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I. INTRODUCTION

On February 17, 2011, the Court of Justice handed down a judgment on a series of questions referred from the Stockholm District Court on the interpretation of Article 102 TFEU in relation to an alleged abuse of dominance in the form of a margin squeeze (the *TeliaSonera* judgment).[2] The Court gave guidance on the factors that are a condition or relevant and on those that are not to determine whether a margin squeeze occurred, including the absence of any regulatory obligation on the undertaking concerned to supply ADSL[3] services on the wholesale market in which it holds a dominant position. Further, the Court elaborated on the necessity to demonstrate that the practice produces an anticompetitive effect, at least potentially, on the retail market, and that the practice is not in any way economically justified.

In this regard, the Court clarified that the indispensability of the product offered upstream by the dominant operator is a factor for assessment of the effects and not a necessary condition of the abuse, thus differentiating the margin squeeze abuse from the refusal to supply abuse. In the *TeliaSonera* judgment, the Court of Justice complements and develops its previous findings in the *Deutsche Telekom* judgment of a few months earlier.[4] This case law shows that the prize squeeze practices are more likely to be considered abusive and anticompetitive in the European Union ("EU") than in the United States.

II. FACTS OF THE CASE

TeliaSonera Sverige AB ("TeliaSonera") is the historical operator of the fixed telephone network in Sweden. In addition to offering retail broadband services, TeliaSonera also offers wholesale access to its metallic access network to other operators who are also active in the retail market. Access is offered either: (i) through local loop unbundling, in compliance with Regulation

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[2] Case C-52/09 Konkurrensverket v TeliaSonera Sverige, February 17, 2011, not yet reported.

[3] ADSL stands for "Asymmetric Digital Subscriber Line," a type of broadband technology used for connecting to the internet.

[4] Case C-280/08 P Deutsche Telekom v Commission, October 14, 2010, not yet reported. In this ruling the Court had held that: (i) the regulatory framework cannot be considered a justification for a margin squeeze abuse (¶¶ 80-85); (ii) the margin squeeze test must be based on the costs of the dominant undertaking itself ("as-efficient" competitor), instead of on the particular situation of its actual or potential competitors (reasonably-efficient test) (*see* ¶ 169); and (iii) actual exclusionary effects must be shown to establish the abusive nature of a margin squeeze (¶¶ 250-54).

No 2887/2000,[5] or (ii) by virtue of a particular input product for ADSL connections, voluntarily and under no regulatory obligations.

The Swedish Competition Authority (Konkurrensverket) brought proceedings before the Stockholm District Court against TeliaSonera alleging that it had abused its dominant position on the wholesale market by applying a margin between the wholesale price for input ADSL products and the retail price for ADSL services it offers to consumers, which would not have been sufficient to cover TeliaSonera's incremental costs on the retail market.

Under Article 267 TFEU, the Stockholm District Court referred ten questions as to the preconditions under which the pricing policy of a vertically integrated dominant undertaking qualifies as a margin abuse under Article 102 TFEU.

III. CONFIRMATION THAT REGULATORY OBLIGATION FOR THE DOMINANT OPERATOR IS NOT RELEVANT

As expected since its previous decision in *Deutsche Telekom*, in the TeliaSonera judgment the Court held that the absence of any regulatory obligation on the undertaking concerned to supply ADSL services on the wholesale market is not relevant to determine whether a margin squeeze occurred.

First, the Court referred to its previous ruling in *Deutsche Telekom* where it had held that a regulatory defense is not available for the dominant operator.[6] In particular, in the presence of a margin squeeze between wholesale and retail prices, the fact that wholesale prices are set by the national regulator does not absolve the vertically integrated dominant undertaking from its duty to comply with competition law where it can adjust its retail prices up to end the margin squeeze.[7] In this regard, the EU approach differs from the U.S. approach where the antitrust agencies appear less likely to find a refusal to deal infringement under Section 2 of the Sherman Act in regulated sectors.[8]

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[5] Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000, L 336, p. 4).

[6] It is probably right that, as the European Commission observes in its press release concerning the Deutsche Telekom ruling (Commission Press Release of 14 October 2010, CJE/104/10, *available at*: http://snipurl.com/1xymog), the Court of Justice appears to have endorsed the Commission's right to intervene under competition law even when National Regulators do not correctly apply regulatory (or competition) law principles. This will likely force undertakings active in regulated industries that wish to comply with EU competition law to act in a manner that (i) may be inconsistent with the national regulatory framework (in this case Deutsche Telekom should have increased its retail prices where the regulatory decisions aimed at retail price reductions) and (ii) seems contrary to consumers' interests (*i.e.*, retail price rises as a result). In substance, it is now for the regulated undertakings to effectively challenge or second-guess the National Regulators. Though not entirely new (*See* Case C-198/01 Consorzio Industrie Fiammiferi [2003] ECR I-8055), this approach seems impractical and shows a lack of consideration of what is real life, where telecom operators need to deal, abide, and respect guidance and rulings from National Regulators and cannot be the stakeholders in charge of putting in question what the latter decide in the absence of corrective actions by the Commission, which very rarely attempts to openly criticize or review the work of National Regulators.

[7] Deutsche Telekom v Commission, *supra* note 4, ¶¶ 80-85. The Court of Justice found against the involved dominant operator, Deutsche Telekom, even though it noted that (i) Deutsche Telekom was "encouraged" by the German regulatory authority for telecommunications and post (RegTP) as regards retail prices (¶¶ 87 and 286) and (ii) it is not inconceivable that RegTP may have itself infringed EU competition rules (in which case the Commission could have brought infringement proceedings against Germany under Article 258 TFEU; ¶ 91).

[8] *See* footnote 22, *infra*.

In *TeliaSonera*, the Court concluded "a fortiori, where an undertaking has complete autonomy in its choice of conduct on the market, Article 102 TFEU is applicable to it" (paragraph 52). In this regard, the Court took a different view from Advocate General Mazak's opinion according to which margin squeeze is a form of refusal of supply and thus it is only abusive where the dominant undertaking has a regulatory obligation to supply the wholesale input in question or where that input is indispensable to the downstream competitors' businesses.[9]

IV. MARGIN SQUEEZE AS INDEPENDENT FORM OF ABUSE DISTINCT FROM THAT OF REFUSAL TO SUPPLY

The Court held that a duty to supply is not needed and a margin squeeze "may, in itself, constitute an independent form of abuse distinct from that of refusal to supply" (paragraph 56). As indicated above, in this regard the Court diverged from the advice of Advocate General Mazák, who had argued that unless the firm has a duty to deal in the first place it cannot be under a distinct duty to deal on particular terms.

The Court's approach is not entirely aligned with the position previously taken by the European Commission in its Guidance Paper, which treats margin squeezing as a variation of a refusal to supply, thereby suggesting that the same basic analysis applies.[10]

V. EQUALLY EFFICIENT COMPETITOR TEST

In *Deutsche Telekom*,[11] for the first time the Court of Justice had confirmed the margin squeeze test set out in the previous case law of the General Court[12] and the practice of the European Commission.[13] In particular, the Court had indicated that the margin squeeze test is based on the costs and the strategy of the dominant undertaking itself ("as-efficient" competitor), instead of on the particular situation of its actual or potential competitors (reasonably-efficient test).[14]

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[9] Opinion of Advocate General Mazák of September 2, 2010, in Case C-52/09 Konkurrensverket v TeliaSonera Sverige, not yet reported, paragraph 21: "[…] I consider that if there was no regulatory obligation compatible with EU law on a dominant undertaking to provide an input which is not indispensable then the dominant undertaking should not in principle be charged with a margin squeeze abuse. If margin squeezes were prohibited purely on the basis of an abstract calculation of the prices and in the absence of any assessment of the indispensability of the input for competition in the market, dominant undertakings' willingness to invest would be reduced and/or they would be likely to raise end-user prices lest they be charged with a margin squeeze. […]."

[10] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (current Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings (OJ 2009, C 45, p. 7), ¶ 80: "Finally, instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a so-called 'margin squeeze') […]".

[11] Deutsche Telekom v Commission, *supra* note 4, ¶¶ 169 *et seq*.

[12] *See e.g.* Case T-5/97 Industrie des Poudres Sphériques v Commission [2000] ECR II-3755, ¶ 180.

[13] *See e.g.* Commission Decision of July 4, 2007 in Case COMP/38.784 - Wanadoo España v Telefónica, recital 310.

[14] The as-efficient-operator test allows dominant companies to assess themselves the lawfulness of their activities and is consistent with the general principle of legal certainty: "[w]hile a dominant undertaking knows what its own costs and charges are, it does not, as a general rule, know what its competitors' costs and charges are" (Deutsche Telekom v Commission, *supra* note 4, ¶ 202). However, there may be marginal cases where more rigorous analysis is required. For instance, as the OECD policy roundtable paper of 2009, *available at* http://snipurl.com/1xypj6, observes, behavior resembling a price squeeze may be undertaken for efficiency or pro-competitive reasons (*e.g.*, to

In *TeliaSonera*, the Court confirmed the application of an equally efficient competitor test that takes account of the dominant operator's costs and revenues (paragraph 46). However, the Court recognizes that it may be appropriate to take account of competitors' costs in certain circumstances, for example when: (i) the costs of the dominant undertaking are not precisely identifiable; (ii) the dominant competitor's costs have been written off (e.g. the cost of access to the infrastructure); or when (iii) "the particular market conditions of competition dictate it," such as when the level of the dominant competitor's costs is determined precisely by the undertaking's dominant position (paragraph 45).

VI. POTENTIALLY ANTICOMPETITIVE EFFECTS ARE REQUIRED TO ESTABLISH A MARGIN SQUEEZE (AND ALSO FOR OTHER EXCLUSIONARY PRACTICES?)

As already indicated in *Deutsche Telekom*,[15] the Court held that it is necessary to demonstrate that the practice produces an anticompetitive effect, at least potentially, on the retail market (paragraph 64), and that the practice is not in any way economically justified (paragraphs 74-75). Therefore the Court confirmed that margin squeeze is not a *per se* abuse; it is always necessary to show the potential for anticompetitive effects on the specific facts.

At least for Article 102 TFEU cases involving a margin squeeze, but perhaps also for other exclusionary practices, the Court seemed to encourage the use of an effect-based analysis.[16]

In the *TeliaSonera* case the Court went even further. It held that, while an anticompetitive effect is "probable" where the wholesale product at issue is "indispensable" for the supply of the end product, still an anticompetitive effect can be produced when the wholesale product is not indispensable (paragraphs 69-72).[17] Therefore, indispensability is a factor for assessment but not a necessary condition. This approach will probably broaden the range of practices that could be categorized as margin squeezes.

Further, the Court held that it is necessary to determine the levels of margin squeeze of competitors at least as efficient as the dominant undertaking (*i.e.*, whether the margin is positive or negative) (paragraph 73). While the Court considered that an abuse is "probable" when the

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eliminate a double marginalization, to more effectively discriminate in the downstream market, or to meet competition from another technology).

[15] Deutsche Telekom v Commission, supra note 4, ¶¶ 250 et seq. In this ruling, the Court of Justice held that it is not necessary to prove any actual anticompetitive effects for the conduct to be find illegal (¶¶ 250-251). Then the Court recalled that the dominant undertakings' pricing practices are abusive when they have potentially an exclusionary effect "capable of making market entry more difficult or impossible" for as efficient competitors, even if financially smaller (¶ 253). In this respect, it underlined that "in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue cannot be classified as exclusionary" (¶ 254). Finally, the Court considered that the difference between Deutsche Telekom's wholesale and retail prices hindered competition in retail service markets since an as efficient competitor could not provide retail services without selling at a loss, as it was shown by the competitors' small market shares acquired since the market liberalisation (¶¶ 255 and 257).

[16] The Court's determination that actual exclusionary effects must be shown in order to establish the abusive nature of a particular practice seems to confirm the finding in a recent judgment from the General Court: Case T-57/01 Solvay v Commission [2009] ECR II-4621, ¶ 503. However, the appeal brought by Intel in Case T-286/09 Intel v Commission (OJ 2009, C 220, p. 41) against the Commission decision imposing a fine on it raises the issue one more time ("The applicant […] contends that the Commission errs in law by: finding that the conditional discounts granted by Intel to its customers were abusive per se by virtue of them being conditional without establishing that they had an actual capability to foreclose competition […]").

[17] In the present case the product was not indispensable as TeliaSonera offered, in compliance with Regulation No 2887/2000, unbundled access to the local loop.

margin is negative (e.g. the upstream price is higher than the downstream price), both rulings seem to imply that even when the margin is not negative there can be a margin squeeze. In *Deutsche Telekom*, the spread was negative in a first period and "not sufficient" in a second one.[18] In *Teliasonera*, the Court considered that the spread can be insufficient and thus there can be a margin squeeze when the competitor is brought to operate at a loss or "at a reduced level of profitability" (paragraph 33).

Finally, the Court clarified that "an undertaking remains at liberty to demonstrate that its pricing practice, albeit producing an exclusionary effect, is "economically justified," for example "whether the exclusionary effect arising from such a practice […] may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer" (paragraphs 75-76). There is always room for efficiency defense, with the well-known difficulties this entails.

In this regard, it is worth noting that, unlike in *Deutsche Telekom*, the dominant operator, Teliasonera, had a dominant position solely on the wholesale market for ADSL input services and not on the retail market. Therefore, it can attempt to argue (in front of the national judge) that the retail market was competitive and that its conduct was economically justified.

VII. OTHER IRRELEVANT PARAMETERS FOR MARGIN SQUEEZE

The Court also held that the following factors are, as a general rule, not relevant to determine whether a margin squeeze occurred:

- the exact degree of dominance held by that undertaking in that market (paragraph 82);
- the fact that that the undertaking does not also hold a dominant position in the retail market for broadband connection services to end users (paragraph 89);
- whether the customers to whom such a pricing practice is applied are new or existing customers of the undertaking concerned (paragraph 95);
- the fact that the dominant undertaking is unable to recoup any losses which the establishment of such a pricing practice might cause (paragraph 103); and
- the extent to which the markets concerned are mature markets and whether they involve new technology, requiring high levels of investment (paragraph 111).

VIII. BRIEF COMPARISON BETWEEN THE U.S. AND THE EU APPROACHES TO MARGIN SQUEEZE

Unlike the EU that, as we saw above, recognizes a broad concept of margin squeeze, the United States does not recognize margin squeeze as a standalone abuse and, moreover, the presence of sector-specific regulation makes the application of antitrust to the price levels that comprise the squeeze less likely.

In its *linkLine* decision of 2009,[19] the Supreme Court ruled, "if there is no [antitrust] duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is not required to price both of these services in a manner that preserves its rival's profit margin"

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[18] Deutsche Telekom v Commission, *supra* note 4, ¶ 102.

[19] Pacific Bell Telephone Company, dba AT&T California, et al., v. linkLine Communications, Inc., et al., 555 U.S. 438 (2009). The linkLine judgment was similar to the TeliaSonera judgment as they both concerned ADSL services.

(paragraph 1120).[20] The Supreme Court thus held that absent an antitrust duty to deal or predatory pricing, a "margin squeeze" cannot constitute a valid antitrust claim on its own.[21]

Further, contrary to the situation in the EU, in the United States the existence of regulations at the upstream or retail levels makes the finding of a margin squeeze violation less likely,[22] though not excluded.[23]

Whether the *linkLine* decision constitutes the highest point of divergence between U.S. and EU competition policies or not,[24] it seems true that there might be a different application of competition rules on each side of the Atlantic regarding the same pricing policy adopted by an undertaking.

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[20] However note that, up until linkLine, margin squeeze had been recognised in U.S. law for more than half a century since the seminal decision of the Second Circuit in Alcoa. United States v. Aluminium Company of America et al., 148 F.2d 416, 65 U.S.P.Q. 6 (2nd Cir. 1945). In Alcoa, Judge Learned Hand recognized margin squeeze in different historic settings (1945) in a case where a dominant operator, Alcoa, was depriving its competitors of a living profit.

[21] In the United States, an antitrust claim can arise in a "price squeeze" situation only if some other antitrust violation is being committed. At the upstream level, there is no such thing as excessive pricing in the United States, so high pricing can constitute an infringement only if it amounts to a *de facto* refusal to deal and if refusing to deal would be an antitrust infringement in the circumstances (dominance, lack of business justification, etc.). At the downstream level, low pricing can be an infringement only if constituting below cost predatory pricing. Without the presence of either of those independent infringements, there can be no margin squeeze (hence it is not a "stand alone" infringement).

[22] In Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) ("[t]o decide this case, we must first determine what effect (if any) the 1996 Act has upon the application of traditional antitrust principles. […] That Congress created these duties, however, does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim. Indeed, a detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity. […]. In some respects the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme 'that might be voiced by courts exercising jurisdiction under the antitrust laws.' […] Congress, however, precluded that interpretation. Section 601(b)(1) of the 1996 Act is an antitrust-specific saving clause"). Thus the Supreme Court seems to find that it may be less likely to find a refusal to deal infringement in a regulated industry when the regulations enact various provisions aimed at combating anticompetitive behaviour. In those cases, the Court will look to the regulation for the economic "context" in which the conduct is occurring to see if it is likely to have an anticompetitive effect. This was the case in Trinko, but the Court did not need to go that far because it found a legitimate justification for the refusal (while finding that duties to deal are exceptional).

[23] While duties to deal are rare in the United States, the fact that a company is active in a regulated sector is not the determining factor. It was relevant in linkLine and Trinko for a different reason. In linkLine, AT&T did not have dominance in the relevant product, which is a prerequisite to finding a duty to deal under the U.S. antitrust laws. Therefore, any duty to deal would have had to come from the communication statute alone, but that statute did not impose such a requirement. There was no duty to deal in Trinko under the antitrust laws because the company had legitimate reasons to refuse to deal. It was not merely forgoing short-term profits to drive out competition. But again, Verizon's participation in a regulated industry was not the determining factor. The only way that the antitrust agencies and courts could not apply Section 2 in regulated sectors at all is if the U.S. Congress expressly says in the statute regulating the sector that the statute supersedes the antitrust laws. That rarely happens and it did not happen in linkLine or Trinko.

[24] Warren S. Grimes, *U.S. Supreme Court Rejects Price Squeeze Claim: A High Point for Divergence between US and European Law?* ZEITSCHRIFT FÜR WETTWEBERSRECHT, p. 343, 2009; Southwestern Law School Working Paper No. 1024. (August 17, 2010). *Available at* SSRN: http://ssrn.com/abstract=1660803.

IX. CONCLUSION

Unlike in the United States, the subject of margin squeeze has grown in significance in the EU in recent years and the active role played by the European Commission has made it a compliance priority for incumbent network operators in the telecommunications industries. In any sector, it has implications for companies wishing to control and to use a key infrastructure (e.g. a distribution network). In the *Teliasonera* judgment, the Court provides further important clarification to complement and develop its analysis in *Deutsche Telekom*. In particular, the Court's more flexible approach to the indispensability criterion is likely to extend the range of practices that could be categorized as margin squeezes. What matters are the likely effects and its proof, which does not require showing that the upstream service is indispensable for competition to survive.