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ABUSE OF DOMINANCE IN TECH: COMPARATIVE ANALYSIS OF MARGIN SQUEEZE CLAIMS AGAINST U.S., EU, AND KOREAN TELECOMMUNICATIONS FIRMS

Alex Hyojung Roh
ABUSE OF DOMINANCE IN TECH: COMPARATIVE ANALYSIS OF MARGIN SQUEEZE CLAIMS AGAINST U.S., EU, AND KOREAN TELECOMMUNICATIONS FIRMS

Alex Hyojung Roh*

ABSTRACT—Telecommunications network operators around the world are often characterized as natural monopolists. Only one or few telecommunications firms control nationwide networks through which all other ancillary service providers reach their customers. Many jurisdictions, including the United States, European Union, and Korea, seek to prevent such powerful market players from abusing their dominance by regulating their business conduct under competition law.

This Note focuses on the regulation of “margin squeeze,” whereby a dominant firm leverages its market power in one market with the intent to monopolize a separate but related market. The United States does not currently impose a standalone antitrust liability based on margin squeeze, whereas the European Union has established that margin squeeze constitutes a standalone abuse. In 2021, the Korean Supreme Court adopted a similar approach to the European Union. A comparative analysis reveals that the Korean Supreme Court has judicially created the notion of margin squeeze based on a notable statutory ambiguity. Korean competition law authorities must resolve this ambiguity through legislative reform based on thoughtful policy choices that adequately reflect the purpose of competition law.
INTRODUCTION

In February 2015, the Korea Fair Trade Commission (KFTC) imposed administrative sanctions on two of Korea’s largest telecommunications firms, KT and LGU+, alleging that the firms abused their dominant market positions in violation of the Monopoly Regulation and Fair Trade Act (MRFTA). According to the KFTC, the firms priced their services too low, making it impossible for their competitors to operate—not in the market of telecommunications network operators in which KT and LGU+ are dominant firms, but in a related market of Business Text Messaging Services (BTMS). In other words, the firms leveraged their

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1 The Korea Fair Trade Commission (KFTC) is the primary competition law enforcement agency in Korea. The KFTC investigates potential violations of the Monopoly Regulation and Fair Trade Act (MRFTA; the main body of Korean competition law) and may impose sanctions including remedial measures and fines. The Seoul High Court has exclusive jurisdiction over appeals of the KFTC’s decisions and the Korean Supreme Court may further review questions of law arising from the Seoul High Court’s decisions in competition law cases. See generally OECD, The Standard of Review by Courts in Competition Cases – Background Note (4 June 2019), http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm [https://perma.cc/SYG4-Q38D].

2 In Korea, SKT, KT, and LGU+ are the only mobile network operators which hold a combined market share of over 87%. I determined the combined market shares based on the number of mobile phone users who are subscribed to each firm’s mobile network. In July 2022, their market shares were 42.35% (SKT), 25.07% (KT), and 20.29% (LGU+), respectively. Status of Wireless Telecommunications Service Statistics, July 2022, MINISTRY OF SCI. & ICT (Sep. 2, 2022), available in Korean at https://www.msit.go.kr/publicinfo/view.do?code=user&mId=63&mPId=62&pageIndex=&formMode =R&referKeyId=353%2C14&publicListSeqNo=353&publicListNo=14&searchMapngCd=&searchSeCd =&searchOpt=&searchTxt=&pageIndex2=1 [https://perma.cc/V39M-DPMZ]. In February 2015, their market shares were 46.4% (SKT), 26.3% (KT), and 19.1% (LGU+). Status of Wireless Telecommunications Service Statistics (2015), MINISTRY OF SCI. & ICT (Sep. 11, 2015), available in Korean at https://www.msit.go.kr/publicinfo/view.do?code=user&mId=63&mPId=62&pageIndex=&formMode =R&referKeyId=353%2C2&publicListSeqNo=353&publicListNo=2&searchMapngCd=&searchSeCd =&searchOpt=&searchTxt=&pageIndex2=2 [https://perma.cc/D2RT-SZSF].

3 See generally KFTC Resolution No. 2015-050, (Feb. 23, 2015).

4 Business Text Messaging Services connect businesses such as banks and hospitals with their customers by providing a software through which businesses can text alerts or marketing information to their customers who use mobile phones. Providers of BTMS must use a telecommunications network to distribute the text messages. See KFTC Resolution No. 2015-050, ¶ 5 (Feb. 23, 2015).
dominant positions in one market to gain a competitive advantage in a separate but related market in an attempt to monopolize the related market. The Korean Supreme Court decided in 2021 that this practice, called “margin squeeze,” may indeed constitute an “abuse of dominance” in violation of the MRFTA.

Competition law authorities and scholars across all jurisdictions are currently in “a period of intellectual foment” when it comes to regulating margin squeezes. In this Note, I take a comparative law approach to analyze the Korean Supreme Court’s decisions in light of the current doctrines in the United States and the European Union. As a “new kid on the block” of competition law, Korean competition authorities routinely consult cases and economic theories from the United States and the European Union. With the world’s largest consumer markets and...
longstanding competition regimes, the United States and the European Union have more established rules related to margin squeezes. The EU court, like the Korean Supreme Court, has established that margin squeezing constitutes a standalone abuse under Article 102 of the Treaty of the Functioning of the European Union, whilst the United States does not recognize margin squeezing as illegal conduct under the Sherman Act.

Part I conceptualizes the practice of margin squeezing and explains its implications on competition and technological innovation. Part II analyzes comparable U.S. and EU cases involving margin squeeze claims and identifies that the current doctrines only partially meet the common goals of ensuring effective competition and promoting consumer welfare by under- or over-detering the practice of margin squeeze. Part III examines the Korean Supreme Court’s 2021 Decisions in light of the existing U.S. and EU doctrines. I conclude that the Korean Supreme Court adopted the European Union’s doctrine without sufficient textual support in the Korean statute, and thus, the 2021 Decisions call for a legislative reform adopting clearer legal standards on margin squeeze.

PART I

A. Conceptualizing Margin Squeeze

Margin squeeze is a pricing strategy used by a vertically integrated firm that operates in two separate but related markets. The practice assumes that the firm has monopoly or near-monopoly power in the

14 In the United States, the Sherman Act was enacted in 1890 as the main law of regulating monopolist behavior; the European Union’s competition law was established in 1957 as part of the European Union’s founding treaties that laid the ground for the common market. Bradford et al., supra note 9, at 731, 736.


“upstream” or “wholesale” market. In a separate but related “downstream” or “retail” market, the firm competes with other non-integrated rivals whose operations require indispensable input from the upstream market. The following diagram helps visualize the structure of two vertically related markets in which a vertically integrated firm (M) operates:

In the diagram, the vertically integrated firm (M) monopolizes the upstream market and simultaneously competes in the downstream market with non-integrated rivals (a) and (b). To provide services to the retail customers in the downstream market, all three firms require critical input from the upstream market. Hence, firms (a) and (b) must purchase the input that (M) sells at a certain wholesale price.

Vertical integration arguably brings procompetitive benefits in the form of lower consumer prices because it reduces intermediary transaction costs and induces stronger retail price competition downstream. On the other hand, critics worry that vertically integrated firms may harm competition by leveraging their upstream market power to achieve and maintain downstream dominance. Specifically, a vertically integrated firm may drive out present competitors or foreclose future entrants by charging prohibitively low retail prices and/or high wholesale prices that make it impossible for non-integrated rivals to match the integrated firm’s retail price and generate positive profits.

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18 Id.
19 Id.
21 Salop, supra note 20, at 148.
22 Id.
B. Vertical Integration in Telecommunications Markets

Often characterized as a market of “natural monopolies,” the telecommunications service industry features emblematic cases of vertical integration. Only one or few enterprises own nationwide telecommunications networks due to large fixed costs and network externalities that lead to powerful economies of scale. Duplicating such networks is neither privately profitable nor socially desirable. Hence, many jurisdictions mitigate the potentially anticompetitive effects of incumbent operators by way of competition law and regulations. Indeed, sector-specific regulators in each of the United States, European Union, and Korea may impose ex-ante regulations including price caps to ensure that telecommunications firms provide network access to other businesses and consumers under reasonable terms of dealing.

Notwithstanding the regulatory oversight in the upstream market, a telecommunications network operator may participate in a related downstream market by providing a value-added service that requires the use of their network. BTMS, the subject matter of the Korean Supreme Court decisions, is an example of such a value-added service. A network operator who enters the BTMS market would vertically integrate their upstream network operations business with the downstream BTMS.

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25. Strong effects of network externalities exist where the value of a service exponentially increases with the number of users of the same service. A classic example is the online gaming industry wherein a game’s utility increases with the number of players because it becomes “more . . . fun.” See generally Debasmita Basak & Emmanuel Petrakis, Social Efficiency of Entry: Implications of Network Externalities, 30 J. ECON. & MGMT. STRATEGY 820, 820 (2021).


28. Id.


30. In the EU, National Regulatory Authorities (NRAs) monitor and implement the EU communications regulatory framework. For example, Reg TP is the German NRA regulating the telecommunications and post industries. Id. at 7–8, 12.

31. In Korea, the Ministry of Information and Communication (MIC) is the primary regulator of the telecommunications sector. Id. at 12.

32. Id. at 30–31.

33. See supra note 4 and accompanying text.

34. KFTC Resolution No. 2015-050, ¶ 5 (Feb. 23, 2015).
A non-integrated BTMS provider wishing to distribute text messages on behalf of its customers must pay network operators to access their telecommunications networks.\textsuperscript{36} The integrated firm may benefit by charging high wholesale prices to non-integrated BTMS rivals for the critical input of network access.\textsuperscript{37} High wholesale charges increase the production costs of BTMS rivals, preventing the BTMS rivals from charging lower consumer prices.\textsuperscript{38} If wholesale charges are high enough, the high production costs may force BTMS rivals to exit the market and, thereby, “foreclose” the competitors.\textsuperscript{39}

The vertically integrated firm may also foreclose its downstream competitors by charging very low retail prices in the BTMS market.\textsuperscript{40} Absent the upstream prices for network usage which non-integrated firms must bear, the vertically integrated firm could sustain much lower retail prices until it forces the downstream rivals to exit the market.\textsuperscript{41} Each of the three cases examined in this Note addresses whether setting such low retail prices constitutes an illegal anticompetitive behavior in the United States, European Union, and Korea, respectively.

\textbf{PART II}

\textit{A. Current U.S. Doctrine}

In the United States, section 2 of the Sherman Act prohibits firms from creating or attempting to create monopolies.\textsuperscript{42} The most relevant U.S. Supreme Court decision involving a margin squeeze claim against a vertically integrated telecommunications firm was rendered in \textit{Pacific Bell Telephone v. linkLine Communications, Inc.}\textsuperscript{43} The defendant in the case, AT&T,\textsuperscript{44} was an incumbent monopolist who provided Digital Subscriber Line (DSL)\textsuperscript{45} transport services in the wholesale market to non-integrated

\textsuperscript{35} See id. ¶ 55.
\textsuperscript{36} Id. ¶ 5.
\textsuperscript{37} See Salop, supra note 20, at 143–44.
\textsuperscript{38} Id. at 148.
\textsuperscript{39} Id.
\textsuperscript{40} Id. at 143.
\textsuperscript{41} Id.
\textsuperscript{42} 15 U.S.C. § 2: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .”
\textsuperscript{44} I refer to the defendant as AT&T because Pacific Bell, the named appellant-defendant, was AT&T’s regional division that owned the local telephone lines in California. Id. at 442.
\textsuperscript{45} DSL is a method of providing high-speed internet over telephone lines. Id.
internet service providers (ISPs).\textsuperscript{46} The ISPs competed with AT&T in the downstream market in providing DSL to retail consumers.\textsuperscript{47} The ISPs claimed that AT&T unfairly squeezed their margins by charging high wholesale prices and low retail prices, which constituted an unlawful attempt to monopolize under the Sherman Act.\textsuperscript{48}

The Supreme Court ruled in favor of AT&T.\textsuperscript{49} The Court found no basis for antitrust liability “simply because a vertically integrated firm’s wholesale price happens to be greater than or equal to its retail price.”\textsuperscript{50} The Court analyzed the lawfulness of AT&T’s wholesale prices and retail prices independently, without regard to the relationship between the two markets. With respect to the wholesale market, the Court noted the lower court’s undisputed finding that AT&T had no antitrust duty to deal.\textsuperscript{51} Because AT&T was a lawful monopoly in a regulated industry and had no duty to deal with the ISPs, it was “free to charge whatever wholesale price it would like” absent sector-specific price controls.\textsuperscript{52} The Court explicitly denounced attempts by antitrust courts to “act as central planners, identifying the proper price, quantity, and other terms of dealing” because courts are ill-suited to administer “day-to-day controls characteristic of a regulatory agency.”\textsuperscript{53}

The Court also rejected the claim that AT&T’s retail prices were “too low,” because the very essence of competition is to cut prices and benefit consumers “regardless of how those prices are set.”\textsuperscript{54} Low prices are illegal under the Sherman Act only if a plaintiff proves that the defendant’s prices are below “predatory” levels.\textsuperscript{55} Predatory pricing is a separate antitrust liability requiring a distinct two-part inquiry, and U.S. courts presume that prices are not predatory if they exceed the cost of production.\textsuperscript{56} Thus, “above-cost prices” are presumptively legal, even if those prices fall below “general market levels” or the “costs of a firm’s competitors.”\textsuperscript{57}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id. at 443.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id. at 455.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Id. at 448. Under the antitrust duty to deal, a monopolist who controls a critical input is subject to antitrust liability if it unilaterally refuses to sell access to rivals. See Verizon Commc’ns, Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) (”Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2.”).
\item \textsuperscript{52} Pac. Bell, 555 U.S. at 454.
\item \textsuperscript{53} Id. at 453 (quoting Trinko, 540 U.S. at 408, 415).
\item \textsuperscript{54} Id. at 451 (quoting Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990)).
\item \textsuperscript{55} Id.
\item \textsuperscript{57} Id.
\end{itemize}
\end{footnotesize}
It follows that, under U.S. antitrust law, margin squeezing does not constitute a standalone liability. Absent a duty to deal, a vertically integrated firm has no obligation to set prices that preserve its competitors’ profit margins. This rule results in the following formula:

\[ p_r \geq c_{rw} \]

where \( p_r \) is the integrated firm’s retail price and \( c_{rw} \) is the integrated firm’s total production costs for the retail services, including the wholesale cost. A vertically integrated firm’s retail prices are presumed to be lawful unless the integrated firm’s retail prices and costs fail to satisfy the formula. Even if a vertically integrated firm’s prices fail the test, the plaintiff must bring a separate predatory pricing claim to find antitrust liability.

The Court’s refusal to recognize a standalone margin squeeze liability is based on its reluctance to expand the scope of potential antitrust liability. The Court stated that recognizing a margin squeeze claim “where the defendant’s retail price remains above cost” would discourage firms from lowering their consumer prices in the effort to avoid antitrust liability. Expressing that this was “the precise harm [the Court] sought to avoid,” the Court essentially defined antitrust “harm” as chilling the competition towards lower consumer prices.

**B. Current EU Doctrine**

Article 102 of the Treaty on the Functioning of the European Union (TFEU; formerly Article 82 of the EC Treaty) prohibits “abuse of a dominant position,” which includes “directly or indirectly imposing unfair purchase or selling prices.” The Commission’s 2009 Guidance on enforcement priorities explicitly deems “margin squeeze” an abuse under Article 102. Margin squeeze occurs where a dominant undertaking “charges a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an

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59 *Id.* at 451.
60 *Id.*
61 Consolidated version of the Treaty on the Functioning of the European Union, Part 3, Title VII, Chapter 1, Section 1, Article 102 (formerly Article 82 of the Treaty Establishing the European Economic Community, 1957).
62 2009 O.J. (C 45/02) ¶ 80.
equally efficient competitor to trade profitably in the downstream market on a lasting basis.”

In 2010, the Court of Justice of the European Union found that Deutsche Telekom (DT), a German telecommunications network operator, abused its dominant position by engaging in a margin squeeze. DT was a dominant firm monopolizing the wholesale market of “local loop access services.” Local loop is the physical circuit connecting an end-user’s premises to the main telephone network. DT provided local loop access services to other operators who competed with DT in the retail market of “end-user access services.” End-user access services included providing customers with access to narrowband and broadband connections.

Notably, DT’s wholesale prices had already been approved by Regulierungsbehörde für Telekommunikation und Post (Reg TP), the German national authority that monitors and implements the EU communications regulatory framework. DT’s retail prices were also subject to regulatory oversight. Though DT had reduced their retail prices far below the mandatory price caps, Reg TP had reviewed and approved the retail prices.

Notwithstanding the industry-specific regulations, the Court found a standalone liability for margin squeeze. The Court held that, even if DT’s wholesale and retail prices may not independently be abusive, DT’s practice nevertheless constituted an abuse under Article 102 because the spread between the prices was unfair. A spread is unfair if it is “negative or insufficient to cover [the dominant firm’s] product-specific costs of providing its own [downstream] services, so that a [downstream] competitor who is as efficient as [the dominant firm] is prevented from entering into competition.”

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63 Id.
65 Id. ¶6.
66 Id. ¶3.
67 Id. ¶2.
68 Id.
69 Id. ¶8.
71 Id. ¶2.
72 Id. ¶169.
73 Id.
74 Id.
In other words, the Court applied the “equally efficient competitor (EEC) test”: The Court asked whether DT would have been able to set the same retail prices without incurring losses if DT itself had to pay the wholesale prices charged to competitors. As many scholars have already identified, the test derives the following formula:

\[ p_r \geq p_w + c_r \]

where \( p_r \) is the retail price, \( p_w \) is the wholesale price, and \( c_r \) is the retail cost of the vertically integrated firm. To satisfy the formula, DT’s retail prices must be equal to or greater than DT’s own cost of producing the retail services and DT’s wholesale prices charged to competitors. This ensures that DT cannot leverage its monopoly power to charge wholesale prices to drive out a downstream rival who is equally or more efficient as DT. By factoring in wholesale prices to the analysis, the rule protects DT’s competitors with the capacity to produce the same retail services at a cost equal to or less than DT.

As such, a vertically integrated firm’s retail prices that fall below their wholesale prices charged to non-integrated rivals and/or their own cost of providing retail services may constitute an unlawful margin squeeze. Though failing the test does not per se determine illegal conduct, DT illustrated that the spread between wholesale and retail prices provides strong grounds for finding a monopolist’s abuse of dominance under Article 102.

The EU Court acknowledged that DT may have to increase its retail prices to avoid liability, meaning that consumers may have to pay higher prices. This implies that the court is willing to overlook higher consumer prices to maintain a high degree of market rivalry. The Court reasoned that Article 102 not only encompasses conduct that directly harms consumers, but also “those which are detrimental to them through their impact on competition.” This articulates the European Union’s underlying policy
goals of preserving long-term competition by protecting the “equality of opportunity” for rivals, even at the risk of increasing consumer prices.\footnote{George A. Hay & Kathryn McMahon, The Diverging Approach to Price Squeezes in the United States and Europe, 8 J. COMP. L. & ECON. 259, 260 (2012).}

As such, the EU doctrine provides room for the court to determine the appropriate spread between retail and wholesale prices. The DT case illustrates that the presence of sector-specific price regulations does not preclude antitrust liability. By contrast, U.S. courts simply consider whether the retail price and wholesale price are independently legal. If sector-specific agencies are already regulating the prices, then the court is unlikely to intervene and conduct a separate analysis on the appropriate spread between retail and wholesale prices.

C. The Under- and Over-Deterrence Problem

The U.S. Court’s analysis in \textit{Pacific Bell} reflects the influence of the Chicago School’s contention that vertical integration is “virtually never competitively harmful and should be governed by benign antitrust rules approaching per se legality.”\footnote{Hovenkamp, supra note 10, at 371.} Characterized by their focus on consumer welfare, the Chicago School in the 1970s sought “low prices, high output, and high quality and variety of products and services” as the primary goals of antitrust law.\footnote{Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 7 (1978) ("[T]he only legitimate goal of antitrust is the maximization of consumer welfare."); Herbert Hovenkamp, Whatever Did Happen to the Antitrust Movement?, 94 NOTRE DAME L. REV. 583, 589 (2019).} They opposed the idea of redistributing surplus through competition law and argued that courts should refrain from speculating on anticompetitive effects because such intervention is more likely to reduce consumer welfare.\footnote{Anu Bradford et al., The Chicago School’s Limited Influence on International Antitrust, 87 U. CHI. L. REV. 297, 306 (2020).}

However, the Chicago School’s approach to vertical integration ignores the complex interactions between “intellectual property rights, networks, and information technologies” which may lead to significantly more harm than previously imagined.\footnote{Hovenkamp, supra note 10, at 371.} In fact, empirical studies suggest that vertical integration may reduce downstream competition,\footnote{See Johannes Boehm & Jan Sonntag, Vertical Integration and Foreclosure: Evidence from Production Network Data, 69 MGMT. SCI. 141, 148 (noting that concentration and market power among U.S. firms have increased over the past few decades and finding empirical evidence that downstream competitors experience a temporary drop in sales when an upstream supplier vertically integrates with a downstream competitor).} often resulting in higher prices and consumer harm.\footnote{Hovenkamp, supra note 10, at 371.} Economists have also...
demonstrated how the United States’ current approach under-deters anticompetitive pricing strategies; a vertically integrated dominant firm may force an equally or even more efficient competitor to exit the market whilst being otherwise legal by antitrust standards.\textsuperscript{88} 

On the other hand, the EEC test used in \textit{Deutsche Telekom} suffers the opposite problem of over-deterrence.\textsuperscript{89} Failing to distinguish between exploitative margin squeeze\textsuperscript{90} and exclusionary margin squeeze,\textsuperscript{91} the EEC test deters the competitive pricing strategy of exploitative margin squeeze which in fact rewards the most-efficient firm in the downstream market.\textsuperscript{92} 

Notably, the policy goals of EU competition law are often understood as encompassing a broader range of goals than those envisioned by the Chicago School in the 1970s.\textsuperscript{93} This largely stems from the European Union’s unique mission of “single market integration,” whereby the EU Commission and courts seek to prevent a retreat into economic nationalism.\textsuperscript{94} Thus, the EU’s competition policy is “concerned not only with promoting efficient production but also achieving the aims of the European treaties: establishing a common market, approximating economic policies, promoting harmonious growth, raising living standards, bringing Member States closer together, etc.”\textsuperscript{95} 

The European Union’s interest in preserving the competitive process may explain their tendency to err on the side of over-deterrence, while the Chicago School’s strong faith in the result of unfettered market competitions explains the United States’ under-deterrence. Yet, whether process-focused (as in the European Union) or outcome-based (as in the United States), the common goal of competition law is ensuring effective

\textsuperscript{88} Gaudin & Mantzari, \textit{supra} note 6, at 165-66.  
\textsuperscript{89} \textit{Id.} at 169-70.  
\textsuperscript{90} \textit{Id.} at 167-68. Exploitative margin squeeze occurs when the integrated firm sets its prices at levels where a downstream competitor that is at least as efficient or less efficient may earn negative profit; but the prices allow an existing more efficient competitor (with lower costs) to earn a positive profit. Through its upstream price, the integrated firm captures the surplus rent arising from the more efficient competitor’s technological superiority that generates more demand in the downstream market. Hence, such exploitative margin squeezes harm rivals in the downstream market (whose profits decrease due to the integrated firm’s higher upstream price). However, exploitative margin squeezes do not harm competition itself because the most-efficient firm still remains in the downstream market.  
\textsuperscript{91} \textit{Id.} at 168-69. Exclusionary margin squeeze occurs when the integrated firm sets its upstream and downstream prices at levels where a downstream competitor that is at least as efficient as the integrated firm cannot profitably remain in the market. Such predatory margin squeezes that exclude competitors who are at least as efficient as the integrated firm may harm competition and lower total surplus.  
\textsuperscript{92} \textit{Id.}  
\textsuperscript{93} WHISH & BAILEY, \textit{supra} note 15, at 51.  
\textsuperscript{94} \textit{Id.}  

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competition and promoting consumer welfare.\footnote{See \textit{International Competition Network}, supra note 16.} Falling short of these goals, the current treatment of margin squeeze claims under U.S. and EU laws suffer from under- and over-deterrence, respectively.

Professors Germain Gaudin and Despoina Mantzari provide a helpful illustration of the under- and over-deterrence problem.\footnote{Id.} In a hypothetical scenario, a vertically-integrated, dominant firm A competes with a non-integrated downstream competitor B in the retail market.\footnote{Id.} To serve one customer, firm A incurs a wholesale cost ($c_w$) of $5 and provides critical input to firm B at a wholesale price ($p_w$) of $10.\footnote{Id.} Firm A is a less-efficient retail producer than firm B. Firm A’s retail cost ($c_r$) is $20 per customer, and firm B’s retail cost is $18.\footnote{Id.} In this situation, firm B must set a retail price above $28 to remain profitable in the retail market.\footnote{Id.}

Under the current U.S. doctrine, firm A’s retail price ($p_r$) is presumptively legal if it is equal to or above the total cost of production ($c_r+w$).\footnote{Id.} This means that firm A may set its retail price at $25 or above.\footnote{Id.} By setting its retail price within the range of $25 and $28 (and thus, earning a profit between $0 to $3), firm A can force firm B to exit the market, even though firm B is a more efficient producer with a lower retail cost of $18.\footnote{Id.} When firm B exits the market, and therefore no longer purchases the wholesale product from firm A, firm A foregoes the profit from the wholesale market of $5 ($p_w-c_w$).\footnote{Id.} In other words, firm A opts for a lower profit of $0 to $3 in the short run to drive out its downstream competitors.\footnote{Id.} Firm A has no incentive to lower its profits by squeezing out firm B other than to monopolize the downstream market.\footnote{Id.} Once firm A establishes its monopoly in the retail market, it may attempt to recoup the lost opportunity cost of $5 to $2 by increasing retail prices in the long run.\footnote{Id.}

As such, the United States’ approach overlooks the market failure whereby the interaction between two related markets enables a vertically-

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\footnote{Id.}
integrated firm to operate inefficiently in the retail market, establish
downstream monopoly, and potentially increase consumer prices by way of
predatory pricing.\textsuperscript{109} Even though firm A’s prices are above its production
costs, the law fails to deter the anticompetitive conduct of exclusionary
\textit{margin squeeze}\textsuperscript{110} whereby the dominant firm excludes more efficient
competitors by leveraging its upstream monopoly power.\textsuperscript{111}

On the other hand, the EEC test adopted by the EU court suffers from
an over-deterrence problem.\textsuperscript{112} Using the same hypothetical scenario above,
firm A’s retail price must be at or above $30 to pass the EEC test ($p_r \geq p_w +
c_r$).\textsuperscript{113} The weaker competitive pressure from firm A allows firm B to set the
retail price between $28 and $30 (and thus, earning a profit between $0 to
$2).\textsuperscript{114} Given this choice, firm B is likely to charge a retail price that is as
close to $30 as possible to maximize its profits.\textsuperscript{115}

Crucially, the current EU doctrine deters exploitative \textit{margin
squeezes}\textsuperscript{116} whereby firm A could set its retail price at $29, a lower
consumer price that would fail the EEC test but would not actually
foreclose efficient competitors.\textsuperscript{117} Here, firm B would remain profitable
because firm B, as a more efficient producer, incurs a total cost of $28.\textsuperscript{118}
By setting the price at $29, firm A can lower the consumer price below the
level required by the EEC test without forcing firm B to exit the market and
deploying, thereafter, predatory pricing tactics to recoup the losses from
foregone opportunity costs.\textsuperscript{119} This exploitative margin squeeze harms
competitors that are equally or less efficient than firm A but allows more
efficient competitors like firm B to earn a positive profit whilst firm A
captures the surplus rent in the wholesale market.\textsuperscript{120} Thus, exploitative
\textit{margin squeezes} arguably allow for lower consumer prices without
harming the competitive process.\textsuperscript{121}

The next part of this Note analyzes the 2021 Decisions in the Korean
Supreme Court and draws parallels with the European Union’s current

\textsuperscript{109} Id. at 167–68.
\textsuperscript{110} See id. at 168–69.
\textsuperscript{111} Id. at 167–68.
\textsuperscript{112} Id. at 170.
\textsuperscript{113} Id. at 166.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 167–68.
\textsuperscript{117} Id. at 170.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} See id. at 169.
treatment of margin squeeze claims. The comparative analysis reveals how the Korean Supreme Court’s disagreement with the lower court’s judgment echoes the jurisdictional divergence of the European Union and the United States. This disagreement among the Korean courts largely stems from a statutory ambiguity that Korea must now resolve through legislative reform.

PART III

A. Background of the 2021 Decisions

Like EU competition law, Article 3-2(1)(5) of the MRFTA prohibits dominant firms from “abusing” their market power by making “unfair transaction[s]” that exclude competitors.122 Under Article 5(5)(1) of the Enforcement Decree of the MRFTA, such “exclusionary” conduct includes “unfairly supplying products or services” below the “Normal Transaction Price” or, alternatively, “unfairly purchasing products or services” above the “Normal Transaction Price.”123 It is unclear whether this language specifically describes predatory pricing or whether it also leaves room for regulating margin squeezes, because the article does not explicitly list “predatory pricing”124 or “margin squeeze” as examples of abuse of

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122 Monopoly Regulation and Fair Trade Act, Art. No. 3-2(1)(5), (S. Kor.).
123 Enforcement Decree of Monopoly Regulation and Fair Trade Act, Art. No. 5(5)(1), (S. Kor.). “Normal Transaction Price” is a direct and intuitive translation of the Korean term “통상거래가격” which is a unique concept in Korean competition law that neither US nor EU law adopts. Notably, the supplementary English summary of the 2021 Decisions provided by the Korean Supreme Court translates the same term to “arm’s length price,” instead of “Normal Transaction Price.” This choice of terminology follows the supplementary English translation of the Enforcement Decree of MRFTA provided by the Korea Law Information Center (Korean government’s official legal information website) which also translates the term to “arm’s length price.” However, like other commentators who believe Normal Transaction Price (sometimes translated as Normal Trading Price) better captures the original Korean term, I use “Normal Transaction Price” instead of “arm’s length price” throughout this Note. See, e.g., Jinyul Ju, Predatory Price Cutting and Price (Margin) Squeeze in Korean Competition Law: A Critique on the Korean Supreme Court Decisions 2018Du37700 and 2018Du37980, 44 J. KOR. COMP. L. 125 (2021), available in English at https://www.kci.go.kr/kciportal/ci/sereArticleSearch/ciSereArtiView.kci?sereArticleSearchBean.artiId=ART002764922 [https://perma.cc/6AUG-2EL5] (using “Normal Transaction Price” terminology in translated abstract).

124 The notion of predatory pricing is not entirely absent from the MRFTA. Article 36(1) of the Enforcement Decree of the MRFTA explicitly lists predatory pricing (or “dumping”) as an illegal practice that “unfairly exclude[s] competitors” under Article 23(1)(2) of the MRFTA. However, Article 23(1)(2) of the MRFTA regulates “unfair trade practices,” as opposed to “abuse of dominance” prohibited under Article 5(5)(1). Because the Korean cases in this Note relied on Article 5(5)(1) (abuse of dominance), the reference to predatory pricing under Article 23(1)(2) (unfair trade practices) has limited relevance. See Monopoly Regulation and Fair Trade Act, Art. No. 23(1)(2), (S. Kor.); Enforcement Decree of Monopoly Regulation and Fair Trade Act, Art. No. 36(1), (S. Kor.); Daebeobwon [S. Ct.], Nov. 22, 2007, 2002Du8626, p. 6 (S. Kor.) (holding that “refusal to deal” as an
dominance. In contrast, the EU Commission’s 2009 Guidance on enforcement priorities lists both “margin squeeze” and “predation” as two distinct types of abusive conduct that Article 102 of the TFEU intends to regulate.\textsuperscript{125}

Relying on the rather ambiguous notion of “Normal Transaction Price,” the KFTC imposed sanctions on KT and LGU+ (Firms) in February 2015.\textsuperscript{126} The Firms are dominant telecommunications network operators in Korea with near-monopoly power.\textsuperscript{127} The Firms are vertically integrated and operate in the downstream market of BTMS.\textsuperscript{128} At the time, the Firms’ BTMS retail prices fell below the average of the lowest wholesale prices for network access charged to their downstream rivals.\textsuperscript{129} This meant that non-integrated BTMS firms’ attempts to match the low retail prices of the Firms necessarily resulted in negative profits, because the wholesale prices for network access constitute the minimum production costs of BTMS.\textsuperscript{130}

The KFTC alleged that the Firms were supplying BTMS at prices below the Normal Transaction Price of the retail BTMS market in violation of Article 3-2(1)5 of the MRFTA.\textsuperscript{131} The KFTC claimed that the Normal Transaction Price in the BTMS market should be at least equal to the minimum wholesale price that the BTMS rivals must pay.\textsuperscript{132} This price constituted the minimum amount that non-integrated BTMS rivals may charge to consumers without incurring losses.\textsuperscript{133}

The KFTC noted that the Firms’ wholesale prices for network access were regulated, but the Firms had discretion over their retail prices.\textsuperscript{134} The Firms set prohibitively low retail prices that fell below the Normal Transaction Price defined as the Firms’ minimum wholesale prices, which

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\textsuperscript{125} See 2009 O.J. (C 45/02), supra note 62, ¶ 63 (clarifying that the Commission will intervene if “a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (referred to hereafter as ‘sacrifice’), so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm”).

\textsuperscript{126} See generally KFTC Resolution No. 2015-050 (Feb. 23, 2015).

\textsuperscript{127} KFTC Resolution No. 2015-050, ¶ 51 (Feb. 23, 2015).

\textsuperscript{128} Id. ¶ 23.

\textsuperscript{129} Id. ¶ 28.

\textsuperscript{130} Id. ¶ 73.

\textsuperscript{131} Id. ¶ 61.

\textsuperscript{132} Id.

\textsuperscript{133} Id. ¶¶ 60–61.

\textsuperscript{134} Seoul Godeungbeobwon [Seoul High Ct.], Jan. 31, 2018, 2015Nu38278, p. 31 (S. Kor.); Seoul Godeungbeobwon [Seoul High Ct.], Jan. 31, 2018, 2015Nu38131, p. 31 (S. Kor.).
forced the downstream rivals to operate at a loss.\textsuperscript{135} From this, the KFTC inferred that the Firms had an intent to maintain market power and exclude downstream rivals in the BTMS market.\textsuperscript{136} This constituted an “abuse” of the Firms’ dominant position.\textsuperscript{137}

\subsection*{B. The Seoul High Court’s Dismissal (2018)}

In 2018, the Seoul High Court dismissed the KFTC’s charges, holding that the KFTC inappropriately determined the Normal Transaction Price.\textsuperscript{138} The court defined Normal Transaction Price as the “realistic market price” that forms when “efficient competitors” transact in a market and choose their prices based on the economy, operations, market structure and uncertainties.\textsuperscript{139} It follows that the average of the Firms’ lowest wholesale prices may constitute the Normal Transaction Price of the upstream market only; the KFTC erred by deeming the average wholesale price as the Normal Transaction Price of the downstream BTMS market.\textsuperscript{140}

Moreover, the KFTC provided insufficient evidence that the Firms unfairly excluded rivals in the BTMS market or harmed consumer welfare.\textsuperscript{141} Specifically, the KFTC did not prove that the Firms’ BTMS retail prices exceeded their own BTMS production costs or that the exclusion of BTMS rivals would cause the Firms to raise consumer prices for recoupment thereafter.\textsuperscript{142} In fact, since the Firms entered the downstream market, the BTMS market had seen a decrease in retail prices and a yearly growth of around ten to twenty percent.\textsuperscript{143}

With respect to the difference between the Firms’ retail prices and wholesale prices, the court held that the pricing was not abusive assuming that the wholesale prices were reasonably regulated to ensure consumer welfare.\textsuperscript{144} Without proving that the regulated wholesale prices were unreasonable, the fact that low retail prices incurred losses for downstream rivals cannot alone demonstrate the unlawfulness of the prices, given the enhanced efficiency and benefits to consumers that such low prices bring.\textsuperscript{145}

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\textsuperscript{135} KFTC Resolution No. 2015-050, ¶ 73 (Feb. 23, 2015).
\textsuperscript{136} Id. ¶ 74.
\textsuperscript{137} Id.
\textsuperscript{138} Seoul Godeungbeobwon [Seoul High Ct.], Jan. 31, 2018, 2015Nu38278, p. 23–24 (S. Kor.).
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 24.
\textsuperscript{141} Id. at 30.
\textsuperscript{142} Id. at 31–32.
\textsuperscript{143} Id. at 30.
\textsuperscript{144} Id. at 33.
\textsuperscript{145} Id.
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The Seoul High Court’s analysis strongly resembles the U.S. Supreme Court’s approach in *Pacific Bell*.\(^{146}\) Like the U.S. Supreme Court, the Seoul High Court deferred to regulatory agencies to administer the appropriate retail and wholesale prices.\(^{147}\) The Seoul High Court assessed the retail prices independently of the wholesale prices, requiring proof of predatory pricing to find liability for the allegedly low retail prices.\(^{148}\) As such, the court interpreted Normal Transaction Price as a concept used for regulating predatory pricing in a single market, rather than margin squeezing in two related markets.

### C. The Korean Supreme Court’s Analysis (2021)

The Korean Supreme Court held that the lower court misconstrued the meaning of Normal Transaction Price and insufficiently examined the potential exclusionary effects of the Firms’ margin squeeze.\(^{149}\) According to the Court, Normal Transaction Price does not simply denote a production “cost.”\(^{150}\) Rather, Normal Transaction Price is a broader instrumental concept that allows competition law authorities to determine whether a firm’s prices are “abusive” considering the specific circumstances of the case.\(^{151}\) The KFTC’s determination of the Normal Transaction Price was “not unreasonable” because it was based on the totality of circumstances.\(^{152}\) The Court provided the following conceptual definition of Normal Transaction Price:

Normal Transaction Price means a price which would generally result from normal transactions that take place in a market of free and fair competition without any market-dominant firm’s abuse of its dominant position based on an intent to unfairly exclude its competitors.\(^{153}\)

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\(^{146}\) *See supra* Part II-A.

\(^{147}\) *See Seoul Godeungbeobwon [Seoul High Ct.], Jan. 31, 2018, 2015Nu38278, p. 33 (S. Kor.).*

\(^{148}\) *See id. at 31–32.*

\(^{149}\) *Daebeobwon [S. Ct.], June 30, 2021, 2018Du37700, p. 8 (S. Kor.); Daebeobwon [S. Ct.], June 30, 2021, 2018Du37960, p. 6 (S. Kor.).*

\(^{150}\) *Daebeobwon [S. Ct.], June 30, 2021, 2018Du37700, p. 6-7 (S. Kor.); Daebeobwon [S. Ct.], June 30, 2021, 2018Du37960, p. 5 (S. Kor.).*

\(^{151}\) *Id.*

\(^{152}\) *Id.* The Court lists the following examples of such circumstances: “the characteristic or specific form of the abusive conduct,” “market structure, price-setting method and patterns,” “amount and period of the purchase or sale,” and “the product’s idiosyncrasies or situations of supply and demand.”

\(^{153}\) *Daebeobwon [S. Ct.], June 30, 2021, 2018Du37700, p. 7 (S. Kor.); Daebeobwon [S. Ct.], June 30, 2021, 2018Du37960, p. 5 (S. Kor.).*
The Court inferred potentially exclusionary intent from the Firms’ conduct because the Firms could have anticipated that the spread between their wholesale and retail prices may exclude their BTMS rivals. The Court expressed concerns that the Firms’ retail prices may exclude non-integrated BTMS firms even if they were as or more efficient absent the Firms’ upstream leverage; this exclusionary effect on competition in the retail market may ultimately drive up consumer prices, lower service quality, and diminish innovation in the long run.

Interestingly, neither the KFTC nor the Seoul High Court ever explicitly debated whether the Firms’ practices constituted an unlawful “margin squeeze.” This would make sense, given that the notion of margin squeeze is absent from the statute. Regardless, the Court characterized the Firms’ conduct as a margin squeeze and ordered the Seoul High Court to further examine the exclusionary effects of the spread between the Firms’ retail and wholesale prices. Thus, in January 2023, the Seoul High Court newly decided that the KFTC’s sanctions against the Firms were legal. Thereby, the 2021 Decisions rendered the first Korean Supreme Court case which recognized margin squeeze as a standalone abuse under Article 3-2(1)5 of the MRFTA.

The Court’s decision to favor the KFTC’s determination of the Normal Transaction Price effectively renders the following formula:

\[ p_r \geq p_w \]

where \( p_r \) is the dominant firm’s retail price charged to consumers and \( p_w \) is the dominant firm’s wholesale price charged to downstream rivals. In other words, the dominant firm’s retail price must be equal to or above the dominant firm’s wholesale price to be considered as a Normal Transaction Price. The Court may infer an anti-competitive intent from a dominant firm’s prices if they fail to satisfy the formula. Even if the prices pass the

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155 Id.
156 Id.
157 See Ju, supra note 123, at 125.
160 See Ju, supra note 123, at 128.
test, the Court may additionally consider the dominant firm’s retail service production costs and examine the degree of the allegedly abusive margin squeeze under “exceptional circumstances.”\textsuperscript{162}

The Korean Supreme Court’s analysis is almost identical to the EU Court’s EEC test in \textit{Deutsche Telekom}; both courts preserved the discretionary power to determine what constitutes a “fair” margin spread, notwithstanding the ex-ante price controls with which the firms complied.\textsuperscript{163} However, unlike the European Union, the Korean Supreme Court judicially created the notion of margin squeeze amid a unique statutory ambiguity that has not been clarified by way of pre-established enforcement guidelines.

\textbf{D. Key Implications of the 2021 Decisions}

In the 2021 Decisions, the Korean Supreme Court signaled two important viewpoints with respect to the role of competition law authorities and the policy goals of competition law. First, by rejecting the Seoul High Court’s definition of Normal Transaction Price, the Korean Supreme Court preserved the broad discretion of competition law authorities in administering “fair” pricing notwithstanding ex-ante regulations. This starkly contrasts with the U.S. Supreme Court’s explicit delegation of such administrative tasks to regulatory agencies.\textsuperscript{164} Hence, like the European Union, the Korean Supreme Court’s ex-post assessment has broadened the scope of competition law liability to the potential effect of chilling pro-consumer price-cutting by dominant firms.

Second, in the 2021 Decisions, the Korean Supreme Court clearly stated their policy goal of preserving the competitive process in the long run, even at the expense of short-term consumer welfare. This resembles the European Union’s broad range of policy considerations and is also consistent with the origins of the MRFTA as a vehicle for a “just society,” intended to regulate the negative consequences of concentrated market power.\textsuperscript{165} Thus, with respect to margin squeezes, the Korean Supreme Court has made the policy choice of favoring over-deterrence over under-deterrence.

Yet, the Korean Supreme Court adopted the European Union’s doctrine without sufficient textual support in the Korean statute. As the Seoul High Court’s 2018 decision illustrated, it is arguably more consistent

\textsuperscript{162} Id. In this case, the formula would be identical to the EU’s: $p_r \geq p_w + c_r$.

\textsuperscript{163} See supra Part II-B.


with the statutory language to interpret “Normal Transaction Price” as a concept used for regulating predatory pricing in a single market, rather than margin squeezing in two related markets.\textsuperscript{166} After all, the MRFTA and its Enforcement Decree make no reference to the notion of margin squeeze. Instead of providing predatory pricing or margin squeezing as examples of abusive practices, the current statute simply prohibits firms from setting their prices below an ambiguous Normal Transaction Price.\textsuperscript{167} Without resolving this statutory ambiguity, the Korean Supreme Court’s 2021 Decisions remain unpersuasive, and future cases involving margin squeeze claims may render contradictory results. Thus, the 2021 Decisions call for a legislative reform adopting a clearer definition of margin squeeze as a distinct exclusionary conduct from predatory pricing. This will lay the groundwork for the immense legal, economic, and policy debate on how Korea may develop effective legal tests and sophisticated regulations to deter abusive margin squeezes.

CONCLUSION

Abuse of dominance in imperfect markets requires competition law authorities to intervene with clear rules and consistent enforcement. Yet, without rigorous economic analyses and measured policy choices, intervention will only lead to stifled innovation and higher prices that harm consumers. With the 2021 Decisions, Korean competition law authorities now face the critical task of legislative reform. Clearer statutory language will provide a stronger legal basis for the KFTC and the courts to regulate exclusionary margin squeezes, preventing further confusions or contradictions in future cases involving similar claims.

Meanwhile, competition law authorities must acknowledge the over-deterrence problem of regulating margin squeezes, as this may cause increased consumer prices and market inefficiencies against the MRFTA’s goal of “protect[ing] consumers.”\textsuperscript{168} They must develop clearer legal tests and enforcement standards based on economic theories and policy decisions to predictably distinguish pro-consumer price-cutting from

\textsuperscript{166} See supra Part III-B.

\textsuperscript{167} See Enforcement Decree of Monopoly Regulation and Fair Trade Act, Art. No. 5(5)(1), (S. Kor.).

\textsuperscript{168} Monopoly Regulation and Fair Trade Act, art. 1 (S. Kor.), translated in Korea Legislation Research Institute’s online database, https://elaw.klri.re.kr/eng_mobile/viewer.do?qseq=41658&type=part&key=19#:~:text=The%20purposes%20of%20this%20Act,and%20any%20excessive%20concentration%20of 

[https://perma.cc/XQ3Q-LDVK] (“The purposes of this Act are to promote fair and free competition, to encourage thereby creative business activities, to protect consumers, and to strive for balanced development of the national economy, by preventing business entities from abusing their market-dominant positions. . .”).
margin squeezes that harm competition. The 2021 Decisions have undoubtedly paved the way for much debate in law and economics, hopefully leading to Korea’s unique reconciliation of freedom and fairness in market competition.