

## • Sweden: The Competition Authority welcomes ECJ Judgment on Competition in the Telecom Sector

The Swedish Competition Authority (the Authority) welcomes the Judgment of the European Court of Justice (ECJ) of 17 February 2011 in the case C-52/09, Konkurrensverket against TeliaSonera Sverige AB. The Authority issued proceedings against the Swedish telecoms operator TeliaSonera Sverige AB ('TeliaSonera') in 2004 for abusing its dominant position in the broadband market, ADSL. The Stockholm City Court (the City Court), where the proceedings are pending, requested a preliminary ruling from the European Court of Justice in 2009 asking a series of 10 questions on the interpretation of Article 102 TFEU (formerly Article 82 EC) concerning an alleged abuse of a dominant position in the form of a margin squeeze.

The Authority considers that the judgment that has now been issued by the ECJ essentially supports the line it has taken. The judgment indicates, among other things, how the ECJ views the preconditions for a 'margin squeeze' to constitute an abuse of a dominant position. This judgment helps to clarify case-law in this area. The ECJ, confirms the position taken in Deutsche Telekom that margin squeeze is a stand-alone abuse. The ECJ holds that a margin squeeze may constitute an abuse of dominance, even where a dominant company has no legal obligation to supply its downstream competitor and that it is irrelevant whether TeliaSonera was not subject to a regulatory duty to deal with competitors.

The ECJ judgment makes it clear that TeliaSonera cannot defend its margin squeeze, as it has sought to do, by the fact that it was not under a regulatory duty to provide access to its local network to its competitors through its wholesale ADSL product. The judgment also clarifies that margin squeeze can be an independent form of abuse distinct from that of refusal to supply. The ECJ points out that even where the wholesale product is not indispensable, the pricing practice may be capable of having anti-competitive effects on the markets concerned. The ECJ also holds that where access to the supply of the wholesale product is indispensable for the sale of the retail product, the at least potentially anti-competitive effect of a margin squeeze is probable.

Further, the ECJ holds that it is necessary to determine the level of margin squeeze of competitors at least as efficient as the dominant undertaking. The ECJ thereby points out that if the margin is negative (in other words if, in the present case, the wholesale price for the ADSL input services is higher than the retail price for services to end users) an effect which is at least potentially exclusionary is probable, taking into account the fact that, in such a situation, the competitors of the dominant undertaking, even if they are as efficient, or even more efficient, compared with it, would be compelled to sell at a loss.

The ECJ also concludes that:

- when assessing whether pricing practice which causes a margin squeeze is abusive, account should as a general rule be taken primarily of the prices and cost of the undertaking concerned on the retail market. Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of its competitors on the same market be examined (para. 46)
- the absence of any regulatory obligation to supply the ADSL input services on the wholesale market has no effect on the question of whether the pricing practice (at issue in the main proceedings) is abusive (para. 59)
- While the degree of dominance is not relevant for establishing that margin squeeze is abusive (mere dominance being sufficient), the degree of market strength is, as a general rule, significant in relation to establishing the extent of the effects of the conduct.
- the question whether a pricing practice resulting in a margin squeeze is abusive does not depend on whether the undertaking concerned (a vertically integrated dominant undertaking) is dominant in the retail market (i.e. a dominant position in the wholesale market is sufficient, it is not necessary to demonstrate that the dominant undertaking has a dominant position in the retail market) (para. 89)
- it is not relevant to the assessment whether the customers to whom the margin squeeze is applied are new or existing customers of the undertaking concerned (para. 95)

- whether the dominant undertaking is able to recoup any losses suffered as a result of applying the pricing practice at issue has no relevance to the matter of establishing whether that pricing practice is abusive (para. 103)
- the fact that the markets concerned are growing rapidly and involve new technology, requiring high levels of investment, is not, as a general rule, relevant to establishing whether the pricing practice at issue constitutes an abuse (para. 111)

The main hearing in the case is intended to take place in October 2011, during which the City Court will rule on whether TeliaSonera's conduct constituted an abuse of dominant position, i.e. amounted to 'margin squeezing'. The City Court's final judgment is expected to be pronounced around the turn of the year. An appeal against the judgment may be made to the Market Court, which is the court of final instance.

"This judgment represents a success for the Swedish Competition Authority. We now know what the stance is of the European Court of Justice, which is important to know prior to the forthcoming hearings at Stockholm City Court," Dan Sjöblom, Director-General of the Swedish Competition Authority said in comments. "Abuse of a dominant position is a serious violation of the competition rules. Stakeholders that dominate the market bear a significant responsibility not to take any action that excludes competition to the disadvantage of the consumer."

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