

THE EUROPEAN UNION'S GENERAL COURT RULES (YET AGAIN!) THAT MARGIN SQUEEZES ARE PROBLEMATIC UNDER EU COMPETITION RULES

To Our Clients and Friends:

In two separate but related appeals, the General Court of the European Union has today confirmed that the practice of margin squeezing by a dominant firm can constitute abusive behaviour, contrary to the terms of Article 102 TFEU.[1] In parallel, the General Court ruled that the Commission was entitled to apply the doctrine of parental responsibility when also extending its fine beyond the immediate perpetrator - Slovak Telekom - to its ultimate parent company, Deutsche Telekom ("DT"). The latter company was not merely liable by reason of its corporate relationship with Slovak Telekom, but because it knowingly allowed the margin squeezing practice to take place despite full knowledge of its obligations in this regard as a result of previous Commission interventions.[2] However, the General Court annulled those parts of the Commission Decision which erred in its calculation of the exclusionary effects of the practice, and in terms of the degree to which a parent should be responsible for the culpability of its subsidiary in an Article 102 TFEU context.

Both appeals relate to the Commission's Decision of 15 October 2014 in Case AT. 39523, in which the Commission fined Slovak Telekom and its German parent, DT, for the refusal by the former to grant access to competitors to its fixed broadband network and for engaging in a margin squeeze when access was ultimately granted. In that Decision, both parties were jointly fined €38.8 million (just over \$44 million) while DT was fined on additional €1 million around (around \$35 million), given the fact that DT had been found guilty of similar conduct on the German broadband access market in 2003.[3] This additional fine was prompted by the Commission's desire to deter "repeat offending" by DT in conducting margin squeezes.

A margin squeeze is a competition law offence which is based on the unfairness of the spread between a dominant firm's wholesale access prices charged to its competitors and its retail prices. It is the narrowness in the spread between wholesale and retail price that threatens to foreclose the operations of equally efficient competitors. The margin squeeze offence has no equivalent under US antitrust law, which prefers to consider the competition law implications of margin squeezes to be actionable only in one of two extreme scenarios – either a refusal to deal situation or in the case of predatory (*i.e.*, below cost) pricing – but a practice which is not actionable in its own right.

1. The Appeals

In the appeal raised by Slovak Telekom, the General Court was asked to address a number of key aspects of the Commission's Decision, including:

- whether the Commission was correct in taking the view that it was not necessary to demonstrate the essential nature of the infrastructure when considering the legality of the refusal to supply under the *Bronner*^[4] case-law;
- the types of factors which the Commission can take into account when determining the extent of Slovak Telekom's margin and the implications of the methodology chosen in determining the duration of the infringement;
- the attribution of parental responsibility on DT; and
- the gravity of the fine.

In addition, DT argued that the Commission had erred:

- by violating the presumption of innocence when attributing the infringement to DT, as Slovak Telekom did not form part of a single economic entity with DT, given that DT had neither exercised decisive influence over Slovak Telekom nor was it aware that Slovak Telekom was engaging in questionable competitive conduct; and
- to the extent it had treated DT and Slovak Telekom as a single entity, by imposing an additional fine on DT.

2. The Judgments

The General Court largely upheld the Commission's Decision regarding the finding that Slovak Telekom and DT had abused a dominant position. However, due to certain errors in the Commission's analysis, the Court lowered the fine imposed on Slovak Telekom by a small amount (*i.e.*, from 38, 838, 000 to 38, 061, 963 Euros for joint liability for the infringement), but reduced the additional fine on DT to a significant degree (*i.e.*, from 31,070,000 to 19,030, 981).

The key rulings of the General Court were as follows:

- In determining the anti-competitive effects of a margin squeeze allegation, the Commission was not under a legal obligation to demonstrate that access to Slovak Telekom's local loop was "indispensable" in antitrust terms. Indeed, to the extent that Slovak Telekom was already mandated under regulatory provisions to provide access, the usual antitrust enquiry as to whether or not a dominant firm should only be obliged to deal with competitors where its wholesale access input is indispensable (*i.e.*, tantamount to an "essential facility") was rendered moot.
- However, when the Commission estimated the duration period of the infringement, it erred in not taking due account of the fact that, over a period of four months in 2005, a positive margin existed between Slovak Telekom's wholesale and retail prices. In these circumstances, the Commission was subject to a specific obligation to demonstrate that the contested margin squeeze actually led to exclusionary effects in the market. It was the Commission's failure to

investigate whether or not competitive harm had occurred during this period which justified the small reduction in the fine.

- When determining the extent to which DT might be held responsible for the actions of its Slovak subsidiary, it will only be appropriate for this derivative responsibility to result in a larger fine on the parent than the subsidiary if factors are shown to exist which relate to the activities of the alleged infringing party. Taking into account repeat offences may indeed be such a material consideration. By contrast, it will be inappropriate to impose a higher fine on the parent simply because of its larger revenue base, since revenues do not constitute a particular factor that is attributable to market behaviour. Hence, according to the Court, the facts of this case were such that the decision to impose an additional fine solely on the basis of a large revenue base lacked an objective justification, and was contrary to the understanding that liability should be associated with the particular actions of the relevant undertaking. In the circumstances, a significant reduction in the fine on DT was appropriate.

3. Conclusions

The Judgments confirm the validity of the margin squeeze offence under EU Competition rules. In this respect, the Judgment has elements of "Groundhog Day". Critically, however, the landmark Judgment of the Court of Justice in *TeliaSonera*^[5] has been applied in a review of the Commission Decision. In practice, it enforces the Commission's enforcement hand in prosecuting cases in regulated sectors where the theory of harm is related in some way to the decision of the dominant firm to deny access or to render its terms so unattractive as to implicitly deny access. Without having to prove that the dominant firm benefited from its operation of an essential facility, the Commission can move forward to the critical issue of potential foreclosure. One also needs to ask the question whether, even in those industries where the decision of firms to provide access as part of their business model is not mandated by regulation (such as many online platforms), a similar short-cut to a foreclosure analysis is acceptable. Where the access seeker has developed a relationship of dependence on the access provider, it may be difficult to draw bright lines as to why this behaviour should not be treated on equal footing as with that which is subject to sector- specific regulation.

Of some comfort to dominant firms will be the fact that the Court has undertaken to subject to serious scrutiny any Commission allegations that a margin squeeze will be likely to result in the foreclosure of competitors. By subjecting the Commission's time-line for the offence to a rigorous analysis, hope for the meaningful endorsement of the "effects-based" theory anti-competitive harm under Article 102 TFEU seems to be fulfilled.

Finally, the Court has laid down an important marker for the use of the recidivism doctrine as the basis for increasing administrative fines in the context of Article 102 TFEU actions. While the Court has insisted that the actual role of the parent will be a highly relevant factor in attributing an additional degree of responsibility for an infringement on a parent company, it has made it clear that repeat offending (even if in another EU Member State) is a highly relevant factor.

- [1] Case T-827/14 *Deutsche Telekom v Commission* EU:T:2018:930, and Case T-851/14 *Slovak Telekom v Commission* EU:T:2018:929.
- [2] Refer to Case C-280/08P *Deutsche Telekom AV. Commission* EU:C:2010:603. See also case C-295/12 *Telefonica –Telefonica de España* EU:C:2014:2062.
- [3] Case COMP 7-451 *Deutsche Telekom AG*.
- [4] See case C-7/97, *Bronner* [1998] EU:C:1998:569.
- [5] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* EU:C:2011:83.



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