General Court of the European Union
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Press and Information

Judgments in Cases
T-336/07 Telefónica and Telefónica de España v Commission
and T-398/07 Spain v Commission

The General Court confirms the fine of more than €151 million imposed by the Commission on Telefónica for having abused its dominant position in the market for access to broadband internet in Spain

In particular, Telefónica abused its dominant position in the Spanish wholesale market for regional and national access

EU law forbids undertakings from exploiting in an abusive manner a dominant position in the internal market or a substantial part of that market in so far as trade between the Member States is liable to be affected.

Before the total liberalisation of the telecommunications markets in 1998, Telefónica enjoyed a legal monopoly over the retail provision of landline telecommunications services. Upon liberalisation, Telefónica was therefore the only Spanish telecommunications operator which had a fixed telephone network throughout the country.

Between September 2001 and December 2006, Telefónica provided services throughout the broadband network via ADSL technology, which enables access to broadband internet by means of a landline.

During that period, Telefónica marketed retail broadband products to individuals. Relying on its fixed telephone network, that undertaking also provided wholesale broadband products to other telecommunications operators in order to allow them to provide retail broadband services to individuals. As regards those wholesale products, there were three offers available to other telecommunications operators: 1) unbundling of the local loop[1], only marketed by Telefónica; 2) wholesale access at a regional level (GigADSL)[2], also only marketed by Telefónica; and 3) several offers of wholesale access at a national level[3], marketed both by Telefónica (ADSL-IP and ADSL-IP Total) and by other operators on the basis of the unbundling of the local loop and/or the wholesale product with regional access.

Following a complaint, the Commission decided[4] on 4 July 2007 that Telefónica had abused its dominant position in the Spanish market for wholesale access at a regional and national level during the period between September 2001 and December 2006. In that respect, the Commission held that Telefónica had imposed unfair prices on its competitors in the form of a margin squeeze between the prices of retail access to broadband and the prices of wholesale access to broadband at a regional and national level. Therefore, a fine of €151 875 000 was imposed on Telefónica.

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[1] That possibility gives direct access to the local loop – the circuit between the customer's premises and the telecommunications operator's local switch or equivalent facility. That access allows the alternative operator to establish a greater diversity of its final retail services.

[2] Wholesale access at a regional level requires the deployment of a network counting up to 109 regional access points. It allows alternative operators to establish a 'certain degree of distinctiveness' of their retail product (the unbundling of the local loop nevertheless allowing a greater distinctiveness).

[3] Wholesale access at a national level condenses the traffic into a single point of access. That access does not allow the alternative operators to significantly distinguish their retail product.

[4] Commission Decision C (2007) 3196 final, of 4 July 2007, relating to proceedings under Article 82 [EC] (Case COMP/38.784 – *Wanadoo España* v *Telefónica*).

Spain and Telefónica brought an action before the General Court seeking the annulment of the Commission decision.

In the judgments which it delivers today, the General Court dismisses the actions, holding that the Commission rightly held that Telefónica had abused its dominant position.

Firstly, **the General Court confirms that the unbundling of the local loop, the regional wholesale product and the national wholesale product did not belong to the same product market during the period concerned, with the result that the possible existence of a dominant position held by Telefónica in each of those markets had to be evaluated separately**. As a consequence, the General Court rejects the argument put forward by Telefónica that the Commission ought not to have examined the existence of a margin squeeze for each wholesale product taken separately, since the alternative operators used an optimum combination of wholesale broadband products, including the unbundling of the local loop, allowing reductions in costs. According to the General Court, such an approach amounted to holding that an alternative operator could compensate for the losses incurred because of the margin squeeze by the income resulting from the use, in certain more profitable geographical zones, of the unbundling of the local loop, which was not subjected to a margin squeeze.

In that respect, the General Court points out that the notion of a market implies the existence of actual competition between the products which form part of that market, which supposes a sufficient degree of interchangeability for the same use between all the products which form part of the same market, and indeed in the short term. The General Court points out that functional differences exist between the national wholesale products, the regional wholesale products and the unbundling of the local loop. Moreover, the General Court states that the actual use of the local loop only started to a limited degree at the end of 2004 and the beginning of 2005.

Secondly, the General Court is of the view that **the Commission rightly held that Telefónica was in a dominant position in the regional and national wholesale markets during the period covered by the infringement**. It was not disputed that Telefónica had been the only operator to provide the regional wholesale product in Spain since 1999, thus having a de facto monopoly over that market. Similarly, in the national wholesale market, it was not disputed that Telefónica possessed a share of the market which was higher than 84% during the period covered by the infringement.

Thirdly, as regards the abusive conduct of Telefónica, the General Court points out **that a margin squeeze in a relevant market is capable itself of constituting an abuse of a dominant position**. A margin squeeze is the result of the spread between the prices for wholesale services and those for retail services. The Commission, therefore, was not required to prove that Telefónica charged excessive prices for its wholesale products with indirect access or that it charged predatory prices for its retail products.

Furthermore, as regards the assessment of the lawfulness of the pricing policy applied by Telefónica, the General Court confirms the approach followed by the Commission, which refers to pricing criteria based on the costs incurred by Telefónica itself and on its strategy. As regards a pricing practice which causes a margin squeeze, the use of such analytical criteria can establish whether an undertaking in a dominant position would have been sufficiently efficient 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 the intermediary services.

Fourthly, **as for the effects of the conduct of Telefónica,** the General Court is of the view that the Commission did not make a manifest error of assessment in holding that the conduct of the undertaking had probably reinforced the barriers to the entry and expansion of that market, and that, in the absence of distortions resulting from the margin squeeze, the competition would have probably been stronger in the retail market, which would have benefited the consumers in terms of price, choice and innovation.

Fifthly, as regards the determination of the fine, the General Court rejects the arguments of Telefónica that it was not reasonably able to predict the anti-competitive nature of its conduct.

First of all, the General Court confirms that Telefónica had sufficient discretion to determine its pricing policy. Telefónica had the freedom to reduce the price of the national wholesale product, since that price was not subject to regulations. Moreover, as regards the price of the regional wholesale product of Telefónica, the General Court is of the view that the prices determined by the Spanish Telecommunications Market Commission (CMT) were maximum prices and that, as a consequence, Telefónica was free to request a reduction of its prices. Finally, as regards the retail prices, Telefónica did not dispute that it was free to increase its prices at any moment.

The General Court is also of the view that Telefónica must have known that compliance with the Spanish legislation concerning telecommunications – and, in particular, compliance with the decisions taken by the CMT on the basis of the regulatory framework – **did not protect it against an intervention by the Commission on the basis of competition law**. In that respect, the General Court points out that the rules of the European Union on competition law supplement, through the carrying out of an ex post facto verification, the regulatory framework adopted by the European Union legislature for regulating the telecommunications markets.

Finally, as regards the regional wholesale product of Telefónica, the CMT had laid down a pricing system for that product and had examined the existence of a margin squeeze effect in several decisions taken during the period covered by the infringement on the basis of preliminary estimates. However, the General Court is of the view that those factors do not affect the responsibility incumbent upon Telefónica under competition law. **Telefónica must have known that the CMT had never laid down the pricing system in question, nor had it examined the existence of margin squeeze effect on the basis of the actual costs of the undertaking, but rather on the basis of estimates which had not in actual fact been confirmed by the developments of the market**.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

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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