



Press and Information

Court of Justice of the European Union

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Judgment in Case C-280/08 P
Deutsche Telekom AG v Commission

The Court of Justice upholds the €12.6 million fine imposed by the Commission on Deutsche Telekom for abuse of its dominant position in the fixed telephony markets in Germany

European Union law prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it in so far as it may affect trade between the Member States.

Before the full liberalisation of telecommunications markets in Germany on 1 August 1996, Deutsche Telekom enjoyed a legal monopoly in the retail provision of fixed-line telecommunications services.

Following the lodging of complaints from competitors of Deutsche Telekom, the Commission decided¹ on 21 May 2003 that Deutsche Telekom had been abusing its dominant position in the markets for direct access to its fixed telephony network since 1998. That abuse consisted in charging competitors prices for network access services ('local loop access services') that were higher than the retail prices which Deutsche Telekom's end-users were charged for access. Such pricing forced competitors to charge their end-users prices higher than those which Deutsche Telekom charged its own end-users.

Consequently, the Commission fined Deutsche Telekom €12.6 million.

Deutsche Telekom brought an action before the Court of First Instance (now 'the General Court') for annulment of the Commission's decision or, at the very least, for a reduction of the fine imposed. By judgment of 10 April 2008,² the General Court dismissed the action, holding, in essence, that the Commission was entitled to impose that fine on Deutsche Telekom on account of the implementation of an unfair pricing practice, resulting in a margin squeeze generated by an inappropriate spread between wholesale charges for local loop access services and retail charges for end-user access services.

Deutsche Telekom appealed to the Court of Justice against that judgment of the General Court.

In its judgment today, the Court finds, on examining Deutsche Telekom's grounds of appeal, that the General Court did not commit any error of law when it dismissed Deutsche Telekom's action against the Commission's decision.

As regards the attributability of the infringement, the Court considers that even though wholesale prices for local loop access services were set by national regulatory authorities, the General Court was entitled to hold that the margin squeeze at issue was a practice attributable to Deutsche Telekom, since the latter had sufficient scope to adjust the retail prices charged to its end-users, notwithstanding the fact that those prices were subject to some regulation. Admittedly it is not inconceivable that the national regulatory authorities may themselves have infringed European Union law, and therefore that the Commission could have brought an action for failure to fulfil

¹ Commission Decision 2003/707/EC of 21 May 2003.

² Case [T-271/03](#) *Deutsche Telekom v Commission*. See also Press Release [26/08](#).

obligations against the Federal Republic of Germany. However, that circumstance does not, according to the Court, affect the scope which Deutsche Telekom had to adjust its retail prices.

As regards the abusive nature of the margin squeeze at issue, the Court confirms that such a practice is, as such, one of the cases of abuse of a dominant position prohibited under European Union law, and that there is no need to demonstrate that wholesale prices or retail prices are, in themselves, abusive. By squeezing the margins of its competitors who are just as efficient, thereby driving them from the market, Deutsche Telekom strengthens its dominant position and, consequently, causes damage to consumers by limiting the choices available to them as well as their prospects of benefiting from a longer-term reduction of retail prices for end-user access services as a result of competition exerted in that market.

With regard to the method used to determine whether a margin squeeze is abusive, the Court considers that the General Court and the Commission were entitled to rely on the 'as-efficient-competitor' test, which consists in considering whether the pricing practices of a dominant undertaking could drive an equally efficient economic operator from the market, relying solely on the dominant undertaking's charges and costs instead of on the particular situation of its competitors. Such a test can establish whether Deutsche Telekom would have been able to offer its retail services to end-users otherwise than at a loss if it had first been obliged to pay its own wholesale prices for local loop access services. In addition, the test is consistent with the principle of legal certainty in so far as it allows dominant undertakings, which necessarily know what their own costs and charges are, to assess the lawfulness of their own conduct.

Finally, as regards the effects of the conduct at issue, the Court of Justice, in common with the General Court, takes the view that, in order to be regarded as abusive, a margin squeeze must have made market penetration more difficult for Deutsche Telekom's competitors. Proof of certain anti-competitive effects is therefore required. In the present case, the Court considered that the General Court was entitled to find that there was proof of such effects. Since the wholesale local loop access services provided by Deutsche Telekom are indispensable to its competitors' effective penetration of the retail markets for the provision of services to end-users, a margin squeeze, in principle, hinders the growth of competition in the retail markets in services to end-users, given that, in those circumstances, a competitor who is just as efficient as the appellant cannot carry on his business in the retail market for end-user access services without incurring losses.

Consequently, the Court **dismisses** the appeal and upholds the fine of €12.6 million imposed by the Commission.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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