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Comments on CFI Jugement in *Deutsche Telekom AG*

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1. Compliance with regulatory obligations as an Article 82 excuse

- « *For the national framework to have the effect of making Articles 81 EC and 82 EC inapplicable to the anti-competitive activities of undertakings, the restrictive effects must originate solely in the national law […]. Articles 81 and 82 EC may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings » (paras. 87 and 88)*

- DT found to have reduced its retail tariffs below the maximum cap set by RegTP. Thus, there was room to increase retail tariffs

2. Price squeeze as a stand-alone form of abuse

- No need to show that retail prices were abusive:

  « *The abusive nature of the applicant's conduct is connected with the unfairness of the spread between its prices for wholesale excess and its retail prices, which takes the form of a price squeeze. Therefore, in view of the abuse found in the contested decision, the Commission was not required to demonstrate that the applicant's retail prices were, as such, abusive* » *(para.167)*

- Reversal of case law in *Industrie des Poudres Sphériques:*

  « [I]n the absence of abusive prices being charged by PEM for the raw material, namely low-oxygen primary calcium metal, or of predatory pricing for the derived product, namely broken calcium metal, the fact that the applicant cannot, seemingly because of its higher processing costs, remain competitive in the sale of the derived product cannot justify characterizing PEM's pricing policy as abusive » (para. 179)

3. Hypothetical v. reasonably efficient competitor test

- Origin of the two methodologies: Access notice, paras. 117 and 118
- DT case confirms relevance of hypothetical competitor test:
  - Reference to case law in *AKZO* and *Industrie des Poudres Sphériques*, where costs of dominant enterprises were assessed (paras. 189 and 190)
  - Reference to principle of legal certainty limiting ability to take into account costs of new entrants (para. 192)

- Efficiency of smaller operators as main obstacle to the reasonably efficient competitor test
  - Smaller market share is not necessarily a sign of inefficiency
  - O2 Germany v. Commission

    « *O2, which was the last operator to enter the German market, appears to be in the weakest competitive position. Even if O2 does have some infrastructure, […], its modest market share and its situation as the last entrant place it objectively in a less favourable position. […] The dependence […] thus stems from de facto inequality that the agreement specifically seeks to rebalance by placing O2 in a more favourable competitive position » (para. 107)*

  - Mobistar v. Commune de Fléron

    « *[I]n the context of its examination, the national court will have to assess the effects of the taxes bearing in mind, in particular, the point at which each of the operators concerned entered the market. It may become apparent that operators which have or have had exclusive or special rights were able to enjoy, before other operators, a position allowing them to redeem their costs of establishing networks. The fact that operators entering the market are subject to public service obligations, including those concerning territorial cover, is likely to put them, in terms of controlling their costs, in an unfavourable position by comparison with traditional operators »*

- Did the Court intend to exclude reasonably efficient competitor test?
  - Context in which DT referred to the costs of new entrants
  - Principle of equality of chances in DT:

    « *[A] system of undistorted competition between the applicant and its competitors can be guaranteed only if equality of opportunity is secured as between the various economic operators […]. [E]quality of opportunity as between the incumbent operator and owner of the fixed network, such as the applicant, on the one hand, and its competitors, on the other, therefore means that prices for access services must be set at a level which places competitors on an equal footing with the incumbent operator as regards the provision of call services. Equality of opportunity is secured only if the incumbent operator sets its retail prices at a level which enables competitors – presumed to be just as efficient as the incumbent operator – to reflect all the wholesale costs in their retail prices. However, if the incumbent operator does not adhere to that principle, new entrants can only offer access services to their end-users at a loss. They would then be obliged to offset losses incurred in relation to local network access by higher call charges, which would also distort competition in telecommunications markets* » *(paras. 198 and 199)*

- Principle of equality of chances is well established in the telecom regulatory case law:

Connect Austria:

« *The Court has consistently ruled that a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators » (para. 83)*

ISIS Multimedia:

« *In that regard, a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators »*

4. Proof of anti-competitive conduct

« The small market shares acquired by the applicant's competitor in the retail access market since the market was liberalized […] are evidence of the restrictions which the applicant's pricing practices have imposed on the growth of competition in those markets » (para. 239)