronner* criteria are met.[41] This line of thought corresponds to the one set out in the Guidance Paper. AG Mazák, in his opinion to the judgement, thoroughly endorsed it.[42]

The CJ, however, disregarded the AG Mazák's opinion. It declared that it makes no difference that TeliaSonera was not under the regulatory duty to supply its input. Margin squeeze is a stand-alone abuse. Therefore, the *Bronner* conditions, including the indispensability element, need not be fulfilled for abusive margin squeeze to arise.[43]

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[39] ibid para 45.
[40] O'Donoghue and Padilla (n 26) 381.
[41] *TeliaSonera* (n 38) para 54.
[42] *TeliaSonera*, AGO (n 16).
[43] *TeliaSonera* (n 38) paras 54-59.

Following TeliaSonera's line of thought, the CJ vaguely explained, would mean that "before any conduct of a dominant undertaking in relation to its terms of trade could be regarded as abusive the conditions to be met to establish that there was a refusal to supply would in every case have to be satisfied, and that would unduly reduce the effectiveness of Article 102 TFEU".[44] Nazzini strongly argues that this reasoning is flawed. The applicability of the *Bronner* criteria to margin squeeze cases does not denote that they would constitute a requirement for every other abusive conduct.[45]

Subsequently, the CJ specifically declared that the indispensability requirement **may** be taken into consideration when carrying out the second part of the margin squeeze test: [46]

> Where access to the supply of the wholesale product is indispensable for the sale of the retail product [...] the at least potentially anti-competitive effect of a margin squeeze is probable.[47]
>
> However, [...] even where the wholesale product is not indispensable, the practice may be capable of having anti-competitive effects on the markets concerned.[48]

It may be safely said that in *TeliaSonera*, the notion of indispensability in margin squeeze was dealt a huge blow. From a pre-requisite for abusive margin squeeze, it devolved into one of the many factors which may be taken into account when testing for anti-competitive effects.

(iii) Telefónica[49]

A fundamental point to be noted at the outset is that whilst the GC and CJ judgements were handed down after the *TeliaSonera* preliminary reference, the Commission decision was issued in 2007. At the time, the general understanding was that margin squeeze constitutes a constructive refusal to supply.

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[44] ibid para 58.
[45] R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press 2012), 274-275.
[46] *TeliaSonera* (n 38) para 69.
[47] ibid para 70, 71.
[48] ibid para 72.
[49] Case C-295/12, *Telefónica and Telefónica de España v Commission* [2014].

Telefónica held a dominant position on the wholesale broadband access market at regional level and national level as well as on the broadband retail market. Owing to its former monopolistic position, it was the only telecommunications operator in Spain that owned a nation-wide fixed telephone network. Put simply, this infrastructure allowed downstream competitors to provide retail broadband services.

Spanish law obliged Telefónica to grant its downstream competitors access to its network on fair conditions. Even though it abided by the regulatory requirements, the Commission found that Telefónica had committed an abusive margin squeeze. The margin between the wholesale and retail prices was insufficient to cover the costs the dominant undertaking incurred in providing retail services to end-users.[50]

Telefónica argued that margin squeeze constitutes a constructive refusal to supply and so, for it to be considered abusive, the *Bronner* criteria must be met. Inasmuch as its input was not indispensable, its pricing practices could not be considered abusive.[51]
Without taking a firm position as to whether margin squeeze should be considered a constructive refusal to supply, the Commission established that the *Bronner* criteria were inapplicable. It declared that the said criteria were set up in order to avoid undermining the dominant undertaking's incentives to invest and innovate. In *Telefónica* owing to two fundamentally different circumstances, such incentives were not at risk: (i) Spanish law in conformity with EU law required Telefónica to supply its input to its downstream competitors; and (ii) Telefónica's network was established prior to the arrival of broadband in Spain and at a time when it benefited from special/exclusive rights.[52]

At the time, the 'Telefónica exceptions' were highly controversial. AG Mazák in his opinion to the *TeliaSonera* preliminary reference essentially agreed with the first exception. He opined that margin squeeze constitutes a constructive refusal to supply and as such acquires an abusive character whenever the input is indispensable. However, this holds water if and only

[50] *Wanadoo España vs Telefónica* (Case COMP/38.784) Commission Decision [2007].
[51] ibid paras 299, 300, 301.
[52] ibid paras 302-304, 309. These two 'Telefónica exceptions' were subsequently incorporated in Guidance Paper para 82. *Vide* Part A of Section II.

if the dominant undertaking is not under the regulatory obligation to supply. In such a case, the undertakings' incentives to invest and innovate would not be at risk.[53]

It is submitted that the position the AG undertook was incorrect. Disregarding the then essential *Bronner* criteria merely because the dominant undertaking was under a regulatory obligation to supply constituted an inappropriate decision. In the first place, as Geradin strongly claims, whilst the indispensability element does protect the dominant undertaking's incentive to invest and innovate, it primarily serves the more general purpose of protecting the dominant undertaking's fundamental right to property.[54]

Secondly, as was explicitly asserted in *Deutsche Telekom,*[55] a sector specific regulatory law pursues a broader set of objectives which are not entirely in compliance with those competition law pursues. These include, the entry of competitors on the downstream market and ensuring universal service. Therefore, on the basis of its balancing exercise, an NRA may impose a duty to deal in circumstances where an antitrust duty to deal would be unlawful.[56]

With respect to the second exception, AG Mazák was more sceptical.[57] His scepticism was undoubtedly understandable. This is because, in certain situations, it would be rather difficult to determine whether and to what extent an undertaking's upstream dominance has been established under the protection of special/exclusive rights or financed by state resources. For example, a former state-owned monopoly may need to incur hefty costs in order to render its pre-liberalization infrastructure usable for the provision of retail services.[58]

This having been said, as Auf'mkolk correctly claims, following the *TeliaSonera* ruling, the 'Telefónica exceptions' have in a way become the general rule. As formerly mentioned, in *TeliaSonera*, the CJ declared that the absence of a regulatory duty to supply is an irrelevant

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[53] *TeliaSonera*, AGO (n 16) paras 18, 58.
[54] D Geradin, 'Refusal to Supply and margin squeeze: A discussion of why the "Telefonica exceptions" are wrong' TILEC Discussion Paper (2010) 8-9.
[55] *Deutsche Telekom* (n 28), para 113.
[56] Geradin (n 54) 9; G Faella and R Pardolesi, 'Squeezing Price Squeeze under EC Antitrust Law' (2010) 6(1) *European Competition Journal* 255, 272-273; D Geradin, A Layne-Farrar and N Petit, *EU Competition Law and Economics* (1st edn, Oxford University Press 2012), 265; H Auf'mkolk, 'The "Feedback Effect" of Applying EU Competition Law to Regulated Industries: Doctrinal Contamination in the Case of Margin Squeeze' (2012) 3(2) *Journal of European Competition Law & Practice* 149, 155.
[57] *TeliaSonera*, AGO (n 16) para 27.
[58] Geradin (n 54) 10; Geradin, Layne-Farrar, Petit (n 56) 266.

factor in a margin squeeze claim. In any case, the fulfilment of the *Bronner* criteria, including the indispensability requirement, is not crucial for margin squeeze to constitute an abuse.[59]

Inasmuch as the *TeliaSonera* ruling had already been handed down, on appeal, the GC and CJ followed this broad margin squeeze approach.[60] However, before the CJ, Telefónica did bring forward quite an interesting argument in this respect. It asserted that the non-application of the *Bronner* criteria, particularly the indispensability requirement, amounts to an infringement of its fundamental right of property.[61] As Azzopardi convincingly argues, this argument is quite compelling.[62] Nevertheless, the CJ did not enter into its merits. Since it was brought forward for the first time before the CJ, the latter rejected it on a procedural point.[63]

Thereafter, the CJ confirmed that indispensability may be considered when determining whether the squeeze may lead to potential anti-competitive effects. Telefónica argued that the GC unlawfully failed to consider that its input was not indispensable when carrying out the second part of the test. However, the CJ referred to *TeliaSonera* and declared that the GC may but is not obliged to take the indispensability or the non-essentiality of the input into account.[64]

Therefore, *Telefónica* confirmed the broad margin squeeze approach adopted in *TeliaSonera* and clearly illustrated that indispensability, formerly an essential element which determined the outcome of a margin squeeze investigation, may nowadays be lawfully disregarded.

(iv) Slovak Telekom[65]

In 2014, the Commission found Slovak Telekom ("ST") guilty of having committed, *inter alia*, an abusive margin squeeze. In its decision, the Commission specifically reiterates that margin squeeze is not tied to refusal to supply but is a stand-alone abuse which arises

[59] Auf'mkolk (n 56) 149, 156.
[60] *Telefónica* (n 49) para 95, 96.
[61] ibid para 97.
[62] A Azzopardi, No abuse is an island: the case of margin squeeze' (2017) 13(2-3), *European Competition Journal* 228, 245-246. For a more detailed analysis of this argument, see pages 29-30.
[63] *Telefónica* (n 49) paras 98-100.
[64] ibid paras 117-118.
[65] Case C-165/19 P *Slovak Telekom v Commission* [2021]

whenever the two-fold margin squeeze test is satisfied.[66] The Commission's decision was confirmed on appeal by both the GC[67] and the CJ.

Amongst others, the CJ made reference to both *Telefónica*[68] as well as to the effectiveness of Article 102 TFEU argument set out in *TeliaSonera,*[69] and affirmed once more that the indispensability element is not a *sine qua non* criterion for the abuse of margin squeeze to arise:

> [W]here a dominant undertaking gives access to its infrastructure but makes that access, provision of services or sale of products subject to unfair conditions, the conditions laid down by the CJ in paragraph 41 of the judgment in Bronner do not apply. […] [A]s regards practices other than a refusal of access, the absence of such an indispensability is not in itself decisive for the purposes of the examination of potentially abusive practices on the part of a dominant undertaking.[70]

This being said, whilst the GC and CJ both confirmed the Commission's decision, it is worth noting that since for four months in 2005, the resultant margin was positive and the Commission failed to prove that the margin squeeze led to exclusionary effects on the downstream market, the fine imposed on ST was reduced.[71] This constitutes further demonstration that EU Courts have endorsed the effects-based approach vis-à-vis margin squeeze.

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[66] *Slovak Telekom* (Case AT.39523) Commission Decision [2014] para 822.
[67] Case T-851/14 *Slovak Telekom v Commission* [2018]
[68] *Slovak Telekom* (n 65) para 52.
[69] ibid para 53.
[70] ibid para 50.
[71] *Slovak Telekom* (n 67) para 260.

3. The significance of the indispensability requirement in margin squeeze

A. The economics of margin squeeze

A vertically integrated undertaking effects a margin squeeze in order to vertically foreclose (either totally or partially) its downstream competitors and thereby reap the maximum amount of profits.[72]

Traditionally, the general understanding was that an undertaking holding a monopolistic position on the upstream market invariably has the incentive to leverage its upstream market power onto the downstream market in order to reap two monopoly profits instead of one. However, the "single monopoly profit" theorem developed by the Chicago School of Antitrust ("Chicago School") dealt this "leverage doctrine" a hefty blow.[73]

The Chicago School sustains that an upstream monopolist does not have the incentive to foreclose its downstream competitors since in a vertical chain of production there is only one available monopoly profit which may be extracted by charging a monopoly price for the upstream product. Assuming that the downstream market is competitive, the foreclosure of downstream competitors would never give rise to additional benefits. This is because, the additional profits gained by virtue of the increased sales of the downstream product are set off by the losses resulting from the reduction of sales of the upstream product. On the contrary, the Chicago School contends that the upstream monopoly has an interest in ensuring that the downstream market is competitive since this leads to low downstream prices, an increase in sales and consequently the maximisation of its total profit.[74]

The Post-Chicago School of Antitrust asserts that whilst the Chicagoan approach is theoretically valid, it rests on two strict assumptions: (i) there is perfect competition on the

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[72] O'Donoghue and Padilla (n 26) 366; G Niels, H Jenkins and J Kavanagh, *Economics for Competition Lawyers* (Oxford University Press 2011) 239.
[73] O'Donoghue and Padilla (n 9) 179-180.
[74] ibid 180; P Crocioni and C Veljanovski, 'Price Squeeze, Foreclosure and Competition Law, Principle and Guidelines' (2003) 4(1) *Journal of Network Industries* 28, 35-36. See also Dennis Charlton, 'Should "Price Squeeze" Be a Recognized Form of Anticompetitive Conduct?' (2008) 4(2) *Journal of Competition Law & Economics* 271, 275.

downstream market with costless entry and exit; (ii) the upstream and downstream products are strict complements with fixed ratios.[75]

Whilst the single monopoly profit theory does indeed have its limitations (in the sense that there are situations where an upstream monopolist would be incentivized to foreclosure its downstream competitors), it proves that a vertically integrated undertaking is not invariably incentivised to vertically foreclose its downstream competitors and so to commit a margin squeeze. Indeed, generally speaking, whenever the downstream market is highly competitive with low barriers to entry,[76] the vertically integrated undertaking would be better off by taking its monopoly profits upstream, without foreclosing its downstream competitors.

In light of this, economic literature established that in order for a margin squeeze to constitute a feasible and profitable strategy, the following four conditions must be cumulatively satisfied:

(i) **The vertically integrated undertaking has a significant degree of dominance on the upstream market stemming from the indispensability of its input.** The undertaking must have a strong position on the upstream market which emanates from the lack of close alternatives and the far from cheap and expeditious duplicability of the input.[77]

(ii) **The vertically integrated undertaking has downstream market power**. Whilst economists do not thoroughly agree as to the extent of market power required, they acknowledge that some sort of downstream market power is essential. This is because a vertically integrated undertaking must be able to extract the profits deriving from the foreclosure of downstream competitors. Otherwise margin squeeze will actually benefit the more efficient competitors on the downstream market.[78]

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[75] Crocioni and Veljanovski (n 74) 28, 36;
[76] ibid; Niels, Jenkins and Kavanagh (n 72) 243.
[77] O'Donoghue and Padilla (n 26) 367. See also Crocioni and Veljanovski (n 74) 28, 38-39, 40; C Fumagalli, M Motta and C Calcagno, *Exlucisionary Practices, The Economics of Monopolisation and Abuse of Dominance* (1st edn, Cambridge University Press 2018) 549; NC Gleeson, 'Has Margin Squeeze Abuse in EU Competition Law Developed Because of the Liberalisation of the Network Industries in the EU?' (2013) 1 *European Networks Law and Regulation Quarterly* 15, 23.
[78] O'Donoghue and Padilla (n 26) 367. See also Crocioni and Veljanovski (n 74) 28, 39.

(iii) **There are barriers to entry and re-entry on the upstream and downstream markets**. Barriers on the upstream market safeguard the vertically integrated undertaking's margin squeeze by ascertaining that it is not circumvented through the entry of another competitor. On the other hand, barriers on the downstream market ensure that once the vertically integrated undertaking stops effecting the squeeze and raises the downstream price, no other undertaking will be able to enter the market.[79]

(iv) **There is a degree of asymmetry between predator and prey**. In the margin squeeze context, the asymmetry arises from the fact that the predator is vertically integrated, i.e., it is present on both the upstream and downstream market, whilst the prey is merely present on the downstream market.[80]

This basic economic analysis illustrates that whenever the input is actually or potentially substitutable, a margin squeeze is neither feasible nor profitable. In other words, from an economic point of view, the indispensability of the input constitutes an essential requirement for a margin squeeze to arise. In light of this, it is particularly difficult to rationalise how under EU competition law, a vertically integrated undertaking may be found liable for abusive margin squeeze when its input is non-essential.

To some extent the non-essentiality of the input is offset by requiring upstream dominance. In general, upstream dominance denotes that the vertically integrated undertaking owns and/or controls an indispensable input.[81] However, this assumption is anything but absolute. Under EU competition law a position of dominance is acquired quite easily. A 40% market share indicates dominance[82] whilst a 50% market share gives rise to a presumption of dominance.[83] This rather low threshold renders it very possible for a vertically integrated undertaking to hold a dominant position on the upstream market when it does not own/control an indispensable input. *TeliaSonera* is a case in point.[84]

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[79] O'Donoghue and Padilla (n 26) 367.
[80] ibid 367-368. See also Crocioni and Veljanovski (n 74) 28, 39-40.
[81] Azzopardi (n 62) 228, 244.
[82] Guidance Paper (n 3) para 14.
[83] Case 85/76 *Hoffman-La Roche & Co AG v Commission* [1979] ECR 461, para 41; Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, para 60.
[84] ibid, Auf'mkolk (n 56) 149, 156.

B. The effects of the current EU competition law position

Margin Squeeze: Constructive Refusal to Supply or Self-Standing Abuse?

It is undisputable that margin squeeze is economically equivalent to a refusal to supply.[85] An outright refusal to supply the input and provision of the input at an unsustainable upstream price yield the same result, i.e., downstream competitors are forced to exit the market. In light of this, there is a strong argument that in furtherance of the principle of consistency, margin squeeze and refusal to supply should be treated in an identical manner.[86]

Several academics endorse this view.[87] They maintain that a margin squeeze should be considered a constructive refusal to supply and as such constitute an abuse if and only if the *Bronner* criteria are met. Geradin, Layne-Farrar and Petit specifically assert that finding a vertically integrated undertaking guilty of abusively squeezing the profit margins of its downstream competitors when it is under no antitrust duty to supply is paradoxical. This is because in so doing, the more severe restriction (outright refusal) is rendered easier to defend for the dominant firm than the less severe restriction (margin squeeze).[88]

Nevertheless, other commentators convincingly argue that analysing margin squeeze as a self-standing abuse is of paramount importance since it allows competition law authorities to detect internal transfer pricing, vertical leveraging and cross-subsidies which would be undetectable under a refusal to supply analysis.[89] Put differently, there is certain conduct which may be declared abusive whenever the upstream and downstream markets are viewed jointly and not distinctly. Considering margin squeeze a stand-alone abuse and not a constructive refusal to

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[85] SC Salop, 'Refusals to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist' (2010) *Antitrust Law Journal* 709, who suggests an identical test for a price squeeze and a refusal to supply; O'Donoghue and Padilla (n 26) 399; D Geradin and R O'Donoghue, The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector' (2005) 1(2) *Journal of Competition Law and Economics* 355, 396; Niels, Jenkins and Kavanagh (n 72) 239.

[86] OECD, 'Policy Roundtables: Margin Squeeze' (2009) DAF/COMP(2009) 29; Auf'mkolk (n 56) 154-155.

[87] JY Art, 'Highway 102: A Nice Turn with Still Some Miles to Go' (2011) 2(3) *Journal of European Competition Law & Practice* 183, 184; Díez Estella, 'Jurisprudence of the EUJC on margin squeeze: from Deutsche Telekom to TeliaSonera and beyond ... to Telefonica!' (2011) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851315> accessed on 24 May 2021, 16; Nazzini (n 45) 274-275; M Rauber 'Case C-52/09 Konkurrentsverket v TeliaSongera Sverige AB [2011] ECR I- 527 – Confirming an Inappropriate Assessment Framework for Margin Squeeze' (2013) 34(9) *European Competition Law Review* 490, 493-494; Faella and Pardelosi (n 56) 255, 270.

[88] Geradin, Layne Farrar and Petit (n 56) 267.

[89] N Dunne, 'Margin Squeeze: Theory, Practice, Policy: Part 1' (2012) 33(1) *European Competition Law Review* 29, 39; Azzopardi (n 62) 228, 235; Jones and Sufrin (n 4) 428.

supply allows competition law authorities to view the markets jointly and as such detect the said conduct. The OECD and Faella and Pardelosi, strong promoters of the principle of consistency with respect to economically equivalent actions, acknowledge this notion.[90]

This position is in line with the rather protective approach EU competition law has consistently adopted with respect to abuses of dominance. It reflects the ordoliberal foundations of EU competition law.[91] Indeed, a principal feature of ordoliberalism is that competition arises as a result of the undertakings' freedom to choose, however, in order to safeguard such economic freedom, there must be rules punishing restraints of competition.[92] What is more, the stand-alone abuse of margin squeeze and the underlying protective approach strongly promote one of the main objectives of EU law, i.e., single market integration. They ensure that the internal market is completely protected from any and every abusive conduct.[93]

Therefore, it is unequivocal that margin squeeze and refusal to supply are linked to one another. At the same time, however, the decision to consider margin squeeze a stand-alone abuse, in and of itself, rests on a sound foundation. This article questions whether the subsequent decision to reduce indispensability to one of the many factors which may be considered in the anti-competitive effects test was a reasonable one.

Demoting the indispensability of the input to a non-essential element

Initially, in *Deutsche Telekom*, the CJ indicated that the indispensability of the input constitutes a fundamental requirement for the stand-alone abuse of margin squeeze. However, it quickly backtracked on its initial position. A year later, in *TeliaSonera*, the very same court established that the indispensability of the input is non-essential.

It asserted that making the abuse of margin squeeze contingent on the fulfilment of the *Bronner* criteria – one of which is the indispensability requirement – unduly reduces the effectiveness of Article 102 TFEU. This same argument was reiterated once more in the recent *Slovak Telekom* case. To what extent is this true if one solely considers the requirement of

[90] OECD (n 86) 36, Faella and Pardelosi (n 56) 255, 259, 266. See also O'Donoghue and Padilla (n 26) 373.
[91] Azzopardi (n 62) 228, 235.
[92] P Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and Its Impact on Article 102 TFEU' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658045> accessed on 24/5/2021, 12.
[93] Azzopardi (n 62) 228, 234.

indispensability? In other words, would rendering the stand-alone abuse of margin squeeze subject to a finding that the input be indispensable truly reduce the effectiveness of Article 102 TFEU?

A fundamental consideration in this regard is that a margin squeeze, as all other vertical foreclosure practices, constitutes a distinctive phenomenon, in the sense that, as indicated in section II of this article, competition law must balance the dominant undertaking's right to property against effective competition on the downstream market.[94]

By deciding to reduce indispensability to a non-essential element, the CJ has significantly widened the liability of vertically integrated dominant undertakings, placing them in a particularly difficult position. Indeed, as Jóhannsson asserts, this decision places a "bull's eye" on said undertakings.[95] Whenever the input is not essential, they are under no antitrust duty to supply it. At the same time, however, if they decide to provide the input to downstream competitors, they must do so on advantageous terms, else, they will be charged with a margin squeeze abuse.

Arguing *a contrario sensu*, does the non-essentiality of the indispensability element promote the effectiveness of Article 102 TFEU? Is it beneficial to competition and consumers? Furthermore, does it strike a balance between the vertically integrated undertaking's interests and effective competition on the downstream market?

First and foremost, in order to circumvent liability, the vertically integrated undertaking may simply choose not to provide its input or completely withdraw it from the upstream market.[96] Whilst this is not an appealing solution to a dominant undertaking – all dominant undertakings seek to create trading opportunities in order to generate revenue – the risk of rendering itself susceptible to a competition law investigation and a hefty fine might leave it no alternative.[97]

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[94] *Oscar Bronner* AGO (n 10) para 56; R Nazzini, 'Google and the (Ever-Stretching) Boundaries of Article 102 TFEU' (2015) 6(3) *Journal of European Competition Law & Practice* 301, 309.
[95] GP Jóhannsson, "Assessment of a Margin Squeeze as an Abuse of Dominant Position under EU Competition Law" (JAEM01 Masters Thesis, Lund University, 2014), 40.
[96] GP Jóhannsson (n 95) 41; PS Iglesias, 'The Non-Indispensable Condition in "Margin Squeeze" Claims in Europe' (2013) 19 *Columbia Journal of European Law Online* 1, 8; Auf'mkolk (n 56) 149, 156; Azzopardi (n 62) 228, 245; Rauber (n 87) 490, 494-495.
[97] Azzopardi (n 62) 228, 245.

This action is all the more anti-competitive,[98] the alternatives available on the upstream market diminish and consequently competition and consumers are harmed.

Secondly, the undertakings' incentives to invest and innovate are weakened, leading to consumer harm.[99] A vertically integrated dominant undertaking will undoubtedly think twice before investing in its input and innovating. This is because, it recognises that even if the input it supplies is actually or potentially substitutable, it is still bound to share the benefits deriving from the said investments with its downstream competitors on advantageous terms:

> If margin squeezes were prohibited purely on the basis of an abstract calculation of the prices and in the absence of any assessment of the indispensability of the input for competition in the market, dominant undertakings' willingness to invest would be reduced.[100]

The cognisance that the vertically integrated undertaking supplying its non-essential input is susceptible to a margin squeeze investigation will also disincentivise downstream competitors from investing and innovating. Downstream competitors are aware that the vertically integrated undertaking supplying its input, must necessarily do so on favourable terms. Therefore, they find themselves in a convenient position and are discouraged from developing an upstream infrastructure and competing with the vertically integrated undertaking on the upstream market too[101]:

> if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term.[102]

In its Guidance Paper, the Commission itself acknowledges that the foregoing effects (lack of investment and innovation) are prejudicial to consumers in the long term: "Neither of these

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[98] Jones and Sufrin (n 4) 427; O'Donoghue and Padilla (n 26) 402.
[99] Jóhannsson (n 95) 41-42; Iglesias (n 96) 1, 8.
[100] *TeliaSonera* AGO (n 16) para 21.
[101] Iglesias (n 96) 1, 8.
[102] *Oscar Bronner* AGO (n 10) para 57.

consequences would, in the long run, be in the interest of consumers."[103] Therefore, more specifically, the said effects run counter to the main objective of Article 102 TFEU, protection of competition for the benefit of consumers.[104]

Thirdly, the non-essentiality of the indispensability element leads to false-positives. As noted previously, economic theory affirms that the indispensability of the input is an essential condition for a margin squeeze to arise. Yet, in *TeliaSonera*, the CJ explicitly held that a vertically integrated dominant undertaking may be found guilty of abusive margin squeeze notwithstanding that the input is non-essential. This approach leads competition law authorities to falsely impute an abusive margin squeeze when in reality none exists.[105] This strongly disincentives dominant undertakings from investing.

Moreover, as noted in section II of this article, in *Telefónica*, the vertically integrated dominant undertaking brought forward the argument that the inapplicability of the *Bronner* criteria, most prominently the indispensability requirement, gives rise to an infringement of its fundamental right to property.[106] Even though this argument has some force to it, it is submitted that it would be more appropriate to specifically argue that the non-essentiality of the indispensability of the input infringes a vertically integrated undertaking's right to property.

The current approach effectively forces a vertically integrated dominant undertaking granting access to its non-essential property, to do so on advantageous conditions, when in competition law terms it would not even be required to grant the said access. Therefore, while the aim of promoting effective competition on the downstream market is legitimate, rendering the indispensability of the input in-essential is disproportionate. It exceeds the measures required to protect downstream competition.

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[103] Guidance Paper (n 3) para 75. This was also reiterated in *TeliaSonera* AGO (n 16) para 21.
[104] Vide *Oscar Bronner* AGO (n 10), para 58; Guidance Paper (n 3) para 6; C-413/14 P - *Intel v Commission* [2017], para 133 (not yet reported).
[105] O'Donoghue and Padilla (n 26) 403; Jóhannsson (n 95) 43.
[106] *Telefónica* (n 49) para 95.

4. Conclusions

The CJ's decision to reduce indispensability to an in-essential element runs counter to the economics of margin squeeze and in reality does not promote the effectiveness of Article 102 TFEU. In contrast, it places vertically integrated undertakings in a prejudicial position and consequently leads to detrimental effects both on competition and on consumers.

In light of this, this article proposes that the CJ grants the indispensability element a mandatory status. It is submitted that this be done by converting the two-fold margin squeeze test into a three-part test, wherein before all else, a thorough analysis of the indispensability of the input is executed. Whenever the input is non-essential, the possibility of abusive margin squeeze would be definitively excluded.

This test gives rise to significant advantages which substantially enhance the EU competition law position with respect to the abuse of margin squeeze. First of all, it grants economic understanding to the abuse, thereby substantially reducing the possibility of false positives. Secondly, it places vertically integrated undertakings in a reasonable position, thus ensuring that they do not resort to the adverse actions of refusal to supply or withdrawal of the upstream product and are incentivised, along with downstream competitors, to invest and innovate to the benefit of competition and consumers. Thirdly, the three-part test provides additional authority to the stand-alone abuse of margin squeeze. As affirmed throughout this article, analysing margin squeeze as a stand-alone abuse is a reasoned decision. Nevertheless, by subsequently demoting indispensability to a non-essential element, the CJ unjustifiably denied the unequivocal economical equivalence of margin squeeze and refusal to supply. Rendering the stand-alone abuse of margin squeeze contingent on the indispensability of the input, one of the *Bronner* conditions, allows EU competition law authorities to reap the paramount benefits deriving from considering margin squeeze an independent abuse whilst at the same time acknowledging the economical equivalence linking margin squeeze and refusal to supply.

Therefore, it is evident that the CJ's decision to reduce indispensability to an in-essential element was an erroneous one. The indispensability element is a must for abusive margin squeeze. It will be interesting to see how the margin squeeze abuse will evolve, particularly,

whether the CJ will decide to grant indispensability a mandatory status and thereby enhance the EU competition law position with respect to the stand-alone abuse.

THE ABILITY OF BILATERAL COOPERATION TO INTERNATIONALISE COMPETITION POLICY FOR THE PURPOSES OF ACHIEVING CONVERGENCE AND HARMONISATION BETWEEN NATIONAL COMPETITION AUTHORITIES

Quinten Ijland*

Whilst the mechanism of bilateral cooperation can be considered to be an old one in the field of competition law and policy, it has regained prominence and relevance in the wake of the increased internationalisation of markets and cross-border anti-competitive conduct by multinational enterprises. Among other things, this essay will provide a critical analysis of the strategy from a policy perspective, including a consideration of its advantages and disadvantages in achieving convergence between national competition authorities. This essay will conclude with a look at two highly effective bilateral agreements that have entered into force over the last decades. Research will indicate that, particularly for exploring potential future directions of this form of cooperation, the successful examples discussed form the exception rather than the rule.

I. Introduction

1. The Importance of International Competition Rules in a Globalised World

It is widely accepted that a body of law is only as effective as its enforcement mechanism; any system of competition law in a global context will thus lack effective enforcement, regardless how complex or sophisticated it may be, where an international character is absent.[1] The emergence of a global market, where it is recognised that firms operate across jurisdictions with their practices having the potential to impact serval national markets, necessitates the creation of rules adapted to the current globalised environment, detached from territorialism.[2]

[1] Karen Yeung, *Securing Compliance: A Principled Approach* (1st edn, Hart Publishing 2004) 3.
[2] Valerie Demedts, 'International Competition Law Enforcement: Different Means, One Goal?' (2012) 8 *The Competition Law Review* 224.

Moreover, with global economic liberalisation being realised and the removal of trade barriers, incentives are created for firms who are vulnerable to foreign competition to engage in anti-competitive conduct. International competition law is therefore aimed at supplementing this liberalisation, intervening where market failures arise and facilitating the creation of competition. Further, the proliferation of competition laws testifies to the need for increased cooperation on competition matters.[3] With currently more than a hundred national competition law systems in place, there is a risk that different laws based on a myriad of legal and economic standards are being applied to the same case, leading to a procedural burden on companies and possible divergent outcomes.[4] Whilst international competition law is not the panacea for this issue, it may be able to foster greater understanding, mutual trust and cooperation between different competition authorities, and may potentially lead to the convergence and harmonisation in the economic and legal analysis of competition cases between authorities across the globe.

2. Aspects of Research Considered

Whilst it may be argued that convergence between competition authorities and a more internationalised competition policy can be achieved through various means, including multilateralism and extraterritoriality, the focus of this essay will be on *bilateral* cooperation. This section has briefly sought to outline the necessity and benefits of international cooperation within competition law. An evolving concept, bilateralism contains various forms and is shaped by different developments within and outside the competition law arena, including public and domestic economic policy.[5] Traditionally, in the field of competition law, bilateral cooperation is based on a formal cooperation agreement between two jurisdictions. Whilst such agreements, particularly those containing an element of positive comity,[6] have emerged as the most dominant form of bilateral cooperation in recent years, bilateral cooperation can refer to any situation – with or without a formal cooperation agreement – in which competition authorities of two jurisdictions coordinate activities,

[3] Ibid 227.
[4] Ibid.
[5] Maher Dabbah, 'The Bilateral Option: Cooperation Between Competition Authorities', *International and Comparative Competition Law* (Cambridge University Press 2010) 495.
[6] The procedure whereby either party may request the other party to enforce its competition laws to address anti-competitive practices which impact the interests of the requesting party, requiring positive actions to be taken.

cooperate to enhance the enforcement of rules and seek to eliminate potential conflicts in their work.[7]

This essay aims to provide a broad contextual background, referring to the mechanism's effectiveness in internationalising competition policy in the subsequent section. Considering this background, two key illustrations of bilateral agreements will be discussed in the third section; the 1991 Competition Cooperation Agreement and 1998 Positive Comity Agreement between the United States (US) and the European Union (EU), and the Australia-New Zealand cooperation framework (including both the 1983 Australia-New Zealand Closer Economic Relations Trade Agreement and 2007 Cooperation Agreement). Ultimately, the research will indicate that whilst the examples demonstrate the effectiveness of bilateralism in achieving convergence, when considered from a wider perspective, it has currently not reached its full potential in internationalising competition policy on a global scale.

II. Evaluating Bilateral Cooperation for the Purposes of Internationalising Competition Policy and Achieving Convergence and Harmonisation

The primary focus of this section is the critical evaluation of bilateral cooperation in its ability to internationalise competition policy effectively, particularly in the context of convergence and harmonisation.

1. Suitability of Bilateralism to Internationalise Competition Policy and achieve Convergence and Harmonisation

The growing number of bilateral cooperation agreements between competition authorities, ministries and governments indicates the significance of this model for cooperation. This growth resides in its alleged ability to achieve various practical economic and diplomatic aims, many of which the Organisation for Economic Cooperation and Development (OECD) has advocated for. These ambitions include the improved efficiency in competition investigations, the avoidance of jurisdictional conflicts and the crucial relief for firms from needing to interact

[7] Dabbah, 'The Bilateral Option' (n 5) 495.

with various competition authorities for the same matter, leading to avoidable additional costs and inefficiencies.[8]

The involvement of two parties that form an environment beneficial to the creation of mutual trust and promotion of continuous cooperation and interaction, is something which may be more superficial in multilateral frameworks. Under this model, parties may differ widely in terms of legal and economic expertise, approach and goals, making it increasingly difficult to reach any consensus considering the sensitive nature of competition policy.[9] Hence, bilateralism's nature in that it does not threat or intrude state-sovereignty creates a positive forum for consultation between competition authorities and may also contribute to the evolution towards long-term substantial and procedural convergence.[10]

Convergence is best considered to be "the tendency of societies to grow more alike, to develop similarities in structures, processes and performances."[11] Whilst this may be considered as a more passive process, harmonisation can best be described as "active" convergence, intended to work towards a predefined standard.[12] This is therefore a long-term benefit of bilateral cooperation which goes beyond the focus of any stand-alone case, but more towards the establishment of a common policy perspective regarding the understanding and application of competition law. Hence, it may be argued that "convergence supports the role of bilateral cooperation as one of the strategies to internationalise competition law."[13] This likely prospect of convergence however, ought to be contrasted with disagreements that do occasionally arise. Such limitations shall be further considered below.

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[8] Maher Dabbah, 'Future Directions In Bilateral Cooperation: A Policy Perspective', *Cooperation, Comity, and Competition Policy* (Oxford University Press 2010) 289.
[9] Demedts (n 2) 232.
[10] Ibid.
[11] Clark Kerr, *The Future Of Industrial Societies: Convergence Or Continuing Diversity?* (Harvard University Press 1983) 3.
[12] Eva Julia Lohse, 'The Meaning Of Harmonisation In The Context Of European Union Law – A Process In Need Of Definition', *Theory and Practice of Harmonisation* (Edward Elgar Publishing Limited 2012) 291.
[13] Dabbah, 'The Bilateral Option' (n 5) 512.

2. Limitations of Bilateralism to Internationalise Competition Policy and achieve Convergence and Harmonisation

Highlighting the possible shortcomings and limitations of bilateral cooperation in light of its ability to enhance the internationalisation of competition policy and achieve convergence, provides for a more nuanced and balanced assessment of this model.

Irrespective of the remarkable level of coordination and convergence that this bilateral model has accomplished in numerous instances, practical impediments to cooperation remain. As a consequence of local laws, competition authorities are greatly limited in their ability to share confidential information obtained from a party in the course of an investigation with a foreign competition authority.[14] According to Newman and Echevarría, "effective cooperation rests on the agencies' ability to discuss remedies in specific cases, to exchange specific documents disclosing anti-competitive behaviour, and to disclose enforcement decisions when such decisions are not yet public."[15] It ought to be noted however, that to the extent that it is permitted (particularly through waivers from the firms involved or clear authorisation under local laws), the sharing of business information between authorities happens routinely, and policy convergence has begun to break down this barrier. Corporations which seek to merge frequently have an incentive to grant a waiver to guarantee a short and swift investigation.[16] In the transatlantic context between the US and the EU, parties have increasingly waived confidentiality protections, thus permitting authorities to share information to the benefit of competition law enforcement.[17]

A further shortcoming of this model refers to the fact that frequently, a case needs to have an effect on both domestic markets before both authorities will apply the equal amount of time, effort and financial commitment to the matter.[18] Where the case does not contain an element of dual-illegality, it is unclear to what extent an authority is prepared to invest its resources

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[14] Bevin Newman and Marta Delgado Echevarría, 'Gaps And Bridges: Transatlantic Cooperation' (2005) The European Antitrust Review 27.
[15] Ibid 28.
[16] Anu Bradford, 'International Antitrust Cooperation and the Preference for Nonbinding Regimes', *Cooperation, Comity, and Competition Policy* (Oxford University Press 2010) 323.
[17] Newman and Delgado Echevarría (n 14) 27.
[18] Dabbah, 'The Bilateral Option' (n 5) 521.

into a competition-related matter that effects the interests of another country. In such a situation, any form of bilateral agreement may be rendered futile and can also be considered to be a consequence of a further limitation, namely the soft law nature of bilateral agreements.

Most frequently, bilateral cooperation agreements have a soft law nature which do not impose binding obligations on the signatories.[19] Whilst difficult to quantify, competition authorities tend to place their emphasis on "cooperation" as oppose to fixating on bilateral agreements, sensing that cooperation in an informal context may be more fruitful and cost effective as opposed to concluding formal bilateral agreements with a soft law element. Academic scholars including Anu Bradford contend that the disagreement between states over the substance and institutional form of cooperation has resulted in a process of watering down any proposed binding international competition agreement to the extent that any net benefits have been limited or fully eliminated.[20] Formal international competition agreements are therefore not currently feasible to negotiate, and perhaps it may be most effective to rely on the International Competition Network's (ICN) influential international regime in order to internationalise competition policy, particularly following the collapse of the WTO competition negotiations in 2003. Hence, one can deduce that where provisions are difficult to enforce in the case of conflict, non-compliance or serious divergence, authorities tend to shy away from this formal bilateral option to cooperate across borders.

The final challenge bilateral cooperation faces in its effort to internationalise competition policy and as a result achieve convergence and harmonisation, is the long-term nature and high costs of bilateral agreements.[21] This aspect further hinders the prospect of developing a global principle of positive comity and expanding a truly global network of competition authorities to preserve competition in a global economy. Due to the costs associated with the bilateral model, particularly developing and transition countries in particular share a preference for cooperating on the multilateral level such as the ICN. In the following section, the above-mentioned limitations of the bilateral model shall be weighed against the great potential that this model has, illustrated by two key case studies.

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[19] Ibid 522.
[20] Bradford (n 16) 321.
[21] Dabbah, 'The Bilateral Option' (n 5) 521.

III. Case Studies

Whilst bilateral cooperation can be categorised based on its various forms (negative comity, positive comity, *de facto* cooperation and cooperation within a wider framework), two key illustrations will be further elaborated on in this section. As agreements containing an element of so-called positive comity[22] have emerged as the more dominant form of bilateral cooperation in recent decades, both examples in this discussion include such an element. The two most high-profile illustrations containing an element of positive comity is the EU-US cooperation framework (including both the 1991 Competition Cooperation Agreement and 1998 Positive Comity Agreement), and the Australia-New Zealand cooperation framework (including both the 1983 Australia-New Zealand Closer Economic Relations Trade Agreement and 2007 Cooperation Agreement), each representing cooperation in a competition-specific and a wider context based on free trade, making these appropriate illustrations to elaborate on.

1. 1991 EU-US Competition Cooperation Agreement, and 1998 EU-US Positive Comity Agreement

The most obvious example of bilateralism refers to the cooperation between the US and EU, two of the world's key competition regimes with a well-established history of cooperation. In fact, it may even be argued that the competition agencies in the US and EU enjoy the strongest bilateral relationship within the competition law arena today; it is in many ways a model for cooperation.[23] The parties have entered into two agreements in 1991 and 1998; the former, incorporating a positive comity procedure, established a mutual obligation to notify competition matters to the extent that these cases relate to key interests of the other authority and referred to the exchange of information on matters relating to the implementation of competition rules. The latter agreement further clarified how and when positive comity ought to be invoked.[24] What makes this relationship particularly effective is the "quiet and business-like cooperation" between the European Competition Directorate and its counterpart agencies

[22] See footnote 6 for an elaborated explanation on positive comity.
[23] Newman and Delgado Echevarría (n 14) 26.
[24] Ibid.

in the US – the Federal Trade Commission and the Department of Justice Antitrust Division.[25] Initially however, one would not assume that these two strong and dominant competition authorities would have a great interest in moving closer to one another, particularly considering their opposing procedural and substantive rules within competition law. Contrary to this narrative, the mechanism of close bilateral cooperation has significantly contributed to bringing these systems closer together,[26] particularly in the areas of cartel regulation and merger control as a result of the intensive review of substantive and procedural competition laws undertaken by the EU.

As a result, it may be argued that both parties are committed to fostering an effective competition-based dialogue, identifying areas of convergence and seeking to minimise cases of divergence. Both US and EU competition authorities are devoted to cooperate in detecting and punishing international cartel activities.[27] The signatories are conscious of the fact that "cooperation and convergence in cartel enforcement provide powerful incentives for participants to avail themselves of effective amnesty programmes and to expose illegal activity in all jurisdictions where they have exposure."[28] In light of the "internationalisation" of cartel activity, the European Commission has revised its corporate amnesty programme in 2002 based partly on the shared insights and experiences of their American counterpart. As a result, the EU's revised amnesty programme now substantially mirrors the US Department of Justice's Corporate Leniency Policy.[29] A main consequence of this convergence, is that parallel amnesty applications have increased, and other parties have conducted near simultaneous executions of search warrants and other inspections.[30]

The bilateral cooperation between the parties, particularly within merger control where the agreements have enabled them to gain a better understanding of one another's competition law and policy, further strengthens their individual enforcement efforts and prevent unnecessary divergence in their decision-making.[31] Since the authorities jointly issued their

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[25] Mario Monti, 'Convergence In EU-US Antitrust Policy Regarding Mergers And Acquisitions : An EU Perspective' (Los Angeles, 2004).
[26] Dabbah, 'The Bilateral Option' (n 5) 504.
[27] Newman and Delgado Echevarría (n 14) 26.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Dabbah, 'The Bilateral Option' (n 5) 516.

Best Practices on Cooperation in Merger Investigations in 2002, officials have characterised their close collaboration in this area as "frequent and intense".[32]

Besides specific cases, collaboration is also fostered in terms of policy, where the agencies express shared aims of implementing economically sound and transparent policies, as well as consistent merger remedies.[33] As stated by Mario Monti in discussing the European Merger Regulation, "put simply, the EU and US agree on what competition policy should be all about. We share a common fundamental vision of the role and limits of public intervention. We both agree that the ultimate purpose of our respective intervention in the marketplace should be to ensure that the consumer is not harmed."[34] This testament serves as further evidence for the notion that the key benefit arising from the US-EU bilateral cooperation is the significant convergence between the two regimes.[35] The agreement therefore gives credence to the fact that bilateralism has the clear potential to achieve convergence between competition authorities and harmonise rules.

Despite the successes, both competition authorities still encounter several obstacles and practical limits to their increasingly common policy goals. There remains significant divergence in substantive laws relating to the abuse of dominance, the approach to merger efficiencies and the licensing of intellectual property.[36] Whilst a rare occurrence, the mergers between General Electric and Honeywell as well as between Boeing and McDonnel Douglas exemplify this. The cases resulted in periods of disagreement between the authorities, particularly regarding the aims of merger control and the core values to be pursued by competition policy. In addition, different procedural laws can lead to drastic divergence which can limit effective cooperation. Merger parties often notify the merger to the European Commission before triggering the review process in the US, due to the greater transparency of deadlines. In addition, the prospect of facing criminal penalties in the US, something which is absent from EU law, can further impede coordination between the parties.[37]

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[32] European Commission, '33rd Report On Competition Policy' (2004) 658.
[33] Newman and Delgado Echevarría (n 14) 27.
[34] Monti (n 23).
[35] Dabbah, 'The Bilateral Option' (n 5) 516.
[36] Newman and Delgado Echevarría (n 14) 27.
[37] Ibid 28.

However, it must be recognised that each party to the agreement applies different rules, hence divergence is an unavoidable result of close cooperation; irrespective of their differences in philosophy, procedure and analytical technique, the mutual adoption of norms between the US and EU is "a genuine success story in the modern transatlantic relationship."[38]

2. 1983 Australia-New Zealand Closer Economic Relations Trade Agreement, and 2007 Cooperation Agreement

The Closer Economic Relations Trade Agreement between Australia and New Zealand, signed in 1983, established a free trade area between the two signatories, eliminated trade barriers and ensured the foundation of a full-functioning Trans-Tasman market.[39] Whilst this economic cooperation is not competition-specific, the relationship involves unique cooperation instruments relating to competition law enforcement. This includes the mutual recognition and enforcement of civil court judgements and the ability of courts in one nation to issue orders addressed to individuals located in the other. In reference to the agreement itself, the fourth objective stated in Article 1, "to develop trade between New Zealand and Australia under conditions of fair competition", and Article 12(1)(a) calling on parties to "examine the scope for taking action to harmonise requirements relating to…restrictive trade practices" does allude to harmonisation and convergence. In practice, under this meaningful and effective cooperation between the Australia Competition and Consumer Commission, and the New Zealand Commerce Commission, one authority is at liberty to demand information from individuals based in the other jurisdiction. The agreement has initiated a long, fruitful and extensive process of convergence, particularly in the field of merger control, with notably New Zealand bringing its regime "closer" to the Australian system.[40]

The Labour Government of New Zealand introduced various economic reforms throughout the 1980s, including the 1986 Fair Trading Act and 1986 Commerce Act, largely modelled on

[38] William Kovacic, 'Competition Policy In The European Union And The United States: Convergence Or Divergence In The Future Treatment Of Dominant Firms?' (2008) Competition Law International 16.
[39] Dabbah, 'The Bilateral Option' (n 5) 505.
[40] Ibid.

Australia's 1974 Trade Practices Act. As a consequence thereof, "New Zealand competition law was effectively brought into line by that of Australia by 1986."[41] In this regard, the structure is best described as sitting in-between the North American Free Trade Agreement (NAFTA), which imposes no requirement of harmonisation or common wording between the countries' legislation, and the supra-national enforcement of competition law by the European Commission. The provisions between Australia and New Zealand are highly similar, yet these are enforced in domestic courts rather than through a supra-national body.[42] In 2007, the parties signed a Cooperation Agreement, which has promoted and furthered the ongoing cooperation and coordination between the parties with respect to facilitating competition and protecting consumers.

It is widely accepted that a great deal of the success of the Closer Economic Relations Trade Agreement and the resulting Cooperation Agreement has been made possible because of various non-legal factors. The New Zealand Ministry of Economic Development stated that "Australia and New Zealand have many common features, including geographic proximity, similarities in history and immigration, similar institutions (legal, political, financial, education, health), same language, similar customs, culture and attitudes, similar economic histories, and longstanding free labour movement between the two countries."[43]

IV. Concluding Remarks

It is clear that substantial and procedural convergence and the harmonisation of competition rules across authorities within a properly designed competition regime would simplify the international business environment and significantly mitigate the risks, costs and inconveniences associated with fragmented and diverse national competition laws. The reality is however, that within the global economy, there is little consensus between nations on the exact nature and content of such cooperation,[44] and that within the global economy, nations are "at different stages of economic development and have different capabilities, perceptions,

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[41] Jarrod Hepburn, 'The Australia New Zealand Closer Economic Relations Trade Agreement: First Among Equals' (2009) 10 Journal for World Investment & Trade 163.
[42] Ibid 164.
[43] New Zealand Government, Ministry of Economic Development, *CER Interdependence Study* (2004)
[44] Bradford (n 16) 321.

and priorities."[45] As further stated by Bradford, an advocate of a non-binding international competition regime, "the primary impediment to international antitrust cooperation is the disagreement over the substance and institutional form of such cooperation", leading nations to resolve differences on an informal case-by-case basis instead of binding international agreements. [46]

It might be easy to infer therefore, that the serious shortcomings, limitations and ambiguities associated with bilateralism make this an unsuitable tool to internationalise competition policy for the purposes of achieving convergence and harmonisation between national competition regimes. In this light, it can be argued that whilst the US-EU and Australia-New Zealand frameworks have led to significant convergence, they do belong to a small group of successful collaborative examples which form the "exception rather than the rule".[47] This does not mean that bilateralism ought to be disregarded from the debate, however. The two main examples illustrated in this essay indicate that bilateralism does in fact have great potential to be the dominant strategy in internationalising competition law and achieve the long-term benefit of convergence. Shifting the perception therefore, to the notion that convergence is realised over an extended period of time and that bilateral cooperation is able to achieve this at policy level, is determinative of its future success. An appropriate way forward would be to introduce a new generation of agreements within an international organisation (such as the ICN), in order to ensure the inclusion of developed *and* developing nations and transforming the cornerstone of bilateralism from a national one to a widely accepted international tool that is able to achieve widespread harmonisation and convergence on analytical concepts and implementation techniques.

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[45] Eleanor Fox, 'Antitrust without Borders: From Roots to Codes to Networks', *Cooperation, Comity, and Competition Policy* (Oxford University Press 2010) 267.
[46] Bradford (n 42) 321.
[47] Dabbah, 'The Bilateral Option' (n 5) 523.

Aim

The *ICC Global Antitrust Review* aims at encouraging and promoting outstanding scholarship among young competition law scholars by providing a unique platform for students to engage in research within the field of competition law and policy with a view to publishing the output in the form of scholarly articles, case commentary and book reviews. The Review is dedicated to achieving excellence in research and writing among the competition law students' community around the world.

Scope

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The *Review* will be published annually in electronic format. Each yearly volume will consist of a maximum of five long articles, two short essays, a case note section and a book review section. Further information on submission guidelines can be found in the *Review's Guidelines for authors*.

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