Feature Article: *Price Squeeze: The Implications of the CJ Judgments in Deutsche Telekom* and *TeliaSonera*

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On October 14, 2010, the European Union's Court of Justice ("CJ") issued its long-awaited judgment upholding the European Commission's €12.6 million fine against Deutsche Telekom for abusive price squeeze.[1] The judgment is remarkable in that, for the first time, the CJ established price squeeze as a stand-alone abuse under Article 102 of the Treaty on the Functioning of the European Union ("TFEU") (formerly Article 82 of the EC Treaty), irrespective of the abusive nature of either the wholesale charges or the retail tariffs, and regardless of sector-specific regulation.

Very recently, on February 17, 2011, the CJ, issued a preliminary ruling in relation to a reference from the Stockholm District Court on various questions concerning price squeeze abuses in a pending case between Swedish telecommunications company TeliaSonera AB and the Swedish Competition Authority.[2] The preliminary ruling provides additional useful guidance in assessing margin squeeze abuses under Article 102 of the TFEU.

This article reviews the significance of the CJ's judgments in *Deutsche Telekom* and *TeliaSonera*.

I. Background

Deutsche Telekom. In 2003, the European Commission imposed a €12.6 million fine on Deutsche Telekom for abuse of its dominant position under Article 102 TFEU. The Commission found that Deutsche Telekom abused its position by setting wholesale and retail prices for access to its local network at such levels that new competitors could not profitably offer retail access services to consumers using wholesale access purchased from Deutsche Telekom.

Deutsche Telekom appealed the Commission's decision to the General Court (formerly the Court of First Instance) and subsequently to the CJ. In essence, the appeal to the CJ was based on the grounds that (i) the alleged infringement should not have been attributed to Deutsche Telekom since RegTP (the German regulatory authority) gave approval for the pricing, (ii) the Court should not have applied a price squeeze test, but should have instead analyzed whether Deutsche Telekom's low retail prices were in fact abusive, given RegTP's regulation of its wholesale prices, (iii) even if the price squeeze test was the correct analysis, the Commission should have applied a 'reasonably efficient competitor test' and taken into account the higher revenues generated by its competitors, instead of focusing on the capped tariffs approved by RegTP, and (iv) the General Court erred in holding that the Commission had sufficiently established that the practice gave rise to exclusionary effects on competitors.

The CJ upheld the Commission's decision, finding that Deutsche Telekom abused its dominant position. The decision's main contributions to European Union case law are discussed below.

TeliaSonera. In December 2004, the Swedish Competition Authority (*Konkurrensverket*) brought a case against TeliaSonera before the Stockholm District Court (Tingsrätt). The Competition Authority alleged that TeliaSonera abused its dominant position on the wholesale input market for broadband services by applying a margin between wholesale tariffs charged to downstream competitors and retail tariffs charged to end-users for broadband ADSL services that did not cover TeliaSonera's own incremental retail costs.[3] The case differs from the *Deutsche Telekom* case in that the wholesale services at issue in *TeliaSonera* are not subject to sector-specific regulation.

On February 6, 2009 the Stockholm District Court referred the case to the CJ requesting guidance on the relevance of certain factors in determining whether a margin squeeze is abusive. The CJ issued its judgment on February 17, 2011.

II. Implications

Price squeeze as a stand-alone abuse. In *Deutsche Telekom*, the CJ was called upon for the first time to rule on the legality of a price squeeze as a stand-alone abuse of dominant position under Article 102 TFEU.[4] The question was thus whether a combination of a lawful wholesale charge and a non-predatory

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1 Case C-280/08, *Deutsche Telekom AG v. European Commission*, Judgment of 14 October 2010 (unreported) ("*Deutsche Telekom* Judgment"), available here.

2 Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, Judgment of 17 February 2011 (unreported) ("*TeliaSonera* Judgment"), available here.

3 TeliaSonera, as the incumbent operator in Sweden, owns a nationwide fixed telecommunications network. It can therefore offer both (i) downstream retail broadband services to end-users and (ii) upstream wholesale access to its fixed network to enable competitors to compete in the retail market for broadband services.

4 As noted by the Court, Deutsche Telekom did not challenge the existence as such of price squeeze as a stand-alone abuse, but argued that the Commission should not have applied such a test give that the Deutsche Telkom's wholesale access prices were regulated. *Deutsche Telekom* Judgment, *supra* note 1, at ¶ 163.

retail price could be characterized as abusive conduct based on the analysis of the margin between the two prices.

The CJ went to great lengths to explain that a price squeeze abuse is a stand-alone abuse, irrespective of the abusive nature of either the wholesale charges or the retail tariffs.

The CJ started by recalling that Article 102 TFEU "is an application of the general objective of European Community action, namely the institution of a system ensuring that competition in the common market is not distorted."[5] As such, it targets behavior by an undertaking holding a position of economic strength enabling it to impede effective competition on the relevant market[6].

Article 102 TFEU (subparagraph (a)) explicitly prohibits dominant undertakings from directly or indirectly imposing unfair prices. [7] However, the CJ very clearly stated that the list of abusive practices contained in Article 102 TFEU is not exhaustive: "The list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position prohibited by the Treaty."[8]

Broadly, the CJ took the view that Article 102 TFEU prohibits conduct by a dominant undertaking whereby, in a market where competition is already weakened by the presence of that dominant undertaking, such conduct further weakens competition through "methods that differ from those governing normal competition" and thereby strengthens its dominant position.[9] Assessing whether conduct further weakens competition should take into account "all circumstances," including determining whether the practice tends to restrict sources of supply, bar competitor access from the market, or discriminate between trading partners.

As such, Article 102 TFEU prohibits practices having an exclusionary effect on competitors, "that is to say practices which are capable of making entry very difficult or impossible for such competitors."[10]

The CJ noted that Deutsche Telekom did not deny that the spread between wholesale charges and retail tariffs was capable of having an exclusionary effect on competitors. The CJ therefore concluded that the General Court correctly found that "margin squeeze is capable, in itself, of constituting an abuse within the meaning of Article [102 TFEU] in view of the exclusionary effect that it can create for competitors."[11] There was no need to demonstrate that wholesale charges or retail tariffs were separately abusive: "The General Court was not, therefore, obliged to establish, additionally, that the wholesale prices for local loop access services or retail prices for end-user access services were in themselves abusive on account of their excessive or predatory nature, as the case may be."[12]

Hence, in addition to confirming for the first time that price squeeze is a stand-alone abuse, the CJ clearly confirmed the broad application of Article 102 TFEU, which entails more an examination of a (potential) effect on competition rather than simply checking off boxes from a formulaic legal straightjacket.

In *TeliaSonera*, the CJ confirmed margin squeeze as a stand-alone abuse, stressing that it can constitute an abuse distinct from a refusal to supply and in the absence of any regulatory obligation to supply.

In doing so, the CJ dismissed the arguments of Advocat General ('AG') Jan Mazák, in his Opinion of September 2, 2010.[13] Mazák argued that a price squeeze can only be abusive if the dominant undertaking is subject to a regulatory obligation to supply at wholesale level or if the wholesale input is "indispensable." In his view, a price squeeze constitutes a constructive refusal to deal: "I consider that imposing a duty to deal on a dominant undertaking is no different from imposing a duty to deal at particular wholesale

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5 *Id.* at ¶ 170.

6 The CJ stated that: "Thus, the dominant position referred to in Article 82 EC relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers (see Case 85/76, *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 38, and Case C-202/07 P, *France Télécom v Commission* [2009] ECR I-2369, paragraph 103)." *Id.*

7 Article 102 TFEU states that "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; […]." available here.

8 *Deutsche Telekom* Judgment, *supra* note 1, at ¶ 173.

9 The CJ stated that : "In that regard, it must be borne in mind that, in prohibiting the abuse of a dominant position in so far as trade between Member States is capable of being affected, Article 82 EC refers to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (see, to that effect, *Hoffman-La Roche v Commission*, paragraph 91; *Nederlandsche Banden-Industrie-Michelin v Commission*, paragraph 70; Case C-62/86, *AKZO v Commission* [1991] ECR I-3359, paragraph 69; *British Airways v Commission,* paragraph 66; and *France Télécom v Commission,* paragraph 104)." *Deutsche Telekom* Judgment, *supra* note 1, at ¶ 174.

10 *Id.* at ¶ 177.

11 *Id.* at ¶ 183.

12 *Id.* at ¶ 183.

13 Opinion of Advocate General Jan Mazák delivered on September 2, 2010 in Case C-52/09, *Konkurrensverket v. TeliaSonera AB*, (Reference for a preliminary ruling from the Stockholms tingsrätt) ("AG Mazák Opinion").

and retail prices (margin squeeze)."[14] As such, a price squeeze abuse can only occur where an obligation to deal has been imposed or where the conditions applying to abusive refusals to deal are fulfilled.

Applying the well-established CJ case law with respect to refusals to supply, as set out in *Bronner* (Case C-7/97), a price squeeze would then be abusive only if:

- it is likely to eliminate all competition on the downstream market by the undertaking requesting access;
- it is not objectively justifiable; and
- wholesale input is indispensable to providing competing services on the downstream market "in the sense that there is no realistic possibility of creating a potential alternative."[15]

More particularly, in the absence of a regulatory obligation to supply, a price squeeze would only be abusive if there are "technical, legal, or even economic obstacles capable of making it impossible, or even unreasonably difficult" to replicate the incumbent operator's network, even if that would be economically unviable for undertaking which does not benefit from the same economies of scale due to smaller size.[16]

The AG's opinion suggested an elevation in the legal standard for a finding of an abusive price squeeze in the absence of a regulatory obligation to supply. This would constitute a departure from the Commission's administrative practice and guidelines with respect to price squeezes. It is equally at odds with the CJ's judgment in *Deutsche Telekom*, in which the CJ confirms the broad application of Article 102 TFEU, the assessment of which is more an issue of (potential) effect on competition than simply checking the boxes imposed by a legal straightjacket.

Unsurprisingly, this approach was rejected by the CJ which clearly stated that a margin squeeze may "constitute an independent form of abuse distinct from that of a refusal to supply"[17], applicable also in the absence of a regulatory obligation to supply and without having to meet the restrictive conditions set out in *Bronner*:[18]

> Moreover, if *Bronner* were to be interpreted otherwise, in the way advocated by TeliaSonera, that would, as submitted by the European Commission, 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 102 TFEU.[19]

Similarly, the CJ rejected indispensability as a condition to establish price squeeze. However, as further discussed below, it does recognize indispensability as an important factor in determining anti-competitive effects.[20]

Abusive conduct despite regulation. Deutsche Telekom argued before the CJ that it could not be held liable for applying an abusive price squeeze because RegTP had reviewed its wholesale charges and retail tariffs. According to Deutsche Telekom, RegTP had already taken into account the purported price squeeze and had concluded that it did not restrict competition. The CJ, however, rejected Deutsche Telekom's 'defense.'

The CJ recalled that, according to well-established case law, Articles 101 and 102 TFEU will not apply to an undertaking's conduct in the limited circumstances where (i) the anticompetitive conduct is required by national legislation or (ii) national legislation creates a legal framework which itself eliminates any possibility of competition. Against this background, the CJ found that Deutsche Telekom had the ability to adjust its retail prices for end-user access services. Since Deutsche Telekom had the scope to adjust its retail prices, the price squeeze was attributable to it alone, even if RegTP itself might have infringed European competition laws. The mere fact that an undertaking would be encouraged by a national authority to engage in anti-competitive behavior is not sufficient to absolve that undertaking from liability under Article 102 TFEU.

Consumers' (long-term) interest. *Deutsche Telekom* is also a significant case in that the CJ's reasoning is infused with references to the need to protect consumer interests, albeit through the protection of market competition. An often heard criticism of the enforcement of price squeeze abuses (and other exclusionary abuses) is that enforcement is geared towards protecting competitors and not consumers, thereby subordinating the protection of consumers to the protection of competitors. The CJ rejected this often unsubstantiated criticism.

Deutsche Telekom had alleged that the test applied by the Commission and endorsed by the General Court would require it to increase retail prices to the detriment of end-consumers. The CJ noted that: "Article 82 EC [102 TFEU] thus refers not

14 *Id.* at ¶ 16.

15 *Id.* at ¶ 15.

16 Case C-7/97, *Oscar Bronner v Mediaprint Zeitungs- und Zeitschriftenverlag*, 1998 E.C.R. I-07791, ¶ 47.

17 *TeliaSonera* Judgment, supra note 2, at ¶ 56.

18 *Id.* at ¶ 58.

19 *Id.*

20 *Id.* at ¶ 72.

only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition [...]."[21] The CJ held that consumers also suffer if competitors or competition are weakened, as this may prevent or reduce a long-term reduction of retail prices. A short-term increase in prices can be outweighed by the long-term prospect of retail price reduction.

Article 102 TFEU prohibits not only practices that directly harm consumer interests, but also practices detrimental to consumers in the long run through their impact on competitors and competition.[22]

Equally efficient competitor test. As regards the method for determining a price squeeze, the CJ found that the General Court did not err in law by upholding the Commission's reliance on an equally efficient competitor test. This test takes account of the dominant operator's costs and revenues, rather than those of a reasonably efficient competitor. The CJ stated that such approach is also consistent with the general principle of legal certainty, as it allows the dominant undertaking to assess the lawfulness of its conduct.

However, the CJ also recalled that "a dominant undertaking cannot drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them."[23] In essence, the CJ held that a competitor should not be driven out of the market by an unsustainable pricing practice simply because it does not have the financial resources to compensate for that unsustainable pricing practice and because it is therefore in an objectively different position that is independent of its efficiency in operating a business. For the same reasons, we have previously argued that a new entrant should not be driven out of the market just because it cannot match the same economies of scale as the incumbent competitor, and especially if such economies of scale result from previously enjoyed special and exclusive rights (such as in recently liberalized markets).[24]

Admittedly, aside from start-up costs, a new entrant is not necessarily less efficient than an incumbent operator, although not benefiting from the same economies of scale as an incumbent undertaking and therefore perhaps facing a higher cost structure. As such, in applying an equally efficient competitor test, the dominant undertaking's costs may require adjustment in order to take account of objective parameters relating to the competitors' size and financial capacity, but which do not bear on their efficiency in operating a business.[25] This seems economically sound and in the interests of consumers, at least in the mid- to long-term.

In *TeliaSonera*, the CJ confirmed that it may be appropriate to take account of competitors' costs in certain circumstances. For example when (i) the costs of the dominant undertaking are not precisely identifiable, (ii) the dominant competitor's costs have been written off, or when (iii) "the particular market conditions of competition dictate it," such as when "the level of the dominant undertaking's costs is specifically attributable to the competitively advantageous situation in which its dominant position places it."[26] The latter example seems to target situations in which the dominant undertaking's costs are lower because of the economies of scale it derives from its dominant size.

Actual, likely or potential effect on the market? One of the most contentious issues under Article 102 TFEU is the standard of anti-competitive effects; more particularly whether the Commission must show actual, likely or possible anti-competitive effects.

Thus far, Community courts have generally endorsed a 'potential effects'-approach, most notably embodied by the General Court's judgment in *Michelin*:

The 'effect' referred to in the case-law cited in the preceding paragraph does not necessarily relate to the actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is *capable of having* that effect. (emphasis added)[27]

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21 *Deutsche Telekom* Judgment, *supra* note 1, at ¶ 176.

22 This is generally in line with the Commission's Guidance on the enforcement priorities in applying Article [102] in which the Commission emphasizes the importance of balancing protection of the competitive process, competitors and consumer interests: "The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide. In doing so the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market." Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20, ¶6, available here.

23 *Deutsche Telekom* Judgment, *supra* note 1, at ¶ 199.

24 See Serge Clerckx & Laurent de Muyter, *Price Squeeze Abuse in the EU Telecommunications Sector: A Reasonably or Equally Efficient Test?*, COMPETITION POLICY INT'L: ANTITRUST CHRONICLE, April 15, 2009 available here.

25 *Id.*

26 *TeliaSonera* Judgment, *supra* note 2, at ¶ *45.*

27 Case T-203/01, *Michelin v Commission*, ECR [2003] II-4071 at ¶ 239. See also Case T-219/99, *British Airways v Commission*, ECR [2003] II-5917 at ¶ 293; on appeal Case C-95/04 *British Airways v Commission*, ECR [2007] I-2331.

Although inconclusive, the CJ seems to stick to its prior case law, and in any event provides useful guidance as to the standard of proof.

The CJ rejected the Commission's contention that a finding of an abuse does not require an anti-competitive effect to be demonstrated.[28] That in itself does not say whether the Commission or a complainant is to demonstrate actual, likely or potential effects.

However, while remaining vague as to what exact standard should be retained; the language used in *Deutsche Telekom* and *TeliaSonera* indicates that possible or likely, rather than actual effects should be retained. In *Deutsche Telekom*, the CJ states that the anti-competitive effect that "the Commission is required to demonstrate [...] relates to the *possible* barriers which the appellant's pricing practices could have created [...]" (emphasis added).[29] Similarly, in *TeliaSonera* it states that "it is again for the referring court to satisfy itself that [...] the practice *may be capable of* having anti-competitive effects" (emphasis added)[30], thereby mirroring the language used in *Michelin* cited above. In other paragraphs the CJ refers to the *likelihood* of the practice to hinder competition.[31]

The CJ went further. It also stated that because wholesale local loop access is *indispensable* to Deutsche Telekom's competitors, the General Court was entitled to hold that the price squeeze "*in principle*, hinders the growth of competition in the retail markets in services to end-users" (emphasis added).[32] In *TeliaSonera*, the CJ similarly held that if the wholesale input is *indispensable* for competing undertakings to sell on the downstream market "the at least potentially anti-competitive effect of the margin squeeze is *probable*." (emphasis added)[33] It could be argued on that basis that the CJ creates a presumption of existence of potential anti-competitive effects when the wholesale input is indispensable.[34]

This seems to be what the CJ applied in the *Deutsche Telekom*, even though the presumption in that case was coupled with a very low evidentiary threshold in showing actual effects. The CJ endorsed the General Court's approach, which found that, at least when the upstream input is indispensable to competition on the downstream market, a price squeeze "in principle, hinders the growth of competition in the retail markets in services to end-users."[35] This finding is then linked to the simple conclusion that competition had effectively suffered from the price squeeze; in the case at hand, this was shown by the fact that competitors had only experienced marginal growth. At no time did the Commission undertake in-depth economic analysis concerning the competitive harm caused by Deutsche Telekom. The fact that Deutsch Telekom did not produce "any evidence to rebut the findings in the decision at issue that its pricing practices actually restricted competition in the retail market" was enough for the CJ to conclude that the General Court was correct in holding that an anti-competitive effect had been demonstrated.[36]

As regards demonstrating actual effects, the CJ provided little guidance. It thus remains unclear what standard of proof should be retained in the event that the Commission or the complainant would seek to provide evidence of actual anti-competitive effects, as opposed to potential or likely effects or demonstrating that a practice affects competition 'in principle', as discussed above.

The CJ merely reiterated that a practice is abusive if it "has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[37] However, the effect need not be such as to eliminate competition from the market:

> Admittedly, where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze of its equally efficient competitors, with the purpose of driving them from the relevant market, the fact that the desired result is not ultimately achieved does not alter its categorization as abuse within the meaning of Article 82 EC.[38]

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28 Although in its decision, the Commission did demonstrate that Deutsche Telekom's conduct had effectively caused anti-competitive effects, as it also did even more extensively in its subsequent price squeeze case against *Telefónica*. See European Commission's decision of July 4, 2007 relating to a proceeding under Article [82 EC] (Case COMP/38.784 – *Wanadoo Espana vs. Telefónica*, recitals 543-618). In this respect, it should also be noted that in its recent Article 102 TFEU Guidelines, the Commission follows a more effects-based approach, requiring the demonstration of likely elimination of effective competition on the downstream market and consumer harm. *See also Guidance*, *supra* note 22, at ¶¶ 81-88.

29 *Deutsche Telekom* Judgment, *supra* note 1, at ¶ 252.

30 *TeliaSonera* Judgment, *supra* note 2, at ¶ 72. Similarly, the CJ states that "It follows that, in order to establish whether such a practice is abusive, that practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete, [...]." Id. at ¶ 64.

31 *Id.* at ¶ 67 and 74.

32 *Deutsche Telekom* Judgment, *supra* note 1, at ¶ 255.

33 *TeliaSonera* Judgment, *supra* note 2, at ¶ 71

34 In this respect it should be noted that the CJ also refers the level of the margin squeeze as a factor to take into consideration for such presumption. See *TeliaSonera* Judgment, *supra* note 2, at ¶ 73.

35 *Id.* at ¶ 255.

36 *Id.* at ¶ 258.

37 *Deutsche Telekom* Judgment, *supra* note 1, at ¶ 251.

38 *Id.* at ¶ 254.

Conclusion

The CJ in both its *Deutsche Telekom* and *TeliaSonera* judgments for the first time recognized the validity of a price squeeze claim as a stand-alone abuse of dominant position under Article 102 TFEU, distinct from a refusal to supply and in the absence of a regulatory obligation to supply. It further recognized that national sector-specific regulation does not prevent the attribution of an abuse, and endorses the application of an "equally efficient competitor" test, while arguably leaving the door open for an adjusted test that takes account of the objectively different situation of competitors. The CJ seems to stick to its 'potential effects'-approach as far as the requirement to show anti-competitive effects is concerned, while arguably introducing a presumption of anti-competitive effects if the wholesale input is indispensable to compete. The CJ's approach is at odds with the position taken by the U.S. Supreme Court in *Pacific Bell v. Linkline* in which the Supreme Court seemed to have rejected the traditional price squeeze theory, holding that a plaintiff should prove either an unlawful refusal to deal at wholesale level, or a predatory pricing practice at retail level.[39]

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[39] *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109 (2009).