

“Competition Policy in the Network Industries – Comparative Legal Studies of Margin Squeeze Regulation across Japan, USA and EU and Economic Analysis”

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Margin squeeze is a behaviour where an entrepreneur in the upstream market which offers products required for carrying out business activities in the downstream market and is also engaged themselves in business activities in the downstream market sets a price of its product in the upstream market at a higher level than that of their own product in the downstream market, or sets a price at such a level that their customers in the upstream market cannot compete with them in the downstream market by economically reasonable business activities. The view of the anti-monopoly law on this behaviour is clearly stipulated in the guidelines for the exclusionary private monopolization. And lately, while we see numerous important precedents and legal decisions for margin squeeze overseas mostly in the US and EU, much attention has been paid to marked differences in regulations against margin squeeze between the US and EU.

In the EU, margin squeeze had been traditionally treated as a type of unilateral refusal to deal in the Commission's guidance on the Article 82. However, its recent precedents treat the margin squeeze as an independent type of violation. In contrast, the US authorities tend to be passive in regulating margin squeeze (more often called price squeeze in the US) and not to treat it as an independent type of violation but to interpret it as two separate issues in anti-trust law: an issue of unilateral or unconditional refusal to deal in the upstream market and an issue of unjust low price sales or predatory pricing in the downstream market. Meanwhile in Japan, the Supreme Court's decision in December 2010 on the case of NTT East Japan, where the relevance of margin squeeze was in contention, ruled that the conduct of NTT East Japan was a “unilateral and one-sided refusal to deal or price cutting” and provided factors to consider the relevance of exclusionary conducts. Based on those recent major shifts in the regulation of margin squeeze both

domestically and internationally, especially in the network industry, this research examined cases of illegal margin squeeze in the US and EU, and then compared them with those of Japan, so as to obtain suggestions for the future application of the Anti-Monopoly Act and competition policy concerning the regulation of margin squeeze.

Our evaluation on the treatment of margin squeeze and the regulatory stance in Japan, the US and EU are the following. Although the guidance on the Article 82 had treated margin squeeze as a type of unilateral refusal to deal in EU, the European Court of Justice ruled that it is an independent type of violation. According to the guidelines on the exclusionary private monopolisation, the Japanese law treats margin squeeze as a type of unilateral refusal to deal like the EU guidance on the Article 82. However, the Supreme Court decision on the case of NTT East Japan declared it to be a 'refusal to deal or low price sales'. Nevertheless, the anonymous exposition published in the judicial precedents bulletin believed to be written by a research law clerk at the Supreme Court, while stating that 'it is considered that the judgement of its legality could be satisfactorily made if the same standard is applied as that applied to a refusal to deal,' also stated that 'there would be no substantial disparity in this case whichever stance is to be taken for the decision' even if it is identified as a low price sale, arguably placing their position closer to that of the guidance on the Article 82. In addition, the subsequent exposition written by a research law clerk at the Supreme Court indicated that 'this decision seems to have avoided a predication as to what sort of framework to be adopted in judging the actions in this case and judged from the viewpoint of "whether the stated actions in the case correspond to an exclusionary conduct as an illegal refusal to deal," referring in principle to the guidelines (note: Guidelines on Exclusionary Private Monopolisation)'. In contrast to the case in Japan, rulings in the US showed a marked difference with the decision on the *linkLine* case interpreting margin squeeze not as an independent violation type and deemed that prosecutions based on margin squeeze will not be valid in terms of competition law, unless unjust refusal to deal occurs in the wholesale market where an anti-trust legal duty is recognised or predatory pricing in a retail market. The US takes the following stance toward margin squeeze: margin squeeze is a problem inherent to unilateral refusal to deal in the upstream market or to predatory pricing in the downstream market.

As to these differences in regulation of margin squeeze between the US and EU, this study listed a couple of factors contributing these differences such as

consideration for investment incentives in the upstream market and different enforcement frameworks of competition policy. Having understood those points, this study proposed several factors to recognize margin squeeze as illegal under the Anti-Monopoly Act in Japan. Firstly, we evaluate whether the price gap between a wholesale price and a retail price is negative or not, and if it is negative, margin squeeze is identified as an illegal conduct under the Anti-Monopoly Act. On the other hand, if the price gap is positive, we determine whether the dominant entrepreneur sets the price at such a level as to exclude an equally-efficient competitor from the market. If the pricing is deemed exclusionary, then it will be identified as illegal under the Anti-Monopoly Act.

This study also provides economic analysis of the regulation of margin squeeze. When obliged to deal with competitors under access charge regulation in the upstream market, a vertically integrated entrepreneur with market dominance has incentives to exclude its equally or more efficient competitors by exercising margin squeeze because it cannot make enough profits in the upstream market due to its inability to set an access charge on its own. In the end, the margin squeeze regulation was identified appropriate because in the above-mentioned instance, the market dominant entrepreneur is still able to set such retail prices as to exclude its competitors without infringing rules on predatory pricing as long as their margin allowance approved under the access charge regulation leaves enough room for profitability.

Lastly, concerning the content of the cease and desist orders against margin squeeze, it is necessary to examine adequate remedies on a case-by-case basis in light of various factors such as situations behind the violation, comparable prices, if any, and the existence of access charge regulation, because it is difficult to identify appropriate remedies in a single uniform way, noting that margin squeeze is an act of violation relating to the mark-up between a wholesale price and a retail price. Regarding the current situation that the Anti-Monopoly Act in Japan does not give entrepreneurs incentives to actively offer remedy, this study suggested an incentive scheme such as the commitment system in the EU which could spare a designation of violation or imposition of surcharges in return for a certain commitment, or a mechanism to let entrepreneurs offer constructive remedy in return for decreasing surcharges.

(English translation by CPRC Secretariat)