



European Commission

Competition

CLEC – The prohibition of abuse of dominant position in the
electronic communications sector
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Tackling abusive conduct in the telecommunications industry

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“The views expressed are purely those of the speaker and may not in any circumstances be regarded as stating an official position of the European Commission.”



Outline

- Introduction
- Past price abuse cases
 - Deutsche Telekom → Wanadoo → Telefónica
- The Art 82 Guidance
- Ongoing cases
 - Telekomunikacja Polska, Slovak Telekom
- Challenges and trends



Introduction

Overall aim: Making markets work better in the telecoms sector through:

- Antitrust Enforcement
 - Focus on abuse of dominance (Article 82)
 - Focus on broadband Internet
- Pro-competitive Regulation
 - Ensuring that competition law principles are correctly applied by regulators
 - Ex-ante regulation and ex-post application of competition rules should support each other



Past price abuse cases (1)

Deutsche Telekom (May 2003)

- 10 April 2008 CFI judgment fully upheld the Commission's decision.
- The judgement clarifies a number of important points in relation to margin squeeze cases.
- Under appeal before ECJ.



- **CFI (*Deutsche Telekom*) on *ex post* and *ex ante*:**
 - 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



Past price abuse cases (2)

Wanadoo (July 2003)

- Predatory pricing
- CFI rejects FT's appeal on 30 January 2007
- FT appeals CFI judgment
- ECJ judgment (2 April 2009) dismisses the appeal



Past price abuse cases (3)

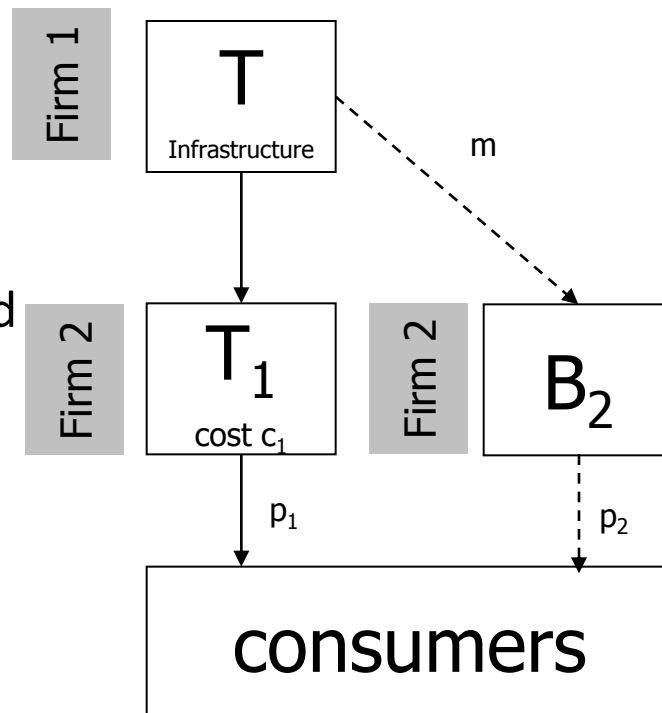
Telefónica (July 2007)

- Conditions for finding a margin squeeze
- Dominance
- Establishing the squeeze
- Likely effects
- Liability of Telefónica



Conditions for a margin squeeze

- 3 conditions
 - The company is dominant upstream
 - Downstream costs are not covered by the spread between upstream and downstream prices
 - Likely anticompetitive effects



Retail price (p_1) < wholesale price (m) + downstream costs (c_1)



Dominance: Spanish Broadband Market

- Three forms of wholesale access:
 - Local loop unbundling (7000 Pol): monopoly
 - Regional wholesale (109 Pol): monopoly
 - National wholesale (1 Pol): share > 84%
- Retail market: share 66% - 56% (not necessary to establish dominance downstream – *Tetra Pak II*)
- LLU was made available with significant delays – sanctioned by CMT in 2006 and 2007
- Cable networks have limited coverage (about 40%)



Telefónica - Establishing the squeeze

- Based on Telefónica's downstream costs ("as efficient competitor" approach)
- 3 methods used for assessment:
 - Downstream losses on a yearly basis from 2001 to 2006 ("period-by-period" method)
 - The downstream activity was loss-making over the period 2001-2006. Reasonable hypothetical profit over the period 2007-2011 not sufficient to recover losses ("discounted cash flow" method)
 - Own business plan indicated downstream losses over the period 2001-2011



Likely effects

- No need to prove exit: rivals were prevented from competing vigorously with Telefónica
 - No substitute at regional level and no viable substitute at national level
 - Entrants faced with irrecoverable losses over a significant period of time
- The ladder of investment process in Spain was delayed
 - Due to the margin squeeze, the only viable entry would have been LLU.
 - The margin squeeze delayed as long as possible the arrival at a level of economies of scale justifying investments in LLU.
 - LLU has only been available with significant delays (sanctioned by CMT).
- Highest EU-15 retail prices in Spain
 - Confirmed by all independent benchmarks
 - No demand/supply factor presented by Telefónica can explain high price level



Liability of *Telefónica*

- Telefónica's scope to avoid margin squeeze:
 - Only Regional wholesale regulated - Maximum prices
- CMT approved its prices
 - CMT based itself on estimates (not on Telefónica's accounting data)
 - Business plan
 - Actual cost data



Conclusions on past price abuse cases

- EC approach fully confirmed by the Courts
- EC cases set important precedent for enforcement at national level in the EU
- Focus now shifting to non-price abuses ((constructive) refusal to deal) and integrated strategies



The Art 82 Guidance (1)

- « Refusal to supply and margin squeeze »
- Circumstances that need to be present:
 - Refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market
 - Refusal is likely to lead to the elimination of effective competition on the downstream market
 - Refusal is likely to lead to consumer harm.



The Art 82 Guidance (2)

- Where regulation already imposes an obligation to supply the Commission does not need to test the above three conditions, because the input owner's and/or other operators' incentives to invest and innovate upstream, whether *ex ante* or *ex post*, are manifestly not affected.



Ongoing cases

Focus on wholesale broadband access in the new Member States:

- Telekomunikacja Polska: refusal to supply
- Slovak Telekom: refusal to supply and margin squeeze



Challenges and trends

- Multiple-play uptake
- More bandwidth needed to provide content services (TV, video)
- Rollout of fibre deeper in the access network
- Transition to NGA entails risk of re-monopolization
- Mobile broadband
- Regulation a necessary complement