

# The Legal Complexities of Margin Squeeze

*The “Frankenstein Monster” of Article 102*

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**MARGIN SQUEEZE**

**Competition  
Authority**

**Refusal to supply  
Excessive pricing  
Predatory pricing**

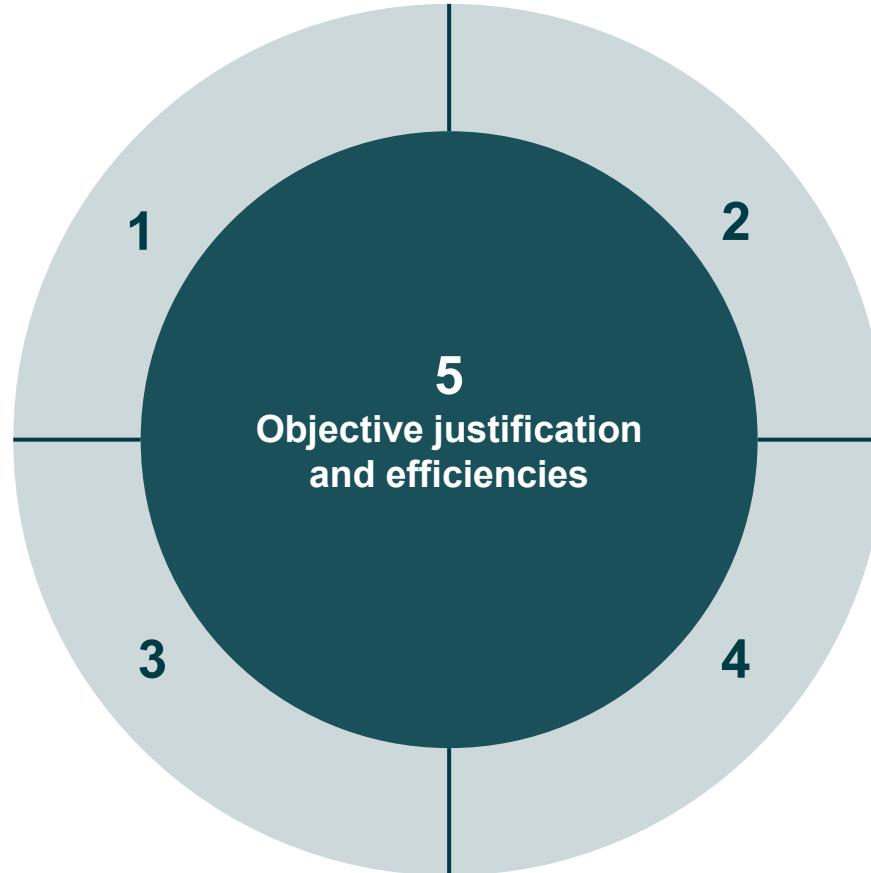
**Rival**

**Incumbent**

# Margin Squeeze – an overview

**Vertical integrated undertaking**

**Undertaking is dominant on the upstream market**

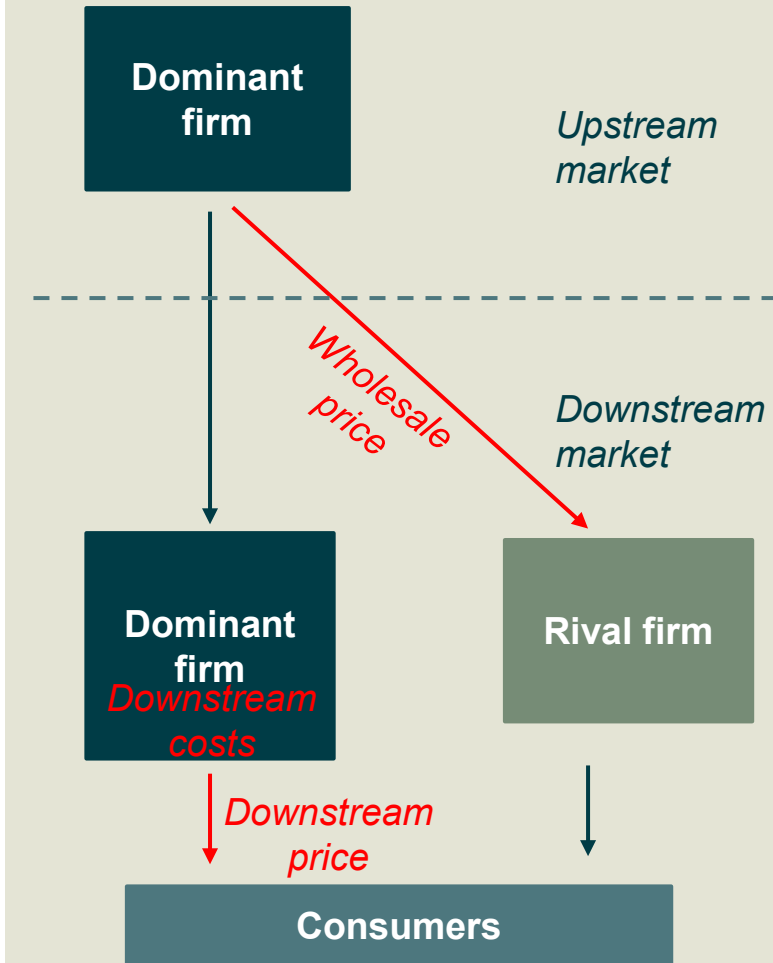


**Price spread insufficient for an as-efficient competitor**

**Capability to foreclose**

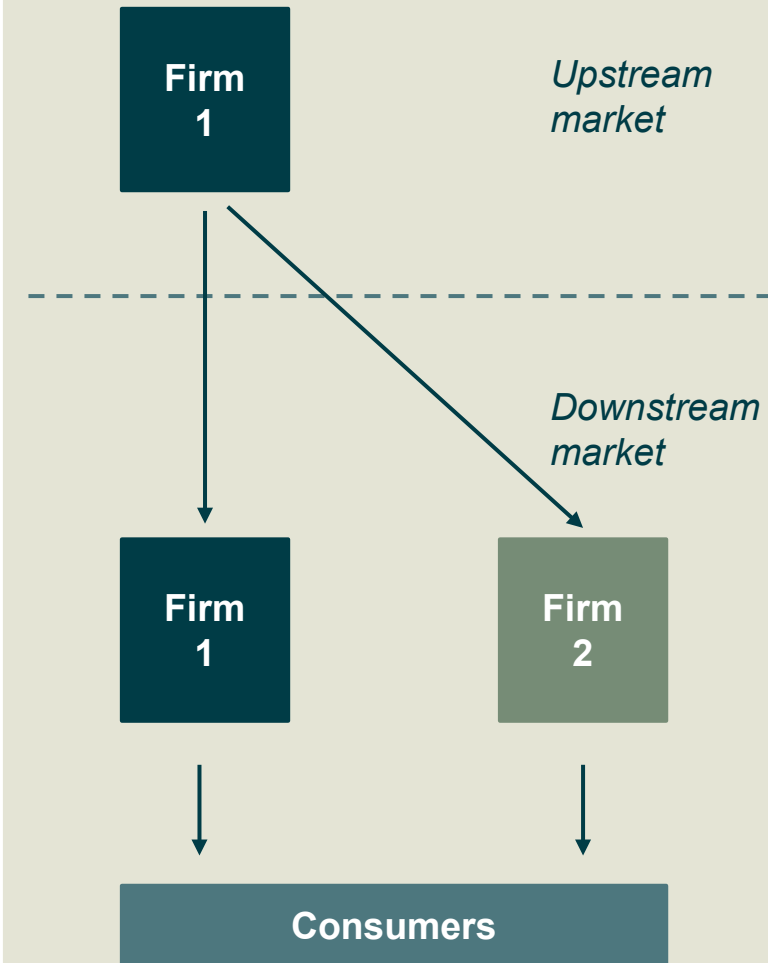
# Relationship with other forms of abuse? (1)

- Margin squeeze exists if the spread between the dominant undertaking's upstream and downstream prices prevents equally efficient competitors from operating profitably on the downstream market.
  - *Includes several elements from other forms of abuse such as*
    - ***refusal to supply,***
    - ***predatory pricing, and***
    - ***excessive pricing.***



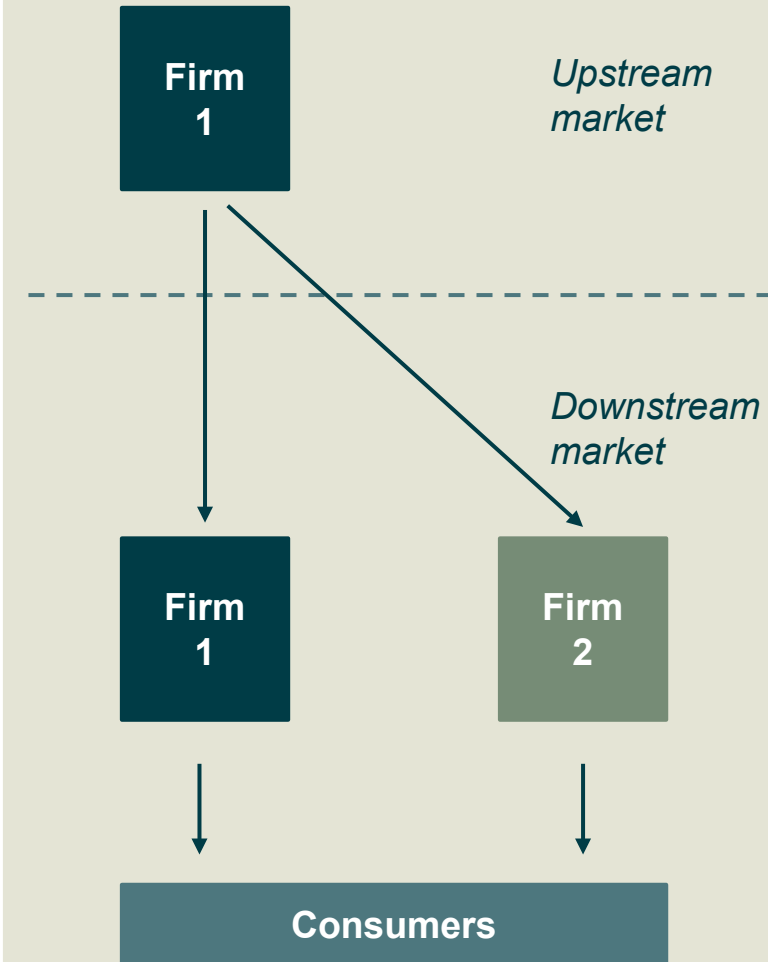
# Relationship with other forms of abuse? (2)

- Margin squeeze is an **independent abuse**, distinct from refusal to supply, predatory pricing and excessive pricing.
  - *T-336/07, Telefónica, para 181*: “If Bronner [...] were to be interpreted otherwise, that would amount to a requirement 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 82 EC...”
  - *C-52/09, TeliaSonera, para 34*: “..the unfairness, within the meaning of Article 102 TFEU, of such a pricing practice is linked to the very existence of the margin squeeze and not to its precise spread, it is in no way necessary to establish that the wholesale prices for ADSL input services to operators or the retail prices for broadband connection services to end users are in themselves abusive on account of their excessive or predatory nature, as the case may be.”
- Although the Oscar Bronner criteria do not apply, the question of “indispensability” remains relevant for effects analysis.
  - If input is indispensable: Capability to foreclose is “probable”
  - If input is not indispensable: “The possibility cannot be ruled out” that capability to foreclose exist, but more must be shown



# Vertical integration and dominance

- A margin squeeze relates to a two-level supply chain where an undertaking is active upstream and downstream and supplies competitors with the upstream input used to compete downstream (i.e. a vertically integrated undertaking).
- It offers an undertaking scope for taking the profit (or loss) either upstream or downstream – to the detriment of competitors – **but only if upstream dominance is established**.
- Downstream dominance not required, but market position is still relevant for assessing capability to foreclose.



# Market definition

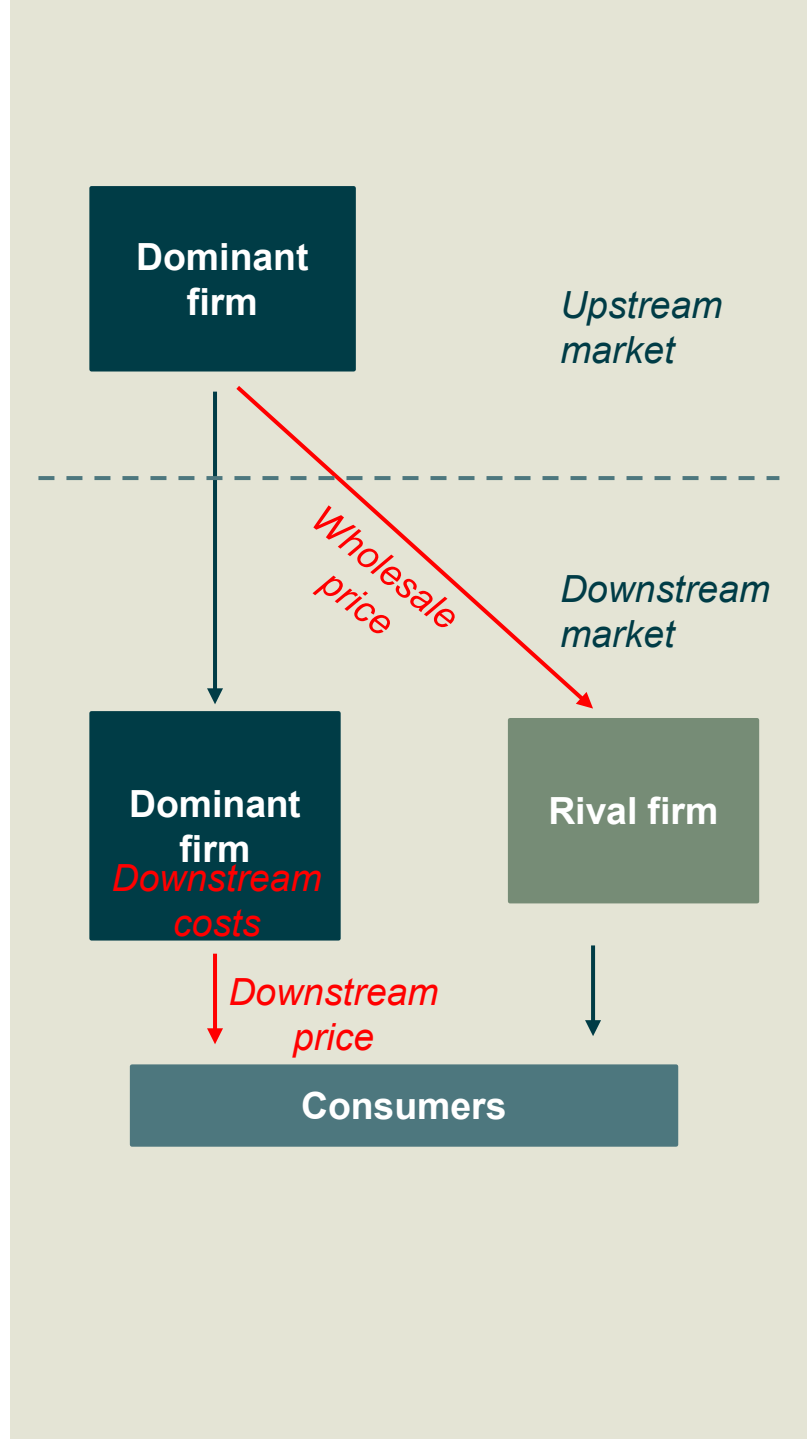
- Two separate markets must be defined; an upstream market (wholesale input) and a downstream market (retail).
  - Upstream market relevant for assessing dominance.
  - Downstream market relevant for setting the framework for carrying out the price-cost test (discussed later) and assessing capability to foreclose.
- Two different product markets does not require two different products
- *Specific challenges:*
  - Risk of circularity
  - Sector specific regulation?
  - Multi-product offerings

## Danish Competition Council decision of 29 January 2025, Coloplast

- A key element of the case was the narrow, brand-specific definition of the upstream market comprising solely Coloplast ostomy products sold to wholesalers in Denmark.
- The downstream market was defined as the sale of ostomy products (from all manufacturers) and related services to municipalities.  
*..but the price-cost test was based on revenues from Coloplast ostomy products only..*

# Price spread insufficient for an as-efficient competitor

- The AEC-test is “..whether a **competitor** having the **same cost function as the downstream arm** of the vertically integrated company is able to be **profitable** in the downstream market **given the wholesale and retail prices levied by the vertically integrated company.**“
  - *Wanadoo España vs. Telefónica.*
- But what about a “reasonable efficient competitor”?



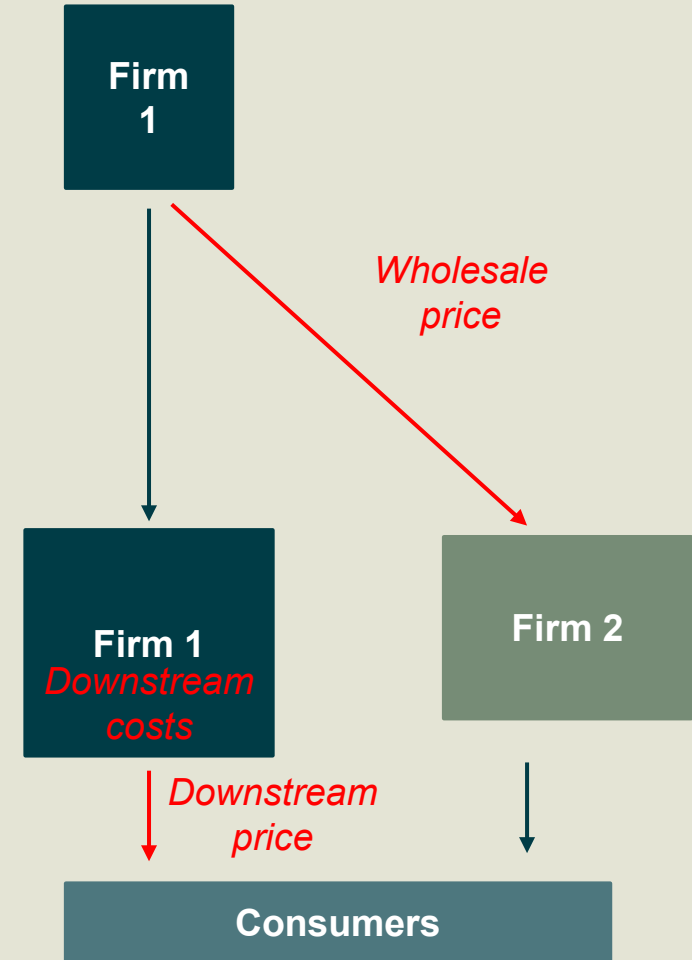
# Profitability threshold

- **Negative margin:** exclusionary effect is “probable”
- **Positive but "insufficient" margin:** more analysis will likely be needed.

## When is a margin sufficient?

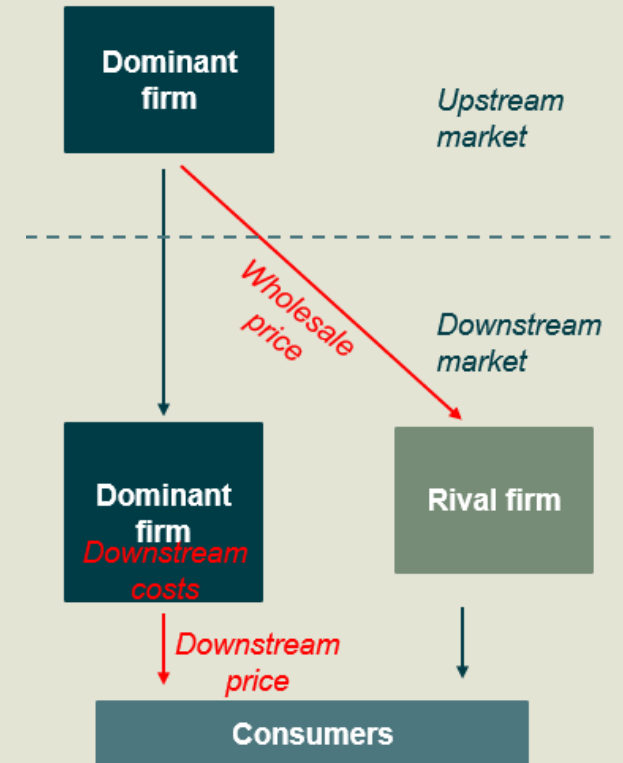
*“A reasonable profit margin means that an equally efficient competitor must be able to achieve a certain positive profit margin, the size of which will depend on the specific industry.” - Coloplast, para 510*

*“The OFT considers that in the circumstance of this case, it was correct to prefer ROT [Return on turnover] over ROCE as a measure for determining the level of normal profit required to be earned by DisCo. It is satisfied with its choice of a ROT of 1.5% in the Decision.” - BSKyB, para 142.*



# Downstream Revenues and Costs

- **Revenues** must correspond to the defined downstream market
- **Costs** must be linked to the corresponding revenues.
- Seems simple, **but** raises several important questions that can determine the outcome of the entire test;
  - Need for symmetry between wholesale and retail sides?
  - Bundles & multi-product offerings.
    - How does this affect the price-cost test?
  - Aggregated vs. product-by-product (no symmetry issues)
  - What about promotional offers, discounts and rebates?



## Danish Competition Council decision of 29 January 2025, Coloplast

- In Coloplast, the price-cost test was based on revenues from Coloplast ostomy products only – even though they covered less than 5% of the relevant downstream market.

# The importance of cost standards

- An appropriate cost standard (AAC, LRAIC, LRIC+, FAC etc.) must be determined (can affect the outcome of the entire test).
- LRAIC (Long-Run Average Incremental Cost) is the established cost standard in margin squeeze cases:
  - Includes all product specific variable and fixed costs but excludes any non-attributable common costs.



# Capability to foreclose and evidential burden

- Margin squeeze is not a per se abuse — anti-competitive effects must be established
  - The threshold is case specific (see below), but generally it is enough for the authority to establish that the pricing behavior **is capable** of making it more difficult, or impossible, for competitors to enter or remain in the downstream market.
- Evidential burden in respect of “capability” to foreclose:
  - Negative margins = presumption of capability (without needing additional evidence to support this).
  - Positive but insufficient margins = demonstrate that reduced margins actually makes competition harder.

# Objective justification and efficiencies

- An otherwise unlawful margin squeeze may, in certain cases, be lawful with reference to **objective justifications** and **efficiencies**:
  - **Efficiencies**; high evidential burden in the past (one could hope that the “theory of benefit” puts more oxygen into efficiencies in abuse cases)
  - **Objective justification**: prove that the pricing behavior was “suitable, indispensable and proportionate”.

## What about “meeting the competition”-defence?

- Could be a relevant “objective justification”, e.g. if the competitors (and not the dominant firm) are driving down the retail price:
  - The Danish Competition Council in “*Song Networks margin squeeze complaint concerning B2B telecommunication services*”, para. 160:

*[...] It is thus considered that a dominant undertaking (TDC) may rely on the so-called meeting the competition defence principle. In the relevant downstream market, SONOFON was the first to introduce an integrated product. With this product, Multiplan, SONOFON has gained market share from TDC, [...]. Accordingly, TDC must, as a defensive measure, be afforded a certain scope to respond to SONOFON on the basis of the meeting the competition defence argument.”*
  - Meeting the competition defence has previously been argued in cases before the European-Commission – but rejected on account of the specific circumstances of these cases, e.g. *Telefónica*.

# Key takeaways

1. Margin squeeze is a **standalone abuse** — but every element of the test involves significant discretionary assessments that can determine the outcome.
2. Market definition is **uniquely consequential**: it simultaneously drives dominance, the scope of the price-cost test, and the effects analysis — and it is susceptible to circularity.
3. Revenue and cost choices are **outcome-determinative**: the same pricing behaviour can be lawful or abusive depending on which revenues are included, which cost standard is applied, and how common costs are allocated.
4. The **effects threshold** is a sliding scale: negative margins create a near-presumption of foreclosure capability, while positive-but-insufficient margins require the authority to show more.



# Any questions?

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