

## The “Regulatory Authority Dixit” Defence in European Competition Law Enforcement

by

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### *Abstract*

The European Commission (EC) and the European Courts have been reaffirming in the *Deutsche Telekom* and *Telefónica* cases that guide-prices established by sector regulators upon electronic communications incumbents cannot *per se* exclude that conducts with anticompetitive foreclosure effects, such as margin squeeze, undertaken within the boundaries of those pre-established prices, can be considered abusive under Article 102 TFEU.

The paper aims at showing that the reasoning put forward by the EC and the Courts not only dismantles the defensive reasoning put forward by the incumbents before the EC and on appeal before the Courts but actually reaffirms the centrality of the enforcement activity of the EC. The paper examines the reasoning behind the “regulatory authority’s instructions defence” – the argument of the incumbents stating that their actions were justified because they had set their wholesale access prices and retail prices in line with the guidelines imposed by the sectorial regulators. Recalled in this context were also the principles of proportionality, subsidiarity and fair cooperation between the EC and individual Member States.

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The affirmation of the “heliocentric” doctrine that puts the EC at the hearth of competition law enforcement *vis á vis* national regulators and domestic legislation (provided decisions of the regulatory authorities can be considered secondary law sources) should take into consideration the important precedent of *Conorzio Industrie Fiammiferi*. The latter affirms that competition authorities can automatically put aside legislation that goes against Article 101 TFEU. However, they cannot impose pecuniary fines when certain behaviours are imposed by national legislation (while they can impose fines if those behaviours were suggested or facilitated by national legislation).

### Résumé

La Commission européenne (CE) et les juridictions européennes ont réaffirmé dans les cas de *Deutsche Telekom* et *Telefonica* que les prix-guides établis par les organismes de réglementation du secteur sur les titulaires de la communication électronique ne peuvent pas en soi exclure ces pratiques avec des effets d'éviction anticoncurrentielle, tels que la compression des marges réalisée dans le limites de ces prix pré-établi. Les prix-guides peuvent être considérés comme abusifs vertu de l'article 102 du TFUE.

L'article vise à montrer que le raisonnement présenté par la CE et les juridictions européennes ne démonte que le raisonnement défensif avancé par les titulaires auprès de la CE et en procédure d'appel devant les tribunaux, mais réaffirme en fait la centralité de l'activité de l'application accomplie par la CE. L'article examine le raisonnement derrière « la défense des instructions de l'autorité réglementaire» – l'argument des titulaires affirmant que leurs actions étaient justifiées parce qu'ils avaient mis leurs prix d'accès de gros et les prix de détail en ligne avec les directives imposées par les régulateurs sectoriels. Les principes de proportionnalité, de subsidiarité et de coopération équitable entre la CE et les États membres sont également rappelés dans ce contexte.

L'affirmation de la doctrine «héliocentrique» qui place la CE dans le foyer de l'application des lois de la concurrence vis-à-vis des régulateurs nationaux et la législation nationale (à condition que les décisions des autorités réglementaires peuvent être considérées comme des sources secondaires du droit) devrait prendre en considération le précédent important du cas *Conorzio Industrie Fiammiferi*. Ce jugement affirme que les autorités de la concurrence peuvent automatiquement mettre à côté une loi qui va à l'encontre de l'article 101 TFUE. Toutefois, ils ne peuvent pas imposer des amendes pécuniaires lorsque certains comportements sont imposés par la législation nationale (alors qu'ils peuvent infliger des amendes si ces comportements ont été suggérés ou facilités par la législation nationale).

**Classifications and key words:** Regulatory authorities, national sector regulators, national competition authorities, electronic communications, proportionality, subsidiarity, cooperation, enforcement, price caps, margin squeeze, wholesale access, retail price

## I. Introduction

In two important cases of the last decade, *Deutsche Telekom*<sup>1</sup> and *Telefónica*<sup>2</sup>, the European Commission (hereafter: EC or Commission) and European Courts reaffirmed that guide-prices imposed by National Regulatory Authorities (hereafter: NRAs or regulators) upon electronic communications incumbents cannot, *per se*, exclude the realisation that the foreclosing conducts of incumbents (such as those determined by margin squeeze) may be considered abusive under Article 102 TFEU<sup>3</sup>.

The purpose of this paper is to show that the reasoning put forward by the Commission and European Courts not only dismantles the defensive reasoning put forward by the incumbents before the EC and, on appeal, before the Courts but actually reaffirms the centrality of the enforcement activity of the Commission.

The position of the EC and European Courts underlines the supremacy of competition law over regulatory measures and sets out some important consequences thereof. On the one hand, the authoritative power of NRAs is restricted, at least at the European level (or where they have enforcement powers<sup>4</sup>), by the reaffirmation of the centrality of the enforcement action of the Commission. On the other hand, the benefits deriving from specialised

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<sup>1</sup> EC decision of 21 May 2003 in case *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579) [2003] OJ L263/9 (hereafter: EC decision *Deutsche Telekom*). On appeal, judgment of the Court of First Instance (CFI) of 10 April 2008 in case *Deutsche Telekom AG v. Commission* (Case T-271/03) [2008] ECR-II-477, [2008] 5 CMLR 631 (hereafter: CFI judgment *Deutsche Telekom*); on appeal, judgment of the Court of Justice (CJ) of 14 October 2010 in case *Deutsche Telekom AG v European Commission* (Case C-280/08) [2010] ECR I-09555, [2010] 5 CMLR 1495 (hereafter: CJ judgment *Deutsche Telekom*).

<sup>2</sup> EC decision of 4 July 2007 in case *Wanadoo España v Telefónica* (Case COMP/38.784) [2008] OJ C83/6 (hereafter: EC decision *Telefónica*). On appeal, judgment of the General Court (GC) of 29 March 2012 in case *Telefónica and Telefónica de España v Commission* (Case T-336/07) [2007] OJ C269/55 (hereafter: GC judgment *Telefónica*); on appeal, judgment of the Court of Justice (CJ) of 10 July 2014 *Telefónica SA and Telefónica de España SAU v European Commission* (Case C-295/12), available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-295/12%20P> (hereafter: CJ judgment *Telefónica*) as well as opinion of Advocate General (AG) Wathelet in Case C-295/12 delivered 26 September 2013, available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-09/cp130117en.pdf> (hereafter: AG Wathelet opinion in *Telefónica* Case C-295/12).

<sup>3</sup> W. Wils, “Ten Years of Regulation 1/2003 – A retrospective”, presentation at the conference 10 Years of Regulation 1/2003, Mannheim Centre for Competition and Innovation, 7 June 2013, available at <http://ssrn.com/abstract=2274013>.

<sup>4</sup> For instance, OFCOM has sector specific enforcement powers under the Communications Act 2003 (2003 Chapter 21), available at <http://www.legislation.gov.uk/ukpga/2003/21/introduction>.

intervention by sectorial regulators seem nullified when the EC's approach diverges from the guidelines provided by NRAs.

A similar trend, reaffirming the leading role of the Commission in enforcing EU competition law, expands beyond the area of the electronic communications sector. In the energy sector, in particular, the EC has already encouraged electricity and gas incumbents to adopt structural remedies to address competition concerns on several occasions. By doing so, it went beyond the scope of sector-specific legislation that foresees less invasive, behavioural remedies. Three recent cases of commitments – E.ON<sup>5</sup>, RWE<sup>6</sup> and ENI<sup>7</sup> – go in this direction.

The paper examines the reasoning behind “NRAs' recommended practices defence”. It also assesses the incumbents' arguments that they had established their wholesale access prices in line with the guidelines recommended (and, in certain cases, imposed) by their NRAs. Their second line of defence was usually that of recalling the principles of proportionality, subsidiarity and fair cooperation between the Commission and individual Member States, arguing that EC decisions had somehow been undermining the unity of the legal system.

It is useful to look at the relevant cases to see the line of reasoning followed by the Commission and the European Courts.

## II. The *Deutsche Telekom* case and the influence of the *Conorzio Industrie Fiammiferi* case

The *Deutsche Telekom*<sup>8</sup> case of 2003 can be considered the leading case of margin squeeze at European level in the electronic communications sector. The German telecoms incumbent, Deutsche Telekom (hereafter: DT), was fined by the EC for exclusionary abuse. The incumbent was found to be dominant in the provision of both wholesale fix telephony network (so called ‘local loop’) access, and in the downstream market for the provision of retail services to end customers. The retail services included fixed telephony, ISDN and ADSL services. In other words, DT, the provider of wholesale (upstream)

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<sup>5</sup> EC decision of 26 November 2008 in case *E.ON* (Case COMP/38.388-38.389) [2009] OJ C36/8.

<sup>6</sup> EC decision of 18 March 2009 in case *RWE (Gas Foreclosure)* (Case COMP/39.402), available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39402/39402\\_576\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39402/39402_576_1.pdf).

<sup>7</sup> EC decision of 29 September 2010 in case *ENI* (Case COMP/39.315) [2010] OJ C352/8.

<sup>8</sup> EC decision *Deutsche Telekom* (Case COMP/C-1/37.451, 37.578, 37.579); CFI judgment *Deutsche Telekom* (Case T-271/03); CJ judgment *Deutsche Telekom* (Case C-280/08).

services for access to the local loop, was also a direct competitor on the retail market of the purchasers of its services.

The EC found that DT had committed an abuse in two different ways in two different timeframes.

The first abuse consisted of DT charging its competitors (from 1998 until 2001) for access to its local network “more for unbundled access at wholesale level than it charged its own subscribers for access at the retail level”<sup>9</sup>. This margin squeeze practice, consisting of a negative spread between the two sets of charges, was evident and did not require any further analysis of costs.

The second form of margin squeeze, put in place from 2002 until the decision was made in May 2003, was more subtle. After 2002, the prices charged by DT to its competitors for wholesale access became lower than the retail subscription prices DT charged to its own customers, determining a positive spread. However, the Commission found that the positive spread “was still not sufficient for DT to cover its own product-specific cost for the supply of comparable end-user services”<sup>10</sup> and it still constituted a margin squeeze practice prohibited by Article 102 TFEU.

The EC decision imposed a fine of EUR 12.6 million for DT abusing its dominant position by way of margin squeeze. DT appealed arguing that its wholesale access prices had been set by the German telecommunications regulatory authority – *Regulierungsbehörde für Telekommunikation und Post* (hereafter: RegTP)<sup>11</sup>. On appeal, the European judiciary confirmed that competition law provisions (in particular, the prohibition to put in place exclusionary conduct under Article 102 TFEU) prevail over regulatory obligations (prices-caps)<sup>12</sup>.

DT’s defence was partly based on the argument that the company’s management had no margins of discretion in setting its prices. Indeed, under the German regulatory regime, the NRA established a “price-cap” for local loop interconnection rates, rather than a mere regulatory mechanism. Starting from the cost-orientation principle, the incumbent had a margin to fix the

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<sup>9</sup> See paras 152 and 153 EC decision *Deutsche Telekom*. See also R. Klotz, J. Fehrenbach, “Two Commission decisions on price abuse in the telecommunications sector”, (2003) 3 *Competition Policy Newsletter* 8 and; R. Whish, D. Bailey, *Competition Law* 7<sup>th</sup> edition, Oxford OUP 2012, p 756.

<sup>10</sup> See paras 154-162 EC decision *Deutsche Telekom*. See also R. Klotz, J. Fehrenbach, “Two Commission decisions...”, *op. cit.*, p. 9 and; R. Whish, D. Bailey, *Competition Law...*, *op. cit.*, pp. 756–757.

<sup>11</sup> *Regulierungsbehörde für Telekommunikation und Post* (RegTP), the German electronic communications regulator, active since 1 January 1998.

<sup>12</sup> CFI judgment *Deutsche Telekom*, para 70 ff. See also CJ judgment *Deutsche Telekom*, paras 77-96.

price within the threshold of that price cap<sup>13</sup>. DT argued that the Commission should not have intervened to assess whether the “margin” established by DT was infringing competition law principles (in particular, exclusionary practices, as per Article 102 TFEU). The incumbent stated that since the price-cap had been set by the regulator, DT’s pricing policy could not be considered abusive<sup>14</sup>. However, the Commission replied that the European Courts “have consistently held that the competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition. This is particularly so in the case of complaints submitted to the Commission regarding possible violation of the EU competition rules. In such cases the Commission has a duty to investigate, and if necessary to order appropriate remedies”<sup>15</sup>.

The Commission argued that the imposition of regulatory tools does not preclude the undertaking from applying the principles of competition law<sup>16</sup>. Therefore, it focused on demonstrating that there was an evident disproportion between wholesale charges and retail charges for access to the local network. Even though the charges in both cases (wholesale and retail) were subject to sector-specific regulation, DT had commercial discretion which allowed it to restructure its tariffs further so as to “reduce or indeed to put an end to the margin squeeze”<sup>17</sup>. The Commission found that having failed to do so, DT had carried out a practice of margin squeeze constituting the imposition of unfair selling prices within the meaning of Article 102 (a) TFEU.

A definition of margin squeeze is provided in paragraphs 106 and 107 of the EC decision where it is said that “there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking

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<sup>13</sup> EC decision *Deutsche Telekom*, para 32. With respect to the 2<sup>nd</sup> margin squeeze practice (period of time: 2002/2003): “Under the German telecommunications charges order, the price cap method is the preferred tariff regulation tool: strict cost orientation is applied to an individual retail service only if that service cannot be allocated to one of the predetermined baskets (39). This means that the firm whose charges are regulated has some discretion to fix its prices on a commercial basis. The price cap system is made up of one price cap decision, laying down the division of services into baskets, the price adjustment guideline and other general terms for a specified period, and other decisions reached on individual applications for adjustments to charges during that price cap period”.

<sup>14</sup> EC decision *Deutsche Telekom*, para 53.

<sup>15</sup> *Ibid.*, para 54.

<sup>16</sup> *Ibid.*, para 55 “[...] Given the detailed nature of the ONP rules and the fact that they may go beyond the requirements of Article 86 [now Article 102 TFEU], undertakings operation in the telecommunications sector should be aware that compliance with the Community competition rules does not absolve them of their duty to abide by obligations imposed in the ONP context, and vice versa”.

<sup>17</sup> *Ibid.*, para 57.

and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market”<sup>18</sup>.

The definition of “anticompetitive pressure” can be found in paragraph 108 of the decision. The Commission states therein that it is “exerted on competitors’ trading margins, which are non-existent or too narrow to enable them to compete with the established operator on retail access markets. An insufficient spread between a vertically integrated dominant operator’s wholesale and retail charges constitutes anticompetitive conduct especially where other providers are excluded from competition on the downstream market even if they are at least as efficient as the established operator”<sup>19</sup>.

The Commission concluded that DT had abused its dominant position in the relevant markets for direct access to its fixed telephone network, as per Article 102 (a) TFEU. Such abuse consisted of, in particular, charging unfair prices for (i) wholesale access services to competitors and (ii) retail access services in the local network. The Commission found that DT was “in a position to end the margin squeeze entirely by adjusting its retail charges. [Later] DT could in any event have reduced the margin squeeze, by increasing the ADSL retail access charges not subject to the price cap system”<sup>20</sup>. However, it did not do so.

The EC decision was appealed before the Court of First Instance (hereafter: CFI) (now the General Court), but it was upheld in its entirety. The CFI considered that DT had had the opportunity to bring to an end, or to reduce, the margin squeeze deriving from the difference between its retail and its wholesale charges, if only the incumbent had applied to the German regulator for a review of these charges. The CFI deemed that in failing to do so, the EC was right to apply Article 102 TFEU to DT’s abusive conduct, even in the presence of price caps established by the NRA. The CFI observed that: “decisions of national authorities in respect of Community telecommunications law do not in any way affect the Commission’s power to find infringements of competition law”<sup>21</sup>.

DT argued before the CFI (para 70 ff) that “[it] did not have sufficient scope to avoid the margin squeeze alleged in the contested decision. [The] Commission itself found that the applicant did not have scope to fix charges for wholesale access. Charges for wholesale access, which are fixed by RegTP, ought to correspond to the cost of efficient service provisions. Therefore, they

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<sup>18</sup> EC decision *Deutsche Telekom*, para 107.

<sup>19</sup> *Ibid.*, para 108.

<sup>20</sup> *Ibid.*, para 109.

<sup>21</sup> Press release of the GC No. 26/08 on the CFI judgment in Case T-271/03 (CJE/08/26 of 10 April 2008).

do not need to correspond to the applicant's costs"<sup>22</sup>. Again, the applicant argued that it "did not have scope to fix its charges for retail access either. As regards the period from 1998 to 2001, any abuse by the applicant is precluded by the fact that RegTP alone [...] is responsible for the applicant's charges for narrowband connections [...]"<sup>23</sup>.

The incumbent admitted that it could have had, after 2002, room to manoeuvre with respect to narrowband connections and so it could have been accused of abuse of its dominant position only after 2002. However, DT argued also that prices of narrowband access would not have caused conducts to be considered margin squeeze captured under what is now Article 102 TFEU<sup>24</sup>. DT expressly stressed how, as far as narrowband connections are concerned, "[...] under German law, all its retail prices had to be examined and approved in advance by RegTP [...]. The applicant [...] could not depart from the charges thus authorised without incurring a fine – [and] cannot therefore be regarded as having infringed Article [102 TFEU] by applying those charges"<sup>25</sup>.

DT was very bold in stating that it could not be blamed for the contested behaviour (in particular, for fixing retail prices for narrowband connections before 2002) simply because the contested prices had been established by RegTP. Furthermore, the incumbent claimed that it could not have departed from those prices without being fined by the NRA<sup>26</sup>. More interestingly, DT stressed the related ruling of the German Court of Justice (*Bundesgerichtshof*) delivered on 10 February 2004 that had set aside the judgment of the Düsseldorf court (16 January 2004). DT noted that the *Bundesgerichtshof* had agreed with DT's claim that the RegTP usually has to check whether "a charge to which a request for authorisation relates is compatible with Article 82 EC and that responsibility for any infringement of article 82 EC can only exceptionally be ascribed to the undertaking which applied for the charge to be authorised"<sup>27</sup>. The applicant observes that RegPT itself has concluded on several occasions since 1998 that there is no margin squeeze to the detriment of the applicant's competitors. Furthermore, the *Bundesgerichtshof* expressly left open the question of the applicant's responsibility under competition law on account of the regulated charges"<sup>28</sup>.

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<sup>22</sup> CFI judgment *Deutsche Telekom*, para 70.

<sup>23</sup> *Ibid.*, para 71.

<sup>24</sup> *Ibid.*, para 72.

<sup>25</sup> *Ibid.*, para 73.

<sup>26</sup> *Ibid.*

<sup>27</sup> CFI judgment *Deutsche Telekom*, para 79.

<sup>28</sup> *Ibid.*

By contrast, the CFI was adamant in stating that “[...] Articles 81 and 82 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 [...]”<sup>29</sup>. Moreover, “[...], if a national law merely encourages or makes it easier<sup>30</sup> for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Article 81 EC and 82 EC”<sup>31</sup>. The CFI expressly recalled here, among various precedents, the *Conorzio Industrie Fiammiferi* (hereafter: *CIF*)<sup>32</sup> case.

Indeed, a few lines before this statement, the CFI had reaffirmed the concept contained in the *CIF* judgment whereby: “[...] Articles 81 EC and 82 EC apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 81 EC and 82 EC do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings”<sup>33</sup> and “the possibility of excluding particular anticompetitive conduct from the scope of Articles 81 EC and 82 EC, on the ground that it has been required of the undertaking in question by existing national legislation or that the legislation has eliminated any possibility of competitive conduct on their part, has been only partially accepted by the Court of Justice”<sup>34</sup>.

The CFI acknowledged therefore that it was first necessary to look at the applicable national legislation to see whether that legislation gave the incumbent any room for manoeuvre<sup>35</sup>.

The CFI arrived at the conclusion that “[...]even on the assumption that RegTP is obliged to consider whether retail charges proposed by the applicant are compatible with Article 82 EC, the Commission would not thereby be precluded from finding that the applicant was responsible for an infringement. The Commission cannot be bound by a decision taken by a national body pursuant to article 82 EC (see, to that effect, Case C-344/98 *MasterfoodsandHB* [2000] ECR I-11369, para graph 48)”<sup>36</sup>.

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<sup>29</sup> *Ibid.*, para 88.

<sup>30</sup> Emphasis added.

<sup>31</sup> *Ibid.*, para 89.

<sup>32</sup> CJ judgment, Case C-198/01 *Conorzio Industrie Fiammiferi* [2003] ECR I-8055, [2003] 5 CMLR 829, para 67 (hereafter: CJ judgment *CIF*).

<sup>33</sup> CFI judgment *Deutsche Telekom*, para 85.

<sup>34</sup> *Ibid.*, para 86.

<sup>35</sup> *Ibid.*, para 90.

<sup>36</sup> CFI judgment *Deutsche Telekom*, para 120.

Furthermore, the CFI found that DT had a margin of discretion at least with respect to the setting of retail prices in such a way as to avoid engaging in margin squeeze. At para 131, the CFI expressly points out that the incumbent did not use the discretion at its disposal so as to secure an increase in its retail prices, which would have helped to reduce the margin squeeze in the period from 1 January 1998 to 31 December 2001. On the contrary, DT used that discretion to even further lower its retail prices in respect of ISDN lines during that period<sup>37</sup>. The CFI confirmed therefore the findings of the EC, reaffirming that the German incumbent had indeed abused its dominant position, within the margin of discretion which it still had, within the thresholds (price caps) set by the German regulator.

The DT judgment stressed also the negative effects of the contested practice on the communications market as a whole, saying that margin squeeze “will in principle hinder the growth of competition in the downstream markets. If the applicant’s retail prices are lower than its wholesale charges, or if the spread between the applicant’s wholesale and retail charges is insufficient to enable an equally efficient operator to cover its product-specific costs of supplying retail access services, a potential competitor who is just as efficient as [DT] would not be able to enter the retail access services market without suffering losses”<sup>38</sup>.

In response to DT’s claims, the CFI replied that the practice of the European judiciary had consistently gone in the direction of considering Article 101 and 102 TFEU of prevailing weight over national legislation (including the provisions set out by NRAs) when the latter “leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings [...]”<sup>39</sup>. If national legislation makes it easier for companies to infringe competition law, they are still subject to Article 101 and 102 TFEU<sup>40</sup>. The CFI argued therefore that it had first to ascertain whether the “German legal framework” (including also the rules set out by the telecom regulator) would have left some margin of discretion to the undertaking or not<sup>41</sup>.

DT went further in its defence claiming that the German NRA was obliged, according to national law, to verify and examine the conformity of the requested adjustment of charges “with [...] other legal provisions (said by the applicant to include Article 82 EC) [...]”<sup>42</sup>. In other words, DT tried

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<sup>37</sup> Ibid., para 31.

<sup>38</sup> Ibid., para 237. Emphasis added.

<sup>39</sup> Ibid., para 86 ff.

<sup>40</sup> Ibid., para 89.

<sup>41</sup> CFI judgment *Deutsche Telekom*, para 90.

<sup>42</sup> Ibid., para 112.

not only to justify its conduct with the fact that it had set its behaviour within the range authorised by the German regulator, but also that the latter “had to act”, by law, in line with European provisions. However, the CFI correctly recalled in this context the *CIF*<sup>43</sup> case and confirmed the obligation of all organs of the State to respect the provisions of the Treaty. The CFI added that “the national regulatory authorities operate under national law which may, as regards telecommunications policy, have objectives which differ from those of community competition policy (see the Commission’s Notice of 22 August 1998 on the application of the competition rules to access agreements in the telecommunications sector – framework, relevant markets and principles (OJ 1998 C 265, p. 2), Paragraph 13)”<sup>44</sup>.

The CFI stressed also how the same NRA found that “the competitors are not so prejudiced with regard to their competitive opportunities”<sup>45</sup> in the local network by the slight difference between retail and wholesale prices at to make it economically impossible for them to enter the market successfully or even to remain in the market”. It thus somehow confirmed that it was not only DT, but also the German telecoms regulator, that were not fully aware of the anticompetitive consequences of DT’s conducts within a theoretically complete legal framework of tariffs designed by that very regulator<sup>46</sup>.

In its judgment, the CFI had also to look whether the Commission “has established to the requisite legal standard in the contested decision that the applicant has sufficient scope in the period from 1<sup>st</sup> January 1998 to 31 December 2001 to [avoid] the margin squeeze [...]. In that respect, the Commission stated in the contested decision that the applicant ‘was in a position [during that period] to end the margin squeeze entirely by adjusting its retail charges’ [...]”<sup>47</sup>.

The CFI stressed that Treaty provisions (now Articles 101 and 102 TFEU) had to be applied by NRAs. It also confirmed that the Commission was the ultimate guardian of compliance with those provisions by NRAs, indirectly carrying out its own scrutiny over the regulators. Hence, paragraph 140 of the judgment concluded that “the Commission was entitled to find in the contested decision (recitals 164 and 199) that the applicant had sufficient scope during the period from 1 January 1998 to 31 December 2001 to end entirely the margin squeeze complained of in that decision”<sup>48</sup>.

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<sup>43</sup> CJ judgment *CFI*, para 67.

<sup>44</sup> CFI judgment *Deutsche Telekom*, para 113.

<sup>45</sup> Emphasis added.

<sup>46</sup> *Ibid.*, para 117. Emphasis added.

<sup>47</sup> *Ibid.*, para 132. Emphasis added.

<sup>48</sup> CFI judgment *Deutsche Telekom*, para 140.

A similar conclusion was reached with respect to the time from 1 January 2002 to the adoption of the Commission decision (May 2003) with respect to the margin squeeze identified in the EC decision by way of increasing DT's charges for its ASL access services<sup>49</sup>.

In other words, the DT judgment is fundamental in proving that the position of the European Courts is unequivocally in favour of the Commission's enforcement activity aimed at addressing distortions of competition. This is so even in the presence of *ex ante* measures imposed by NRAs, which do not stop incumbents from adopting prices that ultimately amount to an anticompetitive conduct (margin squeeze in the examined case).

The judgment concluded that "while it is not inconceivable that the German authorities also infringed [EU] law – particularly the provisions of Directive 90/388/EC, as amended by Directive 96/19 – by opting for a gradual rebalancing of connection and call charges, such a failure to act, if it were to be established, would not remove the scope which the applicant had to reduce the margin squeeze"<sup>50</sup>.

The judgment of the CFI was upheld in December 2010 by the Court of Justice (hereafter: CJ) which confirmed the correctness of the original conclusion concerning the duty of the incumbent to operate in line with competition law principles, even in the presence of *espace de manoeuvre* established by the NRA. The second instance judgment confirmed that even in the presence of a specific approval by the NRA of wholesale prices proposed by a given incumbent, if the latter has the possibility of bringing to an end an existing margin squeeze, it is obliged to comply with Article 102 TFEU: "According to the case-law of the Court of Justice, it is only if anti-competitive conduct is required<sup>51</sup> of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that Articles 81 EC and 82 EC do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings. 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"<sup>52</sup>.

The CJ recalled in its judgments key jurisprudence showing that even though national provisions may actually induce companies to infringe Articles 101 and 102 TFEU, companies (as well as national legal entities) have a duty

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<sup>49</sup> Ibid., para 151.

<sup>50</sup> Ibid., para 265.

<sup>51</sup> Emphasis added.

<sup>52</sup> CJ judgment *Deutsche Telekom*, para 80. Emphasis added.

to comply with Treaty provisions<sup>53</sup>. The CJ stressed here that the fact that DT “was encouraged by the intervention of the national regulatory authority such as REgTP to maintain the pricing practices which led to the margin squeeze of competitors who are at least as efficient as the appellant cannot, as such, in any way absolve the appellant from responsibility under Article 82 EC”<sup>54</sup>.

The CJ went a step further in stating that “[a]dmittedly it is not inconceivable, as the appellant observes, that the national regulatory authorities may themselves have infringed Article 82 EC in conjunction with article 10 EC, and therefore that the Commission could have brought an action for failure to fulfil obligations against the Member State concerned”<sup>55</sup>. The CJ (paragraph 105) stressed how DT, in its appeal, reiterated the same arguments put forward before in the first instance, in particular, its “good faith” in complaining with the instructions received from the NRA (not challenged by national courts). However, DT did not provide any further elements to deduct that the first instance court erred in law in claiming that both the NRA and the incumbent are bound by EU competition law (Articles 101 and 102 TFEU) and that the Commission complied with its duties in investigating and finding that the company had abused of its dominant position.

The analysis of the DT case-law shows a coherent line of reasoning. The position was confirmed by the CFI in 2008 and the CJ in 2010, which was already clarified by the CJ in its *CIF* judgment of 2003. Where national provisions leave a margin of discretion, and the management of the undertaking at stake still has the possibility of modifying its line of conduct (in the DT case, to avoid infringing Article 102 TFEU, ending the margin squeeze practice), the presence of regulatory provisions adopted in line with European directives (in the captioned matter, provisions of the national telecoms regulator setting retail and wholesale access prices), does not *per se* preclude the possibility that the incumbent will be fined by the competition authority (Commission).

### III. The position of European Courts in the *Telefónica* case

It must be noted that not long before the CFI (now General Court, hereafter: GC) delivered its judgment in the *Deutsche Telekom* case on 10 April 2008,

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<sup>53</sup> *Ibid.*, para 81, 82, 83. In particular, the CJ also recalls Case 322/81 *Michelin v Commission* [1983] ECR 3461, para 57, where it stresses that the dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market.

<sup>54</sup> CJ judgment *Deutsche Telekom*, para 84.

<sup>55</sup> *Ibid.*, para 91. Emphasis added.

the Commission has decided in July 2007 another case of margin squeeze – the *Telefónica* case<sup>56</sup>. This second decision is interesting not only because the fine imposed on the Spanish incumbent was higher (EUR 151 million), but also because of the relevance given to the *effects on competition* of the margin squeeze. In this decision, the Commission evidently took into consideration the Article 102 TFEU review triggered by the Discussion Paper of 2005.

The *Telefónica* decision relates to the abuse of a dominant position carried out by way of margin squeeze over a significant period of time (five years) with respect to the wholesale broadband access market at the national and regional level (not a local loop unbundling case). The incumbent charged high broadband access rates to its competitors, keeping the access rate very low for its own retail broadband access services, and thus forcing competitors out of the market. This conduct not only damaged competitors in the long term (leading to the severe fine) but also hindered many companies from entering the market, consequently excluding final consumers from having access to broadband services<sup>57</sup>.

The Commission pointed out that unless competitors decided to create an alternative network, which was not viable economically, they had no other choice but to deal with the incumbent to get access to its ADSL enabled local loops in order to provide DSL access services<sup>58</sup>. The decision noted that from 2002 onwards, the Spanish regulator mandated wholesale access to the incumbent's network at national and regional level in favour of competitors (paragraphs 289-290). Access rates were set applying the so-called *retail minus price* regime<sup>59</sup>, which has a number of positive consequences. The *retail minus price* regime: (i) does not alter recovery of costs of wholesale access; (ii) it should avoid margin squeeze between the incumbent's wholesale and retail prices; (iii) it ensures productive efficiency (a potential entrant enters only

<sup>56</sup> EC decision *Telefónica* (Case COMP/38.784); on appeal, GC judgment *Telefónica* (Case T-336/07); on appeal, CJ judgment *Telefónica* (Case C-295/12); see also AG Wathelet opinion in *Telefónica* Case C-295/12.

<sup>57</sup> Nellie Kroes, former Commissioner for Competition at the European Commission, pointed out that Spanish consumers paid 20% more than the EU-15 average for broadband access, with a rate of penetration 20% below EU-15 average, and a growth 30% lower than that of the EU-15. See press release IP/07/1011 of 4<sup>th</sup> July 2007.

<sup>58</sup> See para 74 of the decision: "An undertaking wishing to provide broadband access to the end-users throughout the Spanish territory has no other option, save the economically not viable roll-out of an alternative nation-wide access network, but to contract one of the wholesale ADSL services available on the market, which are all built on TESA's access network consisting of ADSL enabled local loops".

<sup>59</sup> Under the retail-minus system, the wholesale access charge is set at the vertically-integrated operator's retail price minus the incremental cost of providing downstream services and any network elements supplied by the access seeker. See W.J. Baumol, J.G. Sidak, "The pricing of Inputs Sold to Competitors" (1994) 11 *Yale Journal of Regulation* 196.

if entry is viable, which occurs only if that entrant is more efficient than the incumbent in the given downstream activity); and (iv) the system preserves the incentives of networks operators (including the incumbent) to invest in their own infrastructure.

Access based on similar price conditions was in line with both the 1998 liberalization regulatory framework<sup>60</sup>, and with the electronic communications regulatory package of 2000 (in particular with the Framework Directive<sup>61</sup> and the Access Directive<sup>62</sup>).

The decision at stake is particularly important for the relevance given to *the abuse's exclusionary effects on competition*, in line with the new perspective that forms the basis of the Discussion Paper and Guidance Paper<sup>63</sup>. The decision showed that the margin squeeze “affected Telefónica's competitors' ability to enter into the relevant market and exert a competitive restraint on Telefónica”<sup>64</sup>. As a result of the margin squeeze, Telefónica's competitors, even those as efficient as the incumbent, incurred “unsustainable” losses, being ultimately forced to leave the competition and discouraged from innovating and investing in new infrastructures (impact on growth).

The GC dismissed an appeal against the *Telefónica* decision in March 2012<sup>65</sup>. In its judgment, the GC rejected the claim submitted by the incumbent that the Commission (i) had not taken into consideration that the infringement was committed in part through simple negligence by Telefónica, or (ii) had considered its negligence as “extremely serious”. The GC confirmed that the company was dominant in the wholesale markets where the margin squeeze occurred and rejected Telefónica's claim that the Commission had failed to carry out a *margin squeeze test* based on an optimal mix of available wholesale products.

The Court confirmed also the approach kept in the *Deutsche Telekom* case with respect to the balance between application of *ex ante* provisions and

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<sup>60</sup> As confirmed by the judgment given in a preliminary ruling by CJ on 13 December 2001 in Case C-79/00 *Telefónica de España vs. Administración General del Estado* [2001] ECR I-10057.

<sup>61</sup> Art. 8 of the Framework Directive.

<sup>62</sup> Art. 8 of the Access Directive.

<sup>63</sup> EC decision *Telefónica*. The *Telefónica* decision devotes a large part of the text to the impact assessment of the abusive conduct (para 564 to para 618) showing high interest not only for the mere effects of the margin squeeze on competitors and consumers but also, more generally, on the entire broadband market, the Spanish economy as a whole, and as part of the European construction.

<sup>64</sup> See point 3.3. “Effects of the abuse” of the summary of the EC decision *Telefónica*, in OJ C83/6 of 2 April 2008.

<sup>65</sup> GC judgment *Telefónica*. The GC judgment (Case T-336/07) was confirmed upon appeal on 10 July 2014 by the CJ (Case C-295/12); the operative part of the judgment is available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2014.315.01.0003.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.315.01.0003.01.ENG).

compliance with EU competition law, stating that the decisions taken by NRAs on the basis of a national regulatory framework do not release dominant firms from their duty to comply with EU competition law<sup>66</sup>.

Similarly to the *Deutsche Telekom* case, it must be stressed that the GC made it clear that “Article 82 EC applies only to anti-competitive conducts engaged in by undertakings on their own initiative. If anticompetitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 82 EC does not apply”<sup>67</sup>. However, “Article 82 EC may apply if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition”<sup>68</sup>. The same stance was presented by the AG Wathelet<sup>69</sup> in the appeal proceedings before the CJ, position substantially upheld in the CJ judgment delivered on 10 July 2014<sup>70</sup>.

The GC also rejected the argument put forward by Telefónica that “the Commission had at its disposal an *ad hoc* formal instrument of intervention resulting from Article 7 of the Framework Directive, which enabled it to intervene in a situation such as that at issue in the present case”<sup>71</sup>. In other words, Telefonica argued that the Commission should have followed a regulatory approach rather than adopting a decision imposing a pecuniary fine. The GC stated clearly, however, that *ex-ante* remedies do not exclude the intervention of the Commission when Article 102 TFEU is infringed: “[t]he existence of that measure [as per Article 7 of the Framework Directive<sup>72</sup>] has no effect whatsoever on the powers which the Commission derives directly from Article 3(1) of Regulation no 17 and, since 1 May 2004, from Article 7(1) of Regulation 1/2003 to find infringement of Articles [101 and 102 TFEU] [...]. Thus, the competition rules laid down in the EC Treaty supplement, by *ex post* review, the regulatory framework adopted by the EU legislature for *ex ante* regulation of the telecommunications markets [...]”<sup>73</sup>.

The judgment also rejected Telefónica’s claims that the Commission would have infringed the principles of subsidiarity, proportionality and legal certainty

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<sup>66</sup> GC judgment *Telefónica*, paras 327 ff.

<sup>67</sup> *Ibid.*, para 328.

<sup>68</sup> *Ibid.*, para 329.

<sup>69</sup> AG Wathelet opinion in *Telefónica* Case C-295/12.

<sup>70</sup> CJ judgment *Telefónica*.

<sup>71</sup> *Ibid.*, para 291.

<sup>72</sup> Between brackets are the references in the above-mentioned judgment to *Deutsche Telekom v Commission*.

<sup>73</sup> GC judgment *Telefónica*, para 293. Emphasis added).

“since [the Commission] interferes without good reason in the exercise of the power of the [Spanish telecommunications regulator]”<sup>74</sup>.

However, in particular with respect to the principle of subsidiarity, the GC stated that Article 5 EC provides that the Commission can intervene and take action “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community [the Commission]”<sup>75</sup>.

Here the GC confirmed once again, in line with the *Deutsche Telekom* judgments, the Commission’s competence in applying and enforcing Articles 101 and 102 TFEU going beyond the range of actions of NRAs. The judgment stated that the Spanish regulator “is not a competition authority and it has never intervened to enforce Article 82 EC or adopted decisions relating to the practices penalised in the contested decision [...]. The Commission cannot be bound by a decision taken by a national authority pursuant to Article 82 EC”<sup>76</sup>.

The GC also recalled the judgment in the *Deutsche Telekom v Commission*<sup>77</sup> case where the CJ stated “[...] notwithstanding such legislation, if a dominant vertically integrated undertaking has scope to adjust even only its retail prices, the margin squeeze may on that ground alone be attributable to it”<sup>78</sup>.

At CJ level, AG Wathelet confirmed in his opinion<sup>79</sup> the principle of unlimited jurisdiction of the European Court, and its possibility to cancel or to confirm a fine, but also to reduce or to increase it<sup>80</sup>. He also confirmed that the EC did not breach the duty of cooperation with the Spanish regulator. He thus reaffirmed the principle that, in line with Regulation 1/2003, the Commission does not have a duty of consultation with NRAs<sup>81</sup>. He spoke for the rejection of Telefónica’s appeal claim whereby, according to the incumbent, the EC had breached both the duty of loyal cooperation and good administration. He also argued for the rejection of the claim that the GC failed to take into consideration Telefónica’s claim that it had, in good faith,

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<sup>74</sup> Ibid., see paragraphs 296 ff.

<sup>75</sup> Ibid., 297.

<sup>76</sup> Ibid., 301. Emphasis added.

<sup>77</sup> CJ judgment *Deutsche Telekom*, para 85.

<sup>78</sup> GC judgment *Telefónica*, para 330.

<sup>79</sup> AG Wathelet opinion in *Telefónica* Case C-295/12.

<sup>80</sup> The AG also stated that the paragraphs of the GC’s judgment in *Telefónica* with respect to the calculation of the fines do not contain a genuine analysis and recommended the GC to conduct *ex novo* a full review of the Commission decision with respect to the amount of the fine.

<sup>81</sup> AG Wathelet opinion in *Telefónica* Case C-295/12, para 41.

relied on the conformity of its pricing practices with the scope of Article 102 TFEU<sup>82</sup>.

By contrast, with respect to the imposition and effectiveness of fines, AG Wathelet submitted that the GC had not exercised its power of review over the EC decision correctly with respect to the fine. As such, he argued for the annulment of the GC judgment<sup>83</sup>.

However, the CJ upheld on 10 July 2014 the GC's judgment<sup>84</sup>. The CJ rejected the claim that the GC "[had] disregarded the principle of legal certainty by accepting that conduct which complied with the regulatory framework may constitute a breach of Article 102 TFEU"<sup>85</sup>. The CJ considered the complaint as "unfounded since, as the Commission, the ECTA and France Telecom correctly observe, the fact that an undertaking's conduct complies with a regulatory framework does not mean that such conduct complies with Article 102 TFEU"<sup>86</sup>.

Paragraphs 134 and 135 of the CJ judgment are key in reaffirming the centrality, independence and autonomy of the Commission in ascertaining potential infringements of Article 102 TFEU. Telefónica argued that "the General Court clearly distorted their claims and disregarded the fact that the objectives pursued by competition law and by the regulatory framework are the same. Since those objectives are the same, the General Court should have ascertained whether the Commission's intervention on the ground of infringement of competition law is compatible with the objectives pursued by the Comisión del Mercado de las Telecomunicaciones (Spanish Commission for the Telecommunications Markets, CMT) under the regulatory framework"<sup>87</sup>.

However the CJ rejects this argument stating that "it is, in part, inadmissible, in so far as it alleges distortion of the appellants' arguments, since the appellants fail to identify the arguments which they claim the General Court distorted and, in part, unfounded, in so far as it alleges breach of the principle of subsidiarity, since the Commission's implementation of Article 102 TFEU is not subject to any prior consideration of action taken by national authorities"<sup>88</sup>.

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<sup>82</sup> Ibid., para 55.

<sup>83</sup> Ibid., para 175.

<sup>84</sup> CJ judgment *Telefónica*.

<sup>85</sup> Ibid., para 132.

<sup>86</sup> Clear on this point is para 128 of the CJ's judgment of 10 July 2014: "It should be recalled in that regard that Article 102 TFEU is of general application and cannot be restricted, inter alia, as the General Court was correct to point out at paragraph 293 of the judgment under appeal, by the existence of a regulatory framework adopted by the EU legislature for ex ante regulation of the telecommunications markets".

<sup>87</sup> CJ judgment *Telefónica*, para 134.

<sup>88</sup> Ibid., para 135. Emphasis added.

This point confirms the approach of European Courts *vis à vis* the role of the Commission with respect to the conduct of dominant undertakings as far as they allege that they have followed the guidelines of NRAs, without being left with a margin of doubt.

The judgments in the *Deutsche Telekom* and *Telefónica* cases are therefore particularly important for the definition and the “reconstruction” of the conduct that may lead to abuse by way of a margin squeeze. They are also quintessential for having clarified the applicability of Article 102 TFEU to conducts that might have been put in place within the boundaries and the limits of regulatory provisions that, *per se*, are not sufficient to exclude an infringement by the incumbent. The position of the Commission and the European Courts (as well as of the AGs) is unanimous in stressing that in analysing the behaviour of companies, the EC is exclusively bound by the Treaty and its provisions (Articles 101 and 102 TFEU). Considered irrelevant are therefore *ex ante* remedies (including the imposition of prices aimed at favouring rather than hindering competition) imposed on those companies at a regulatory level.

Before focusing on the rationale of the *CIF* case, showing the consistency of the last decade’s worth of EU jurisprudence, another case of margin squeeze has to be mentioned. *TeliaSonera* is a case referred in 2009 to the CJ by the Stockholm District Court. The CJ expressed serious concerns about the consequences of margin squeeze for end-consumers (preliminary ruling judgment given on 14 February 2011)<sup>89</sup>.

The case is relevant because the Commission, somehow departing from its own Guidance Paper, stressed that margin squeeze has to be considered harmful for consumers without passing through the “refusal to supply test”, irrespective of whether the abusive practice is carried out in the presence of a pre-existing duty to deal. As stressed earlier, the Guidance Paper considered conduct in the form of margin squeeze under the heading “refusal to supply”<sup>90</sup>

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<sup>89</sup> CJ judgment of 17 February 2011 in case *Konkurrensverket v TeliaSonera Sverige* (Case C-52/09) [2011] ECR I-000, [2011] 4 *C.M.L.R.* 982 (hereafter: CJ judgment *Telia Sonera*); see also the Opinion of AG Mazák in this case, available at [http://curia.europa.eu/juris/document/document\\_print.jsf;jsessionid=9ea7d2dc30dbf77499818e064569b96087495a7299e9.e34KaxiLc3qMb40Rch0SaxuLbNn0?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=78688&occ=first&dir=&cid=489105](http://curia.europa.eu/juris/document/document_print.jsf;jsessionid=9ea7d2dc30dbf77499818e064569b96087495a7299e9.e34KaxiLc3qMb40Rch0SaxuLbNn0?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=78688&occ=first&dir=&cid=489105).

<sup>90</sup> See on this point R. Nazzini, *The Foundations of European Union Competition Law – the Objective and Principles of Article 102*, Oxford OUP 2001, pp. 273–274. Nazzini notes that AG Mazák suggested a different approach, with respect to refusal to supply, in particular (i) to look at the margin squeeze as a form of vertical foreclosure tactic similar to that carried out by refusal to supply, (ii) to take into consideration the risk that if there is not a duty to deal, “to impose a duty to charge upstream and downstream prices that allow as efficient downstream firms to compete effectively would reduce the dominant undertaking’s investment incentives”

as an indirect form of abuse carried out by a dominant undertaking, which in the particular market has a duty to supply access to an essential facility.

The CJ confirmed its concern for final consumers, irrespective of the existence of all the pre-conditions that were considered fundamental in the Commission's Guidance Paper, in line with existing and well-settled jurisprudence. The CJ stresses in *Telia Sonera* how "the fact that a vertically integrated undertaking, holding a dominant position on the wholesale market in asymmetric digital subscriber line input services, applies a pricing practice of such a kind that the spread between the prices applied on that market and those applied in the retail market for broadband connection services to end users is not sufficient to cover the specific costs which that undertaking must incur in order to gain access to that retail market may constitute an abuse within the meaning of Article 102 TFEU"<sup>91</sup>.

More importantly, the CJ underlined that any circumstances may be useful to determine whether margin squeeze is abusive, but certainly "it is necessary to demonstrate that, taking particular account of whether the wholesale product is indispensable, that practice produces an anti-competitive effect, at least potentially, on the retail market, and that the practice is not in any way economically justified"<sup>92</sup>.

The analysis of these two cases shows that the doctrine expressed by the *CIF* case in 2003 is still applicable. The *rationale* behind that judgment, given at the dawn of the so called "great enlargement" of the European Union, was that of acknowledging the power (or, rather, the duty) of national competition authorities (NCAs) to "neutralise" any existing pieces of national legislation in breach of a competition law provision (in that specific case, in breach of Article 101 TFEU)<sup>93</sup>.

Not all authors are in favour of such an approach. G. Monti noted how there could be a valid reason to argue that "until national regulators can be trusted to act independently of the government and of the incumbent operator, the Commission's ability to use competition law to oversee the markets is necessary to ensure that markets are liberalised and incumbents are not protected by regulators"<sup>94</sup>. However, he also argued that the power of the EC and the application of competition law, in particular when NRAs

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and, most interestingly (iii) to take into consideration an "a fortiori", a very subtle, argument: if the duty to deal is not a pre-condition, and the company in theory could refuse to supply, "why can it not harm them by charging upstream and downstream prices that make it difficult for them to compete?"; R. Nazzini, *The Foundations...*, op. cit., p 274.

<sup>91</sup> CJ judgment *Telia Sonera*, para 115 (conclusion). Emphasis added.

<sup>92</sup> *Ibid.*, para 115.

<sup>93</sup> CJ judgment *CIF*.

<sup>94</sup> G. Monti, "Managing the Intersection of Utilities Regulation and EC Competition Law", (2008) 4(2) *Competition Law Review* 125f.

act according to normative schemes set up by EU law in regulated sectors, should encounter a reasonable limit in line with a wider interpretation of the principles of subsidiarity, proportionality, legal certainty and loyal cooperation (all principles recalled by Telefónica’s lawyers in the CFI appeal). Indeed, for G. Monti, there might be circumstances in which the Commission should be more “deferential” to the regulators, in particular when reasons of public interest may suggest that actions undertaken or proposed by the regulators may turn to be more apt to address long-term concerns, as for instance, the imperative of ensuring stable growth and innovation<sup>95</sup>.

The Italian NCA had adopted a more cautious approach, arguing that in principle the investigated company could have acted against the general principles of competition law since national legislation “authorised” it. By contrast, the CJ was adamant in saying that the duty of the NCA to neutralise national legislation contradicting EU law provisions, was in line with the general principle of the primacy of European Law<sup>96</sup>. The European judiciary here drew a line between breaches of competition law before the date of the adoption of the NCA’s decision, and breaches committed after that date. The need to preserve legal certainty for the Court led to a conservative interpretative approach of the conducts put in place before the NCA’s decision, therefore excluding the imposition of administrative or criminal sanctions for conducts imposed by national legislation.

To quote P. Nebbia, “the law continues to constitute, for the period prior to the decision to disapply it, a shield for the undertaking concerned against all the consequences of an infringement of Article 81 and /or 82 [now Art. 101 and 102 TFEU] vis-à-vis both public authorities and other economic operators”<sup>97</sup>. Of course once the NCA had adopted a decision (with definitive effects) imposing the disapplication of national, anticompetitive provisions, from that moment on “the ‘shield’ no longer protects them for future infringements: their future conduct is therefore liable to be penalized”<sup>98</sup>.

The approach of the *Deutsche Telekom* and *Telefonica* margin squeeze cases is slightly different, but reaches a similar conclusion.

The most important inference emerging from the analysis of these two cases is that when national legislation (and provisions of NRAs) sets prices as guidelines to be followed by undertakings in a dominant position, the competition authority (and, *a fortiori*, the Commission) will look at the

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<sup>95</sup> Ibid., 131.

<sup>96</sup> See one of the first articles published on the judgment by P. Nebbia, Case C 198-01, *Consorzio Industrie Fiammiferi (CIF) v Autorita’ Garante delle Concorrenza e del Mercato*, judgment of the Full Court of 9 September 2003, (2004) 41 *C.M.L.R.* 843ff.

<sup>97</sup> Ibid., 844.

<sup>98</sup> Ibid.

nature of those provisions more than at the position adopted by the NCA with respect to those provisions. The NCA and the Commission will look whether the provision imposes or merely facilitates anticompetitive conducts that the dominant undertaking can modify in order to avoid exclusionary anticompetitive conducts.

It is worth recalling here also the conclusions reached by the *CIF* judgment. If a (past) national provision *imposed* a specific conduct (in this case, price-cap), the competition authority “may not impose penalties in respect of past conduct on the undertakings concerned [...]”<sup>99</sup>. By contrast, and more importantly, the *CFI* case made it clear also that conducts merely facilitated by national provisions but conflicting with competition law, would have been subject to scrutiny by the NCAs as well as fined (the NCA “may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or promoted by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted”<sup>100</sup>).

#### IV. Reference to the energy sector. Similarity of approach

Dr Koch (deputy head of unit at the DG competition, in charge of the energy sector) reaffirmed in a presentation given in Athens in June 2013 the primacy of competition law over the activities of regulators. Though he did not expressly refer here to the possibility that NRAs establish price-guides that may “mislead” energy incumbents (as argued by DT and Telefonica in their defences), he nevertheless stressed the importance of creating a competitive energy market in Europe through the cooperation of regulators and competition authorities. He pointed out how, where regulators do not adopt measures that prevent or deter abuse such as refusal to supply, excessive prices or margin squeeze, competition authorities have to take action through their enforcement activity<sup>101</sup>. In other words, he very clearly confirmed the

<sup>99</sup> *Ibid.*, conclusion, point 1.

<sup>100</sup> *Ibid.* For a reconstruction of the perception of the primacy of the European provisions over national law and the role played by the NCA in the year following the mass enlargement of 2004, see A. Kaczorowska, “The power of a national competition authority to disapply national law incompatible with EC law-and its practical consequences”, (2004) 9 *European Competition Law Review* 591 ff.

<sup>101</sup> Dr Oliver Koch (deputy head of unit at DG Energy, European Commission), “Creating competitive energy markets through joint enforcement of energy regulators and competition authorities”, conference held in Athens on the 5 June 2013, available at <http://www.energy-community.org/pls/portal/docs/2106186.PDF>.

supremacy of European competition law over regulatory activity, also in terms of remedies (behavioural as well as structural) that can be adopted to create a “level playing field” for competition. Reference to the recent E.ON<sup>102</sup>, RWE<sup>103</sup> and ENI<sup>104</sup> commitments decisions is self-explanatory here where the EC accepted commitments meant to adopt structural measures going beyond the scope of European and national legislation authorising mere behavioural remedies to enhance competitiveness. He stressed how it may happen that regulators (for instance, in the energy sector, but similar conclusion can be drawn with respect to communications) may have insufficient competencies or independence. By contrast, competition law could be more efficient, applied faster and with stronger investigative powers.

The most important consequence from this reasoning, in favour of the supremacy of competition enforcement over the activities of NRAs, is that the Commission can also use the tools established by Article 7 of Regulation 1/2003. Hence, not only fines or behavioural remedies, but also structural remedies would be applicable under EU law.

## V. Conclusion

The analysed judgments have confirmed the unity of the European legal system over the last decade, through the joint actions of the European Commission, NCAs and European Courts. This is true, in particular, in regulated markets such as electronic communications, though the same conclusion can be reached with respect to energy markets. With respect to the latter, the EC has adopted pro-competitive remedies in a number of commitments decisions already (E.ON, RWE and ENI) that go beyond existing regulatory provisions. It has shown that when the enforcement authority is called to recreate a pro-competitive environment, it has a wider “room of manoeuvre” at remedial level than the same regulatory provisions, both at European and national level.

The paper’s conclusion is meant to show how *Deutsche Telekom* and *Telefónica* are in line with the *Conorzio Industrie Fiammiferi (CIF)* judgment. Both confirm the existence of a limit for the enforcement activities of the

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<sup>102</sup> EC decision *E.ON*, available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39388/39388\\_2796\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39388/39388_2796_3.pdf).

<sup>103</sup> EC decision *RWE (Gas Foreclosure)*, available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39402/39402\\_576\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39402/39402_576_1.pdf)

<sup>104</sup> EC decision *ENI*, available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39315/39315\\_3019\\_9.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39315/39315_3019_9.pdf).

EC in applying Article 101 and 102 TFEU when national legislation requires specific anticompetitive behaviours (see on this respect the position of the GC in *Telefonica* where it expressly states “[...] Article 82 EC applies only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 82 EC does not apply. In such a situation, the restriction of competition is not attributable, as that provision implicitly requires, to the autonomous conduct of the undertakings [...]”<sup>105</sup>, but also *de facto* confirming the non-applicability of the “regulatory authority *dixit*” defence where the dominant undertaking had the possibility of adopting upstream or downstream (retail) prices that would not have driven competitors from the market.

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<sup>105</sup> GC judgment *Telefónica*, para 328 ff.