

Price squeeze tests in electronic communications

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Comments on recent CFI decision in the DT case



EUROPEAN COMMISSION
Competition DG

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Overview

- Regulatory **and** competition law remedies
- EU antitrust in the telecoms sector
- *Deutsche Telekom* and beyond
- Conclusion



Regulatory and competition law remedies (1)

- Work of NRAs and the Commission/NCAs is complimentary
- NRAs use ex ante data, Commission/NCAs use ex post data, but both might use the same test
- Regulators can only limit the risk of abuse, but not prevent abuse
- Ex post control is necessary to ultimately determine the dominant firms' conduct not to infringe competition law
 - Dominant firms' discretion to act independently
 - Dominant firms' awareness



Regulatory and competition law remedies (2)

- Three criteria test determines type of remedies (ex ante/ex post)
- Sector-specific regulation rolled back
 - New Recommendation on relevant markets reduces list from 18 to 7(8)
 - Effective wholesale remedies (CS/CPS, BSA, LLU) lowering entry barriers
 - ANOs offer retail services while rolling out own infrastructure
 - Some wholesale markets still represent important bottlenecks
 - » Local (loop) access
 - » Technology neutral broadband access
 - » Termination markets



EU antitrust in the telecoms sector (1)

- Commission and NCAs particularly active as to link between prices at wholesale and retail level
 - Sector-specific regulation at wholesale level
 - Margin squeeze
- *Deutsche Telekom* → (*Wanadoo*) → *Telefonica*
 - Three price abuses sanctioned by the Commission under Art. 82
 - Already in 2003, clear Commission message
 - Conduct which infringes EC competition law
 - But also undermines telecoms liberalization



EU antitrust in the telecoms sector (2)

- *Deutsche Telekom* (May 2003) – margin squeeze
 - » **CFI decision of 10 April 2008**
 - » (in 2004 and 2005, settlement on fees for shared lines avoided another prohibition decision)
- *Wanadoo* (July 2003) – predatory pricing
 - » CFI rejects appeal on 30 January 2007
 - » France Telecom appeals CFI judgment
- *Telefonica* (July 2007) – margin squeeze
 - » Telefonica and Spain appeal Commission decision



Deutsche Telekom and beyond (1)

- Recent criticism relating to the Commission's administrative practice included:
 1. *Ex ante* **and** *ex post* meant double regulation
 2. Incumbents should not be held responsible for competition law infringements when (parts of) their pricing is subject to NRAs' control
 3. Margin squeeze cases should not be brought under antitrust law: either prove predatory prices (retail) or excessive prices (wholesale)
 4. As efficient competitor test incorrect



Deutsche Telekom and beyond (2)

■ CFI and *ex post* and *ex ante*

- CFI judgment addresses recent criticism, i.e. *ex ante* and *ex post* amounted to “double regulation”
- Dominant companies have no “carte blanche” under competition law only because they are subject to sector-specific regulation
- National authorities’ decisions based on telecoms law do not affect the Commission’s power to find competition law infringements



Deutsche Telekom and beyond (3)

■ CFI and *the margin squeeze test*

- CFI confirms that margin squeezes can be sanctioned
 - » Commission was not required to demonstrate that retail prices were, as such, abusive
 - » Responds to criticism that margin squeeze cases should not be brought under antitrust law: either prove predatory prices (retail) or excessive prices (wholesale)
- CFI confirms that the Commission's margin squeeze test is correct
 - » Commission was correct to analyse the abuse solely on the basis of the incumbent's charges and costs
 - » Responds to criticism that "as efficient competitor test" is incorrect
- *Telefonica*



Deutsche Telekom and beyond (4)

- Work of NRAs and the Commission/NCAs are complimentary
 - NRAs use ex ante data, Commission/NCAs ex post
 - Regulators can only limit the risk of abuse, but not prevent it
 - Ex post control is necessary to ultimately determine the incumbents' conduct not to contradict competition law
- After *Telefonica* and the CFI upholding *Deutsche Telekom*:
 - What is an abusive margin squeeze?
 - Likely anticompetitive effects and consumer harm
- NCAs apply such principles in their own territories



Conclusion

- Established practice for price abuses
 - Follow-up cases as appropriate
 - Coordination between Commission and NCAs
- Discussions at national level on which test to use
 - „AEO“ vs „REO“
 - *Telefonica* decision does per se not rule out any of the tests
 - What about CFI in *Deutsche Telekom*?
- Changes of market structure and market players' conduct
 - *Triple and quadruple play* and market power of incumbents
 - Potential difficulties for bringing cases
 - » How to take into account access to content
 - » Complexity of margin squeeze calculations





Thank you for your attention !



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