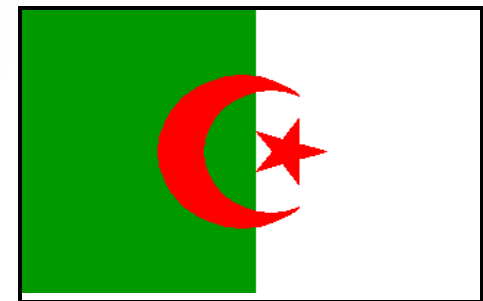




Projet Formation & Voyages d'Etudes FACICO

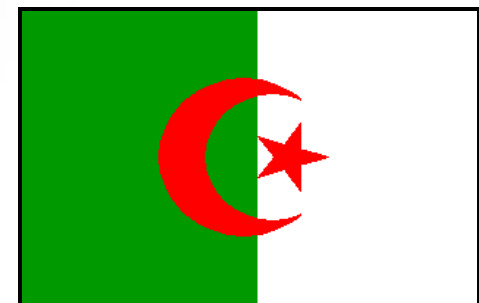


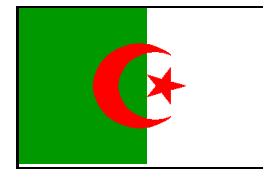


Droit de la Concurrence

Dr. Rainer M. Bierwagen

Septembre 2010





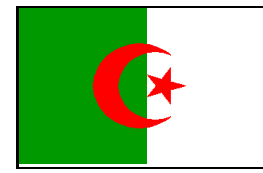
European Commission Decision

Deutsche Telekom AG, 21 May 2003

Pricing strategy
for local access to the fixed telephony network



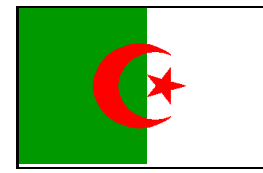
1. Introduction



- Deutsche Telekom AG
- Infringement of Article 102 Treaty
- Commission Decision of 21 May 2003 (OJ 2003 L 263/9)
- Sub judice T-271/03
- Fine of € 12.6 million



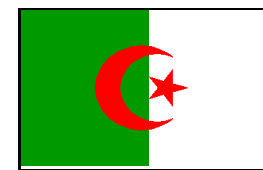
2. Undertakings involved



- Complainants
 - Arcor and 14 local and regional fixed network operators
- Company accused of abuse of dominant position
 - Deutsche Telekom AG (DT)
 - At one time wholly owned by State
 - Shares are sold since 1996



3. Subject of the decision

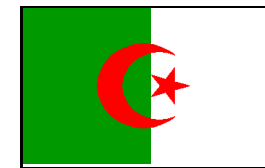


Pricing strategy employed by DT for local access to the fixed telephony network

- The European Commission states that Deutsche Telekom AG (DT) abused its dominant position through unfair prices for the provision of local access to its fixed telecommunications network (local loops). DT charged new entrants higher fees for wholesale access to the local loop than what DT's subscribers paid for fixed line subscriptions. This discouraged new companies from entering the market and reduces the choice of suppliers of telecoms services as well as price competition for consumers.



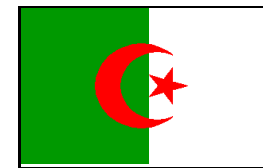
4. Understanding Local loop



- The « local loop » is the physical circuit between the customer's premises and the telecommunications operator's local switch. Traditionally it takes the form of pairs of copper wires.
- New entrants on the telecommunications markets need access on fair and non-discriminatory terms to the local loops (“local loop unbundling”) to be able to offer retail services to end-customers, as it would be impossible to replicate such a network built over a century.



5.1. Facts

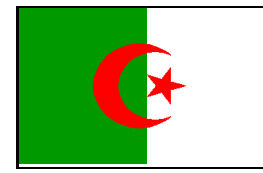


DT offers access to its local network

- To other telecommunication operators
 - Wholesale access
 - Since 1998 DT is legally obliged to provide competitors access to its local loops. Competitors then resell this access to end users
- To end users
 - Retail access



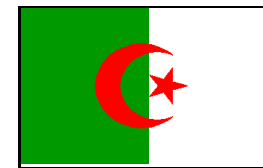
5.2. Facts – Wholesale access



- Full local loop unbundling obligatory since 1998
- DT is the only German network operator having a network with nation-wide coverage. In order to provide a variety of services to end users, new entrants need access to this infrastructure on a wholesale basis
- Charges must be authorised in advance by the regulatory authority



5.3. Facts – Retail access



Analogue connection
and digital narrow band
connection

- Price cap system
- DT has some discretion to fix its prices on a commercial basis

Broadband connection

- Prices are set at discretion of DT
- May be reviewed ex-post



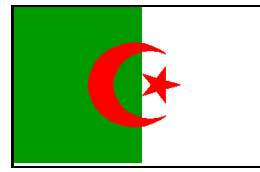
6. Applicability of Article 102



- DT is an undertaking under Article 102 TFEU
- Independent commercial activity
 - Sector specific legislation does not preclude undertakings from engaging in autonomous conduct that prevents, restricts or distorts competition
 - Cases might be subject both to the competition rules and to national or European sector specific measures



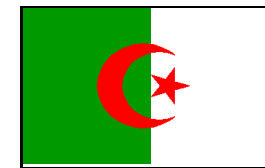
7.1. Dominant position



- Relevant product or service market
 - Provision of local access to fixed telecommunication networks
- Lack of alternative infrastructure
 - DT is the only company with nationwide coverage
- Relevant geographic market
 - German market



7.2. Dominant position

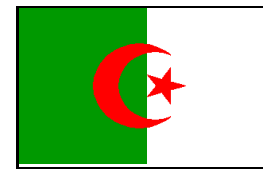


Share of the market

- Wholesale access for narrowband and broadband services: 100%
- Narrowband/broadband retail: 95,6% / 94%
- No potential competition as barrier to entry market



8.1. Abuse

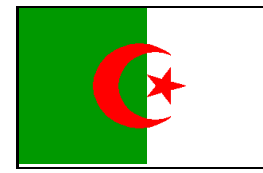


Margin squeeze

- Disproportion between the two charges such that competition is restricted
- Because of the insufficient spread between DT's local loop access prices and the downstream tariffs for retail subscriptions, new entrants have no scope to compete with DT for end consumers. The Commission's decision compares upstream access to the local loops with a bundle of different types of retail offerings, namely analogue, ISDN and ADSL connections. In order to achieve a coherent comparison, the Commission used a weighted approach taking into account the numbers of DT's retail customers for the different access types on retail level



8.2. Abuse

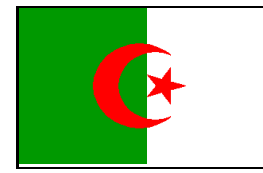


Disproportion and restriction of competition

- Difference between DT's retail and wholesale price was either negative or slightly positive.
- Insufficient to cover DT's product-specific costs of providing its own retail services.
- Because of the insufficient spread: new entrants had no scope to compete with DT for fixed-line access to end consumers.



8.3. Abuse

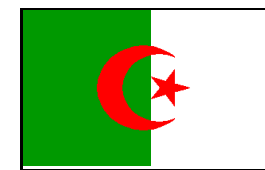


Commercial discretion

- DT could have avoided the margin squeeze
- DT was not forced to act this way. The squeeze was not imposed on DT by decision of the German telecommunication regulator
- Undertaking subject to price regulation has the commercial discretion to avoid or end the margin squeeze on its own initiative



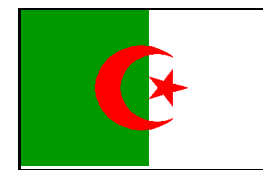
9. Further requirements



- Effect on trade between Member States
- No exception under Article 102 (2)



10. Case T-271/03



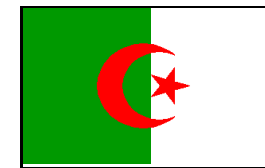
DT brought an action before the General Court against the European Commission, requesting the court to

- Annul the Commission decision
- In the alternative to reduce the fine

On 10 April 2008 the General Court confirms the decision of the commission both concerning the abuse and the amount of the fine.



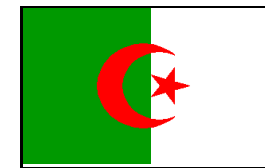
10. Case T-271/03



- La notion d'exploitation abusive au sens de l'article 82 CE est une notion objective. La connaissance subjective du caractère abusif de son comportement par l'entreprise en position dominante ne constitue donc pas une condition d'application de l'article 82 CE.



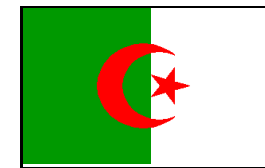
10. Case T-271/03



Le fait que les tarifs d'une entreprise de télécommunications en position dominante aient dû être approuvés par l'autorité nationale de régulation des télécommunications n'élimine pas la responsabilité de cette entreprise au titre de l'article 82 CE, dès lors que les effets restrictifs de la concurrence provoqués par ces tarifs ne trouvent pas leur origine uniquement dans le cadre juridique national applicable, car l'entreprise dominante, ayant pu influencer sur leur montant au moyen des demandes d'autorisation déposées auprès de ladite autorité, disposait d'une marge de manœuvre suffisante pour fixer ses tarifs à un niveau tel qu'il lui aurait permis d'éliminer ou de réduire ces effets restrictifs.



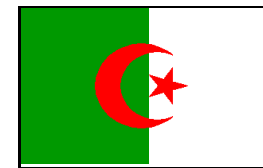
10. Case T-271/03



En effet, dans le cadre de la responsabilité particulière incombant à une entreprise en position dominante, celle-ci est tenue de présenter des demandes de modification de ses tarifs lorsque ceux-ci ont pour effet de porter atteinte à une concurrence effective et non faussée dans le marché commun.



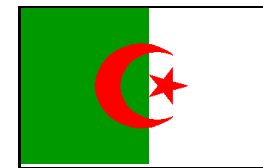
10. Case T-271/03



- Cette conclusion n'est pas remise en cause par le fait que l'autorité nationale de régulation des télécommunications effectue un contrôle ex ante de la compatibilité des tarifs avec l'article 82 CE. En effet, même si, à l'instar de tout organe de l'État, cette autorité est tenue de respecter les dispositions du traité, elle est chargée de l'application de la réglementation sectorielle dans le domaine des télécommunications et elle n'est pas l'autorité de concurrence de l'État membre concerné. Or, les autorités réglementaires nationales agissent conformément au droit national, lequel peut avoir des objectifs qui, s'inscrivant dans les politiques de télécommunications, diffèrent de ceux de la politique communautaire de concurrence.



10. Case T-271/03



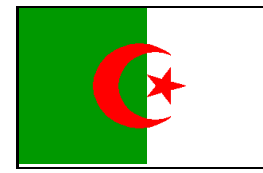
- En tout état de cause, à supposer même que ladite autorité soit tenue d'examiner la compatibilité des tarifs proposés par une entreprise dominante avec l'article 82 CE, cette circonstance n'empêcherait pas qu'une infraction imputée à cette entreprise puisse être constatée par la Commission, qui, en effet, ne saurait être liée par une décision rendue par une autorité nationale en application de l'article 82 CE.

- (cf. points 107-108, 113, 120-122)

- <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=fr&newform=newform&Submit=Rechercher&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurftp=jurftp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=T-271%2F03&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100>
- <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=fr&newform=newform&Submit=Rechercher&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurftp=jurftp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=T-271%2F03&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100>



10. Case C-280/08

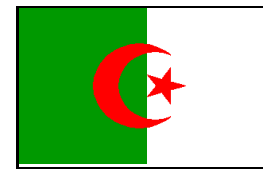


Deutsche Telekom a formé un pourvoi

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:223:0031:0032:FR:PDF>

L'avocat général Mazák conclut qu'il n'est pas fondé

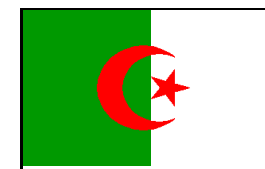
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11. Other cases against Deutsche Telekom



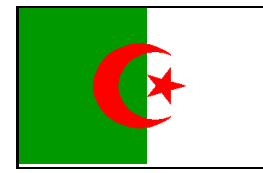
11.1. Alleged margin squeeze for broadband access



- Complaint against DT by alternative provider in 2002
- Similar case as margin squeeze for local access to fixed telephony
- Preliminary investigations according to the margin squeeze test established in decision „Deutsche Telekom of 21 May 2003“



11.2. Presumed margin squeeze for broadband access



„Settlement“ between DG COMP and DT in February 2004

- Commission accepted DT's commitments to fully end the alleged margin squeeze
- See press release IP/04/281 of 1 March 2004
- <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/281&format=HTML&aged=1&language=FR&guiLanguage=en>
- See also press release IP/05/1033 of 3 August 2005 on line sharing
- <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1033&format=HTML&aged=1&language=FR&guiLanguage=en>



Merci pour votre attention!

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