In February 2004, the Directorate-General for Competition concluded a settlement with Deutsche Telekom AG (DT) in a case concerning a presumed margin squeeze for broadband access in Germany. The investigation had been opened in 2002, following a complaint by QSC AG, an alternative German provider of DSL services that is competing with DT. According to the complainant, the margin between DT’s retail tariffs for ADSL and the corresponding wholesale tariffs for line sharing was insufficient to allow new entrants to compete with DT on the retail market. This in turn was supposed to have allowed DT to become the quasi-monopolist for ADSL services in Germany, ever since those broadband services were offered on the mass market.

The settlement followed preliminary investigations in accordance with the method for assessing a margin squeeze as developed in the Commission decision of 21 May 2003 (‘Deutsche Telekom’), where DT’s pricing strategy for local access to the fixed telephony network was found to be contrary to Art. 82. (1) In that decision, the scope of the abuse was however considerably larger than in the case now settled, since it referred to DT’s pricing strategy for access to its local fixed telephony network whereas this case referred to DT’s pricing strategy for mere broadband access.

1. Broadband access in Germany

Broadband access to end-customers allows for the provision of a wide range of electronic communications services, such as high speed Internet access and the transmission of important data volumes. Those services can be delivered via the fixed telephony network as well as other technologies, such as upgraded cable TV networks. However, no competing technology is sufficiently developed in Germany in order to present an economically viable alternative for DT’s competitors. As it is also economically impossible for new entrants to fully replicate DT’s local communication infrastructure (local loops) that was built over a century under a state monopoly, new entrants need access on fair and non-discriminatory terms to those local loops to be able to offer broadband services to end-users.

The frequency spectrum of local loops can be split into a low frequency range, suited for the provision of traditional voice telephony services, and a high frequency range enabling the provision of broadband access. When both are rented out to new entrants, this amounts to full local loop unbundling, whereas the renting out of the mere high frequency range leads to the shared use of local loops (line sharing). Similarly to local loop unbundling, line sharing enables new entrants to offer individually composed services to end-users via a direct connection. In contrast to local loop unbundling, this direct link however relates to the data transmission part of a local loop only so that another operator may still offer its voice telephony services via the same shared line.

Both full local loop unbundling and shared access to local loops were imposed on notified incumbent operators by way of an EU-Regulation as from 1 January 2001. (2) Despite this clearcut regulatory obligation, line sharing has only been made available in Germany in March 2002, when the line sharing tariffs were first set by the German regulatory authority for telecommunications and post (RegTP). According to the preliminary investigations in this case, DT has adopted an anti-competitive tariff structure since then, by not respecting a sufficient margin between the line sharing tariffs at wholesale level and its ADSL tariffs at retail level. As RegTP did not regard those retail tariffs as being subject to ex ante regulation, DT could fix them autonomously.

In this context, is also noteworthy that, during the past years, DT has not offered competitors other complementary wholesale products such as bitstream access or ADSL resale which would also have enabled new entrants to directly provide end-users with broadband services. (3) As a result and despite of numerous alternative operators present

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(1) OJ L 263, 13.10.2003, p. 9; under appeal before the CFI as case T-271/03.
(3) After the settlement, DT has meanwhile introduced an ADSL resale offer.
on the German market, in 2003 DT still held more than 90% of all ADSL lines marketed by then.

2. The settlement and its implementation

The settlement followed preliminary investigations of the Commission according to the margin squeeze test as it was established in the decision of 21 May 2003. Therein, the Commission stated that a margin squeeze can be found to exist if a vertically integrated operator which is dominant both on the wholesale and the retail market, charges its competitors prices for wholesale access which are either higher than the respective retail prices or lead to a margin between both prices which is insufficient to cover the product-specific costs for the provision of the retail services. Under such a margin squeeze, competitors cannot ever make a profit, because they also have other costs to incur before being able to make comparable retail service offerings.

However, instead of opening formal proceedings against DT, the Commission has accepted DT’s commitments to fully close the presumed margin squeeze on a lasting basis as from 1 April 2004. (1) In its commitments, DT offered first of all to refrain from charging the monthly line sharing fees from its competitors between 1 April 2004 and 31 December 2004. From 1 January 2005 onwards, DT proposed to substantially reduce its line sharing tariffs on a lasting basis. DT also decided to increase some of its ADSL retail tariffs as from 1 January 2005. As the line sharing tariffs are subject to approval by RegTP, DT committed itself to file a request for their reduction, so that RegTP was obliged to take a decision about those tariffs. Finally, DT committed to regularly report facts and figures to enable the Commission to check and ensure that no margin squeeze for broadband access will reappear.

After the Commission accepted these commitments in February 2004, DT publicly announced in March 2004 that it intended to substantially lower its line sharing tariffs on a permanent basis and that it will increase some of its ADSL tariffs as of 1 January 2005. Accordingly, DT applied in April 2004 to RegTP for a substantial decrease of the monthly line sharing tariff (about 50%) which was granted at the end of June 2004. (2) Following those announcements and tariff changes, the Commission was therefore in a position to conclude that DT has implemented its commitments. The case could therefore be closed.

3. The role of the German regulator — Scope for the Commission to act

RegTP has played an important role in this case. By approving the substantial decrease of DT’s monthly line sharing tariff, it has enabled DT to remedy the presumed margin squeeze to a large extent at the wholesale level. In doing so, RegTP has supported the Commission’s intention to terminate the presumed anti-competitive tariff structure quickly and in a consumer-friendly manner.

On the other hand, RegTP has already had a significant influence over the tariff structures which were subject to this case before the Commission started its investigations. In March 2002, RegTP fixed the line sharing tariffs for the first time, however without carrying out a full-fledged margin squeeze test which should have taken into account the level of DT’s ADSL tariffs.

Despite the fact that a regulatory decision had thus contributed to the presumed margin squeeze, the investigations were directed against DT. This is due to the fact that DT had over the entire period under examination, i.e. since March 2002, enough entrepreneurial freedom to terminate the margin squeeze, in particular by increasing the retail tariffs for ADSL.

4. Impact of the settlement

Since the settlement only became fully effective with RegTP’s decision approving the reduced monthly line sharing tariffs at the end of June, it is yet too early to judge about the market impact of the new tariff structure because it usually takes new entrants six to nine months to roll-out their network in order to provide end-users with broadband access via line sharing. (3) However, in other EU Member states, like France for example, the decrease of line sharing tariffs has led to a substantial rise in the number of shared lines.

(1) It should however be noted that DT has offered its commitments on the reservation of its rights concerning its appeal of the Commission decision of 21 May 2003.
(3) In this context, it is worthwhile noting that, after the decision of 21 May 2003, the number of newly unbundled local loops per quarter has recently become the highest ever since the full liberalisation.