

COMMON MARKET LAW REVIEW

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, Judgment of the Court of Justice (First Chamber) of 17 February 2011, nyr.

1. Introduction

Courts are ill-suited “to act as central planners, identifying the proper price, quantity or other terms of dealing”.¹ With these striking words, the U.S. Supreme Court recently considerably limited antitrust liability under Section 2 of the Sherman Act for margin squeeze pricing policies pursued by vertically integrated firms with market power.² By contrast, the European Court of Justice has confirmed in *TeliaSonera* its recent line of jurisprudence according to which such a pricing policy may be abusive under Article 102 TFEU (ex 82 EC). The ECJ thus recognizes that vertically integrated dominant undertakings have many different “pricing arrows” in their quivers to unlawfully exclude rivals in associated markets.

A margin squeeze can be described as a situation in which a vertically integrated dominant firm supplies a key input not only to its own downstream entities, but also to its competitors. This input is then converted or split into a related product/service and offered on the downstream market. If the dominant firm can control the price in at least one of the two different, yet adjacent markets (upstream/downstream market), it may abuse this power to “squeeze” the profit margins of its (non-vertically integrated) rivals by charging a price for the input which, in relation to the rather low retail price of the related product/service on the downstream market, makes the economic activities of its rivals unprofitable.³ If the relationship between the input price

1. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). Antitrust liability was further constrained in *Pacific Bell Telephone, Co v. linkLine Communications, Inc.*, 555 U.S. 438 (2009).

2. For further discussion see Geradin, “Limiting the scope of Article 82 EC: What can the EU learn from the U.S. Supreme Court’s judgment in *Trinko* in the wake of *Microsoft*, *IMS*, and *Deutsche Telekom*?”, 41 CML Rev. (2004), 1519–1553; Grimes, “US Supreme Court rejects price squeeze claim: A high point for divergence between US and European law?”, (2009) *Zeitschrift für Wettbewerbsrecht*, 343–356; Haus, “Neues zur Preis-Kosten-Schere in regulierten Industrien – Die Entscheidung des US Supreme Court im Fall *AT&T v. Linkline*”, (2009) *Zeitschrift für Wettbewerbsrecht*, 356–370; Zöttl, “Kein Verbot der Kosten-Preis-Schere im US-amerikanischen Kartellrecht: Anmerkungen zu dem Urteil des Supreme Court in der Rechtssache *linkLine*”, (2009) *RIW*, 445–451.

3. See O’Donoghue and Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing, 2006), pp. 303–305; Eilmansberger, in *Münchener Kommentar, Europäisches und Deutsches*

and the retail price does not cover the cost necessary to convert or supply the related product/service on the downstream market, these rivals cannot compete on a lasting basis with the dominant firm and will be forced to exit the market. Thus, the effect on competition results primarily from the spread of the two prices and only to a lesser degree from their exact value.⁴

Margin squeezes often occur in (partially) regulated industries, such as the telecommunications sector,⁵ but are not limited to such industries.⁶ Over the last years, national competition authorities and courts throughout Europe⁷ as well as the EU Commission⁸ have with increasing frequency been confronted with margin squeeze allegations. This has encouraged a heated debate as to under which conditions an “unduly high” input price combined with an “unduly low” retail price for the related product/service must be regarded as unlawful.⁹ This controversy was framed by the general debate on the “more economic approach” advocated by the EU Commission which led to the publication of a Communication “on the Commission’s enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings” (the “Enforcement Communication”) in the beginning of 2009.¹⁰ At the end of 2010, the ECJ seized the opportunity to

Wettbewerbsrecht (Kartellrecht), Vol. 1 (Beck, 2007), Art. 82 EG, para 533; Whish, *Competition Law*, 6th ed. (OUP, 2009), pp. 744–745; Van Bael and Bellis, *Competition Law of the European Community*, 5th ed. (Wolters Kluwer, 2010), pp. 835–836.

4. Dunne, “Margin squeeze: From broken regulation to legal uncertainty”, 70 CLJ (2011), 34, 35.

5. Cf. Notice on the application of the competition rules to access agreements in the telecommunications sector, O.J. 1998, C 265/19, paras. 117–119; Rädler, “Die Preis-Kosten-Schere im Kartell- und Regulierungsrecht”, (2010) *Computer und Recht*, 780–787; Lommler, “Das Verhältnis des kartellrechtlichen Verbots der Kosten-Preis-Schere zum Verbot der Kampfpreisunterbietung”, (2011) *WuW*, 244, 245.

6. See the examples given by Edwards, “Margin squeezes and the inefficient ‘equally efficient’ operator”, (2011) ECLR, 402.

7. For cases decided in the UK see Whish, op. cit. *supra* note 3, pp. 746–748; for cases decided in Germany see Nothdurft, in Langen and Bunte, *Kommentar zum deutschen und europäischen Kartellrecht*, Vol. 1 (Carl Heymanns Verlag – Luchterhand, 2011), § 19, para 134; for a Greek case see Giannakopoulos, “Price squeeze and other abuses of dominance in the Greek e-communications market: The approach of the national e-communications Commission and the Administrative Court of Appeals of Athens”, (2011) ECLR, 457–471; for cases decided in other EU Member States see the various cases notes available at <www.concurrences.com> (last visited 24 Oct. 2011).

8. Commission Decision 2003/707/EC, *Deutsche Telekom AG*, O.J. 2003, L 263/9; Commission Decision 2008/C 83/05, *Wanadoo España v. Telefónica*, O.J. 2008, C 83/6, appeal pending (Case T-336/07, *Telefónica and Telefónica de España v. Commission*).

9. For an overview of the dispute see O’Donoghue and Padilla, op. cit. *supra* note 3, pp. 303–339.

10. O.J. 2009, C 45/7. For a critical review of the Communication see Monti, “Article 82 EC: What future for the effects-based approach?”, (2010) *Journal of European Competition Law & Practice*, 2–11.

flesh out the general legal test for margin squeezes in the *Deutsche Telekom* case.¹¹ In *TeliaSonera*, the Court refined its approach, thereby broadening the liability of dominant firms considerably, to a certain extent contrary to the proposals made by Advocate General Mazák in his Opinion. As the intervention of competition authorities or courts in the pricing policy of a dominant undertaking pose a danger of restricting aggressive, but pro-competitive pricing strategies, the *TeliaSonera* case merits the attention of the competition law community.¹²

2. Background

TeliaSonera, the former State protected monopolist for fixed telephone services, owned a network connecting in principle all Swedish households, and provided fast broadband connections to end users. Moreover, it offered other internet service providers access to its facilities in two ways: they could obtain access to the so-called local loop in return for payment as prescribed by EC Regulation No. 2887/2000.¹³ Additionally, without being legally forced to do so, TeliaSonera offered an ADSL product to wholesale users (i.e. on the upstream market) which enabled these wholesale firms to supply high-speed broadband connection services to end users (i.e. on the downstream market).

The *Konkurrensverket*, the Swedish Competition Authority, was of the opinion that TeliaSonera's pricing policy for the ADSL product, in conjunction with its low prices for high speed internet connections offered to end users, constituted an abuse of dominance. The competition authority requested the Stockholm *tingsrätt* (District Court) to impose a fine on TeliaSonera for infringement of Article 102 TFEU and its equivalent in the Swedish Competition Act. The Competition Authority argued that the spread between the wholesale prices for the ADSL product and the retail sale price for internet services offered to end users was not sufficient to cover its cost of distributing such high speed internet services to end users. Therefore, even a competitor as efficient as TeliaSonera would have to leave the downstream market to the detriment of the competitive process. The Stockholm court referred ten questions concerning the interpretation of Article 102 TFEU to the ECJ. These questions dealt with the conditions of the basic legal tests to be

11. Case C-280/08 P, *Deutsche Telekom v. Commission*, judgment of 14 Oct. 2010, nyr.

12. Annotations have been written by Leupold, (2011) EuZW, 345–347; Pohlmann and Auf'mkolk, (2011) *Lindenmaier-Möhring, Kommentierte BGH-Rechtsprechung*, 316705; Roda, (2011) *Journ.dr.inter.*, 563–564; Tuominen, (2011) *Revue du Droit de l'Union Européenne*, 148–149.

13. Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 Dec. 2000 on unbundled access to the local loop, O.J. 2000, L 336/4.

used for assessing the pricing policy of vertically integrated dominant undertakings.

This referral coincided with an appeal taken against a Commission decision¹⁴ condemning Deutsche Telekom AG, the operator of the German fixed telephone network, for an abusive margin squeeze in the German telecommunications market. The *Deutsche Telekom* case gave the ECJ, for the first time, the opportunity to spell out in more detail the basic legal test for such type of abuse.¹⁵ The European Court confirmed the conclusion of the EU Commission that margin squeezes may infringe Article 102 TFEU. It further upheld the Commission's practice of looking at the product-specific cost of the dominant undertaking to determine whether the spread between the wholesale price and the retail price was abusive.¹⁶ The *Deutsche Telekom* case concerned a situation in which the dominant firm was obliged by a regulatory regime to offer the input at a certain price. Moreover, the input was essential for rivals to be able to compete with the dominant firm in the downstream market. By contrast, in *TeliaSonera* these conditions were not met. The ECJ had therefore to illuminate the relationship between Article 102 TFEU and regulatory law and to decide whether an abusive price squeeze may be found in a situation in which the input is not indispensable in a strict sense for rivals to operate on the downstream market. Moreover, the referral questions gave the Court the chance to generally clarify the essential criteria according to which the abusiveness of a price squeeze must be judged. Even though the ECJ's answers were very general – as is often the case in referral procedures – the court sketched out the basic analytical framework to test for abusive price squeezes.

3. Judgment of the Court¹⁷

Following a recapitulation of the general function, purpose and assessment principles underlying Article 102 TFEU (paras. 20–28), the ECJ affirmed that a margin squeeze is in itself capable of constituting an abuse of dominance

14. Commission Decision *Deutsche Telekom AG*, cited *supra* note 8.

15. *Deutsche Telekom*, cited *supra* note 11. On this case see Roda, (2011) *Journ.dr.inter.*, 559–562; Dunne, *op. cit. supra* note 4, 34–37; Rädler, *op. cit. supra* note 5. Earlier decisions have only dealt at the margin with this type of abusive pricing, see Case 109/75 R, *National Carbonizing Company Ltd. v. Commission*, [1975] ECR 1193 (decision on interim measures); Case T-5/97, *Industrie des poudres sphériques v. Commission*, [2000] ECR II-3755, paras. 181–185; Commission Decision 88/518/EEC, *Napier Brown/British Sugar*, O.J. 1988, L 284/41, paras. 65–68.

16. *Deutsche Telekom*, cited *supra* note 11, para 169.

17. Due to constraints of space, the Opinion of A.G. Mazák is not presented separately. The points on which the A.G. differed from the ECJ are explained in the comment section *infra*.

(para 31) which must be distinguished from other forms of abuses such as predatory pricing or refusal to deal cases (paras. 31, 34, 56). According to the Court, a margin squeeze strategy violates Article 102 TFEU if it is capable of hindering rivals which are at least as efficient as the dominant firm from competing on the downstream market (para 32). Whether such a hypothetically equally efficient competitor may be foreclosed from the market has to be assessed, in principle, by looking at the cost structure and the pricing strategy of the dominant firm (para 41). The ECJ did not, however, go so far as to declare cost structures of the competitors of the dominant firm completely irrelevant to the analysis, but limited recourse to those cost criteria to special market settings (para 45).

The ECJ ruled further on a variety of specific issues relating to the basic legal test for the detection of anti-competitive margin squeezes. The abusiveness of such a pricing policy, reasoned the Court, does not depend on the dominant firm having a duty to deal with rivals which is imposed by a regulatory regime as was the case in *Deutsche Telekom* (paras. 49–52). The Court held further that the “*Bronner* test”¹⁸ for judging whether a refusal to supply violates Article 102 TFEU does not apply, sight unseen, to margin squeezes, with the result that an abuse may be found even if the input is not “indispensable” for the business operations of rivals in the downstream market (paras. 54–58). Asked to what extent anti-competitive effects of the pricing policy have to be proven, the Court reiterated its findings of *Deutsche Telekom*¹⁹ that a pricing policy is only abusive when it is capable of having an anti-competitive effect on the degree of competition by foreclosing (actual or potential) downstream rivals (paras. 62–63). Such foreclosure effects do not necessarily “have to be concrete”. It suffices to demonstrate that the pricing policy is capable of potentially excluding as efficient rivals of the dominant firm (para 64).

In order to assess whether equally efficient rivals would be excluded, all the specific circumstances of the case have to be taken into account. In this context it has to be asked whether the input product offered by the dominant undertaking is indispensable for the operation of its rivals in the downstream market. If this conditions is met, a potentially anti-competitive effect of the margin squeeze is more likely to occur than in situations in which downstream rivals have alternative supply sources (paras. 70–71). Moreover, one has to carefully evaluate the price spread. If it leads to a negative margin (i.e. if the input price is higher than the retail price for the converted product/service), an anti-competitive effect is likely given that downstream rivals are forced to sell

18. Case C-7/97, *Bronner v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, [1998] ECR I-7791, paras. 37–47.

19. *Deutsche Telekom*, cited *supra* note 11, para 252.

at a loss. If, conversely, the margin remains positive, it must be demonstrated why foreclosure effects are nevertheless likely to occur (para 72). In all cases the dominant firm may prove, as is usual in price abuse cases,²⁰ that its pricing policy, “albeit producing an exclusionary effect, is economically justified” (para 75).

Finally, the questions referred gave the ECJ the opportunity to clarify the criteria that are, in general, not relevant in assessing the abusiveness of price squeezes. In this context, the court held, for example, that a dominant position on the downstream market is not a precondition for the finding of an abuse (paras. 83–87) and that a price spread may also be prohibited even when the dominant firm has no possibility of recouping the capital invested in the exclusionary strategy after its anti-competitive pricing has come to an end (paras. 96–103).

4. Comment

4.1. *Abuse control under the Treaty of Lisbon*

The *TeliaSonera* case is the first abuse case in which the ECJ discussed in more detail the general concept and function of abuse control under the Treaties following the Treaty of Lisbon. Historically, the EU abuse control case law was, *inter alia*, developed by reference to Article 3(1)(g) EC.²¹ This provision committed the European Community to the goal of ensuring a system whereby “competition in the internal market is not distorted”. Based on that goal, the ECJ developed the fundamental concept that the European prohibition of abusive conduct should protect the competitive process. Anti-competitive practices by dominant undertakings may therefore be prohibited not just when they damage consumers directly, but also if they are

20. See *British Airways v. Commission*, [2007] ECR I-2331, para 69; *France Télécom v. Commission*, [2009] ECR I-2369, para 111.

21. See Case 6/72, *Euroemballage Corporation and Continental Can Co. Inc. v. Commission*, [1973] ECR 215, para 23; Case 27/76, *United Brands v. Commission*, [1978] ECR 207, para 63/66. For further discussion see Eilmansberger, “How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses”, 42 CML Rev. (2005), 129, 132–137; Schweitzer, “The history, interpretation and underlying principles of section 2 Sherman Act and Article 82”, in Ehlermann and Marquis (Eds.), *A Reformed Approach to Article 82* (Hart Publishing, 2008), pp. 119, 138–143; Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (CUP, 2010), pp. 60–64; Wurmnest, *Marktmacht und Verdrängungsmissbrauch: Eine rechtsvergleichende Neubestimmung des Verhältnisses von Recht und Ökonomik in der Missbrauchsaufsicht über marktbeherrschende Unternehmen* (Mohr Siebeck, 2010), pp. 93–97.

detrimental “to them through their impact on competition”.²² Following an initiative of the French Government in the process leading to the Treaty of Lisbon, the reference to the system of “undistorted competition” was not carried over in the TEU, but instead banished into a “competition protocol”²³ which is, however, part of the Treaty of Lisbon. This removal raised, *inter alia*, the fear that the scope of the EU abuse control would be cut back in favour of allegedly short-sighted consumer interests to the detriment of a proper protection of the competitive process.²⁴ The Court’s decision in *TeliaSonera* will certainly calm this fear. Without extensive discussion, the ECJ emphasized that the general principles of abuse control developed before the Treaty of Lisbon remain in force, since the principal functions and objectives of the EU competition rules have not been altered *vis-à-vis* the EC Treaty, despite the removal of the “competition clause” and its relocation in a protocol (paras. 20–22).

4.2. *Margin squeeze as independent abuse under Article 102 TFEU*

As a second important finding, the ECJ confirmed its stance taken in *Deutsche Telekom* that anti-competitive margin squeezes are independent forms of abusive behaviour in the sense of Article 102 TFEU and clarified that such a pricing policy violates the prohibition against imposing “unfair purchase or selling prices” as laid down in Article 102(2)(a) TFEU (paras. 25, 34). The Court designed, thus, an additional layer of *ex post* control to the pricing behaviour of dominant firms. Up to *Deutsche Telekom* and *TeliaSonera*, it was settled case law that “unduly low” prices may infringe Article 102 TFEU because they are predatory. Absent special market conditions, this is the case if the retail prices are below an appropriate measure of cost and the dominant firm’s pricing is part of a plan to eliminate competition.²⁵ “Unduly high” prices may constitute a refusal to supply,

22. See e.g. Case C-95/04 P, *British Airways v. Commission*, cited *supra* note 20, para 106; *Deutsche Telekom*, cited *supra* note 11, para 176; similarly *Euroemballage Corporation and Continental Can Co.*, cited *supra* note 21, para 26.

23. Protocol (No. 27) on the Internal Market and Competition.

24. See Drexl, “Wettbewerbsverfassung”, in Bogdandy and Bast (Eds.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, 2nd ed. (Springer, 2009), pp. 905, 915–916, 943–958.

25. Case C-62/86, *AKZO v. Commission*, [1991] ECR I-3359, para 72. The EU Commission recently refined the analytical framework: see Enforcement Communication, cited *supra* note 10, paras. 63–74. For an overview of the refined approach, see Lange and Pries, “Die Neuorientierung der europäischen Missbrauchsaufsicht in dem Bereich von Kampfpreisstrategien (predatory pricing)”, (2009) *Zeitschrift für Europäisches Wirtschafts- und Steuerrecht*, 57–65; Bulst, in Langen and Bunte, *Kommentar zum deutschen und europäischen Kartellrecht*, Vol. 2 (Carl Heymanns Verlag – Luchterhand, 2010), Art. 82, paras.

provided that, in principle, the general *Bronner*-criteria are fulfilled. This is the case if it is likely that the refusal of the dominant undertaking eliminates all competition on the market, the product/service in question is “indispensable” for the non-supplied firms and the refusal cannot be objectively justified.²⁶ Moreover, “unduly high” prices charged by a firm with market power may be abusive because they are “excessive”, provided that the price has “no reasonable relation to the economic value of the product supplied”.²⁷

In *Deutsche Telekom*, the ECJ had ruled that the relationship (the “spread”) between the input price and the retail price may also constitute an abuse even if the prices charged in the upstream market and the downstream market are not in themselves abusive.²⁸ In the annotated judgment, the ECJ confirmed this view (para 34). A price spread is, *inter alia*, abusive if the vertically integrated dominant firm charges prices on the upstream market that are higher than the prices for the related product/service on the downstream market (negative spread) or if the spread, although positive, is so minimal that it prohibits an equally efficient rival from competing with the dominant undertaking on the downstream market on a lasting basis (para 32).²⁹

The classification of the margin squeeze as an independent abuse in its own right also has a bearing on the analytical framework. Margin squeezes may demonstrate similarities to predatory pricing campaigns or refusal to deal scenarios. On the one hand, one could therefore resort to the tests for predatory pricing as the dominant firm drives out its competitors by charging “too low” prices on the downstream market. On the other hand, it seems reasonable to analyse margin squeezes from a refusal to supply perspective, as the dominant firm – if the input price is sufficiently high – may through this pricing policy achieve the effect that competitors stop buying from the dominant firm given the low downstream price for the input. In its Enforcement Communication, the EU Commission opted for the latter solution, which implies that it will usually only take up a case when the supply of the input is “objectively necessary” for rivals to be able to compete effectively on the downstream

319–332; Wurmnest, “Predatory pricing: From price/cost-comparisons to post-Chicago thinking”, in Basedow and Wurmnest (Eds.), *Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State aid* (Wolters Kluwer, 2011), pp. 120–142; Lommler, *op. cit. supra* note 5, pp. 248 et seq.

26. *Bronner*, cited *supra* note 18, paras. 37–47. For further discussion see Whish, *op. cit. supra* note 3, pp. 693–694; Van Bael and Bellis, *op. cit. supra* note 3, pp. 842–844.

27. *United Brands*, cited *supra* note 21, para 250. On the normative foundations for the control of excessive prices see Ackermann, “Excessive pricing and the goals of competition law”, in Drexel and Zimmer (Eds.), *The Goals of Competition Law* (Edward Elgar, forthcoming). On the difficulties in gauging excessive prices see Hou, “Excessive prices within EU competition law”, 7 *European Competition Journal* (2011), 47–70.

28. *Deutsche Telekom*, cited *supra* note 11, para 183.

29. See also *ibid.*, para 169.

market.³⁰ This view was shared by Advocate General Mazák.³¹ In contrast, the ECJ favoured a less stringent legal and potentially over-inclusive test according to which a pricing policy is abusive under the following conditions:

- The incumbent is vertically integrated over several levels of the value chain (para 87).
- The incumbent holds a dominant position in the upstream market. Dominance in the downstream market is, however, not a necessary precondition for finding an abuse (para 89).
- The incumbent can influence the price for its goods in at least one of the two adjacent markets (para 51).³² If both the upstream price and the downstream price are imposed by regulatory law and the dominant firm could not influence the level at which the price spread was set, Article 102 TFEU does not apply (para 49).
- The incumbent's spread between the price for the upstream product/service and the price for the downstream product/service makes it impossible for a (non-vertically-integrated) rival, which is (hypothetically) as efficient as the dominant firm in the downstream market, to withstand the competitive pressure waged against it (para 42). In this regard, an anti-competitive effect must be likely. The input product/service supplied by the dominant undertaking must, however, not necessarily be indispensable for rivals in the downstream market, although anti-competitive effects are more likely if this is the case (paras. 70–71).
- The incumbent has no objective justification for this particular pricing policy (para 75).

Not relevant to the assessment is the degree of dominance held by the dominant firm (paras. 78–82) and whether the dominant firm has an opportunity to recoup losses sustained through its pricing strategy (para 103). Also irrelevant is whether the pricing policy is applied to new or existing customers (paras. 90–95)³³ or whether it is pursued on a matured or a growing market (paras. 104–111).

30. Enforcement Communication, cited *supra* note 10, paras. 75–81.

31. Opinion of 2 Sept. 2010, para 21.

32. See also *Deutsche Telekom*, cited *supra* note 11, para 85.

33. A slightly different position was advocated by A.G. Mazák who argued that “ceasing supply under an existing arrangement may be more likely to be found abusive than a refusal to supply a new customer”; see Opinion of 2 Sept. 2010, para 50.

4.3. *The relationship of sector specific regulation and Article 102 TFEU*

Another point meriting attention is the ECJ's affirmation that the existence of price regulation does not necessarily immunize dominant firms against infringements of Article 102 TFEU. The Court reasoned that the EU competition rules apply to conduct "engaged in by undertakings on their own initiative" (para 49). If, in contrast, national or Community legislation "eliminates any possibility of competitive activity" by requiring anti-competitive conduct from the dominant firm, Article 102 TFEU is not applicable (para 49). The decisive criterion is therefore whether the dominant firm has some margin of manoeuvre when setting its prices. In *Deutsche Telekom* the ECJ had held that the imposition of prices (which were calculated on the basis of certain cost structures of the dominant firm) in the upstream market by a regulatory authority does not bar the application of Article 102 TFEU as the dominant firm was free to alter its downstream prices to avoid the anti-competitive price squeeze.³⁴ A fortiori, argued the Court correctly in *TeliaSonera*, Article 102 TFEU applies when a dominant firm is entirely free to set its prices without regulatory constraints, as the Swedish monopolist could do with regard to the ADSL product in question (paras. 51–58).

4.4. *A flexible as-efficient-competitor test*

Building upon earlier case law,³⁵ the ECJ also clarified the scope of the as-efficient-competitor test. In principle, a margin squeeze infringes Article 102 TFEU only if it hinders a (hypothetical) equally efficient downstream rival from competing with the dominant firm (paras. 31–33)³⁶ In this respect, the Court aligned the analysis of margin squeezes to a certain extent with the assessment of predatory pricing, as it had held already in its first decision on this type of abuse that, as a general rule, only prices which "can drive from the market undertakings which are perhaps as efficient as the dominant undertaking" are predatory.³⁷ In its Enforcement Communication, the Commission even went so far as to make the as-efficient-competitor test the general legal test for all price-based exclusionary conduct,³⁸ an alignment not yet endorsed by the European Courts. Thus far, the ECJ has applied this test only to predatory pricing and margin squeeze cases and not to other pricing abuses. With regard to abusive rebate schemes, the General Court has

34. *Deutsche Telekom*, cited *supra* note 11, para 85.

35. *Ibid.*, para 183.

36. On the origins of that test see Wurmnest, *op. cit. supra* note 21, p. 372.

37. *AKZO*, cited *supra* note 25, para 72.

38. Enforcement Communication, cited *supra* note 10, para 23.

consequently confirmed in a recent judgment that classifying a rebate scheme as abusive is not dependent on an application of price/cost-tests which demonstrate that as efficient rivals of the dominant firm may be foreclosed from the market.³⁹

Generally speaking, the as-efficient-competitor test may be a proper yardstick for the separation of anti-competitive and pro-competitive pricing strategies in many, albeit not all, settings. Its application is, however, very thorny. On the theoretical level the question arises, for example, which cost benchmark needs to be undercut to demonstrate that an equally efficient rival could not profitably match the prices offered by the dominant firm. The appropriate measure of cost is the subject of a heated debate amongst economists and lawyers.⁴⁰ More importantly, a rigid as-efficient-competitor test based on the actual cost of the dominant firm may drive out competitors who may not be equally efficient today, but would be so in the near future if they were, for example, to reach a minimum efficient scale.⁴¹ In addition to these theoretical shortcomings, it is often very much disputed on the practical level which costs should be factored into the calculation of assessing whether an equally efficient rival could compete with the dominant firm.

To apply the as-efficient-competitor test in margin squeeze cases, it is usually investigated whether the dominant firm itself could operate on the downstream market if it had to pay the same input price as its rivals. This is the case if its product-specific costs of producing/supplying the downstream product/service are at least covered.⁴² In other words, only the prices and costs of the dominant undertaking are taken into account to assess the lawfulness of

39. Case T-155/06, *Tomra Systems and others v. Commission*, judgment of 2 Sept. 2010, nyr, paras. 198, 238–246 (appeal pending, see Case C-549/10 P, O.J. 2011, C 63/18). For a critical assessment of the General Court's decision see Federico, "Tomra v Commission of the European Communities: reversing progress on rebates?", (2011) ECLR, 139–142.

40. For an overview of the basic cost criteria see O'Donoghue and Padilla, op. cit. *supra* note 3, pp. 240–243; Howarth, "Pricing abuses – Unfair and predatory pricing under Article 82 EC: From cost-price comparisons to the search for strategic standards", in Amato and Ehlermann (Eds.), *EC Competition Law: A Critical Assessment* (Hart Publishing, 2007), pp. 249, 252–255.

41. Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard University Press, 2005), p. 153; Künzler, *Effizienz oder Wettbewerbsfreiheit?: Zur Frage nach den Aufgaben des Rechts gegen Wettbewerbsbeschränkungen* (Mohr Siebeck, 2008), pp. 458–459; Wurmnest, "The reform of Article 82 EC in the light of the 'economic approach'", in Mackenrodt, Conde Gallego and Enchelmaier (Eds.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer, 2008), pp. 1, 18; Fuchs, "Der 'ebenso effiziente Wettbewerber' als Maßstab für die Missbrauchskontrolle über marktbeherrschende Unternehmen – eine kritische Würdigung", in Bechtold, Jickeli and Rohe (Eds.), *Recht, Ordnung und Wettbewerb: Festschrift zum 70. Geburtstag von Wernhard Möschel* (Nomos, 2011), pp. 241, 257–258.

42. For an overview of the basic cost tests see O'Donoghue and Padilla, op. cit. *supra* note 3, p. 313.

the pricing scheme. In *Deutsche Telekom*, the ECJ has stated that this approach must be the principal legal test. It ensures legal certainty, as the dominant firm usually only knows its own costs and not those of its competitors.⁴³ In *TeliaSonera* the Court added, however, that in very particular circumstances a deviation from the principle of only looking at the cost structure of the dominant undertaking is possible. Cost structures of competitors may be used to demonstrate the abusiveness of the pricing, *inter alia*, (i.) where the cost structure of the dominant firm cannot be precisely identified; (ii.) where “the service supplied to competitors consists in a mere use of an infrastructure the production costs of which have been already written off” and therefore does not represent a cost factor economically comparable to the costs incurred by rivals when accessing it; or (iii.) where the dominant firm takes advantage of particular market conditions of competition such as the “fact that the level of the dominant undertaking’s costs is specifically attributable to the competitively advantageous situation in which its dominant position places it” (para 45).

In sum, the ECJ has adopted a rather “flexible” as-efficient-competitor test, a decision for which it has been criticized.⁴⁴ Even though it is correct that the ECJ’s approach makes it more difficult for dominant undertakings to assess whether their pricing policy is abusive or not, such flexibility is needed to avoid too many so called “false negatives”⁴⁵ as a strict application of the

43. *Deutsche Telekom*, cited *supra* note 11, paras. 198–202.

44. See Tuominen, *op. cit. supra* note 12, 149.

45. False negatives (or type-II-errors) occur when a dominant firm’s anti-competitive conduct is not detected or prohibited by a competition authority or a court because the applied legal test is too lenient. Conversely, one speaks of “false positives” (or type-I-errors) if authorities or courts intervene and mistakenly prohibit pro-competitive conduct. Both errors lead to socially undesired effects but are to a certain extent inevitable, as legal rules must be designed in such a way that they can be administered by competition authorities and courts; see *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983), per Judge Breyer: “Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.” On the two sides of the Atlantic Ocean, the balance between “false negatives” and “false positives” is calibrated differently. US Courts have interpreted Sec. 2 Sherman Act in a way that essentially avoids false positives by all means possible, whereas in Europe it is also the undesirable effects of false negatives which matter. The different balancing is to a large extent the consequence of the different enforcement systems in the EU and the US. Whereas Art. 102 TFEU is to a considerable degree enforced by public authorities which generally respect the fluid line between pro- and anti-competitive pricing, Sec. 2 Sherman Act is primarily enforced by private plaintiffs, often competitors of the dominant firm, who may take advantage of a very plaintiff-friendly litigation system (treble damages, jury-trials etc.). The danger of economically incorrect decisions being made against firms with market power seems therefore higher in the US than in Europe. As a consequence, US courts have defined very high thresholds for antitrust liability which lead to rather under-inclusive rules, whereas the ECJ has defined legal standards which are capable of detecting abuses more comprehensively, but at the risk of

as-efficient-competitor test may leave grave anti-competitive conduct unpunished.⁴⁶ The three examples given by the ECJ prove this point. If the cost structure of the dominant firm cannot be precisely identified, a competition authority or a court must have other ways to assess the pricing policy in question. The dominant firm can avoid this situation by making its cost structure transparent.⁴⁷ The second scenario demonstrates that there might be situations in which a dominant firm that owns an important infrastructure enjoys certain cost advantages from the use of the infrastructure which have to be accounted for in order to assess the proper economic effect of the dominant firm's pricing strategy. A modification may also be proper in cases in which the specific market conditions allow the dominant undertaking to essentially exclude each emerging competitor. An example for the third scenario mentioned by the ECJ is that of particularly strong economies of scale effects which enable quasi-monopolists to supply the product/service at a much lower cost than its actual or prospective smaller rivals.

Even though there are specific market settings in which a deviation from the general rule that only the costs of the dominant firm are relevant seems appropriate, such a deviation should not be made light-heartedly. If a court or a competition authority wants to do so, it must spell out why in light of the investigated market setting a deviation makes economic sense.

4.5. *Form vs. effects*

Over the last years the European decision practice in respect of Article 102 TFEU has often been criticized as "form based".⁴⁸ Put simply, the critics argued that the abusiveness of a given behaviour was mainly inferred by looking at the conduct in question and not by looking at the effects produced by that practice (which might be good for competition). Even though much of that critique was exaggerated, one has to note that the ECJ has, in recent years, slightly opened itself to adopting a more nuanced approach to Article 102 TFEU. The *TeliaSonera* decision can be seen as another step in this direction. Although the Court, in paragraph 61, affirmed its traditional position⁴⁹ that it

a higher rate of false positives. For further discussion see Schweitzer, op. cit. *supra* note 21, p. 163; Wurmnest, op. cit. *supra* note 21, pp. 273–277.

46. Fuchs, op. cit. *supra* note 41, pp. 263–264.

47. Pohlmann and Auf'mkolk, op. cit. *supra* note 12, 316705.

48. See e.g. Sinclair, "Abuse of dominance at a crossroads – Potential effect, object and appreciability under Article 82 EC", (2004) ECLR, 491–501; Niels and Jenkins, "Reform of Article 82: Where the link between dominance and effects breaks down", (2005) ECLR, 605–610.

49. On the traditional position see e.g. Deutsche Telekom, cited *supra* note 11, paras. 250 et seq.

is not necessary to show a “concrete effect” on the market (for example, in the form of reduced consumer choice, higher prices or reduced output), it also made clearer than in other decisions that at least a potential effect needs to be established before a practice may be prohibited as abusive. In other words, it has to be demonstrated that the incumbent’s pricing policy made the penetration of the downstream market “more difficult” (para 66). The Court thus demands the articulation of a coherent economic theory why the pricing policy negatively affects the competitive process in the actual market context before a margin squeeze may be prohibited under Article 102 TFEU.⁵⁰ Such a theory of harm cannot be inferred simply by looking at the pricing conduct of the dominant undertaking.⁵¹

To prove an anti-competitive foreclosure effect, a variety of factors and the special circumstances of the case must be taken into account. Anti-competitive effects are probable if the upstream input is indispensable for downstream rivals and if the spread forces rivals to sell at a loss (para 70). If the examination of the market conditions and the pricing policy reveals by contrast that downstream rivals have alternatives to the product supplied by the dominant firm and/or if the spread allows rivals to make a small profit, the anti-competitive foreclosure effect has to be demonstrated by other factors (para 72). Such factors could be special market conditions, for example, strong economies of scale and scope. Even if the pricing is in principle capable of foreclosing an as efficient rival from the market, this does not automatically mean that it is abusive in the sense of Article 102 TFEU. The Court reiterated its *British Airways* formula⁵² according to which the exclusionary effect might be justified by efficiencies which also benefit consumers (para 76). One may infer from this statement that, for example, a negative price spread may not be regarded as an abuse when it is a consequence of a short-term promotional campaign to launch a new product in the downstream market.⁵³

4.6. *Indispensable products*

Whereas most of the Court’s analytical framework combines economic insights and legal standards very well, the ECJ remained very vague on one decisive point. Unlike Advocate General Mazák, who argued with good reasons that anti-competitive effects resulting from insufficient margins are

50. Kallaugher and Weitbrecht, “Developments under articles 101 and 102 TFEU in 2010”, (2011) ECLR, 333, 340 (with respect to the identical reasoning of the ECJ in *Deutsche Telekom*).

51. Leupold, op. cit. *supra* note 12, 346.

52. *British Airways*, cited *supra* note 20, para 86.

53. For possible justifications for below-cost pricing see O’Donoghue and Padilla, op. cit. *supra* note 3, pp. 283–302.

“difficult to see” if the input product is not indispensable for the downstream rivals,⁵⁴ the Court declared that it “cannot be ruled out that, by reason simply of the fact that the wholesale product is not indispensable for the supply of the retail product, a pricing practice which causes margin squeeze may not be able to produce any anti-competitive effect, even potentially” (para 72). This rather sweeping statement widens the scope of application of Article 102 TFEU considerably without showing the economic rationale why, in such a case, the pricing policy may lead to anti-competitive effects which are not captured by other types of abuses, such as predatory pricing.⁵⁵ The Court acknowledged, however, that anti-competitive effects are more probable where rivals need the input to operate on the downstream market. National competition authorities and courts applying Article 102 TFEU should, consequently, carefully evaluate to what extent rivals have alternatives to the input supplied by the dominant firm and why these alternatives would not enable rivals to compete on a lasting basis with the dominant firm. Without such an analysis there is a danger of prohibiting aggressive, but pro-competitive pricing strategies.

5. Conclusion

The *TeliaSonera* judgment confirmed that margin squeezes are an independent type of abuse and clarified that such a pricing policy of a vertically integrated dominant firm infringes Article 102(2)(a) TFEU. The ECJ further spelled out in detail the basic legal test for the assessment of margin squeezes. In this respect, it is worth noting that the European Court left no doubt that also under the Treaty of Lisbon, the focus of abuse control lies in the protection of the competitive process (and not solely on consumer welfare as wished by some important EU Commission officials⁵⁶). The annotated judgment, however, also shows that the ECJ is willing to accept a more nuanced effects-based abuse control based on sound economic theories of harm. That the ECJ as well as the General Court do not want to depart radically from their older case law is also apparent from other more recent abuse control judgments.⁵⁷ This recent decision practice should be reflected in the

54. Opinion of 2 Sept. 2010, para 21; concurring: Eilmansberger, op. cit. *supra* note 3, Art. 82 EG, para 533; Elhauge and Geradin, *Global Competition Law and Economics*, 2nd ed. (Hart Publishing, 2011), p. 477.

55. Pohlmann and Aufmkolk, op. cit. *supra* note 12, 316705.

56. See e.g. Esteva Mosso, “The more economic approach paradigm – An effects-based approach to EU competition policy”, in Basedow and Wurmnest, op. cit. *supra* note 25, pp. 11, 17.

57. See e.g. Joined Cases C-468-478/06, *Lélos v. GlaxoSmithKline*, [2008] ECR I-7139, para 37; Case T-201/04, *Microsoft v. Commission*, [2007] ECR II-3601, para 229.

Enforcement Communication, in which the European Commission partly deviated from the case law on abuse control. If the Commission cannot convince the European Courts to embrace certain modifications of existing standards in the near future, it will need to overhaul its Enforcement Communication. Otherwise there might be a danger that the EU Commission applies different (more effects-based) criteria for assessing abusive conduct than the national courts which follow the criteria set forth by the European Courts.⁵⁸

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58. Gormsen, “Why the European Commission’s enforcement priorities on article 82 EC should be withdrawn”, (2010) ECLR, 45–51 (arguing even for a complete withdrawal of the Enforcement Communication).

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