

## Enforcement of Art. 102 by public authorities after the ECJ's judgments in *Post Danmark* and *Telia Sonera*

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## ECJ's Post Danmark judgment – a few comments

- 1) When the special responsibility applies to a dominant company that is a former legal monopoly that special responsibility is a little bit more “special”
- 2) Particular pricing policies by dominant companies might be exclusionary. It is a case-by-case assessment – one needs to analyse “**all the circumstances**”.
- 3) Effects based analysis is needed. ECJ makes references to effects since the decision was taken (competitor won the contract with the Coop in 2007 and the one with Spar later) and to the fact that the analysis needs to be across the total business (not on individual contracts) but refers to prices covering “*the great bulk of the costs*”. This is likely to generate future disagreements to interpretation.



## ECJ's Telia Sonera Judgment

- 1) ECJ again stresses that a case-by-case assessment is needed and **"all the circumstances"** need to be considered (par.28)
- **2) Margin squeeze in itself can be abuse (par.31). For products and services where access is not regulated the authority does not need to prove that refusal to supply would be abusive (par.55).**
- 3) Reference to the retail prices charged by competitors is unclear and potentially confusing (par.35) even if a later paragraph (par.46) seems to suggest this applies only when the retail prices charged by the dominant undertaking are not known. Standard approach is to focus exclusively on the retail prices charged by the dominant undertaking.
- 4) Reiterate the importance of proving an effect, that the dominant undertaking can run an efficiency defence, and that the exclusionary effects on competitors need to be weighted against any efficiency benefits going to consumers.



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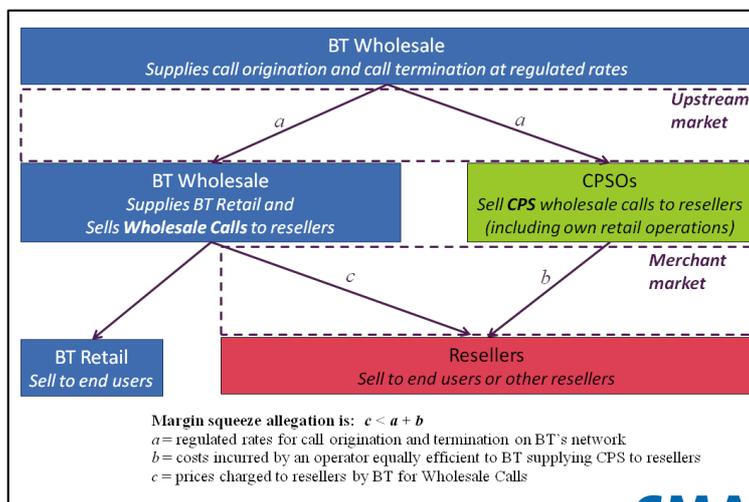
## Margin squeeze in Wholesale Calls pricing: BT vs. THUS/Gamma investigation

- In June 2008 Ofcom received two complaints from THUS (now part of Vodafone) and Gamma about BT's pricing for its Wholesale Calls product.
- *Allegation:* BT has abused its dominant position in a series of upstream markets for interconnection services to effect a margin squeeze in the downstream market for wholesale end-to-end voice calls sold to other communication providers.
- Following a very extensive and detailed investigation, Statement of Objections ("SO") issued in December 2010 outlining Ofcom's concerns. BT provided a substantial response to the SO in June and September 2011. Draft 'no grounds for action' decision issued by Ofcom in December 2012 and a final decision in June 2013 ( [http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_988/final.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_988/final.pdf) ).



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## Alleged margin squeeze



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## Key findings (1/2)

- “BT earned a negative margin (calculated over adjusted EEO costs, with costs measured on a LRIC basis) on its wholesale calls product of £[ ]m over the 10 months from July 2008 to April 2009. However, we conclude that we do not have sufficient evidence to demonstrate that, on the balance of probabilities, BT's conduct was likely to, or has had an anti-competitive effect or that it is likely to have such an effect in future.”
- “Our analysis of the evidence shows that anti-competitive effects did not arise in this case because the negative margin incurred by BT's Wholesale Calls product was principally driven by one large contract, rather than a generalised pattern of pricing below cost. Absent this contract, the evidence of BT earning a negative margin is sensitive to the time period modelled.”

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## Key findings (2/2)

- *“Given the importance of this large contract, we examined the commercial rationale behind this contract and whether this contract alone could give rise to anti-competitive effects. Our analysis shows that there was an efficiency rationale behind this contract and that the pricing of the contract has not led, and is unlikely to lead, to anti-competitive effects. [...], BT’s conduct led to efficiency gains, it did not risk excluding its competitors from winning the contract and BT’s ongoing ability to pursue an exclusionary strategy based on this contract is severely limited.”*
- *“We also reviewed a large number of BT’s internal documents [...]. This review did not identify evidence that BT had a deliberate strategy to exclude its competitors by way of an abusive margin squeeze.”*



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## Some questions on effects

- To what extent evidence needs to be collected on an ongoing basis during an (often long) investigation to assess actual or potential effects?
- To what extent should **new** evidence on effects (i.e., evidence that becomes available after the administrative decision) be used during an appeal? (See CAT’s approach to admissibility of new evidence in regulatory appeals)
- Is it correct to systematically use later evidence to assess whether some potential effects did or did not occur over time?
- Consistently with Telia Sonera our assessment linked the level of the margin squeeze with the effects assessment



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