

Spanish Competition Tribunal Rejects Price Squeeze Allegations In Relation to Mobile VPN Services

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On December 20 and 22, the Spanish Competition Tribunal (Tribunal de Defensa de la Competencia, or TDC) dismissed three actions that were brought by Uni2 and WorldCom (both alternative fixed operators) against the three Spanish mobile operators (Telefónica Móviles, Vodafone, and Amena) for abuse of a dominant position. The complainants alleged that the three mobile operators applied a price squeeze on the corporate market segment and discriminatory pricing practices as regards mobile termination services.¹ In particular, according to Uni2 and WorldCom, during the period 2000-2002, the three Spanish mobile operators offered retail services to corporate clients (including pricing terms for fixed-to-mobile calls) that were lower than the wholesale call termination prices imposed on other telecommunications operators, and in particular fixed telecommunications operators.² The factual issues in the three cases brought before the TDC against Telefónica Móviles, Vodafone, and Amena are slightly different, but the legal conclusions are essentially the same.

The decisions of the TDC followed an initial finding by the lower competition authority in charge of making the preliminary assessment of the file (the Servicio de Defensa de la Competencia, or SDC) that the three mobile operators had abused their dominant position on the market for wholesale call termination (in violation of Article 82 EC Treaty and its Spanish equivalent, Article 6 of the Spanish Law on Competition). The SDC had found that the three mobile operators abused their dominant position by:

- applying a price squeeze between the wholesale price for mobile call termination and the retail price offered to corporations for calls terminating on their mobile networks, which led to fixed telecommunications operators such as Uni2 and WorldCom being excluded from the corporate market;
- applying discriminatory call termination charges among the different telecommunications operators; and
- engaging in discrimination by charging higher prices for national originating traffic than for international originating traffic terminating on their respective networks.

The TDC reversed the SDC's findings and concluded that none of the three mobile operators committed an abuse of a dominant position.

Complaints regarding a very similar (if not identical) issue had been made in other E.U. countries. On May 21, OFCOM (the national regulatory authority in the U.K.) issued a ruling essentially rejecting a complaint alleging margin squeeze on the part of the four mobile network operators in the U.K. (Vodafone, O2, Orange, and T-Mobile).³ Conversely, the French Conseil de la

Concurrence issued a ruling with regard to the charges imposed by France Télécom and SFR Cégétel for fixed-to-mobile calls on October 14, finding that an abuse of a dominant position had been committed and imposing fines of EUR18 million (U.S.\$23.8 million) on France Télécom and EUR2 million (\$2.6 million) on SFR.⁴

Mobile Call Termination Market

The TDC Decision starts by reviewing the market on which the alleged abuses occurred. The TDC revisits the market definition commonly adopted by the Commission and, by now, many national regulatory authorities for the provision of mobile termination services.⁵ The TDC does not go so far as to say that a mobile operator is not dominant on the market for call termination on its network; it does however question whether mobile operators are really able to act *independently* on this market.⁶

The TDC characterizes mobile call termination as an intermediate service, which is inevitably associated with the existence of a customer who wants to communicate with users belonging to different networks. In this regard, the TDC first notes that the income derived from call termination is dependent on price (mobile termination rate) and output (traffic volume), both of which are determined by dynamics that apply on different markets. Whereas prices are negotiated by means of a bilateral agreement between the two interconnected operators, volume is determined by the number of users relying on the network of the operator who is providing call termination. The higher the number of users, the higher the income. The TDC therefore states that mobile network operators may have a monopoly position with regard to the price variable (which is negotiated by bilateral agreements), but not necessarily with regard to the output variable. The latter is subject to competition among operators to attract the largest number of users to their mobile networks. Even for the price variable, the TDC notes that it is not really adequate to refer to monopoly positions, but to "*bilateral monopolies*", as one operator requesting termination services on another operator's network will have the same monopoly position with regard to call termination on its own network.

The TDC also refers to the negotiating power of Telefónica, in its capacity as a dominant fixed telecommunications operator, *vis-à-vis* mobile operators setting their mobile termination rates. According to the TDC, alternative fixed telecommunications operators indirectly benefit from Telefónica's negotiating power as a result of regulatory obligations such as transparency and non-discrimination applying on mobile termination charges.

Despite these *dicta*, the TDC does not go so far as to say that mobile operators are not dominant on the market for call termination on their respective networks. Interestingly, the TDC does not address Vodafone's argument that the market for mobile call termination to the corporate segment is not a relevant market of

its own, in view (among other) of the inapplicability of the “calling party pays” (CPP) principle as regards virtual private network (VPN) offers.⁷ In the U.K., OFCOM decided a case on mobile termination prices for VPNs, in which the inapplicability of the CPP-principle triggered its finding that the market for mobile call termination for VPNs (or closed user groups) was a multi-operator market rather than a market where each operator is dominant on its own network.⁸ OFCOM’s further analysis of this market resulted in a finding that none of the operators were dominant, which ultimately resulted in the dismissal of the part of the complaint based on abuse of a dominant position.⁹

Price Squeeze

The TDC’s analysis of the price squeeze allegation focuses on prices charged to corporate customers for mobile termination within a mobile VPN, as opposed to prices charged at wholesale level to fixed operators such as Uni2 and WorldCom for mobile termination. The TDC notes that a price squeeze can only be substantiated if the wholesale price for mobile call termination, as set out in the interconnection agreement between the fixed and mobile telecommunications operators, can be clearly isolated as a component of the overall cost borne by the mobile operator when providing the mobile VPN to large corporations.

According to the TDC – departing from the earlier findings of the SDC – this is not a straightforward exercise in a market as complex as mobile VPN services. Mobile VPNs are integrated services (which include e.g., services such as call origination, call termination, and access). Such services generate important economies of scope for the providers, which can offer the bundle of services at more attractive prices than if the services were offered separately. In that context, the TDC stresses that it is difficult to compare individual calls charged in the context of a wholesale fixed-to-mobile call termination agreement with calls from the fixed-to-mobile network that are a part of an integrated (VPN) service offered to corporate clients. Contrary to the SDC, the TDC therefore did not conduct a price squeeze analysis and rejected the price squeeze allegation (which was based only on the price level of some individual calls that could be made in the context of mobile VPN services).

The TDC refers to other elements that probably guided its decision. It mentions that the offering of an integrated package to large corporations at lower cost than the individual services is pro-competitive. The TDC also stresses that competition with regard to corporate customers takes place between the different mobile VPN packages offered by the operators, rather than between mobile VPN calls and individual fixed-to-mobile calls as offered by alternative telecommunications operators.¹⁰ Finally, in the cases against Telefónica Móviles and Vodafone, the TDC incidentally refers to the Spanish Telecommunications Regulator which ruled only recently (in 2003) that these two mobile telecommunications operators were not applying a cost-oriented approach when setting the interconnection rates. Prior to that time, according to the TDC, there were thus reasonable doubts as to whether the mobile telecommunications operators were in fact applying interconnection rates that were not in conformity with the applicable regulatory principles.¹¹

The TDC ultimately concludes that Telefónica Móviles (as well as Vodafone and Amena in the related cases) has not committed a price squeeze in violation of Article 82 EC and its Spanish equivalent.

Discrimination

Having reviewed the price squeeze allegation, the TDC decision makes only a brief assessment of the discrimination claims.

First, on the allegation of discrimination through the application of higher prices for national mobile call termination than for international mobile call termination,¹² the TDC refers to the fact that during the early stages of regulation of the telecommunications market, even the Spanish regulator allowed for the different treatment of national and international mobile call termination. In any event, the TDC concludes that the alleged discriminatory practice did not lead to any distortion of competition, as the different rates between national and international calls applied indistinctly to all operators (either fixed or mobile operators).

Second, on the application of discriminatory call termination prices to mobile telecommunications competitors,¹³ the TDC notes that the interconnection prices (including call termination) applied to the different operators must be disclosed to the Spanish Telecommunications Regulator. Thus, according to the TDC, if any irregularity has taken place, this error should primarily be attributed to the Spanish Telecommunications Regulator who is in charge of the surveillance of the Spanish telecommunications sector, not to the company itself.

The TDC thus concludes that, on the issue of discriminatory pricing practices, Telefónica Móviles (as well as Vodafone and Amena in the related cases) has committed no violation of Article 82 EC or its Spanish equivalent.

Dissenting Opinion

Interestingly, the procedural rules of the TDC allow for judges to express a dissenting opinion. In the case against Telefónica Móviles, the possibility was used by two of the nine judges of the TDC, which noted their disagreement with the majority opinion on the price squeeze issue. No dissenting opinion was expressed in the other two cases against Vodafone and Amena.

The dissenting opinion expressed doubts as to the argument that alternative fixed telecommunications operators would indirectly benefit from the buyer power of Telefónica’s fixed telecommunications business when negotiating the interconnection rates with Telefónica Móviles. Both the fixed and the mobile entities of Telefónica have market shares in excess of 50 percent in their respective markets, and are perfectly capable of agreeing on a profit-maximizing strategy for the Telefónica group as a whole. More generally, the dissenting opinion indicated that, in their view, there was little doubt that Telefónica Móviles was able to act independently – and thus, be dominant – on the wholesale market for call termination on its network during the suspected period.

The dissenting opinion further stated that, contrary to the findings of the majority opinion, it is possible to disaggregate the mobile call termination costs in a mobile VPN service, and thus proceed to a meaningful price squeeze analysis. Fixed to mobile call termination can, according to the dissenting judges, be a very important component of a mobile VPN offer and through the price squeeze on this component of the service, Telefónica Móviles could effectively prevent a large number of fixed telecommunications operators from entering this market for integrated services. In support of its opinion, the dissenting vote refers to the *Deutsche Telekom* decision of the European Commission and the decision of the French Conseil de la

Concurrence (with an express reference to the French decision rejecting the "integrated services" defense to justify a price squeeze¹⁴).

Notes

- 1 TDC Decisions of December 20 and 22, 2004, in Case 571/03, *Uni2/Telefónica Móviles*; Case 572/03, *Uni2 and WorldCom/Vodafone*; and Case 573/03, *WorldCom/Amena*, www.tdcompetencia.es/.
- 2 The factual background of these cases relates specifically to corporate market segments and should be distinguished from competition issues that may arise in relation to "on-net" tariffs applied by mobile operators on the residential market.
- 3 OFCOM Decision of May 21, 2004, Case CW/00615/05/03, *Suspected margin squeeze by Vodafone, O2, Orange and T-Mobile*, www.ofcom.org.uk (hereafter "OFCCOM Decision of May 21, 2004").
- 4 Conseil de la Concurrence, Decision 04-D-48 of 14 October 2004, www.conseil-concurrence.fr. The decision of the Conseil de la Concurrence is presently under appeal.
- 5 In its Recommendation on relevant product and services markets (Commission Recommendation of February 11, 2003, O.J. L 114/45) the Commission defined the market for wholesale mobile termination as a single operator market on which all operators automatically hold a monopoly position. Although the TDC made its analysis under competition law, in the context of the new EC Regulatory Framework, all national regulatory authorities that have notified market analyses as regards mobile call termination have until now agreed with the definition of the Commission Recommendation and declared that all mobile operators have SMP on the market for call termination on their networks. OFCOM took a different position, however, as regards call termination for corporate customers within a Virtual Private Network (VPN) in the context of the suspected margin squeeze case (see above, note 3)
- 6 Under E.C. rules, a dominant position is defined as a situation in which an operator is able either individually or jointly to behave to an appreciable extent independently of competitors, customers, and ultimately consumers, see Case 85/76, *Hoffmann-La Roche v. Commission*, 1979 ECR 461.
- 7 The CPP principle implies a disconnect between the calling party, who ultimately pays for the termination service, and the mobile subscriber (the called party) who chooses the mobile operator or services provider. As a result of this disconnect, it is assumed that mobile users are not generally sensitive to prices for mobile termination (see e.g., Explanatory Memorandum to the Commission Recommendation on Relevant Product and Services Markets, p. 33).
- 8 OFCOM Decision of May 21, 2004, paras. 54-69.
- 9 *Id.*, paras. 76-106.
- 10 In its decision on an alleged price squeeze as regards fixed-to-mobile calls for corporate users, OFCOM also highlighted that, rather than trying to exclude fixed operators from the fixed-to-mobile business, the pricing practices were aimed at spurring competition among mobile operators. OFCOM therefore concluded that the practice was not aimed at excluding fixed operators (see OFCOM Decision of May 21, 2004, paras. 189-198).
- 11 The compatibility of the wholesale price with regulatory obligations was also argued in the *Deutsche Telekom* case before the European Commission (see Commission Decision, COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom AG, O.J.* [2003] L 263/9). However, in contrast with the position taken by the TDC in this dictum, the Commission rejected such a defense, stating that Deutsche Telekom had sufficient leeway to avoid the price squeeze by raising its retail tariff (see paras. 164-175). In its decision of October 14, against France Télécom and Cégétel SFR, the French Conseil de la Concurrence also rejected this defense (see para. 201).
- 12 Vodafone was not charged with this particular allegation.
- 13 While the case was brought by two fixed telecommunications operators – and therefore the original claim probably related to discrimination in the prices for mobile call termination charged to other mobile operators and to fixed operators – the SDC and the TDC (probably acting *ex officio*) focused on the alleged discriminatory prices for mobile call termination among mobile telecommunications operators.
- 14 Decision of the Conseil de la Concurrence, paras. 215-221. The French competition authority found that fixed to mobile calls were of such importance for the corporate segment during the period of the investigation that a price squeeze applied on such calls allowed operators to exclude competing offers. It supported these findings with concrete examples of foreclosure effects on the French market.

Journal

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