



eSAPIENCE CENTER FOR COMPETITION POLICY

CASE NOTE:

Spain Appeals European Commission Decision Against Telefónica

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by

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INTRODUCTION

The Spanish Government recently decided to lodge an appeal before the European Court of First Instance (CFI) against the European Commission's decision of July 4, 2007 imposing on Telefónica a high fine for abusing its dominant position in the Spanish broadband access market. At almost 152 million Euros, this was the largest antitrust fine ever imposed by the Commission on a telecommunications company. Telefónica has also appealed the decision arguing, *inter alia*, that the fine is unjustified and disproportionate.

The Spanish Ministry of Industry, Tourism and Commerce declared that the purpose of its separate appeal is to defend the authority of the Spanish telecoms regulator (Comisión del Mercado de las Telecomunicaciones, CMT), rather than to defend Telefónica. In the Ministry's views, the Commission decision interferes with the powers of the CMT, which had adopted several measures concerning price regulation in the Spanish broadband access market in recent years.

The Commission stated in its decision that Telefónica committed an abuse of its dominant position between September 2001 and December 2006 by charging unfair prices in the form of a margin squeeze for access to its broadband network. A margin squeeze can be found if the difference between a vertically integrated operator's prices for retail and wholesale access to comparable services is not sufficient, either for a reasonably efficient competitor to enter the market, or for the incumbent operator itself to

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cover its own cost for the provision of the retail services. The latter methodology was followed by the Commission for assessing the margin squeeze in the Telefónica case. In its appeal, the Spanish Government is not contesting this method as such, but rather focusing on the fact that the tariffs in question were subject to sector-specific regulation at the national level.

This was not the first time that a telecommunications company was fined for a margin squeeze regarding tariffs subject to sector-specific regulation. Previously in May 2003, the Commission imposed a fine of 12.6 million Euros on Deutsche Telekom for a similar abuse, although the German telecoms regulator had regulated the wholesale and retail prices much more heavily than CMT, the Spanish regulator. The German government did not appeal this decision, but the appeal lodged by Deutsche Telekom before the CFI is partly based on similar arguments, and is still pending.

GROUND FOR THE APPEAL

The Spanish government reportedly challenged the Commission decision on the grounds that the decision undermines the powers of the CMT as the national authority competent to assess the tariffs in question. This implies that sector-specific regulation as applied in practice by the CMT would be regarded as *lex specialis* compared to the competition provisions of the EC Treaty, so that the Commission would not have the authority to enforce the EC competition rules if a national regulator has already taken action.

In the views of the Spanish Government, the Commission decision would thus constitute an undue intervention into a matter of national competence and create a situation of legal uncertainty for the operators active in the telecommunications markets.

Spain reportedly also claims that the Commission decision constitutes a breach of the principles of good cooperation with the national regulators—the Commission should have warned the CMT that the tariff regulation adopted was not compatible with the EC Treaty, and should have requested a review of those measures instead of adopting a formal decision against Telefónica.

However, these grounds for appeal do not appear to be convincing at first sight. It might well have been legally possible for the Commission to act against Spain, provided that it could be shown that the CMT decisions had directly caused or at least contributed to the margin squeeze. The same holds true if the CMT had failed to act in order to prevent the margin squeeze. Such action against Spain could have been brought under Article 86 EC, but there is no such obligation for the Commission, and that is not what happened. Instead the Commission chose to act against Telefónica under Article 82 EC, which is possible in case of any abusive behavior for which the company is found to be fully responsible. Only if such responsibility is not given, *e.g.* because a national regulator imposes precise tariffs, there may be no scope remaining for action under Article 82 EC. Conversely, if a company has the freedom to avoid the abuse while complying with the sector-specific provisions, it may also be held responsible for failing to do so. This approach is based on clear-cut case law of the European Court of Justice (*see Ladbroke* judgment of 1997).

Even if, on the face of it, it may be perceived as such, the Commission decision did not violate the competences of the national regulator. One of the key tasks of regulators is to enable and safeguard competition in the telecommunications markets, but their power and tools differ from those of the Commission for enforcing the EC

competition rules. The regulators' powers to impose measures based on their national provisions do not preclude the application of the EC competition rules, especially if the actions at issue are either not covered by the regulatory provisions or if the distortion of competition is not effectively addressed by the enforcement practice of the regulator.

The decision against Telefónica precisely covers such a loophole of the sector-specific regulation in Spain. The CMT did not, in fact, examine whether the broadband access prices charged by Telefónica at wholesale and retail level lead to a margin squeeze to the detriment of its competitors, nor did it take any action in order to bring Telefónica's abusive practices to an end until December 2006. Nevertheless, the Commission's decision does not concern the compatibility of the regulatory practice of the CMT with EC competition rules, but rather the behavior of Telefónica in setting its prices in both the retail and the wholesale broadband access market.

In this respect, the key findings are quite straightforward—the tariffs in the Spanish broadband access market were not fully imposed but were only partially subject to sector-specific regulation, which, in turn, did not legally exclude an abuse by Telefónica. As set out in the Commission's decision, Telefónica enjoyed wide discretion in determining both retail and wholesale tariffs for broadband access. The tariffs for access to the national wholesale service of Telefónica had never been regulated in Spain until December 2006. For access to the regional wholesale service, the Spanish regulator had set maximum tariffs, leaving Telefónica the freedom to implement tariff reductions at its own initiative. The retail prices for broadband access were fully liberalized in 2003 and since then are not subject to any *ex ante* regulation in Spain. Prior to that they used to

be fixed by the Spanish authorities, but even this was done based upon proposals submitted by Telefónica.

CONCLUSION

Under the existing regulatory framework in Spain, Telefónica had significant opportunities to avoid the margin squeeze between 2001 and 2006 by reducing wholesale tariffs and/or increasing retail tariffs. On the basis of this, it does not appear very likely that Spain's appeal against the Commission decision will succeed.

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