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COMPETITION AND REGULATION STUDIES

The Concept of Undertakings: EU Perspective

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Basic Concepts with Landmark Cases - No.1 Undertakings

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Decided Sep 10, 2009

1. Summary of the Judgment

In an appeal, for an appellant to have an interest in bringing proceedings the appeal must be capable, if successful, of procuring an advantage for the party bringing it.

As regards an appeal brought by a parent company and its subsidiaries against a judgment upholding a Commission decision imposing on all the applicants joint and several liability to pay a fine on account of infringement of the competition rules, the parent company and the subsidiaries have an interest in having the judgment under appeal set aside. With regard to those subsidiaries, if the judgment under appeal were to be set aside in respect of the liability of the parent company, the position of its subsidiaries would change, in particular with regard to the implications arising from the rules of joint and several liability.

If, in an appeal, brought by a parent company and its subsidiaries against a judgment upholding a Commission decision which imposes a fine on them for infringing competition rules, the appellants rely on arguments relating to the presumption that a parent company exercises a decisive influence over a subsidiary where it holds 100% of the capital, those arguments must be regarded as developing a plea alleging that joint and several liability was wrongly imputed to the parent company, that the latter does not exercise a decisive influence over the commercial conduct of its subsidiaries and that it does not form an economic unit with them. They constitute additional arguments concerning the application of the rules on the imputability to the parent company of the conduct of its subsidiaries. If such a plea was relied on before the Court of First Instance, the subject-matter of the dispute before it has not been altered. Such arguments are therefore admissible in appeal proceedings.

The infringement of Community competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person. It is also necessary that the statement of objections should indicate in what capacity a legal person is called on to answer the allegations.

If the Commission intends to base its arguments on the presumption that a parent company exercises a decisive influence over a subsidiary where it holds 100% of the capital in the subsidiary, observance of the rights of defence

does not require, at the stage of the statement of objections, evidence other than proof relating to the shareholding of the parent company in its subsidiary.

The conduct of a subsidiary may be imputed to the parent company in particular when, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links which tie those two legal entities. That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking which enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.

In the specific case in which a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary. In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.

The conduct of the subsidiary on the market cannot be the only factor which enables the liability of the parent company to be established, but is only one of the signs of the existence of an economic unit.

In order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list.

Community competition law is based on the principle of the personal responsibility of the economic entity which has committed the infringement. If the parent company is part of an economic unit, which may consist of several legal persons, the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability.

2. Judgment

By their appeal, Akzo Nobel NV ('Akzo Nobel'), Akzo Nobel Nederland BV ('Akzo Nobel Nederland'), Akzo Nobel Chemicals International BV ('Akzo Nobel Chemicals International'), Akzo Nobel Chemicals BV ('Akzo Nobel Chemicals') and Akzo Nobel Functional Chemicals BV ('Akzo Nobel Functional Chemicals') ask the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049 ('the judgment under appeal'), by which it dismissed their action

for annulment of Commission Decision of 9 December 2004 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement.1

In that decision, the Commission of the European Communities accused the addressees of a single and continuous infringement of Article 81(1) EC and, as from 1 January 1994, of Article 53(1) of the Agreement on the European Economic Area of 2 May 1992.2

2.1. Community Law Context

Under Article 15(2) of Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treat: 'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently.'3

Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty provides: 'The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently: they infringe Article 81 or Article 82 of the Treaty … for each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year'.4

2.2. The Facts

According to the findings of the Commission, to which the Court of First Instance referred in the judgement under appeal, the facts which gave rise to the dispute are as follows.

After it received a leniency application in April 1999 from an American producer, the Commission initiated an investigation into the global choline chloride industry, an investigation which lasted from 1992 until the end of 1998.

Choline chloride is a member of the B-complex water-soluble vitamins (Vitamin B4). It is mainly used in the animal feed industry as a feed additive. In addition to producers, the choline chloride market is made up of converters, who buy the product from producers in liquid form and convert it into choline chloride on a carrier either on behalf of the producer or on their own behalf, and distributors.

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1 Case No C.37.533 – Choline Chloride, OJ 2005 L 190, p. 22 ('the contested decision').

2 OJ 1994 L 1, p. 3.

3 OJ, English Special Edition: 1959-1962, p. 87.

4 OJ 2003 L 1, p. 1.

The appellants are five companies belonging to the Akzo Nobel group and they are among the producers of choline chloride. In the period concerned by the Commission investigation, Akzo Nobel the parent company of the group, held, directly or indirectly, all the shares in the other appellants. Akzo Nobel was the owner of all the shares in its subsidiaries Akzo Nobel Nederland and Akzo Nobel Chemicals International. Akzo Nobel Nederland owned all the shares in its subsidiary Akzo Nobel Chemicals, which itself held all the shares in Akzo Nobel Functional Chemicals.

The worldwide consolidated turnover declared by Akzo Nobel in 2003, which is the financial year immediately prior to the contested decision, was EUR 13 billion.

As regards the European Economic Area ('the EEA'), a cartel was implemented at two different but closely connected levels, the global level and the European level.

Globally, several North American and European companies, including the appellants, participated in anti-competitive activities between June 1992 and April 1994. Only the European companies, including the appellants, participated in meetings implementing a cartel at European level, which lasted from March 1994 until October 1998.

The Commission regarded the arrangements concluded at global and European levels as a complex and continuous single infringement concerning the EEA, in which the North American producers participated for some time and the European producers during the entire period covered by the Commission's investigation.

On 9 December 2004, the Commission adopted the contested decision. In Article 1 thereof, it found that a number of undertakings, including the appellants, had infringed Article 81(1) EC and Article 53 of the EEA Agreement by participating in a series of agreements and concerted practices concerning price fixing, market sharing and concerted actions against competitors in the choline choloride sector in the EEA.

As regards the Akzo Nobel group, the Commission decided to address the contested decision jointly and severally to all the appellants. Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals (or their legal predecessors) directly participated in the infringement. Akzo Nobel Functional Chemicals was created as a subsidiary of Akzo Nobel Chemicals in June 1999. Therefore, the Commission found that Akzo Nobel Functional Chemicals was the legal successor to its parent company as regards the majority of the activities in the choline chloride sector previously carried out by the latter and should, therefore, also be an addressee of that decision.

As regards, more precisely, Akzo Nobel, the Commission found that it constituted a single economic unit with the other legal persons in the Akzo Nobel group which are addressees of the contested decision and that it is that economic unit which participated in the cartel. The Commission concluded that that company was in a position to exert decisive influence over the commercial policy of its subsidiaries, in which it held, directly or indirectly, all of the shares, and that it could be assumed that it in fact did so. The Commission therefore concluded that Akzo Nobel's subsidiaries lacked commercial autonomy, which led it to address the contested decision to Akzo Nobel, notwithstanding the fact that it had not itself participated in the cartel.

The Commission took the view that the lack of commercial autonomy of operating companies or business units in the Akzo Nobel group was also proved by the documents produced by Akzo Nobel during the administrative procedure.

By basing its decision on the market share of the appellants as a whole and, in particular, on the figure mentioned in paragraph 9 of this judgment, the Commission, in Article 2 of the contested decision, imposed on the appellants jointly and severally a fine of EUR 20.99 million for the infringements set out in Article 1 thereof.

2.3. The action before the Court of First Instance and the judgment under appeal

In support of their action before the Court of First Instance seeking annulment of the contested decision, the applicants relied on three pleas in law.

The Commission took the view that that action was inadmissible on the ground that it had not been lodged in accordance with Article 21 of the Statute of the Court of Justice and Article 44 of the Rules of Procedure of the Court of First Instance, or as manifestly unfounded, as far as concerns Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals, since the action, which had to be analysed as five individual actions, did not contain any pleas in law capable of justifying the annulment of the contested decision in so far as it established the liability of those companies or in so far as it fixed the amount of the fine with respect to them. The Commission submitted in the alternative that for the same reasons, it was clear that, although they were addressees of that decision, Akzo Nobel's subsidiaries had no legal interest in seeking its annulment.

The Court of First Instance dismissed the objection of inadmissibility raised by the Commission in paragraphs 31 and 32 of the judgment under appeal.

As regards the substance, the applicants' first plea in law was based on the incorrect imputation of joint liability to Akzo Nobel, the holding company of the group, holding, directly or indirectly, all of the shares in its subsidiaries.

The applicants submitted that the decisive influence that a parent company must exercise in order to be considered liable for activities of its subsidiary must relate to the subsidiary's commercial policy in the strict sense.

The Commission therefore had to show, first, that the parent company had the power to direct the conduct of the subsidiary to the point of depriving it of any independence in determining its commercial course of action and, second, that it exerted that power.

It was clear from Community case-law that a wholly-owned subsidiary could be presumed to have carried out the instructions of its parent company. In those circumstances, in order for the Commission to be obliged to find solely the subsidiary liable, the subsidiary must determine its commercial policy largely on its own. Where that is shown to be the case, it is once again for the Commission to show that the parent company did in fact exercise a decisive influence in a specific case.

It followed that the organisation into units of a group of companies such as the Akzo Nobel group did not in itself suffice to make proof of the parent company's actual involvement unnecessary.

The applicants took the view that they had established that Akzo Nobel's subsidiaries determined their commercial policy largely on their own and had thereby rebutted the presumption relied on by the Commission. They maintained that the Commission should have established that Akzo Nobel had exercised a decisive influence over the commercial policy of the other applicants. The Commission had not satisfied that obligation because the evidence, apart from the fact of holding all the shares, on which it based its arguments to hold Akzo Nobel jointly and severally liable for the infringement, was either irrelevant or incorrect.

As regards the first plea in law relied on by the applicants in support of their action, the Court of First Instance examined, as a preliminary point, the question as to whether the unlawful conduct of a subsidiary could be imputed to the parent company and held as follows:

'It must be borne in mind, first of all, that the concept of undertaking within the meaning of Article 81 EC includes economic entities which consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision.5

It is therefore not because of a relationship between the parent company and its subsidiary in instigating the infringement or, *a fortiori*, because the parent company is involved in the infringement, but because they constitute a single undertaking in the sense described above that the Commission is able to address the decision imposing fines to the parent company of a group of companies. It must be borne in mind that Community competition law recognises that different companies belonging to the same group form an economic entity and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market.6

It should also be noted that, for the purpose of applying and enforcing Commission competition law decisions, it is necessary to identify, as addressee, an entity having legal personality.7

In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary8, and that they therefore constitute a single undertaking within the meaning of Article 81 EC.9 It is thus for a parent company which disputes before the Community judicature a Commission decision fining it

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5 See Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 54 and the case-law cited.

6 Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290.

7 See, to that effect, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Maatschappij and Others* v *Commission* ('PVC II') [1999] ECR II-931, paragraph 978.

8 See, to that effect, Case 107/82 *AEG[-Telefunken]* v *Commission* [1983] ECR 3151, paragraph 50, and PVC II, paragraph 59 above, paragraphs 961 and 984.

9 Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, paragraph 59.

for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent.10

In that regard, it must be made clear that, while it is true that at paragraphs 28 and 29 of *Stora*, paragraph 60 above, the Court of Justice referred, as well as to the fact that the parent company owned 100% of the capital of the subsidiary, to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning before concluding that that reasoning was not based solely on the fact that the parent company held the entire capital of its subsidiary. Accordingly, the fact that the Court of Justice upheld the findings of the Court of First Instance in that case cannot have the consequence that the principle laid down in paragraph 50 of *AEG[-Telefunken]* v *Commission*, paragraph 60 above, is amended.

That being so, it is sufficient for the Commission to show that the entire capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy. The Commission will then be able to hold the parent company jointly and severally liable for payment of the fine imposed on the subsidiary, unless the parent company proves that the subsidiary does not, in essence, comply with the instructions which it issues and, as a consequence, acts autonomously on the market.

The Court must also examine, in the context of these preliminary observations, the argument central to the applicants' pleadings that the influence which the parent company is presumed to exercise because it holds the entire capital of its subsidiary relates to the latter's commercial policy in the strict sense ... That policy, in the applicants' submission, includes, for example, distribution and pricing strategy. Accordingly, so the argument goes, the parent company could rebut the presumption by showing that it is the subsidiary that manages those specific aspects of its commercial policy, without receiving instructions.

On that point, it should be noted that, when analysing the existence of a single economic entity among a number of companies forming part of a group, the Community judicature has examined whether the parent company was able to influence pricing policy,11 production and distribution activities12, sales objectives, gross margins, sales costs, cash flow, stocks and marketing.13 However, it cannot be inferred that it is only those aspects that are

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10 Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136; see also, to that effect, Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925 ('Stora'), paragraph 29.

11 See, to that effect, Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraph 137, and Case 52/69 *Geigy* v *Commission* [1972] ECR 787, para 45.

12 See, to that effect, Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paras 37, 39, 41.

13 Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, para 48.

covered by the concept of the commercial policy of a subsidiary for the purposes of the application of Articles 81 EC and 82 EC with respect to the parent company.

On the contrary, it follows from that case-law, read together with the considerations set out at paragraphs 57 and 58 above, that it is for the parent company to put before the Court any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view are apt to demonstrate that they do not constitute a single economic entity. It also follows that when making its assessment the Court must take into account all the evidence adduced by the parties, the nature and importance of which may vary according to the specific features of each case.

It is by reference to those considerations that the Court must ascertain whether Akzo Nobel and its subsidiaries to which the contested decision was addressed constitute a single economic entity.'

The Court of First Instance, in paragraphs 67 to 85, of the judgment under appeal, then examined the various pieces of evidence in the file and held that the applicants had not succeeded in rebutting the presumption that Akzo Nobel, the parent company holding 100% of the capital in its subsidiaries who were the addressees of the contested decision, exercised a decisive influence over their policies. It concluded that that company constituted, together with the other applicants, an undertaking within the meaning of Article 81 EC, and that there was no need to determine whether it had exercised an influence over their conduct. It dismissed the first plea in law relied on by the applicants in support of their action.

As regards the second and third pleas in law, alleging infringement of Article 23(2) of Regulation No 1/2003, in so far as the amount of the fine exceeds 10% of the turnover in 2003 by Akzo Nobel Functional Chemicals, and infringement of the obligation to state reasons concerning the attribution of joint and several liability to Akzo Nobel, the Court of First Instance dismissed them in paragraphs 90 and 91 and 94 to 96 respectively in the judgment under appeal. In paragraph 97 thereof, it therefore dismissed the action in its entirety.

3. Forms of order sought

By their appeal, the appellants claim that the Court should:

– set aside the judgment under appeal, in so far as it rejected the plea that responsibility was wrongfully imputed jointly and severally to Akzo Nobel;

– annul the contested decision, in so far as it imputes liability to Akzo Nobel, and

– order the Commission to pay all the costs of this appeal and of the proceedings before the Court of First Instance, in so far as they concern the plea raised in the appeal.

The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

3.2. The appeal

3.2.1. Admissibility

The Commission submits essentially that, in so far as the single plea in law concerns exclusively the liability of Akzo Nobel, the latter is the only appellant with a legal interest in the annulment of the judgment under appeal. The appeal is inadmissible as regards the other appellants, since neither their liability nor the fine imposed on them is challenged.

In that connection, it must be observed that for an appellant to have an interest in bringing proceedings the appeal must be capable, if successful, of procuring an advantage to the party bringing it.14

In this case, the judgment under appeal upheld the contested decision, which imposes on all the applicants joint and several liability to pay the fine of EUR 20.99 million set by the Commission. It follows that Akzo Nobel Nederland, Akzo Nobel Chemicals International, Akzo Nobel Chemicals and Akzo Nobel Functional Chemicals have an interest in having the judgment under appeal set aside.15

If the judgment under appeal were to be set aside as regards the liability of Akzo Nobel, the position of its subsidiaries would change, in particular with regard to the implications arising from the rules of joint and several liability.

Therefore, the objection of admissibility raised by the Commission relating to the interest in bringing proceedings of Akzo Nobel Nederland, Akzo Nobel Chemicals International, Akzo Nobel Chemicals and Akzo Nobel Functional Chemicals must be dismissed.

The Commission also submits that the single plea in law constitutes a new plea, submitted for the first time in the appeal, and is therefore inadmissible in so far as it contains points that the appellants did not raise before the Court of First Instance. By that plea, the appellants challenge the very existence of the presumption that a parent company exercises a decisive influence over a subsidiary where it holds 100% of its capital, whereas before the Court of First Instance they never challenged the existence of that presumption and, by attempting to rebut it, acknowledged that it was applicable to the present case. The appellants' arguments relating to the relevant object of a subsidiary's activities over which the parent company exercises decisive influence must also be rejected as inadmissible.

According to Article 118 of the Rules of Procedure of the Court of Justice, Article 42(2) thereof, which generally prohibits the introduction of new pleas in law in the course of the procedure, applies to the procedure before the Court of Justice on appeal from a decision of the Court of First Instance. In an appeal, the Court's jurisdiction is thus confined to review of the assessment by the Court of First Instance of the pleas argued before it.16 To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the

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14 See, to that effect, order in Case C-503/07 P *Saint-Gobain Glass Deutschland* v *Commission* [2008] ECR I-2217, para 48 and the case-law cited.

15 See, by analogy, order in case T-111/01 R *Saxonia Edelmetalle* v *Commission* [2001] ECR II-2335, para 17.

16 See, in particular, Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, para 61.

Court of First Instance would in effect allow that party to bring before the Court a wider case than that heard by the Court of First Instance.17

It must be recalled, in that connection, that the appellants relied, before the Court of First Instance, on a plea in law alleging that joint and several liability was wrongly imputed to Akzo Nobel, by which they submitted that it did not exercise a decisive influence over the commercial conduct of its subsidiaries and that it did not form an economic unit with them. Therefore, the arguments relating to the presumption that a parent company exercises a decisive influence over a subsidiary where it holds 100% of the capital which the appellants have put forward before the Court of Justice must be regarded as an elaboration of that plea. In so far as those arguments, and the arguments relating to the relevant object of a subsidiary's activities over which the parent company exercises decisive influence, constitute additional arguments concerning the application of the rules on the imputability to Akzo Nobel of the conduct of its subsidiaries, the appellants have not altered the subject of the dispute before the Court of First Instance.

Accordingly, the appeal must be declared admissible.

3.2.2. Substance of the case

The appellants rely on a single plea in support of their appeal, claiming that, by rejecting the plea alleging that liability for the infringement had been wrongfully imputed to Akzo Nobel, the Court of First Instance incorrectly applied the definition of 'undertaking' within the meaning of Article 81 EC and Article 23(2) of Regulation No 1/2003. That plea consists of two separate parts.

The first part of the single plea: incorrect definition of the burden of proof on the Commission as regards the lack of autonomy of the subsidiary

– Arguments of the parties

The appellants submit that the Court of First Instance applied the wrong legal test in order to determine whether or not Akzo Nobel's subsidiaries acted autonomously on the market.

According to the appellants, it is normally for the Commission to adduce evidence of actual exercise of decisive commercial influence by the parent company on its subsidiary. However, in order to alleviate that burden of proof, the Court of Justice has established a rebuttable presumption.

In *Stora*, the Court expressly stated that merely holding 100% of the capital in a subsidiary does not suffice per se to establish the liability of a parent company if the exercise of decisive commercial influence over that subsidiary is disputed. In that judgment the Court thus followed the reasoning of Advocate General Mischo, set out in point 48 of his Opinion in that case, according to which, although the burden on the Commission of proving that the parent company in fact exercised decisive influence over its subsidiary's conduct is alleviated where it owns 100%

17 See, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, para 165.

of the capital in that subsidiary, something more than the extent of the shareholding must be shown, but it may be in the form of indicia.

Therefore, full ownership of the shareholding of the subsidiary together with the existence of additional indicia gives rise to a presumption that the subsidiary did not act autonomously on the market. The Commission cannot therefore discharge the burden of proof on it by simply referring to the fact that the parent company has a 100% shareholding in its subsidiary. It must also produce other evidence showing that the parent company in fact exercises a decisive influence over its subsidiary. The Court of First Instance has violated that principle by holding that it was sufficient for the Commission to establish that all the shareholding in the subsidiary is held by the parent company to conclude that the latter exercises a decisive influence over its commercial policy.

Furthermore, in two other judgments, namely Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319 and Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, the Court of First Instance correctly applied the principle set out in the preceding paragraph, holding that although a 100% shareholding in its subsidiary provides a strong indication that the parent company is able to exercise a decisive influence over the subsidiary's conduct on the market, this is not in itself sufficient to impute liability to the parent company for the conduct of its subsidiary and something more than the extent of the shareholding must be shown, but this may be in the form of indicia.

The appellants also criticise the Court of First Instance for having alleviated the burden of proof on the Commission and having thereby adopted a conception of the burden of proof which infringes their rights of defence. The Commission is required to adduce what they consider to be further indicia, within the meaning of the *Stora* judgment, as it is interpreted by them, at the stage of the statement of objections and not only at the decision stage. In the statement of objections the Commission's intention to hold Akzo Nobel jointly and severally liable was based solely on the fact that that company had a 100% shareholding in the companies which participated in the infringement. On the other hand, in the contested decision it was also based on alleged further indicia, within the meaning of the *Stora* judgment, which had been artificially formulated by distorting the evidence relied on by the appellants in their response to the statement of objections.

Finally, the appellants criticise paragraph 62 of the judgment under appeal, in which, by holding that in order to rebut the presumption concerned it must be proved that the subsidiary does not, in essence, comply with the instructions issued by the parent company, the Court of First Instance adopted an approach which means that the presumption may be rebutted only where instructions have been issued by the parent company.

The Commission contends that the fact that the subsidiary has a legal personality separate from that of the parent company is not sufficient to exclude the possibility of imputing its conduct to the parent company, in particular where the subsidiary does not decide independently upon its conduct on the market but carries out, in all material respects, the instructions which are given to it by the parent company. There is no need to ascertain whether the parent company has in fact used its power to influence the commercial policy of its subsidiary in a decisive manner where the parent company has a 100% shareholding in it.

The Court did not call that principle into question in *Stora*. It acknowledged that, where a subsidiary is wholly owned by the parent company, the latter is presumed to have exercised its power to influence the conduct of its subsidiary. According to the Commission, although the Court of Justice held, in paragraph 29 of the *Stora* judgment, that it was legitimate for the Court of First Instance to base its findings on that presumption, particularly after finding that the parent company had presented itself during the administrative procedure as the Commission's sole interlocutor concerning the infringement in question, the Court of Justice referred to that factor as a subsidiary point, as an additional argument in favour of imputing the infringement to the parent company.

A series of judgments of the Court of First Instance has applied that presumption, by referring to the judgment in *Stora*, without making the application of the presumption subject to the production of additional indicia. The judgments in *DaimlerChrysler* v *Commission* and *Bolloré and Others* v *Commission* do not call into question the application of that presumption. In those two judgments, the Court of First Instance conflated the concept of control over the subsidiary with that of exercising control, only the latter being presumed where all the shareholding in the subsidiary is held by the parent company. Furthermore, the additional indicia were examined when evidence adduced in order to rebut the presumption was analysed.

As to the argument relating to the infringement of the rights of defence, the Commission takes the view that the existence of presumptions in Community competition law is not unusual. By informing the undertaking concerned that it intended to rely on a presumption, the Commission offered that undertaking the opportunity to comment on that point and to provide it with all documents capable of supporting its position. As it is the undertaking which has all the information relating to its internal functioning, that apportionment of the burden of proof is completely logical.

As regards the criticism of paragraph 62 of the judgment under appeal, the Commission contends that it is based on an incorrect reading of a sentence taken out of its context. The Court of First Instance meant that a subsidiary is an independent economic entity if it does not follow the instructions of its parent company. That is because either no instructions have been given or because the instructions have not been followed.

– Findings of the Court

It must be observed, as a preliminary point, that Community competition law refers to the activities of undertakings,18 and that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.19 The Court has also stated that the concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that

18 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, para 59.

19 See, in particular, *Dansk Rørindustri and Others* v *Commission*, para 112; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, para 107; and Case C-205/03 P *FENIN* v *Commission*, [2006] ECR I-6295, para 25.

economic unit consists of several persons, natural or legal.20 When such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement.21

The infringement of Community competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person.22 It is also necessary that the statement of objections indicate in which capacity a legal person is called on to answer the allegations.

It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company,23 having regard in particular to the economic, organisational and legal links between those two legal entities.24

That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law mentioned in paragraphs 54 and 55 of this judgment. Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.

In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary25 and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.26

In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the

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20 Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, para 40.

21 See, to that effect, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, para 145; Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, para 78; and Case C-280/06 *ETI and Others* [2007] ECR I-10893, para 39.

22 See, to that effect, *Aalborg Portland and Others* v *Commission*, para 60, and Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *August Koehler and Others* v *Commission* [2009] ECR I-0000, para 38.

23 See, to that effect, *Imperial Chemical Industries* v *Commission*, paras 132 and 133; *Geigy* v *Commission*, para 44; Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, para 15; and *Stora*, para 26.

24 See, by analogy, *Dansk Rørindustri and Others* v *Commission*, para 117, and *ETI and Others*, para 49.

25 See, to that effect, *Imperial Chemical Industries* v *Commission*, paras 136 and 137.

26 See, to that effect, *AEG-Telefunken* v *Commission*, para 50, and *Stora*, para 29.

payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.27

As the Court of First Instance rightly held in paragraph 61 of the judgment under appeal, while it is true that at paragraphs 28 and 29 of *Stora* the Court of Justice referred, not only to the fact that the parent company owned 100% of the capital of the subsidiary, but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning and not to make the application of the presumption mentioned in paragraph 60 of this judgment subject to the production of additional indicia relating to the actual exercise of influence by the parent company.

It is clear from all those considerations that the Court of First Instance did not commit any error of law in holding that where a parent company has a 100% shareholding in its subsidiary there is a rebuttable presumption that that parent company exercises a decisive influence over the conduct of its subsidiary.

Accordingly, since the Commission is not required, as regards the imputability of the infringement, to submit, at the stage of the statement of objections, evidence other than proof relating to the shareholding of the parent company in its subsidiaries, the appellants' argument relating to the infringement of the rights of defence cannot be accepted.

As regards the criticism of paragraph 62 of the judgment under appeal, it is sufficient to observe that there is nothing in that paragraph which suggests that the Court of First Instance limited the possibility of rebutting the presumption mentioned in paragraph 60 of this judgment solely to cases where instructions have been issued by the parent company. On the contrary, it is clear from paragraphs 60 and 65 of the judgment under appeal that the Court of First Instance adopted a relatively open position in that respect, holding, in particular, that it is for the parent company to put before the Court any evidence relating to the organisational, economic and legal links between its subsidiary and itself which are apt to demonstrate that they do not constitute a single economic entity.

It follows that the first part of the single plea relied on by the appellants in support of their appeal must be dismissed as unfounded.

The second part of the single plea in law: incorrect definition of the concept of the commercial policy of the subsidiary

– Arguments of the parties

According to the appellants, the Court of First Instance wrongly held that aspects other than those mentioned in paragraph 64 of the judgment under appeal were covered by the commercial policy of the subsidiary over which the parent company exercises a decisive influence, and that the evidence relating to the organisational, economic

27 See, to that effect, *Stora*, para 29.

and legal links between the parent company and its subsidiary are relevant in order to establish the independence of the latter.

Commercial policy relates to the conduct on the market and is limited to the production of goods and services that an undertaking sells on certain conditions to consumers in a given territory and at a given time. It does not include other aspects.

According to the appellants, extending the concept of commercial policy beyond the conduct of the subsidiary on the market would amount to introducing a strict liability regime, which is contrary to the principle of personal responsibility guaranteed by the case-law of the Court.

The Commission submits that the question whether the concept of commercial policy should be given a broad or narrow definition is irrelevant with regard to the issue of determining the existence of a single undertaking, for which the Court of Justice should have regard more to the economic and organisational links existing between the companies.

As regards the argument relating to the introduction of a strict liability regime, the Commission takes the view that there is no principle of strict liability in Community competition law, since the Commission's decisions do not impute liability to companies without its proof being established. It is not contrary to the principle of personal responsibility to hold a parent company liable for the actions of its wholly-owned subsidiary.

– Findings of the Court

As noted in paragraph 58 of this judgment, the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.

It is clear, as the Advocate General pointed out in paragraphs 87 to 94 of her Opinion, that the conduct of the subsidiary on the market cannot be the only factor which enables the liability of the parent company to be established, but is only one of the signs of the existence of an economic unit.

It also follows from paragraph 58 of this judgment that, in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken not only of the factors set out in paragraph 64 of the judgment under appeal, but also of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list.

It follows that the Court of First Instance has not committed an error of law as regards the sphere in which the parent company exercises influence over its subsidiary.

That conclusion is not affected by the appellants' argument relating to strict liability.

It must be observed in that connection that, as it is clear from paragraph 56 of this judgment, Community competition law is based on the principle of the personal responsibility of the economic entity which has committed the infringement. If the parent company is part of that economic unit, which, as stated in paragraph

55 of this judgment, may consist of several legal persons, the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability.

Therefore, the second part of the single plea in law relied on by the appellants in support of their appeal cannot be upheld and the appeal must be dismissed in its entirety as unfounded.

4. Costs

Under Article 69(2) of the Rules of Procedure of the Court of Justice, which is applicable to appeals by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the appellants have been unsuccessful, they must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV and Akzo Nobel Functional Chemicals BV to pay the costs.**

Case No COMP/M.3178. – Bertelsmann/Springer/JV

C(2005)1368 final

Decided May 3, 2005

1. Summary of the Judgment

On 4 November 2004, the Commission received a notification of a proposed concentration by which the German undertakings Bertelsmann AG ("Bertelsmann"), its solely controlled subsidiary Gruner+Jahr AG & Co. KG ("G+J"), and Axel Springer AG ("Springer"), acquire joint control of the German undertaking NewCo ("NewCo") by way of purchase of shares in a newly created company constituting a joint venture. Bertelsmann (and G+J) and Springer are collectively referred to as "the Parties".

On 29 November 2004 the German competition authority, the Bundeskartellamt, informed the Commission that the proposed concentration would threaten to affect significantly competition, either in the German market for rotogravure printing, or, in the alternative in the German market for time-critical print products, in particular magazines.

By decision dated 23 December 2004, the Commission found that the notified operation raised serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement. The Commission accordingly initiated proceedings in this case pursuant to Article 6(1)I of Regulation (EC) No 139/2004 (hereinafter "the Merger Regulation") and decided that it should, by virtue of Article 9(3)(a) of the Merger Regulation, itself deal with the aspects raised by the German competition authority.

2. Judgment

2.1. The Parties

Bertelsmann is an international media company. Its printing activities are concentrated in its subsidiary Arvato AG ("Arvato"), which controls the German rotogravure printer maul-belser in Nuremberg, the offset printer Mohn Media in Guetersloh and various other printers in Europe, such as the rotogravure printers Eurogravure S.p.A. in Italy and Eurohueco S.A. in Spain. In addition, Arvato plans to start up a new rotogravure printing facility in Liverpool (UK) in the next two years. Furthermore, Bertelsmann's solely controlled publishing arm G+J, active

in the publishing, printing and distribution of newspapers and magazines, has two rotogravure printing facilities in Germany, located in Itzehoe (near Hamburg) and Dresden.

Springer is active in the publishing, printing and distribution of newspapers and magazines, and holds shares in television and radio broadcasters. Springer operates two rotogravure printing facilities in Germany, namely in Ahrensburg (near Hamburg) and in Darmstadt. It also operates three off-set printing facilities which print exclusively newspapers.

2.2. Operation

The notified concentration concerns the creation of NewCo, a joint venture between Bertelsmann, G+J and Springer, which will be established with headquarters in Hamburg, Germany. Following the transaction, Bertelsmann and G+J will each hold an interest of 37.45% in NewCo and Springer will hold the remaining 25.1%.

The Parties will contribute to NewCo:

- **their five existing rotogravure printing facilities in Germany and the planned facility in the UK, including the marketing and sales departments. Arvato's printing facilities in Spain and Italy will remain with Arvato and are not part of the notified transaction.**

- **the shares of maul-belser in maul + co. – Chr. Belser Studios GmbH (100%), maul**

+ co. – Chr. Belser Klebebindung GmbH (100%), mbs Pforzheim GmbH (50%), LOG Logistik GmbH (46%) and G+J in the GWL – Gruner Druck Weiterverarbeitung und Logistik GmbH;

- **the printing volume as currently agreed with third-party publishers.**

According to a "Framework Printing Agreement" concluded between Bertelsmann, G+J, Springer and NewCo, the joint venture will print the magazines of G+J and Springer for the next […] years. Following the initial […] period, NewCo has also a matching right for the printing of […%] of a considerable share of the magazines of G+J and Springer, in particular the German magazines. The Framework Printing Agreement has been concluded for the period until […].

During the Commission's procedure Bertelsmann acquired the paper wholesaler Euro- Papier N.V. ("Euro-Papier") via the printer maul-belser. The concentration has been cleared by the Bundeskartellamt. Euro-Papier will be contributed to the proposed joint venture and is therefore part of the notified concentration.

2.3. Concentration

NewCo will be jointly controlled by Bertelsmann and Springer. NewCo's board will consist of the CEO and three non-executive directors. G+J has the right to appoint the CEO and one non-executive director, and Bertelsmann and Springer will appoint one non-executive director each. Decisions relating to a number of strategic decisions, including the annual business plan, the budget and the investment planning, require the prior approval of 75% of the shareholders' meeting. Therefore Bertelsmann and Springer will each enjoy veto rights relating to the strategic commercial behaviour of NewCo.

The notified concentration constitutes a full function joint venture. NewCo will be a separate legal entity with its own printing facilities, machinery, assets, personnel and customer base. Although NewCo, under the terms of the Framework Printing Agreement with its parents, will print the magazines of G+J and Springer for the next […] years, its full-function character will not be affected by a strong dependency on sales to its parents. The printing volumes performed to the benefit of the parent companies under the Printing Agreement do not account for more than […%] of NewCo's total printing capacity. Therefore NewCo will be geared to play an active role in the market and perform, on a lasting basis, all the functions of an autonomous economic entity.

The Parties argue that the Framework Printing Agreement, including the right of the joint venture to print the magazines of G+J and Springer for the next […] years and the matching right for […%] of a certain magazine printing volume until […], is an integral part of the concentration as it was decisive for the valuation of the joint venture and of the shares of each joint venture partner and as […].

Under the Merger Regulation an agreement is an integral part of the concentration if it carries out the main object of the concentration, such as an agreement relating to the sale of shares and assets of an undertaking. This applies clearly to the contribution of the five printing facilities (including personnel, etc.) which are therefore an integral part of the transaction. However, the Framework Printing Agreement is not the main object of the concentration and does not have any impact on the position of the proposed joint venture on the market. It only concerns the relationship with the parent undertakings. The subjective considerations of the Parties concerning the valuation of their shares (and the future profits of the proposed joint venture) do not change this. […] The Framework Printing Agreement therefore is not to be qualified as an integral part of the concentration, but the admissibility of its individual provisions has to be assessed under the Commission Notice on Restrictions directly Related and

Necessary to Concentrations.28 According to this Notice, supply obligations can normally be justified for a transitional period of up to five years.

2.4. Community Dimension

The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion.29 Bertelsmann and Springer each have a Community-wide turnover in excess of EUR 250 million, but they do not both achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

2.5. Relevant Markets

2.5.1. Relevant Product Markets

The notifying Parties submit that there is a uniform market for high-volume illustration printing (exceeding a volume of 200,000 copies), consisting in the printing of catalogues for mail order companies, magazines and advertisements in both rotogravure and heatset web offset (hereinafter "offset") method. In this respect, the Parties are of the opinion that offset machines with 32 pages and more per rotation are substitutable for rotogravure printing machines.

In the alternative, the Parties submit that there are "sub-segments of the market" for catalogues and magazines/advertisements. The market for "catalogues" would include all printing products with a volume of more than 2 million copies, in particular mail order catalogues but also magazines and advertisements exceeding this threshold. The Parties submit that the rotogravure method is normally used for the printing of such volumes. The market for "magazines and advertisements" would include all printing products with a print run of more than 200,000 copies and less than 2 million copies. The Parties submit that these products are printed interchangeably in the rotogravure and offset methods.

In a decision30 of December 2003 pursuant to Articles 6(2), 6(1)(b) concerning the Spanish market, the Commission found a specific product market for rotogravure printing, distinct from the market for offset printing

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28 OJ C 56, 5.3.2005, p. 24.

29 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p. 25).

30 Decision of 15 December 2003 in case COMP/M.3322 – Polestar/Prisa/Inversiones Ibersuizas/JV: OJ C 31, 5.2.2004, p. 19.

services. The Commission considered that for publications to be printed in high volumes and in high quality rotogravure printing was not substitutable by offset printing, although the latter technology has made significant developments in recent years in terms of speed of printing and quality. Customers would continue to use rotogravure printing even in the event of a significant and non-transitory price increase, as a printing machine using the rotogravure method is able to print more copies of a uniform quality in less time. The Commission further considered whether there were distinct markets according to the type of product printed, namely for magazines, catalogues and advertisements. However, in that case, the product market definition could be left open in this respect.

In an opinion of 2002 the French Conseil de la Concurrence31 described distinct markets for (1) the printing of high volumes of catalogues for mail order firms, (2) the printing of magazines, and (3) the printing of catalogues and advertisements in medium or low volumes. The Conseil found for the catalogue market that the rotogravure and the offset methods are not substitutable as the high volumes involved in this market require the use of the rotogravure technology. The Conseil further found that magazines in France are also printed by offset and not exclusively in the rotogravure method. As regards the market for medium or low volumes of catalogues and advertisements, the Conseil considered that they are mainly printed in offset.

With respect to the relevant product markets, the Commission's market investigation focused on the question whether and to what extent rotogravure and offset printing are interchangeable techniques and whether the different printing applications, namely magazines, catalogues and advertisements, constitute separate product markets. Since the merger takes place in Germany and has its main effects there, the analysis refers largely to data gathered from the German market participants.

2.5.1.1. Rotogravure vs. offset printing

2.5.1.1.1. Technical comparison

From a technical point of view, rotogravure and offset printing use two different printing methods. In rotogravure printing, the image area is engraved relative to the surface of the image carrier, which is a copper-plate steel cylinder that is usually also chrome plated to enhance wear resistance. The gravure cylinder rotates in an ink trough or fountain. The ink is picked up in the engraved area, and is scraped off the non-image area with a steel "doctor

31 Conseil de la Concurrence, Avis n° 02-A-01 du 15 février 2002 relatif à l'acquistion de la société European Graphic group ou E2G, filiale de Hachette Filipacchi Presse par la société Imprimerie Quebecor France.

blade". The image is transferred directly to the web where it is pressed against the cylinder by a rubber-covered impression roll, and the product is then dried.

The heatset web offset printing method is a printing system which uses plates instead of cylinders as image carriers. The image and non-image areas on the plate are chemically differentiated: the image area is oil receptive and the non-image area is water receptive. Ink rollers are used to apply onto the plate an oil-based ink which adheres only to image areas of the metal plate. The image is then transferred to a rubber blanket which subsequently transfers the image to the paper or other printing substrate. In the heatset process, which is used for high-quality print products, dryers are added to the offset printing machines in order to avoid the blurring of the colours in the further processing. This is achieved by using special heatset inks, which are essentially dried after the printing process by means of brief heating.

With both methods four colours, namely black, red (magenta), blue (cyan) and yellow, are used, out of which almost any other colour can be composed. Therefore, four plates or four cylinders are necessary in order to create a coloured image. In order to print recto-verso simultaneously, printing presses are usually equipped with eight cylinders or plates. To both types of printing presses can be added finishing machines to bind the paper, using the methods of saddle-stitching or perfect binding either in the printing machine (in-line finishing) or in separate finishing machines (off-line finishing).

2.5.1.1.2. Capacities

The capacities of the individual rotogravure presses are much higher than those of offset printing presses. According to the notifying Parties, rotogravure machines can be classified into the following machine categories which refer to the width of their cylinder: 2000 mm, 2400 mm, 2650 mm, 3000 mm and 3500 mm. It appears that modern rotogravure machines are even larger: the Parties have already installed at least one machine with a width of 4320 mm. The larger offset machines are classified according to the number of pages they can print per rotation: 32, 48, 64 and exceptionally 72 pages (the largest machine type available, with only six machines installed in the EEA).

The Commission assessed the capacity of the different offset and rotogravure machines on the basis of kilotonnes (kt) per year which, according to the notifying Parties, is the most appropriate parameter for comparison.

The notifying Parties claim that the larger offset machines with 32, 48, 64 and 72 pages per cylinder rotation are in direct competition with rotogravure printing since they can be combined in order to achieve higher volumes. For example, two 32-page offset machines could be combined in such a way that they have the same output and similar economics to a 64-page offset machine.

Although such so-called "twin-webs" appear to be technically possible, the economic feasibility of such a method is very questionable. The parallel use of two 32-page machines doubles both the labour cost and the pre-printing costs (for the preparation of double or multiple sets of printing plates etc.) and is likely to increase other costs.32 More importantly, it has to be noted that five 32-page offset machines would have to be combined in order to achieve the capacity of one single, medium-sized 3.00-metre rotogravure machine with the resulting consequences on the costs. Accordingly, the combined use of several offset presses is overall not a commercially viable option in competing with rotogravure presses.

2.5.1.1.3. Cost structures

The costs of a printing process diverge strongly as between offset and rotogravure depending on the volume of a print order, which is determined by the number of pages per issue and the number of copies of the issue to be printed. While the costs per hour of printing are higher for rotogravure, these presses have a bigger capacity and are therefore able to process large volumes faster and more cost-efficiently than offset presses.

A rotogravure printing press is a significantly higher investment for a printer than an offset printing press. This is reflected in a higher depreciation and accordingly in higher so-called "Budgeted hourly rates" (BHR), which are used by printers in order to calculate the costs (and prices) for single print-orders on the basis of the hours needed for carrying out these orders. The BHR includes costs not directly related to single print orders, mainly depreciation and personnel, calculated on an hourly basis.

Similarly the pre-press stage, that is to say, the production of the printing plates (offset) or cylinders (rotogravure) is more costly for rotogravure than for offset. Not only do the costs of a cylinder itself significantly exceed those for a plate, but also the preparation of cylinders is more costly than that of plates. This mirrors the fact that the engraving of the images onto the cylinder requires more work and time than the corresponding preparation of the printing plates.

Offset printing presses are more limited in the number of different pages they can print in one print-run. The surface of the cylinder (in rotogravure) or the plate (in offset) determines the number of pages which can be printed in one print-run and thereby also the time and cost of the complete printing process. The number of

32 A competitor stated that it would be 80% more expensive to run a 32-page offset machine twice than to run a 64-page machine once.

pages to be printed determines whether the entire issue (e.g. of a magazine) can be printed without change and interruption on the same cylinder or plate. As an example, on a 64-page offset machine only 64 A-4 pages can be printed with one plate; any further page requires the preparation and the use of an additional plate. By contrast, on a 4.32-metre rotogravure press up to 192 A-4 pages can be printed on the same cylinder without any interruption of the process, leading to a much higher output of pages per hour. Print orders for a product with a high number of pages will therefore normally be processed more cost- efficiently on a rotogravure printing press than on an offset printing machine, since the costs of a new print-run are avoided.

Rotogravure presses normally operate at a higher rotation rate than offset presses. This means that a large number of copies can be completed in a shorter period of time on a rotogravure press than on an offset press. Owing to the higher speed, a smaller total of fixed costs is eventually attributed to the individual order. For very large volumes, therefore, the advantage of being able to print in one print-run instead of two or more and the higher speed in printing outweighs the higher BHR and pre-press costs of rotogravure.

It can therefore be concluded that for large print volumes rotogravure is generally economically more efficient. This economic advantage grows with increasing numbers of pages per issue and copies.

2.5.1.1.4. Language / country versions and personalisation

An important exemption to this rule applies when one print product is printed in different language or country versions. Some industry players do not regard these different versions as separate print-runs since not all of the plates or cylinders have to be switched, when a new language or country version is to be printed (depending on the circumstances, only the plate or cylinder for the black colour in order to change the text but not the images).

Several customers confirmed that even very large numbers of copies can be printed economically on offset printing machines when many language or country versions need to be produced. This is due to the fact that the exchange of plates is cheaper than the exchange of cylinders. Moreover, in many cases submitted in the market investigation, the complete order consisted of one language or country version with a very large number of copies (400,000 – 1,000,000) and several other versions with sometimes very small numbers of copies (1,000 – 260,000). For the choice between offset and rotogravure, the cost disadvantages associated with offset for the main language version have to be balanced against the cost advantages of offset with respect to the switching of plates and the lower copy-numbers for the smaller language versions. The market investigation showed that offset is usually chosen as the more economical method if there are many language switches and only few copies for the smaller language versions. In the cases when offset was used and very large copy- numbers for the main language version

existed (800,000 – 1,000,000), the companies had between four and thirteen different language or country versions. Rotogravure was used when only two to four language versions were needed.

Another argument which might lead to a decision for offset even for large-volume orders was mentioned with respect to personalisation, meaning the insertion of the end- customer's names and addresses on the cover page or the insertion of customer-focused advertisement. Such a personalisation can technically better be processed with offset.

2.5.1.1.5. Paper format and quality

While offset is – apart from the above mentioned exceptions – economically not efficient with large print-volumes compared to rotogravure, the same rule does not necessarily apply the other way around. Rotogravure is sometimes chosen also for small volumes. This appears to be due to the factors of format and quality.

While rotogravure presses use cylinders of various diameters and therefore can be adapted to any format in both dimensions, offset presses are mostly aligned on A-4-like formats (approximately 30x21 cm +/- 2 cm). A variation is only possible either with respect to the height or the width of the format but not with respect to both dimensions at once. As a result, certain extra-high or extra-large formats cannot at all be printed with the offset technique. Formats shorter or narrower than A-4 lead either to an inefficient use of the offset machine if the printer uses a smaller paper format which only covers parts of the printing plate, or to a loss of paper. In this context it is important to bear in mind that paper accounts for approximately 50% of the total production cost. Both alternatives lead to higher costs and can make rotogravure more economical even for small print volumes.

It was generally confirmed by the market investigation that rotogravure produces a higher and more stable quality than offset printing. In order to achieve comparable quality with offset, heavier paper of higher quality needs to be used in order to avoid the waving of the paper which is caused by the greater volume of moisture entailed by the offset printing process. While the quality tends to decrease in offset printing with the proceeding print-run, the engraving on the copper-plate steel cylinder which is often enhanced by chrome ensures a high stability of quality.

2.5.1.1.6. Analysis of orders

The analysis derived from the data submitted by German print customers confirms the above mentioned considerations. The graph below incorporates the individual order data submitted by catalogue and advertisement

customers. Orders containing different language versions are excluded, be they offset or rotogravure.33 Since in some instances only annual print-runs, meaning the sum of print-runs for several issues in 2003, were indicated, the data collection contains partially very high values. For the purpose of the following graph all orders of more than 1,500,000 copies and more than 450 pages were excluded. None of the excluded entries contradicts the above mentioned delineation of the rotogravure market. This led for the year 2003 to 149 individual data sets derived from customers seeking to print catalogues and advertisements.

The analysis confirms the general pattern described above, namely that rotogravure is clearly more cost-effective for large numbers of copies (more than 400.000 – 450.000) combined with high page-numbers (higher than 64). Indeed, market participants who have not submitted detailed data per order have also confirmed this result. Offset is used with smaller volumes (owing to a smaller number of copies and/or a smaller number of pages).

For magazines, the data submitted by market participants complies with the above assessment. The dividing line between rotogravure and offset is even lower than for catalogues and advertisements. An analysis of the print jobs executed by the Parties' rotogravure plants and Bertelsmann's offset printing subsidiary Mohn-Media, one of the largest offset printers in the EEA, indicates the following: both rotogravure and offset techniques are used within a relatively narrow range of 200,000 and approximately 350,000 copies. However, no magazines for European third parties are printed by Mohn Media in offset with more than 32 pages per copy and with more than 360,000 identical copies. This threshold only takes account of "regular" A-4-like formats and is even lower if the format deviates from the standard format. The market investigation largely confirmed this threshold for continental Europe,34 where the vast majority of magazines with more than 64 pages and more than 360,000 copies are printed by rotogravure.35

This does not rule out the possibility that in exceptional cases higher volumes may be printed in offset as some examples submitted by the Parties show.36 Exceptions may be due to specific features required by the customer

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33 Also excluded were all submissions which did not precisely indicate the printing method used or the number of pages.

34 In the UK higher numbers of copies appear to be printed in offset; this appears to be due to the small rotogravure capacity in Britain which does not satisfy local demand. In a presentation by the parties, it was estimated that the UK only had a rotogravure capacity of 343 ktpa whereas the demand in the UK amounts to 673 ktpa. For this reason, publishers resort to offset printing.

35 The parties submitted one example of a magazine with a print-run of approximately 900,000 copies which was printed in offset. However, the Commission's investigation showed that this magazine contains a very high number of inserts and add-ons and an extremely high degree of personalisation. Under these very specific circumstances offset offers a greater flexibility.

36 The parties have submitted the contact details of these Mohn customers very late in the proceedings asking the Commission to proceed cautiously when questioning these customers about their choice of printing method, since there

(in particular personalisation, split of the magazine into different signatures each with a low number of pages, and high number of inserts) for which they consider the offset technique more appropriate, or individual preferences for specific printers.

2.5.1.1.7. Conclusion

The market investigation has shown that for the purposes of product market definition, rotogravure printing of high volume printing orders is distinct from offset printing. Rotogravure printing is mainly used for large-volume print orders, meaning print orders with a big number of copies and pages, while the use of the offset method is largely restricted to smaller volumes. The market investigation has confirmed that offset printing does not constitute a competitive constraint for rotogravure printing of magazines with more than 64 pages and more than 360,000 copies or for catalogues and advertisements with more than 64 pages and more than 450,000 copies.

2.5.1.2. Magazines, catalogues and advertisements

2.5.1.2.1. Magazines

A rotogravure printing press can print magazines, advertisements and catalogues alike. However, the market investigation showed that, at least for magazines, a separate market has to be assumed, on account of time-constraints connected to the printing of these products and to special requirements with regard to finishing and distribution.

Magazines can generally be regarded as more time-critical than other printing products. Some magazines need to be printed in a very short time-span because of the topicality of their content. Apart from that, short printing times are generally also required by the publishers' advertisement customers, that is to say, the companies which place their advertisements in the magazines. Publishers reported that it is a significant competitive factor for magazines to allow advertisement customers access to the magazine up to a very late stage, in order to allow these customers to flexibly react to new events and actions taken by their competitors. This requires a very quick and optimised printing process and excludes any interruption of the process which may be possible for other print products. For catalogues and advertisements this factor of time-pressure does not exist to the same extent. Even if some catalogues and advertisements might also have short agreed printing times, this depends mostly on their own organisation of production and distribution, and not so much on external factors.

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was a high risk of losing these offset-customers to rotogravure printing.

Magazine printing requires specific know-how with respect to finishing and the preparation of the distribution. Finishing comprises the binding of the printed paper and the attachment of promotional add-ons and inserts. The binding can be done by either of two main methods: saddle stitching and perfect binding. Catalogues are generally finished in perfect binding while magazines are finished in both methods. The distinctive element of magazine finishing relates to the method of enclosing add- ons and inserts.

The finishing of magazines requires specific finishing machines in order to deal with inserts and add-ons of samples. Usually the printers themselves own the specific machines and place them on their printing site or close to it in order to optimize the printing process and to better respond to the time-sensitive character of magazine printing. Unlike the finishing of catalogues which is quite frequently done by third parties to whom the individual signatures of the catalogue are shipped by the different printers involved, third-party finishing companies are used less for magazines. The requirements for dealing with inserts and add-ons differ internationally.

Printers who want to supply magazine publishers not only need to have the ability to respond to the time-critical nature of the print product and to the specific finishing requirements but they also need the know-how about the distribution system used. In some countries the magazine distribution system is far more complicated than the one used for catalogues and advertisements, notably in Germany. While catalogues and advertisements are regularly sent to central distribution hubs or for postal distribution, German magazines are usually transported via the press distribution channels to newsagents. The German distribution system for magazines consists of 80 – 90 geographically dispersed wholesale traders who must be supplied individually.

In addition, often a number of different versions of the same issue of a magazine have to be printed. Advertising customers may choose to place advertisements or to attach inserts or add-ons only for certain "Nielsen-areas" instead for the whole of Germany. The marketing research company Nielsen provides data for different areas in Germany which give information about the composition of target groups for advertisement. Other versions of the same magazine issue, too, may differ, such as the version for reader circles or for distribution outside Germany, which may have no samples or postcards attached.

The decentralised distribution and the need to distribute different versions also influence the organisation of the printing process. The printers need to organise their printing process in order to be able to match the requirements of logistics, i.e. the early completion of those copies dedicated to the wholesale traders located very far away together with those issues which the media forwarder is going to deliver along the route. In parallel, the printers have to consider the different versions to be completed at the same time.

It can be concluded that in sum the requirements of magazine printing are more stringent than those for the printing of catalogues and advertisements. They differ by country, moreover. Not all printers in Europe currently offer services which match the existing specific requirements of all magazine publishers. Their current services depend on the finishing machines they use, the know-how they have concerning different distribution systems as well as the location of their printing facilities and the distance to the publisher and to the area of distribution. Since printers located in other countries than the magazine publisher have difficulties in fulfilling the described specific requirements of these publishers, the product market definition as a result follows closely the geographic market definition discussed below.

2.5.1.2.2. Catalogues and advertisement

While magazine printing has, for these reasons, to be regarded as a separate market, the differences between the rotogravure printing of catalogues and that of advertisements are significantly smaller. There seems to be a continuum between the rather irregular and lower-volume advertisement printing and the seasonal, very high-volume main mail-order catalogue printing. Since a dividing line is difficult to draw, the notifying Parties have suggested considering only "main catalogues" as catalogues and the rest as advertisement.

It is conceivable that some advertisement print products exhibit similar features with respect to time-sensitivity as magazines. Retailers for example advertise their weekly offers with which they want to react on a short-term basis to their competitors' behaviour or wait for the latest sales figures in order to calculate their special offers. However, these potentially time-critical advertisement activities require print products of low page numbers. The products would therefore constitute a business field which is served not only by rotogravure printers but also by offset printers and is therefore not in the centre of this investigation.

Moreover, advertisements are distributed in a way which does not impose any specific requirement on the printers. In this respect the distribution of advertisements rather resembles the distribution system of catalogues. The finishing of advertisements is usually simple saddle stitching without the more sophisticated techniques necessary for inserts and add-ons in the case of magazines.

Consequently, it is concluded that there is a distinct product market for high-volume rotogravure printing of magazines. It can further be left open whether the printing of catalogues and advertisements in rotogravure is to be regarded as a single product market or whether separate markets for advertising printing and catalogue printing have to be considered as under none of these product market definitions competitive concerns arise.

2.5.2. Relevant geographic market

The notifying Parties submit that their proposed high-volume (rotogravure and offset) illustration printing market is EU-wide. As regards their proposed alternative sub- segmentation of the market, the Parties submit that the market for catalogues (with more than two million copies) is EU-wide as each of the main catalogues is printed by various printers in different countries. For the market for magazine and advertisement printing, the Parties submit that each printer can supply customers at least within a radius of 700 km. The drawing of circles of 700 km around the main European rotogravure and offset printing sites would result in a picture of largely overlapping circles. The Parties conclude that these circles would lead to a chain substitution effect so that the relevant geographic market would cover the EU.

In the decision M.3322 – Polestar/Prisa/Iversiones Ibersuizas/JV,37 the Commission concluded, in line with the notification in that case, that the market for the printing of publications was national in scope. In that case, it was not necessary to decide whether magazines, catalogues and advertisements constituted one single or several separate product markets. However, the Commission's conclusion on the national geographic dimension in that case was mainly based on findings of the market investigation which were particularly pertinent for magazines, such as proximity, rapidity, costs and distribution requirements.

The Commission's investigation in this case has shown that the structure of supply and demand for rotogravure printing services in Germany differs considerably from the situation in most other European countries. Owing to the large rotogravure printing capacity available in Germany which accounts for almost 50% of the total capacity installed in the EU,38 there are considerable exports of printing services, in particular to France and the UK. By contrast, German customers purchase rotogravure printing services abroad only to a rather limited extent. However, the number and volume of print jobs handled by foreign rotogravure printers for German customers varies among the different product markets described above.

The merger has its main effects in Germany where it combines five rotogravure printing facilities. Therefore, the following analysis will use as a starting point the conditions of competition in the two rotogravure printing markets (for magazines and catalogues/advertisements) in Germany before assessing whether and to what extent these conditions differ from those in other geographic areas.

37 Commission Decision of 15 December 2003, case M.3322-Polestar/Prisa/Inversiones Ibersuizas/JV.

38 According to the European Rotogravure Association (ERA), Germany accounts for 46% of the rotogravure capacity installed in the EEA, Italy for 15%, France for 10%, the Netherlands, the UK and Spain for 6-7% each (2003 figures, including data for the new Member States that acceded in May 2004).

2.5.2.1. Magazines

As to magazines the Commission's investigation has revealed several elements of evidence that this market is currently limited to Germany. First, only a very small part of German magazines is so far printed by foreign printers. Second, this low import ratio is due to a series of technical and economic factors in favour of domestic printers, namely the time-critical nature of many magazines, the specificities of the German distribution system and the particularities of German magazines with respect to finishing requirements.

Imports account for less than 4% of the total German demand for rotogravure magazine printing, and a very large share of these imports stems from Burda's printing sites in France and Slovakia. There is only one German magazine, accounting for far less than 1% of the German market for rotogravure magazine printing, which is printed abroad by a foreign printer.

One of the reasons for the almost exclusive use of German printers by German magazine publishers is the time-critical nature of these products. The risk of delays in delivery increases with the distance between the printing site and the distribution area, for example due to traffic jams or technical problems of a truck. A delayed release of a magazine not only leads to significant financial losses for the publisher but also damages the image of the magazine. The publishers are therefore very much inclined to minimize such a risk by choosing printing companies within Germany, – in the area where the magazines are to be distributed.

The notifying Parties submitted a study using the magazine Der Spiegel as an example to show that even the tight deadlines for this magazine could be met when printed at sites of competitors located close to the German border in the Netherlands and France (two sites), and at a planned site in Poland. Der Spiegel is currently printed in Itzehoe near Hamburg, and in Dresden. While the final content datareaches the printer on […], the magazine needs to be available on the points of sale in the whole of Germany on Monday morning, and in some cities as early as […]. It appears that the choice of two printing sites (both operated by G+J) was also motivated by the large printing volume and the aim to facilitate and secure punctual distribution.

The study intended to show that the calculated transport time from the printing sites abroad would not exceed the time available for printing and delivery. It was based on a series of assumptions, such as the increased use of fast mini-trucks which would lead to significantly higher transport costs. However, even assuming that foreign printers were theoretically able to meet the time frame for magazines such as Der Spiegel, the other economical and technical constraints would not be altered. This is also illustrated by the mere fact that other magazine publishers who do not face such tight time constraints as Der Spiegel have so far almost exclusively chosen printing sites within Germany.

Time-sensitivity does not, on the other hand, lead to a (regional) market narrower than Germany. There are only two German magazines printed at two different sites: Der Spiegel which had previously been printed for a long time at a single site, and ADAC Motorwelt, a membership magazine with a print run of 14 million copies which is distributed by mail. In both cases the main reason for the print split is the high volume to be printed within given time frames; the special situation of these two magazines would therefore not justify a market definition narrower than national.

The supply of German publishers by foreign printers is further hampered by the specific conditions of distribution in Germany. The German magazine distribution system is comparatively complicated on account of its decentralised structure, with more than 80 regional distribution hubs as already described above. In other countries, such as France, the distribution is organised over a centralised distribution hub. In combination with the need to print a number of different versions, and in particular to allow advertising customers to place their advertising only in specific Nielsen-areas, the decentralised distribution requires printers to organise the printing process according to the truck routing and departure, for example by bringing forward the printing of some regional editions for remote areas and to complete at the same time those editions which have to be delivered by the media forwarder along the route. Foreign magazine printers cannot simply enter the German market for magazine printing by using their existing methods of magazine printing. It was confirmed by the market investigation that it would take a considerable time-period and close co- operation with the publishers to acquire the specific know-how and adjust the printing process accordingly.

Another factor which distinguishes German magazines from magazines in other countries is the different and more complex use of add-ons, and hence the distinctive way of finishing. While in many other countries additional advertising products which are added to a magazine are usually wrapped into a transparent plastic envelope, this practice simply does not exist in Germany. The market investigation showed that German magazines are generally characterised by a particularly high number of advertisement inserts which are loosely inserted at specific pages of a magazine, and add-ons which are regularly firmly attached to the magazine. Printers abroad would therefore have to adjust their machinery to this habit in order to be able to supply German magazine publishers.

On the basis of these findings it is concluded that the geographical scope of the market for the rotogravure printing of German magazines is limited to Germany.

As to the other countries, such as France and UK, the market investigation has shown that imports of rotogravure magazine printing services from Germany are significantly higher than the other way around. The reason for this is the historically larger capacity located in Germany. This apparently led to some extent to differing preferences and a higher readiness of magazine publishers in the other countries to print abroad than is the case with German publishers. However, the exact definitions of the geographic market for these countries – with the exception of

Germany – can be left open in this respect since even the narrowest possible delineation of the geographic markets as national markets does not raise any competition concerns in these countries.

2.5.2.2. Catalogues and advertisement

As to catalogues, the market investigation showed that print orders are regularly split among several printers in order to ensure security of supply and a timely delivery of the required high volumes. It was broadly found that not only catalogue customers in countries other than Germany import printing services, mostly from Germany, but also that German customers regard foreign printers as viable alternatives.

Since catalogues are of clearly less time-critical nature than magazines (catalogues are printed within periods of usually between 2 and 6 weeks), also printers located outside Germany are regularly used by German catalogue editors. Many German catalogue publishers place at least parts of their printing orders with foreign printers, in particular Roto Smeets (Netherlands), Quebecor (France), Mondadori and Rotocalcografica (both Italy), and Ringier (Switzerland) as well as subsidiaries of German printing companies located abroad, such as Burda in France and Slovakia, and Rotoalba in Italy (a subsidiary of TSB). According to the market investigation and the data delivered by the printers, approximately [25-30%] of the German catalogue volume is printed abroad, including [15-20%] in Burda's French and Slovakian printing facilities.

The majority of German catalogue print customers who submitted data within the market investigation currently use printing companies abroad or have already done so in the past. The majority of these customers, moreover, indicated that they could increase their share of printing abroad. The shares of the individual printing volumes that these customers have placed with printing companies abroad range between 10% and 51%. Approximately one-third of the customers giving a reply indicated that they could not print abroad or would only use subsidiaries of German printers located abroad (France, Slovakia and Italy). The latter point in particular shows that with respect to catalogues the sheer distance between printer and distribution area is not as important for the choice of a printer as is the case in magazine printing. This is in line with the generally lesser time-sensitivity of these printing products.

One important issue in the choice of the printer is apparently the language. During the preparation of the printing process many technical details have to be co-ordinated and precisely adjusted between the printer and the customer. In order to avoid any risk arising from difficulties in communication, German printing customers obviously prefer to have technical assistance provided by the printer in German language.

This language question might be the reason why German customers to some extent prefer German subsidiaries abroad over foreign printers. However, the investigation confirmed that the major printers in the neighbouring countries (and Italy) who have successfully acquired German catalogue publishers, provide technical assistance in the German language (at least Roto Smeets, Quebecor and Mondadori; Ringier is located in the German-speaking area of Switzerland), and most of them also have a sales office in Germany. This linguistic presence matters, as customers usually come to the printing facility for the acceptance procedure, often accompanied by a member of the German sales office.

As a result it can be concluded from the responses in the market investigation and from the ordering behaviour of German catalogue customers that printers in countries adjacent to Germany, and in Slovakia and Italy, constitute viable alternatives for German catalogue producers. Since customers from these countries also use printing services from other countries within this area – mainly Germany – the geographic market can therefore be defined as Germany plus the neighbouring countries (France, Belgium, Netherlands, Luxemburg, Switzerland, Austria, Czech Republic, Poland, Denmark) together with Italy and Slovakia, covering the large printers in these areas such as – beside the German printers – Quebecor, RotoSmeets, Mondadori, Ilte, Rotocalcografica and Ringier. The UK is not part of this market since German catalogue publishers unanimously did not consider the printers located in the UK to be a viable alternative.

This market definition is compatible with Decision M.3322- Polestar/Prisa/Iversiones Ibersuizas/JV, where the Commission has concluded that there is a national Spanish market for rotogravure printing of publications, including catalogues and advertisements. It appears that the geographic situation in Spain differs significantly from that part of Europe which is under consideration in this case, since there are no rotogravure printers in the adjacent areas, i.e. Portugal and the South-West of France. For Spanish customers, the possibilities of importing rotogravure printing services are therefore very limited.

Advertisement printing for German customers is apparently to a large extent carried out in Germany: imports account for around 5% of the market. This does not, however, mean that a national market can be assumed. It appears from the market investigation that the reason for the focus of German advertisement customers on domestic printers is rather the availability of sufficient capacities and suppliers in Germany. So far, German customers of rotogravure advertisement printing therefore have had no reason to turn to foreign suppliers, in particular as the motive of risk diversification applicable to catalogues, whereby very large volumes are split, does not prevail to the same extent.

However, in spite of a lower import ratio for advertisement printing than for catalogue printing, German customers can easily turn to credible foreign printers having the capability and the equipment to supply such services to Germany. The printing of advertisements does not create any specific difficulties comparable to those in the magazine printing market, such as the special finishing or specific conditions of distribution. Most advertisements are finished by simple saddle stitching without any specific requirements for add-ons or other

additional features. Distribution apparently does not exhibit specific difficulties and is mostly organised by the customer. Moreover, as was described above, advertisements are generally not as time-critical as magazines. Consequently, every printer abroad who already prints catalogues for German customers can be assumed to be also capable of printing advertisements to be distributed in Germany. Since most publishers of main catalogues also issue advertisements, it would in addition be easy for them to use the existing links to foreign printers for advertisement orders too. For this reason, the geographic scope of the market for rotogravure advertisement printing can be considered to be the same as for catalogues, comprising Germany, its neighbouring countries, and Italy and Slovakia.

3. Compatibility with the Common Market and the EEA Agreement

3.1. Markets for Rotogravure Printing

3.1.1. Overview

The proposed joint venture brings together the current leader among the German and European rotogravure printers, Bertelsmann (including the subsidiary G+J), and the third-strongest German rotogravure printer (and sixth-strongest in Europe), Springer, assessed on the basis of installed capacity for rotogravure printing in tonnes. The concentration will therefore strengthen Bertelsmann's leading position in Germany and Europe in the field of rotogravure printing. Bertelsmann's rotogravure activities in Italy and Spain will remain outside the joint venture. Those activities will be taken into account when assessing the effects of the proposed joint venture in those markets where both NewCo and the printing facilities remaining with Bertelsmann are active.

Outside the proposed joint venture, Bertelsmann operates two further rotogravure facilities in northern Italy: Eurogravure in Bergamo and Milan. It also runs one printing facility in Spain, Eurohueco. The facilities in Spain and Italy have a combined capacity of [200-250 kt].

The main other players in the sector of rotogravure printing in Europe are the following:

- Schlott and TSB in Germany. These undertakings are not vertically integrated into publishing, but only operate rotogravure printing facilities (as well as heatset web offset). Schlott is the largest printer in Germany after Bertelsmann (and the third-largest in Europe) and operates four rotogravure sites in Germany, located in Hamburg, Freudenstadt, Nuremberg and Landau, with a total capacity of [500- 550] kt. TSB operates two rotogravure printing facilities in Germany, located in Moenchengladbach and Munich with a total capacity of [200-250] kt as well as a smaller rotogravure printing facility in Italy, called "Rotoalba" and located close to Turin, with a capacity of [50-75] kt.
- The publishers and printers Burda and Bauer in Germany. Whereas Burda offers a

significant portion of its printing capacity to third parties, Bauer uses its printing facilities nearly exclusively for the captive printing of its magazines. Burda operates a large printing facility in Offenburg in Germany with a capacity of [150-200] kt, a further rotogravure printing facility in Vieux-Thann (France) with a capacity of [100-150] kt and a small rotogravure printing facility in Bratislava (Slovakia) with a capacity of [25-50kt]. Bauer operates a large rotogravure facility in Cologne (Germany) with a capacity of [150-200] kt, and two sites in Poland, one in Ciechanow with a capacity of 101 kt, according to the estimates of the Parties, and a planned facility in Wykroty.

- The non-vertically integrated printer Quebecor with five rotogravure printing facilities in France (located in Blois, Corbeil, Lille, Mary-sur-Marne and Strasbourg) with a total capacity of 383 kt according to the estimates of the Parties and one facility in Belgium and Finland respectively (each with a capacity of 77 kt according to the estimates of the Parties). Quebecor is the second-largest printer in Europe, after Bertelsmann (and the joint venture).

- The non-vertically integrated printer Lenglet with one rotogravure site in France, operating only since 2002 and with a capacity of [50-100] kt.

- The non-vertically integrated printers Roto Smeets and Biegelaar in the Netherlands. Roto Smeets operates two sites in Etten-Leur and in Deventer, with a combined capacity of [250-300] kt. Biegelaar operates one small printing site with a capacity of [50 – 75] kt.

- The publisher and printer Mondadori which operates two rotogravure printing facilities in northern Italy, located in Melzo and Verona, with a total capacity of [150-200]* kt, which is used to a considerable extent for its captive needs. The printer Rotosud uses its capacity exclusively for the captive needs of the publishing parent company.

- The non-vertically integrated Italian printers Ilte (with a printing site in Turin and a capacity according to the estimations of the Parties of 146 kt) and Rotocalcografica, operating a rotogravure printing site close to Milan with a total capacity of [50-75] kt.

- The non-vertically integrated printer Polestar with three existing rotogravure sites in the UK, located in Scarborough, Bristol and Pershore, with a total capacity of 290 kt according to the estimates of the Parties and a printing facility under construction in Sheffield which is due to start production in 2005. Polestar further operates two printing facilities in Spain with a capacity of 159 kt according to the estimates of the Parties.

The position of the Parties in the field of rotogravure is further shown by their share of the capacity for rotogravure printing installed in Germany. The proposed joint venture is also the leading player in Europe. Whereas the installed annual capacity in Germany amounts to 2322 kt,39 the installed annual capacity was

39 The parties estimated the German installed annual capacity to amount to 2608 kt.

only around 656 kt in France and 333 kt in the UK40 according to calculations of the Parties. The importance of the rotogravure capacity installed in Germany is further shown by the fact that the German share of the European rotogravure capacity is more than 45%. The capacity of the proposed joint venture therefore exceeds the total capacity installed in France and the UK.

Players from other Member States are considerably smaller than the proposed joint venture. On a European scale, Arvato's rotogravure capacity in Italy and Spain has also to be taken into account. According to the Commission's calculations, the capacity of the proposed joint venture and of Arvato's Italian and Spanish facilities will be more than double the capacity of Quebecor, taking Quebecor's rotogravure printing facilities in France, Belgium and Finland together. The third player on a European scale is the German company Schlott with the capacity described above.

3.1.2. Structure of the relevant markets

The proposed joint venture will be active in the markets for the rotogravure printing of magazines, catalogues and advertising in a number of countries within the EEA, but the most serious effects of the proposed concentration – owing to the location of the five existing printing facilities brought into the joint venture – will be felt in Germany. The Commission analysed the impact of the transaction in the different markets first on the basis of market shares. In the following paragraphs, all markets in which the proposed joint venture would lead to an addition of market shares and to a combined market share exceeding 15% will be discussed. The geographic market definition for the markets beyond Germany has been left open. For those markets, the analysis will be carried out on the basis of the narrowest geographic market definition conceivable. If no competition concerns arise on the basis of this market definition, competition concerns can be generally considered not to arise.

The Parties have estimated market shares on the basis of the installed capacities of rotogravure machines, assuming an average usage of the machines of 85%, deducting the estimated intra-group sales of the vertically integrated printers, and identifying the proportion of imports and exports on the basis of the Parties' knowledge and the Eurostat statistics of the Commission. The Parties further assumed in their estimates that the competitors have a similar split between the three print products: magazines, catalogues

40 The figures for the UK do not include the new plants built by Polestar in Sheffield and by Arvato (to be transferred to the proposed joint venture) in Liverpool.

and advertising. For their own merchant sales in the year 2003, the Parties submitted the following figures for those different print products, including only those parts of the Parties which are brought into the proposed joint venture.

3.1.2.1. German market for magazines

On the basis of the results of the market investigations, the Commission calculated the market shares for the German merchant market for rotogravure printing of magazines in line with the general approach of the Parties, namely on the basis of tonnes of paper used for the printing of magazines for third parties. According to these calculations, the joint venture will be the clear market leader, with a market share of around [45-50%] in the German merchant market for rotogravure printing, i.e. excluding printing for in-house publishers. The next players are TSB and Schlott with around [20-25%]* each and Burda with a share of [0-5%]. Imports account for [0-5%], which are to a very considerable extent supplied by Burda's printing facilities in Vieux-Thann (France) and Bratislava (Slovakia). Apart from those imports, only one German magazine is printed abroad, by the Dutch printer RotoSmeets.

On the basis of this market structure, competition concerns can be ruled out from the outset, and therefore the market for the rotogravure printing of German magazines will be discussed in detail below.

3.1.2.2. Markets for magazines in other EEA Member States

The merger does not lead to a situation which could give rise to competition concerns in other Member States of the EEA in the markets for rotogravure printing of magazines. In such markets, defined on a national basis as the narrowest market definition conceivable, market shares exceed 15% only in the UK, Austria and the Czech Republic, on the basis of the estimates submitted by the Parties for 2003.

According to the information submitted by the Parties, the proposed joint venture reaches a combined market share of [20-30%] (equalling [40-50 kt]) in the UK market for rotogravure printing of magazines (having a total market volume of 178kt in 2003), with an additional 1% market share achieved by Bertelsmann's remaining activities. However, the overlap is de minimis, as Springer's market share only accounts for [0-1%] (equal to [0-1 kt]). Polestar is much stronger than the proposed joint venture, having a market share of [40-50%]* (equal to [50-100 kt]). Bertelsmann is currently in the process of constructing a new rotogravure printing facility in Liverpool which will start operations in 2006/2007. The capacity will be

[150-200 kt], of which [100-150 kt] are reserved for a large printing order for magazines for a UK customer. Although the printing facility is planned to be brought into the proposed joint venture, a possibly increased market presence in future due to the new plant cannot be attributed to the creation of the joint venture. The construction of the plant was planned to be undertaken by Bertelsmann alone, so that the proposed concentration is not causal for any potential increase in market share due to the construction of the new plant in Liverpool. Even considering a purely speculative increase in market share in the future, the considerations mentioned above are valid in showing that the increment contributed by Springer's presence on this market is de minimis; Polestar is currently the market leader by a wide margin, and will remain a very strong competitor, account being taken of the fact that Polestar is currently constructing a new rotogravure printing facility with a large capacity in Sheffield which will be operational in 2005.

In Austria, the proposed joint venture would have a market share of [60-65%], equivalent only to a volume of [10-15 kt] (Bertelsmann's remaining activities have an additional market share of [1-5%]). However, Springer is not active there, so that no overlap in market share exists. In the Czech Republic, Bertelsmann has a market share of [25-30%] in magazine printing (equal to a volume of [5-10 kt]), but Springer does not add any further market share and the competitor, Nase Vojsko, reaches a share of [30-35%].

3.1.2.3. Markets for catalogues and advertisements

In the market for rotogravure printing of catalogues and advertisements, the market shares of NewCo would amount to [20-25%]* on a European market including Germany, the neighbouring countries and Italy and Slovakia according to the estimates of the Parties on the basis of the volumes for 2003. On the basis of distinct markets for catalogues and advertisements, the proposed joint venture would have a share of [15-20%]* in a market for catalogue printing and of [20-25%]* in advertisement printing. For Bertelsmann's rotogravure printing activities being kept outside the joint venture, an additional [1-5%]* has to be added to each of these market shares. On separate markets as well as on a combined catalogue and advertisement market, Schlott and Quebecor would follow close behind with market shares of between 13% and 14% and TSB with approximately 11%. On such a European market, competition concerns therefore arise neither for a market combining catalogue and advertising prints nor for distinct markets for catalogue and advertisement printing.41

41 Even considering a hypothetical market for catalogue and advertising printing confined to Germany no competition problems would arise. According to the results of the market investigation, the proposed joint venture's market share would amount to [25-30%]* in a hypothetical German market for catalogue and advertising printing: on

The merger does not raise competition concerns for the other markets within the EEA for catalogue and/or advertising printing, even if those markets are delineated as national in scope using the narrowest conceivable market definition. According to the information submitted by the Parties for the UK, no critical market shares are reached on the markets for rotogravure printing of catalogues and/or advertisements. The proposed joint venture would have a share of [20-25%]* in a market for the printing of catalogues and advertising, and of [30-35%]* on a market for catalogues and [15- 20%]* for advertisement printing. Polestar is the leader in these markets with market shares between 42% and 46%.

If the market for Sweden is defined as national in scope using the narrowest conceivable geographic scope, the proposed joint venture would have a market share of [25-30%]* on a market for catalogue and advertising printing and, assuming distinct markets, [35-40%]* on a market for catalogues and [20-25%]* for advertisement printing. Quebecor follows closely with a share of the combined market of 28% and with shares of 25% for a catalogue market and 32% for an advertisements market, where it is the leader. Even if the market share for a distinct market for catalogue printing could be considered high, it has to be noted that Springer only accounts for an increment of less than [0-5%]*, equal to a volume of less than [… kt]* in a market which has a volume of only 17 kt overall. Given the small total market volume, even one printing order may significantly change the picture without conferring decisive market power on the market participants. If Norway and Finland are included in the market, market shares for such a Nordic market for catalogue and advertising printing would drop considerably, to far less than 20% on a combined market and a market for advertisement printing, and considerably less than 30% on a market for catalogue printing.

It can therefore be concluded that no competition concerns arise from the proposed concentration in the markets for catalogue and advertising printing, howsoever the geographic scope of these markets is delineated.

separate markets the proposed joint venture would have a share of [20-25%]* in a German market for catalogue printing and [30-35%]* in a German market for advertising printing. The proposed joint venture would not be the strongest player in such hypothetical markets; the leader would be Schlott.

3.1.3. Potential competitive harm to customers in the German market for rotogravure printing of magazines

As was already mentioned above, the proposed joint venture will be the clear market leader in the German market for the printing of magazines.

As already indicated above, the Parties' main competitors are TSB and Schlott, with a market share of [20-25] % each, and Burda (Germany only) with a market share of [0-5] %. If imports from Burda's printing sites in Vieux-Thann and Bratislava are taken into account, Burda's market share increases to [5-10] %. Bauer cannot be considered a competitor in magazine printing for third parties. Bauer uses its capacity nearly exclusively for its captive needs and does not print a single third-party magazine. The Parties claim that Bauer made an offer for the printing of a third-party magazine some years ago. However, the Commission does not have any indication that Bauer is currently considering the printing of third-party magazines.

The market investigation did not allow an assessment of the market shares over several recent years. In general, it may be assumed that market shares are relatively stable. Although some switches of printers occurred in recent years, in general the relationship between magazine customers and rotogravure printers is quite stable, sometimes leading to the result that a printer prints a magazine for several decades. However, the Parties submitted that the relationship between the merchant market and the captive printing has changed. In 2004, Springer acquired the magazine TV Digital for the German broadcaster Premiere whose printing volume of [1-5 kt]* has therefore become captive. Furthermore, G+J has very recently acquired the publisher Motorpresse42 whose rotogravure printing volume for the magazines […]* and […]*, of close to [… kt]*, will become captive. Whereas these acquisitions by the Parties at the same time reduce the volume of the merchant market as well as their market share, the recent acquisition of the publisher Milchstraße by Burda only reduces the volume of the merchant market, but might even increase the Parties' market shares. Owing to the lack of figures for 2004/5, the exact impact of these acquisitions on the market shares cannot be calculated, but it can be concluded that the overall volume of the merchant market and the supply of the Parties have been reduced.

Furthermore, the Parties waived the matching right [one of the Parties had with regard to an important magazine printing volume. The waiver of this matching right will make this printing volume contestable by

42 Case COMP/M.3648 – Gruner + Jahr/MPS.

third-party printers after the end of the contract and will thereby make sure that this part of the Parties' position, too, is under a competitive threat from third-party printers and that this is not an unchangeable part of the Parties' market share.]*

In the light of the high market shares and despite the mitigating factors, serious competition concerns could be raised for the German market for rotogravure printing of magazines. In such a market, customers – the publishers of magazines – could be harmed if the joint venture were able to profitably raise prices and if customers were not able to counter such price increases by switching to other suppliers on account of a lack of available capacity or an insufficient number of suitable competitors.

3.1.3.1. Available alternative capacity of competitors

Customers could counter a price increase by the proposed joint venture if they were able to replace a significant volume of the quantities purchased from the Parties with supply from competitors so that a price increase would be rendered unprofitable for the Parties. As is shown in table 4 above, the volume supplied by the Parties to the merchant market amounted to [150-200 kt]* ([100-150 kt]* for Bertelsmann; [45-50 kt]* for Springer) in 2003. It may further be considered that a volume of around [10-15 kt]* of this supply has become captive in the meantime owing to the acquisition of publishing houses by the Parties so that no customer can be harmed by this volume. Taking this into account, the volume which the Parties supplied to the merchant market totalled [100-150 kt]*.

The market investigation did not give any indication that the demand for the printing of magazines would increase in future. After a boom around the year 2000, demand for magazine printing decreased, largely on account of a reduction in advertising pages, a decrease in the number of copies per issue and the increasing importance of the Internet for the exchange of information and for advertising. The Commission therefore examined the question whether competitors would be able to replace a significant part of the capacity on the basis of the figures for the year 2003.

In the following, the questions examined will be (1) whether competitors currently have sufficient spare capacity to replace these sales to a significant extent, (2) whether competitors could make available such capacity by shifting their capacity to the printing of magazines, (3) whether planned capacity extensions will make available further capacity and (4) whether potential competitors could contribute to making available further capacity for the printing of magazines in the event of a price increase. However, as a basis for this examination the general capacity allocation by rotogravure printers will be analysed.

3.1.3.1.1. Current capacity allocation by competitors

The Commission analysed the way in which rotogravure printers allocate their capacities to the different print products – magazines, advertising, catalogues – in order to determine how much of their current spare capacity the competitors can use for the printing of magazines and how much of the capacity currently used for the printing of catalogues and advertising could be shifted to the printing of magazines.

One of the main characteristics of the rotogravure printing industry is that it is driven by capacity. The costs of the printing press account for a very considerable share of the total costs for operating the printing facility. According to the calculations of the Parties for printing presses with a width of 3.60 – 4.32 m, the two main cost factors are personnel costs and depreciation, whereby personnel costs account for approx. 29 – 39% and depreciation of the printing press for approx. 26 – 30% of the total indirect costs (expressed in the "Budgeted Hourly Rate" as described above). These exclude costs directly related to an order such as paper, ink and transport. These direct costs are fully variable and only transitory items for the printer. The situation as to the pre-press costs which are related to the engraving of the cylinders and their further preparation for the printing process is similar to the cost calculation for the printing presses themselves, that is to say that the main factors are costs for cylinders, engraving machines and personnel. The main factor which drives the business of a rotogravure printer is therefore the incentive to use the installed capacity as fully as possible in order to recoup the fixed costs (or more precisely the indirect costs) of the printing press. In order to fill the capacity printers will normally try to achieve a mix of different print products – advertising, catalogues and magazines, as these print products have different characteristics.

On the basis of the market investigation, the Commission has come to the conclusion that no 100% supply-side substitutability between the different print products can be assumed. In other words: it cannot be assumed that printers will switch their capacity from printing catalogues and advertisements entirely to the printing of magazines, or that they will use their entire annual spare capacity only for the printing of magazines.

Limitations on the use of capacity for the printing of magazines arise first from the differences in periodicity, printing time and volume of the different print products. Magazines are printed periodically (weekly, fortnightly or monthly) with fixed and relatively short agreed printing times (one to ten days, at the very most). Owing to their long-term and periodical publication, they constitute the "base load" for the printing

facility which fills the presses over the entire year. Differences in the printing volume for magazines only arise over the year as in certain periods – e.g. in summer – editions may have a lower number of pages due to fewer advertisements or may have a lower print-run. The longer-term and regular character of the printing of magazines is also reflected in the relatively long duration of the print contracts for magazines which normally ranges between two and five years.

By contrast, catalogues for mail-order companies or tour operators, et cetera, are usually released only twice per year with very high printing volumes (both in terms of the number of copies and of pages) and longer printing times (up to several weeks). They are normally printed in May and June and from October till December and constitute a "peak load" for the printing presses. The duration of contracts for the printing of catalogues is shorter than that for the printing of magazines: it ranges normally between six months and three years (exceptionally, the Parties entered into longer-term contracts under specific circumstances, […]).

The third category of print products, advertising, is in essence used to fill the printing capacity between the catalogue printing seasons and on the week days when fewer magazines are printed. As publishers prefer to release their magazines on certain week days, the printing of magazines varies over the week and there are days on which a comparatively lower number of magazines is printed. Print orders for advertising are normally placed on a short-term basis; the duration of contracts for advertising printing is normally between three months and one year.

On account of these time characteristics, the majority of printing companies indicated that an unlimited use of spare capacity for magazine printing or an unlimited switch from catalogues/advertisements to magazines would not be feasible. Whereas magazines are printed throughout the year on certain week days in a given frequency, spare capacity may only be available in times of low demand; therefore, at times when no catalogues are printed or on days of the week when demand for magazine printing is low. Periods of low demand in the year are in particular February and March as well as August and September. Advertisement would at least be necessary to fill the smaller gaps in capacity utilisation within the week, since weekly magazines are not released on every day of the week to an equal extent. Moreover, owing to the existence of fortnightly and monthly magazines, apparently also bigger gaps have to be filled within the month by either advertisements or catalogues. In addition, the risk borne by a printer would significantly increase if it focused exclusively on the printing of magazines. In this case, breakdowns of machines could have the result that a magazine – given the rather tight deadlines for magazines in general – was not printed in time whereas the risk can be balanced if the printer also prints other print products with longer deadlines. In this case, the printer can switch the magazine printing to another press and can catch up on the printing of the

advertisement or catalogue later. This flexibility in capacity allocation is considerably reduced if a printer focuses exclusively on magazine printing.

Furthermore, a printer may not wish to abandon the printing of catalogues (and advertisements for filling the gap). Whereas such a printer may readily print magazines in times of low demand, a conflict between the obligation to print magazines throughout the year and the printing of catalogues may arise. If in such peak times neither spare capacity were available nor capacity were used for the printing of advertising, the printer would have to abandon the printing of catalogues in order to be able to print magazines.

Owing to these constraints on the printing of magazines, the majority of the printers which replied during the market investigation stated that they would not be able to use their entire (annual) capacity for the printing of magazines, but that they needed to retain some flexibility. Three rotogravure printers indicated a maximum of 70% and one a maximum of 85% of magazine printing in their printing product mix. Only one printer indicated that its capacities were 100% variable for the printing of the different products.43 The Parties – although arguing in general for a 100% supply-side substitutability – admitted that a capacity utilisation exclusively based on the printing of magazines would not be an "optimal mix" since it would not allow the printer to balance the risk and would make production inflexible.

Secondly, limitations may further arise due to limitations in the capacity of finishing machines. As was explained above, the finishing of magazines – either in saddle- stitching or in perfect binding – is usually done by the printer in Germany and requires specific finishing machines adapted to the finishing of magazines. The capacity for the printing of magazines is therefore generally limited by the available capacity of finishing machines. However, the investment necessary for an extension of the finishing capacity is much less than that necessary to extend rotogravure printing capacity. Whereas the investment for a new finishing machine amounts to between EUR 2.5 and 4.5 million (depending on its capacity and whether it is a less expensive saddle-stitching machine or a more costly perfect binding machine), the price for a new, state-of-the-art rotogravure press (as a system) totals between EUR 20 and 30 million. The market investigation showed that customers may prompt the investment of printers in finishing machines whereas this is very rarely the case for an investment in rotogravure printing capacity. However, the market investigation also demonstrated that finishing machines are only acquired if a continuous utilisation of these machines can be expected, but not if they are not only utilised for one specific order or on one day per week. This may be

43 Two printers could not produce any estimate.

especially relevant for those printers having a relatively small share of magazine printing in their product mix. The market investigation further showed that lack of finishing capacity in peak times can be overcome by outsourcing the finishing to independent finishing undertakings. This is in particular done for perfect binding of magazines, less for saddle-stitching of magazines. This solution is in particular chosen for peak times as the outsourcing usually entails additional costs and time for the transport of the magazines.

Third, limitations on the printing of magazines may arise from the focus of the printer, whether the specific printer gives priority to the printing of catalogues and advertising or whether he gives priority to the printing of magazines. Despite the possibilities of overcoming lacking finishing capacity by investment in new finishing machines and by turning to independent finishing undertakings in peak times, it would not be realistic to assume that those rotogravure printers which have their current focus on the printing of advertising and catalogues would make their capacity available up to the general limit of 70 – 85% for magazine printing and thereby also largely abandon their traditional business.

3.1.3.1.2. Capacity of German competitors

3.1.3.1.2.1. Currently available spare capacity of competitors

On the basis of the foregoing considerations, the Commission analysed how much spare capacity can be made available by competitors for the printing of magazines. Taking into account in particular the seasonality of the different print products, the Commission assumed that a careful approach should include spare capacity of the competitors for the printing of magazines only up to an annual capacity utilisation of 95%. Above that level, it cannot be safely assumed that spare capacity could be used throughout the year for the printing of magazines.

Capacity utilisation has been quite high in this industry in recent years. The German competitors Schlott, TSB and Burda indicated a capacity utilisation of 90% or higher for 2003 or 2004. As regards the available capacity of competitors, the Commission included Burda's printing facility in Vieux-Thann as part of Burda's overall capacity, as Vieux-Thann is located at only 35 km from the German border and at 130 km from Burda's printing headquarters in Offenburg. Both sites therefore are regarded as a single production entity.

On the basis of a maximum capacity utilisation of 95% and the figures submitted for 2003, it appears safe to assume a spare capacity for magazine printing of the German competitors of 17 kt.

3.1.3.1.2.2. Supply-Side Substitutability

Magazine customers could also turn to competitors of the joint venture if German rotogravure printers – irrespective of their current spare capacity – were to make additional capacity available for the printing of magazines instead of printing advertising or catalogues. The shift of capacity to the printing of magazines does not automatically result in a reduced capacity for advertising and catalogue printing and thus lead to a price rise in these markets. Whereas the scope of the market for magazine printing is limited to Germany, the geographic market for catalogue and advertising printing is defined as Germany, its neighbouring countries, and Italy and Slovakia. German advertising and catalogue customers are therefore not limited to German rotogravure printers, but can turn to suppliers abroad such as RotoSmeets, Quebecor, Ringier, Mondadori and Ilte. This possibility for catalogue and advertising customers to turn to printers outside Germany is also confirmed by the lower market shares of the proposed joint venture in these markets as indicated above.44

3.1.3.1.2.3. Possibility for switching to magazines

The Commission assessed the possibility of German rotogravure printers to switch their capacity currently usedfor the printing of catalogues and advertising on the basis of the considerations outlined above. The Commission therefore relied first of all on the figures provided by the competing printers themselves; thereby taking account of their individual limitations due to the lack of finishing capacities and their current printing focus. The competitors which replied by stating a figure indicated switching rates of up to [15-20%] of their total capacity. One German printer did not provide any figure; as a cautious approach and in line with the other results of the market investigation, the Commission assumed that this printer, who currently has a comparatively low share of magazine printing, could dedicate another [10-15%] of its capacity to magazine printing. The Commission therefore did not assume that the competitors could in general switch up to 70% of their capacity to the printing of magazines which were indicated as the general maximum for the printing of magazines in the market investigation. In a cautious approach, the Commission remained far

44 Even on a hypothetical German market for catalogue and advertising printing the proposed joint venture would not raise competition concerns. Even if competitors shift capacity to magazine printing, this does not mean that the proposed joint venture would be able to exert market power on such a hypothetical German market for advertising and/or catalogue printing.

below this figure for those printers which indicated individual constraints due to the lack of finishing machines or a focus on the printing of catalogues and advertising.

On the basis of such estimations, the entire annual capacity which German printers could make available for magazine printing would be around 130 kt. This additional capacity of 130 kt which the other three German rotogravure printers could make available by switching away from catalogue and advertising printing would account for a very large share of the entire capacity used by the Parties for printing third parties' magazines ([150-200 kt]* in 2003).

Furthermore, it has to be underlined that the estimate for the possibility of switching seems to be rather conservative, as it takes account of the current finishing capacity and the current focus of the printers. As was explained above, the market investigation confirmed that printers may acquire additional finishing capacity if this is needed for a major new order, or may use third-party finishing capacity in the interim and may also shift their focus at least in the medium term. Taking account of these factors, it would appear to be possible for those printers to increase the maximum capacity for magazine printing beyond the share actually assumed, at least in a medium-term perspective, if this were required by major new orders for magazine printing. Such a perspective seems a reasonable assumption, as the duration of contracts for magazine printing usually ranges from two to five years so that such contracts will only come on the market one by one over a period of several years.

3.1.3.1.2.4. Incentives for a switch to magazine printing

It would not be sufficient that competitors had the possibility to switch their capacity to magazine printing (and thereby defeat the attempt of a price increase by the joint venture for magazine printing) unless they also had the incentives for doing so.

In order to analyse the incentives of printers to switch their capacities to the printing of magazines, the Commission calculated contribution margins of the Parties for the different print products on the basis of all their print orders in the year 2003. The margins varied very significantly within the categories, and they even varied within the same order for the printing of different issues. This results in particular from the fact that the margins are based on actual costs so that higher costs for the printing of a specific issue due to technical problems, a larger number of inserts, a suboptimal exploitation of the size of the printing machine,

etc. may lead to a reduced contribution margin although the printing of all the issues of a magazine is based on one price and one order.

The Commission therefore calculated weighted averages for the contribution margins for the different print products for the three printing companies involved for all their print orders in the year 2003.

This conclusion, reached on the basis of the Parties' data, is confirmed by the market investigation. For the other printers, the highest margins were either reached with magazine printing or the margins for magazine printing were close to the catalogue margins whereas advertisement printing was much less profitable. It can therefore be assumed that magazine printing is more profitable than a mix of catalogue and advertisement printing.

Magazine printing has a further advantage which may constitute an incentive for printers for a switch to magazine printing. As magazines are printed periodically on the basis of longer-term contracts, they constitute a base load for the printing capacity. If the base load is increased, the printer has to fill less capacity with short-term orders, in particular advertisements. As a consequence, a higher share of magazines in the product-mix significantly reduces the printer's risk of not fully utilizing the existing machines and the effort of acquiring additional orders to fill the gaps.

It can therefore be concluded that the German competitors Schlott, TSB and Burda would have the possibility of switching capacity from advertisement (and catalogue) printing to magazine printing and would also have the incentives to do so. The volume which could be made available would cover a very large share of the volume currently used by the Parties for the printing of magazines.

3.1.3.1.2.5. Additional capacity due to capacity increases of German competitors

Furthermore, the profitability of a potential price increase for magazine printing by the Parties is likely to be thwarted by their competitors' ongoing or planned installation of new and more powerful presses which result in a net increase of rotogravure capacity available for German customers.

All three German competitors, TSB, Schlott and Burda are currently in the process of installing new rotogravure presses or are planning to do so by the end of 2007. To some extent the new presses replace

older presses which are to be dismantled subsequently. Nevertheless, the installation of new presses is likely to lead to an increase of net capacity as the new presses usually have a higher capacity than those old presses. And even if a printer intends to gradually dismantle the same volume of capacity as will be installed, so that there is no net increase in capacity, the printer concerned will still be able to delay the dismantling of the old presses if it expects a rising demand.

On this basis, the Parties' three main competitors in Germany, Schlott, TSB and Burda, are planning to increase their net capacity by at least 50 kt over the next two to three years. This figure does not take into account their additional possibility to increase their net capacity, at least on a temporary basis, in deferring the planned gradual dismantlement of older but still operative presses.

3.1.3.1.2.6. Conclusion on capacity of German printers for magazine printing

On the basis of the above calculations, the three most important German competitors, namely Schlott, TSB and Burda, would be able to offer additional 197 kt (17 kt spare capacity, 130 kt production shifting, 50 kt net capacity extension) for magazine printing in response to a potential price increase for the printing of German magazines. This theoretical calculation does not, obviously, mean that competitors will make this volume available for the printing of German magazines immediately in response to the creation of the proposed joint venture.

Nevertheless, the calculation shows that a very significant volume of rotogravure capacity could be made available by competitors for the printing of German magazines if the proposed joint venture were to undertake to increase prices for the printing of magazines. The volume which could be made available by German competitors according to these calculations even exceeds the volume of [150-200 kt]* which the joint venture offered on the merchant market in 2003 (and even more the volume of [100-150 kt]*, if the print volume which has become captive for the Parties in the meantime is taken into account).

A price rise would only be profitable for the proposed joint venture if this could increase its profitability on the basis of fewer sales. Considering that, as seen above, the costs of the printing presses (and other machinery) play a very important role in this industry and that rotogravure printers therefore need to achieve as high a capacity utilisation as possible, the proposed joint venture could only forego a limited number of sales if it wished to increase its profitability via a price rise; the number of sales which the Parties could risk to loose would likely be considerably smaller than their entire magazine printing volume. Given the volumes

which competitors could make available according to the above calculation, it is unlikely that the Parties could profitably raise prices.

3.1.3.1.3. Potential competition of foreign printers

The likelihood of a price increase on the German market for magazine printing is further limited by the presence of several credible potential competitors, in particular RotoSmeets (Netherlands), Quebecor (France), Mondadori (Italy), and to a lesser extent Ringier (Switzerland). In the event of a price rise for the printing of German magazines, the Commission considers it likely that customers could turn to these companies which are currently to be considered potential competitors.

As was seen above, the geographic market for the printing of magazines for German customers is currently limited to Germany. German magazine publishers have so far almost exclusively used German printers, the only exception being one German magazine printed by RotoSmeets.

One of the reasons mentioned in the market investigation for the limitation of the market to Germany were the time-constraints associated with magazine printing and the required proximity of the printer to the area of distribution. However, printers who are fairly close to the German border can be regarded as a potential alternative for the German magazine publishers. The time-constraints associated with magazine printing differ for the various magazines even though they are in general more time-critical than the other printing products. The most time-sensitive magazines are news magazines, economic magazines, TV magazines and people magazines owing to the topicality of their content. A magazine with an exceptionally tight time-schedule is Der Spiegel. Even for this magazine, however, the publishing house confirmed that it would in principle be conceivable to use printers abroad if they are located close to the German border. As the large majority of magazines are less time-sensitive than Der Spiegel, printers close to the German border can be regarded as potential alternatives.

The distance of the sites of the printers mentioned above to the German border does not exceed 350 km, which equals around six hours of truck transportation into Germany; the sites of Roto Smeets and Quebecor (Strasbourg) are even less than 150 km from the German border. The market investigation also confirmed that there are examples that specialised German media forwarders also take up magazines from printers outside Germany. The market investigation further showed that printing outside Germany may lead to slightly higher transport costs (although uniform tariffs for transports inside and outside Germany on the basis of transported tons may also exist). However, the slightly increased transport costs do not inhibit the

printing of advertising and catalogues outside Germany and, in the event of a price rise in the printing of German magazines, such disadvantage would no longer be relevant even if it were a factor currently considered by the publishers.

Further reasons for the limitation of the market to Germany are the required know- how for the finishing of German magazines and for the preparation of the distribution. German publishers use other methods of finishing and enclosing add-ons, inserts, etc to the magazines than publishers in other countries. Furthermore, different versions of the same edition of a magazine are printed in order to meet the wishes of advertising customers to distribute certain advertisements only on a regional basis (in certain "Nielsen-Gebieten") or not for a specific class of customers (e.g. not to attach advertising post cards or samples to versions distributed to reader circles or to magazines distributed outside Germany). The distribution of different versions to the decentralised system of wholesalers and other points of distribution requires great logistical effort. Printers need to adapt their printing processes to these requirements and finalise the printing of different version of the same magazine so that the media forwarder can take up different versions of the magazine and distribute them in one circuit.

The market investigation showed that German publishers do not consider that printers outside Germany currently possess this know-how (with the exception of RotoSmeets). However, these deficits can be overcome by the acquisition of know-how and, possibly, some investment in finishing machinery. The example of RotoSmeets, which is now able to meet the requirements of the customer for the finishing of a German magazine and for the preparation of the distribution, shows that the necessary know-how can be acquired. It requires close collaboration between the magazine publisher and the printer, and may take some time. In addition to this, competitors located abroad may start to enter the market by using independent German finishing companies in order to enclose add-ons and inserts and prepare the different versions of a magazine for transport and distribution. Since this entails some loss of time, this strategy will mostly be an option for magazines which are comparatively less time- sensitive. This solution might further lead to slightly higher transport costs. Again, in the event of a price rise in the printing of German magazines, such a disadvantage would no longer be relevant even if it were a factor currently considered by the publishers. The market investigation revealed that German printers currently use external finishing companies for magazine printing on a regular basis if they are nearby, in particular during peak-times. This shows that the outsourcing of the finishing part to independent finishing undertakings would be an option for printers located outside Germany in order to overcome the deficits in know-how concerning finishing and preparation for distribution and to start entering the German market.

As regards the current price level in the countries neighbouring Germany the market investigation did not show a clear-cut result, owing to the considerable price differences which exist already for individual orders. However, the market investigation indicated that the price level in neighbouring countries tends to be lower or the same as in Germany.

In general, the magazine publishers apparently do not regard the obstacles to foreign competitors as insurmountable. In the market investigation, the majority of magazine publishers pointed, variously, to RotoSmeets, Quebecor, Mondadori and Ringier as viable potential alternatives. They are already repeatedly invited to submit tender bids by German magazine publishers who thereby monitor the market conditions and contact possible alternatives abroad. Each of the four printers has German-speaking account managers, and has acquired experience and reputation in the German market, as all four are currently printing catalogues and/or advertisements for German customers.

RotoSmeets is considered to be the most credible foreign competitor in the German magazine printing market. It already prints one monthly magazine with a print run of [350,000-400,000]* copies and has a German sales office in Bielefeld. Its printing facilities are situated in Deventer and Etten-Leur which are located at 70 and 130 km from the German border, respectively. Taking account of its current spare capacity (on the basis of a maximum capacity utilisation of 95% as applied for the German printers) and its planned capacity extension in the next two years, RotoSmeets could make a considerable additional capacity available for German magazine customers. In addition, RotoSmeets also indicated it could make further capacity available by switching from advertising and catalogue printing. In general, RotoSmeets also would have the incentives to do so, in line with the considerations put forward for German printers above.

Quebecor is considered as a credible potential entrant into the German magazine printing market. It has printing facilities in Corbeil (Paris), Blois, Lille (250 km from the German border), Mary-sur-Marne (330 km from the German border) and Strasbourg with an approximate total capacity of 383 kt according to the data estimated by the Parties. In Strasbourg, Quebecor has a German-speaking desk which currently deals with German catalogue and advertisement customers. Whereas Quebecor's printing facilities in Corbeil, Lille and Blois are currently almost exclusively producing for the French market, the printing facilities in Strasbourg and Mary-sur-Marne show more important rates of export to Germany. As a careful approach, only the Strasbourg and Mary-sur-Marne sites and a maximum capacity utilisation of 95% (as indicated above for the German printers) are taken into consideration. On this basis Quebecor could readily free some capacity for German magazine printing customers.

Mondadori's printing facilities in Verona and Melzo (Milan) are both located at a distance of 350 km from the German border with a total capacity of [150-200]* kt. Mondadori has extensive experience as a magazine printer in Italy (in-house and for third parties) and could free some capacity for German magazine printing customers on the basis of existing spare capacity and planned capacity extensions in the next two years.

Ringier has a printing site in Zofingen (Switzerland) with a capacity of [25-75]* kt. Data on capacity utilisation has not been provided. Ringier currently prints catalogues and advertisements for German customers.

In the light of the above, at least RotoSmeets, Quebecor and Mondadori are to be considered credible potential competitors on the German magazine rotogravure printing market. On the basis of the figures for 2003, they had at least 32 kt of free capacity which they could dedicate to German magazine publishers. Additional capacity in the amount of around 85 kt could be provided shortly following planned capacity extensions. Further capacity for the printing of German magazines in a volume of more than 50 kt could be made available through shifts in the production mix.

In the light of the above, RotoSmeets, Quebecor and Mondadori can be considered credible potential competitors to which German magazine customers could turn if the joint venture should undertake to raise prices. The calculation for potential competitors of their spare capacity, the planned capacity extensions and the possibility of making capacity available through shifting shows - with all the caveats already set out above for the German competitors – that these potential competitors would be able to make a very significant amount of printing capacity available for the printing of German magazines. This possibility will further reduce the likelihood that the Parties could profitably raise prices.

3.1.3.2. Elimination of a Competitor

Further competitive harm, quite apart from considerations that sufficient capacity is available for the printing of German magazines, could theoretically arise from the elimination of a competitor by the concentration. The concentration will remove Springer as an independent competitor. The creation of the joint venture will further lead to the elimination of the currently remaining competition between Bertelsmann/maul-belser and G+J which did not have a coordinated competitive behaviour in the market.

The concentration will thus limit the choice for publishers of magazines, catalogues and advertisements. As most of these publishers organise private tenders prior to the awarding of their printing contracts, in particular those for magazines and catalogues, the number of potential bidders will be reduced. However, it appears from the market investigation that German customers have increasingly invited the abovementioned foreign rotogravure printers to their tendering procedures. Therefore, the effect of the concentration is likely to be alleviated in that respect.

Even if only the German rotogravure printers are considered, customers can still turn to three other significant players Schlott, TSB and Burda with a large installed capacity. In addition, the loss of Springer as an independent competitor may not lead to competition concerns owing to the existence of printers outside Germany, in particular the Dutch printer RotoSmeets, which are considered to be credible potential competitors.

In the market investigation publishers without their own printing facility raised a further question, namely that there could be a problem in their having their magazines printed by a printer which is vertically integrated into publishing. However, the joint venture will not remove an independent printer from the market, but will only bring together printers which were already integrated into publishing. The overall situation for non-vertically integrated publishing houses should therefore not deteriorate in this respect. The market investigation did not indicate any specific segment of magazines in which currently non-vertically integrated printers would face problems on account of a specific competitive situation of their magazines. Furthermore, the market investigation showed that such conflicts of interests are normally solved by contractual safeguards. They might only be critical if a directly competing magazine is printed on the same day. However, the concentration will not lead to a situation in which non-vertically integrated publishing houses no longer have sufficient choice in such circumstances.

3.1.3.3. Vertical Integration

Third party competitors raised concerns in the market investigation that the vertically integrated structure of the parties into publishing would create competition concerns. The concerns are based on the consideration that the printing orders placed by the parent publishers constitute the base load for the printing facilities of the proposed joint venture so that the parties only have to fill the remaining printing capacity with orders won in the merchant market. Therefore, third party competitors claimed that the proposed joint venture would enjoy a significant competitive advantage over competitors.

However, such a competitive advantage, if any, would not result from the creation of the proposed joint venture. The parties are already currently vertically integrated into publishing and have the major part of their captive needs for the printing of magazines printed by their own printing facilities. The creation of the proposed joint venture will not lead to any increase of the share of the printing capacity which is used for the parties' captive demand. Contrary to that, the creation of the joint venture is intended by the parties to weaken the direct links between their publishing and printing businesses. […]*. In any case, the internal print order of the publishing arms will not account for more than […%]* of the capacity of the proposed joint venture. It will therefore have to fill the remaining capacity with orders won on the market.

Furthermore, the market investigation did not reveal a clear cut picture as to the competitive impact of the vertical integration of the parties into publishing, in particular concerning the "base load" character of the internal print orders. A number of respondents considered that the vertical integration also leads to disadvantages for the printers. The vertical integration makes the printer less flexible as it has to give priority to the internal print orders instead of being able to accept print orders only on the basis of the best commercial results it can obtain on the market.

3.1.3.4. Development of overall supply and demand in rotogravure printing

The overall development of supply and demand in the market does not support the expectation of harmful effects resulting from the merger. While overall supply in tendency increases, there are no indications that demand follows suit to the same extent.

As indicated, many competitors plan investments for the near future which will lead to a net increase in capacity in Germany. Apart from this, also the Parties plan to increase their overall capacity by [100-150 kt]* until the year 2008 in Germany. A major investment is moreover currently being undertaken by the Parties in the UK where a new plant is being built in Liverpool with a planned capacity of [150-200 kt]*, around [100-150 kt]* of which are already reserved to a new long-term contract with a British magazine publisher.

This investment will, nevertheless, not be without effect on the German demand and supply situation. It was broadly confirmed by the market investigation, that in the UK, the supply of rotogravure printing is lower than the demand for it. This is one reason for the imports of rotogravure printing services into the UK, mainly from Germany. Some market participants indicated the expectation that some British customers who have imported printing services so far will switch to the new printing facility in Liverpool. This may

free some capacity in Germany used before to supply the British customers. Since probably the Parties as well as their competitors will be affected, this may lead to some additional free capacity available for magazine publishers willing to switch to the Parties' competitors should the Parties try to increase prices.

3.2. Possible Spill-over effects in publishing of Magazines

Pursuant to Article 2(4) of the Merger Regulation, to the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent, such co-ordination is to be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market. A restriction of competition under Article 81(1) of the Treaty is established when the co-ordination of the parent companies' competitive behaviour is likely and appreciable and results from the creation of the joint venture.

Both Bertelsmann (mainly through its subsidiary G+J) and Springer are active in the publishing of magazines which are to a large extent printed by means of the rotogravure technique. The publishing of magazines thus constitutes an activity downstream from the joint venture's market for rotogravure printing. As most of Springer's magazines focus on the German market and are sold there, any risk of possible coordination may only occur in Germany.

There is no evidence that the joint venture would have as its object the co-ordination of the Parties' competitive behaviour in the publishing of magazines. Since the printing business may supply an input for the business of magazine publishing, there is, however, the risk that the creation of the joint venture might have the effect tof co- ordinating the Parties' competitive behaviour in their publishing of magazines.

However, the Commission's investigation has shown that the economic incentives for Bertelsmann and Springer to coordinate their competitive behaviour in the magazine publishing markets are rather limited; therefore, coordination would be unlikely to occur. According to data provided by the Parties the printing costs (excluding paper) account for less than 15% of the total costs of a magazine. The portion of printing costs varies among the different magazines ([…]*) between 5% and 15%. The comparatively limited impact of the printing costs on the price of magazines results in only a minor risk of coordination on the downstream markets for magazine publishing.

The incentives for coordination are further reduced by the relatively low revenues expected in the joint venture's market in comparison with the Parties' revenues from magazine publishing. The Parties' respective turnovers generated by magazine publishing in Germany greatly exceeded their turnover in rotogravure printing: in 2004, Springer's sales of magazines accounted for € […]* million in Germany whereas its domestic rotogravure printing activities generated a turnover of € […]* million (excluding paper). In the same year, Bertelsmann's (including G+J) sales of magazines reached approximately € […]* million in Germany whereas its domestic rotogravure printing activities generated a turnover of € […]* million (excluding paper).

In view of the comparatively small impact of the printing costs on the total costs of a magazine and the pre-eminent importance of both Parties' publishing activities as compared to rotogravure printing, the Commission concludes that the creation of the proposed joint venture is unlikely to lead to the coordination of the Parties' competitive behaviour in the downstream markets for magazine publishing.

4. Conclusions

For the reasons set out above it must be concluded that the proposed concentration does not significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, and that it does not restrict competition within the meaning of Article 2 (4) of the Merger Regulation and Article 81 of the Treaty. The concentration is therefore to be declared compatible with the common market pursuant to Article 8(1) of the Merger Regulation and with the EEA Agreement pursuant to Article 57 thereof.

The notified operation whereby Bertelsmann and Springer acquire joint control of a newly created joint venture within the meaning of Article 3(1)(b) of the Merger Regulation is hereby declared compatible with the common market and the functioning of the EEA Agreement.

5. Opinion of the Advisory Committee on Concentrations

The Advisory Committee agrees with the Commission that the notified operation constitutes a concentration within the meaning of the Merger Regulation No 139/04 and that it has a Community dimension as defined by that Regulation.

The Advisory Committee agrees with the Commission that, for the purposes of product market definition, rotogravure printing of high volume printing orders is distinct from heatset web offset printing. A minority abstains.

The Advisory Committee agrees with the Commission that there is a relevant product market for rotogravure printing of magazines. A minority abstains.

The Advisory Committee agrees with the Commission that it can be left open whether the printing of catalogues and advertisements in rotogravure is regarded as one single product market.

The Advisory Committee agrees with the Commission that the relevant geographic market for rotogravure printing of magazines is limited to Germany.

The Advisory Committee agrees with the Commission that the relevant geographic market for rotogravure printing of catalogues can be defined as Germany plus the neighbouring countries (France, Belgium, Netherlands, Luxemburg, Switzerland, Austria, Czech Republic, Poland and Denmark) as well as Italy and Slovakia.

The Advisory Committee agrees with the Commission that the relevant geographic market for rotogravure printing of advertisement can be defined as Germany plus the neighbouring countries (France, Belgium, Netherlands, Luxemburg, Switzerland, Austria, Czech Republic, Poland and Denmark) as well as Italy and Slovakia.

The Advisory Committee agrees with the Commission that the proposed concentration does not significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position:

a. in the market for rotogravure printing of magazines in Germany.

b. in the market for rotogravure printing of catalogues in Germany plus the neighbouring countries (France, Belgium, Netherlands,

Luxemburg, Switzerland, Austria, Czech Republic, Poland and Denmark) as well as Italy and Slovakia.

c. in the market for rotogravure printing of advertisements in Germany plus the neighbouring countries (France, Belgium, Netherlands, Luxemburg, Switzerland, Austria, Czech Republic, Poland and Denmark) as well as Italy and Slovakia.

The Advisory Committee agrees with the Commission that the proposed concentration does not significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position

d. in any other relevant geographic market for rotogravure printing of magazines.

e. in any other relevant geographic market for rotogravure printing of catalogues.

f. in any other relevant geographic market for rotogravure printing of advertisements.

The Advisory Committee agrees with the Commission that the proposed concentration does not have as an object or effect the coordination of the competitive behaviour of Bertelsmann and Springer in the magazine publishing markets and does therefore not restrict competition within the meaning of Article 2(4) of the Merger Regulation and Article 81 of the Treaty.

The Advisory Committee agrees with the Commission that the proposed concentration does not significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, within the meaning of Article 2(2) of the Merger Regulation and that the proposed concentration is therefore to be declared compatible with the Common Market and with the EEA Agreement.

The Advisory Committee asks the Commission to take into account all the other points raised during the discussion.

6. Final Report of the Hearing Officer

On 4 November 2004 the Commission received notification of a proposed merger by which the

undertakings Bertelsmann AG (Germany), its solely controlled subsidiary Gruner+Jahr AG & Co. KG (Germany), and Axel Springer AG (Germany), acquire joint control of the undertaking NewCo by way of purchase of shares in a newly created company constituting a joint venture.

Having examined the information submitted by the parties to the proposed merger and conducted a market survey, the Commission concluded that the merger raised serious doubts as to compatibility with the common market and the EEA Agreement. On 23 December 2004, therefore, the Commission initiated the procedure provided for by Article 6(1)(c) of the Merger Regulation.

Following a detailed market investigation, the Commission concluded that the proposed concentration did not significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, and that it did not restrict competition within the meaning of Article 2 (4) of the Merger Regulation and Article 81 of the Treaty. Accordingly, no statement of objections was sent to the parties. In the course of the market investigation, the parties were granted access to key documents under section 7.2 of DG Competition Best Practices on the conduct of merger control proceedings.

The case does not call for any particular comments as regards the right to be heard.

C. Albany V Stichting Bedriifspensioenfonds Textielindustrie

Case C-67/96

European Court Reports 1999 I-05751 - ECLI:EU:C:1999:430

Decided Sept 21, 1999

1. Summary of the Judgment

The need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. Those requirements are of particular importance in certain areas, such as that of competition, where the factual and legal situations are often complex.

The information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 20 of the Statute of the Court of Justice. It is the Court's duty to ensure that the opportunity to submit observations is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties.

If Article 3(g) and (i) of the Treaty (now, after amendment, Article 3(1)(g) and (j) EC), Article 85(1) thereof (now Article 81(1) EC), Articles 118 and 118b thereof (Articles 117 to 120 of the Treaty have been replaced by Articles 136 EC to 143 EC) are construed as an effective and consistent body of provisions, it follows that agreements concluded in the context of collective negotiations between management and labour, in pursuit of social policy objectives such as the improvement of conditions of work and employment, must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.

An understanding in the form of a collective agreement which sets up in a particular sector a supplementary pension scheme to be managed by a pension fund to which affiliation may be made

compulsory by the public authorities does not, by virtue of its nature and purpose, fall within the scope of Article 85(1) of the Treaty. Such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration.

A decision by the public authorities, at the request of the parties to the agreement, to make affiliation to such a fund compulsory cannot therefore be regarded as requiring or favouring the adoption of agreements, decisions or concerted practices contrary to Article 85 of the Treaty or as reinforcing their effects. Accordingly, it does not fall within the categories of legislative measures which undermine the effectiveness of Articles 3(g) of the Treaty, Article 5 thereof (now Article 10 EC) or Article 85 thereof.

It follows that Articles 3(g), 5 and 85 of the Treaty do not preclude a decision by the public authorities to make affiliation to a sectoral pension fund compulsory at the request of organisations representing employers and workers in a given sector.

The concept of an undertaking for the purposes of Article 85 et seq. of the Treaty (now Article 81 et seq. EC) encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.

It therefore embraces a pension fund which has been entrusted with the management of a supplementary pension scheme, which has been set up by a collective agreement between organisations representing management and labour in a particular sector, membership of which has been made compulsory for all workers in that sector by the public authorities, which operates in accordance with the principle of capitalisation and which engages in an economic activity in competition with insurance companies. Neither the fact that the fund is non-profit-making nor the fact that it pursues a social objective is sufficient to deprive it of its status as an undertaking within the meaning of the competition rules of the Treaty.

Articles 86 and 90 of the Treaty (now Articles 82 EC and 86 EC) do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme in a given sector.

The exclusive right of a sectoral pension fund to manage supplementary pensions in a given sector and the resultant restriction of competition may be justified under Article 90(2) of the Treaty as a measure necessary for the performance of a particular social task of general interest with which that fund has been entrusted.

2. **Judgment**

2.1. Parties

Reference to the Court under Article 177 of the EC Treaty by the Kantongerecht, Arnhem, Netherlands, for a preliminary ruling in the proceedings pending before that court between Albany International BV and Stichting Bedrijfspensioenfonds Textielindustrie.

2.2. Grounds

By judgment of 4 March 1996, received at the Court on 11 March 1996, the Kantongerecht (Cantonal Court), Arnhem, referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Articles 85, 86 and 90 of the EC Treaty.

Those questions were raised in an action brought by Albany International BV (hereinafter `Albany') against Stichting Bedrijfspensioenfonds Textielindustrie (the Textile Industry Trade Fund, hereinafter `the Fund') concerning Albany's refusal to pay to the Fund contributions for 1989 on the ground that compulsory affiliation to the Fund by virtue of which such contributions are claimed from it is contrary to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC) and Articles 85, 86 and 90 of the Treaty.

2.2.1. The national legislation

The pension system in the Netherlands is based on three pillars.

The first is a statutory basic pension, granted by the State under the Algemene Ouderdomswet (General law on old-age pensions, `the AOW') and the Algemene Nabestaandenwet (General law on survivors' benefits). That compulsory statutory scheme entitles the whole population to receive a pension of a limited amount, regardless of the wage which they actually received previously, calculated by reference to the statutory minimum wage.

The second pillar comprises supplementary pensions provided in the context of employment or self-employed activity, which serve in most cases to top up the basic pension. Such supplementary pensions are normally managed by collective schemes covering a sector of the economy, a profession or the employees of an undertaking by funds affiliation to which has been made compulsory, as in the case in the main proceedings, by the Wet van 17 maart 1949 houdende vaststelling van en regeling betreffende verplichte deelneming in een bedrijfspensioenfonds (Law of 17 March 1949 on compulsory affiliation to a sectoral pension fund, hereinafter the `BPW').

The third pillar comprises individual pension or life assurance policies which may be concluded on a voluntary basis.

The Wet op de Loonbelasting (Wages Tax Law) provides that pension contributions are deductible only if the pension does not exceed a `reasonable' level. They are not deductible in the case of a pension exceeding that level, which is set at 70% of the final salary after a 40-year career. The effect of this tax regime is that the current standard in the Netherlands for establishing a pension, including the State pension under the AOW, is a pension corresponding to 70% of the final salary.

Article 1(1) of the BPW, as amended by the Law of 11 February 1988, provides:

`The following terms shall, for the purposes of this Law and of provisions based on it, have the following meanings:

...

> (b) sectoral pension fund: a fund operating in a sector of activity for the purposes of which funds are collected either solely for the benefit of employees in the sector concerned or also for the benefit of persons engaged in an activity in another capacity in the said sector.

...

> (f) our Minister: the Minister for Social Affairs and Employment.'

9 Article 3 of the BPW, as amended, provides:

> `1. Our Minister may, at the request of a sectoral trade organisation which he regards as sufficiently representative of the business structure of a sector of activity, after consulting the head of the appropriate general administrative department whose area of responsibility includes the activities of the sector concerned, the Sociaal-Economische Raad (Social and Economic Council) and the Verzekeringskamer (Insurance Board), make affiliation to the sectoral pension fund compulsory for all workers or for certain categories of worker in the sector of activity concerned.
>
> 2. In the circumstances mentioned in the foregoing paragraph, all persons within the categories concerned by virtue of the provisions of that paragraph, and also, in the case of employees, their employers, shall be required to comply with the statutes and regulations of the sectoral pension fund and any provisions applicable to them by virtue thereof. Compliance therewith may be enforced by legal proceedings, in particular with regard to the payment of contributions.'

Article 5(2) of the BPW, as amended, lays down certain conditions to be fulfilled before the Minister for Social Affairs and Employment can approve a request for compulsory affiliation as provided for in Article 3(1). Thus, under Article 5(2)(III) and (IV) of the BPW, as amended, the statutes and regulations of the sectoral pension fund must adequately safeguard the interests of the members, and

the representatives of the associations of employers and workers in the sector concerned must sit in equal numbers on the management board of the fund.

Article 5(2)(II)(1) of the BPW, as amended, also provides that the statutes and regulations of the sectoral pension fund must provide for cases in which, and the conditions under which, workers in the sector concerned are not required to be affiliated to the fund or may be exempted from certain obligations relating to the fund.

Article 5(3) of the BPW, as amended, states:

> `Our Minister for Social Affairs and Employment, after hearing the views of the Insurance Board and the Social and Economic Council, shall adopt guidelines concerning the matters referred to in Article 5(2)(II)(1). Those guidelines should observe the principle that workers who were already affiliated to a pension fund of an undertaking or were insured with a life assurance company six months before the request referred to in Article 3(1) was lodged, shall not be required to be affiliated to that sectoral pension fund or shall be exempted, entirely or to a reasonable extent, from the obligation to contribute to it, provided that they can demonstrate that, in the course of the period for which they are under no obligation to be affiliated or are exempted from the obligation to pay contributions, in their entirety or as regards a reasonable proportion thereof, they will acquire pension rights which are at least equivalent to those which they would acquire if affiliated to the sectoral pension fund and for so long as they can so demonstrate. Our Minister may also adopt guidelines relating to other parts of paragraph 2.'

By the Beschikking van 29 december 1952 betreffende de vaststelling van de richtlijnen voor de vrijstelling van deelneming in een bedrijfspensioenfonds wegens een bijzondere pensioenvoorziening (Order of 29 December 1952 relating to the adoption of guidelines for the exemption from participation in a sectoral pension fund in case of special pension arrangements, as amended by the decision of 15 August 1988, hereinafter `the Guidelines for exemption from affiliation') the Minister for Social Affairs and Employment adopted the guidelines referred to in Article 5(3) of the BPW, as amended.

Article 1 of the Guidelines for exemption from affiliation, as amended, provides:

> `An exemption from the obligation to be affiliated to a sectoral pension fund or from the obligation to pay contributions thereto may be granted by that fund at the request of any interested party, provided that the worker in the sector concerned is covered by special pension arrangements meeting the following conditions:

(a) the arrangements must be applied under the auspices of a company pension fund, another sectoral fund or an insurer holding a certificate of the kind provided for by Article 10 of the Wet toezicht verzekeringsbedrijf (Law on supervision of the insurance industry, Staatsblad 1986, p. 638) or be based on the Algemene burgerlijke pensioenwet (General law on civil service pensions, Staatsblad 1986, p. 540), the Spoorwegenpensioenwet (Law on pensions for employees of the Netherlands Railways and their relatives, Staatsblad 1986, p. 541) or the Algemene militaire pensioenwet (General law on military pensions, Staatsblad 1979, p. 305);

(b) such rights as may arise under those arrangements must, in the aggregate, be at least equivalent to those accruing under the sectoral pension fund;

(c) the rights of the worker concerned and compliance with his obligations must be adequately safeguarded;

(d) if the exemption entails withdrawal from the fund, compensation considered reasonable by the Insurance Board must be offered for any loss suffered by the fund, from the actuarial point of view, as a result of the withdrawal.'

Article 5 of the Guidelines, as amended, provides:

`1. The exemption must be granted where the conditions mentioned in Article 1(a), (b) and (c) are fulfilled, the special pension arrangements applied six months before submission of the request on the basis of which affiliation to the sectoral pension fund was made compulsory and it has been shown that, in the course of the period for which the worker concerned is under no obligation to be affiliated or is exempted from the obligation to pay contributions in their entirety or as regards a reasonable proportion thereof, he will acquire pension rights which are at least equivalent to those which he would acquire if affiliated to the sectoral pension fund.

2. If, at the time referred to in paragraph 1, the special pension arrangements did not meet the condition laid down in Article 1(b), a sufficient period must be allowed to elapse to enable that condition to be met before any decision is taken on the request.

3. An exemption under this article shall enter into force when affiliation to the sectoral pension fund is made compulsory.'

Article 9 of the Guidelines, as amended, states:

`1. The decisions referred to in Article 8 may be the subject of complaints to the Insurance Board lodged within 30 days of receipt of the decision by the person concerned. The sectoral

pension fund must, in writing, bring the foregoing sentence to the notice of the person concerned at the same time as the decision.

2. The Insurance Board shall notify its decision on the complaints to the sectoral pension fund and to the persons who lodged them.'

The appraisal made by the Insurance Board constitutes a proposal for conciliation. It is not a decision with binding force in the context of a dispute. The appraisal by the Insurance Board cannot be the subject of any complaint or appeal.

18 Sectoral pension funds to which affiliation has been made compulsory are subject not only to the BPW but also to the Wet van 15 mei 1962 houdende regelen betreffende pensioen- en spaarvoorzieningen (Law of 15 May 1962 on pension and savings funds, amended subsequently a number of times - hereinafter `the PSW').

The PSW is intended to ensure as far as possible that pension commitments given to workers are actually fulfilled.

To that end, Article 2(1) of the PSW obliges employers to choose one of three sets of arrangements aimed at separating the funds collected for pension purposes from the remainder of the company's assets. The employer may either join a sectoral pension fund, set up a company pension fund, or arrange group or individual life assurance policies with an insurance company.

Article 1(6) of the PSW makes clear that it also applies to sectoral pension funds to which affiliation has been made compulsory under the BPW.

The PSW also lays down a number of conditions which must be met by the statutes and regulations of a sectoral pension fund. Thus, Article 4 of the PSW provides that the setting up of any such fund must be notified to the Minister for Social Affairs and Employment and to the Insurance Board. Article 6(1) of the PSW confirms that representatives of the employers' organisations and representatives of the workers' organisations of the sector concerned are to sit in equal numbers on the management board of a sectoral pension fund.

In addition, Articles 9 and 10 of the PSW lay down detailed arrangements for management of the funds collected. The general rule is set out in Article 9 which obliges pension funds to transfer the risk linked to their pension commitments or to reinsure it. By way of exception to that rule Article 10 allows pension funds to administer and invest the capital collected themselves at their own risk. Before it can be authorised to do so, a pension fund must submit to the competent authorities a management plan explaining in detail the way it proposes to handle the actuarial and financial risks. The plan must be approved by the Insurance Board. Furthermore the pension fund is subject to continuous

supervision. The scheme's actuarial profit and loss accounts must be submitted regularly to the Insurance Board for approval.

Finally, Articles 13 to 16 of the PSW lay down rules for investment of the sums collected. By virtue of Article 13, the assets of the scheme together with expected income must be sufficient to cover pension liabilities. Under Article 14 investments must be made prudentially.

2.2.2. The main proceedings

The Fund was established under the BPW. Affiliation to the Fund was made compulsory by an order of the Minister for Social Affairs and Employment of 4 December 1975 (hereinafter `the order making affiliation compulsory').

Albany operates a textile business which has been affiliated to the Fund since 1975.

Until 1989 the Fund's pension scheme paid a flat-rate benefit. The pension awarded to workers was not proportional to their wage but was a fixed amount for each worker. Albany decided that the scheme was insufficiently generous and in 1981 concluded arrangements with an insurance company for a supplementary pension for its workers so that the total pension to which they would be entitled after 40 years' employment amounts to 70% of their last salary.

With effect from 1 January 1989 the Fund changed its pension scheme. Since then its scheme awards workers an amount which likewise represents 70% of their final salary.

Following the change to the Fund's pension scheme, Albany asked on 22 July 1989 to be exempted from affiliation. Its request was rejected by the Fund on 28 December 1990. The Fund took the view that under the Guidelines for exemption from affiliation such exemption could only be granted when the conditions laid down in the Guidelines were satisfied and where the special provisions concerning pensions had already been in force for six months before lodgment of the request by both sides of the industry in response to which the sectoral pension fund had been declared compulsory.

Albany lodged an objection to the Fund's decision with the Insurance Board. By decision of 18 March 1992, the Board found that, even if the Fund was not required in the circumstances to grant the exemption, it should be asked to exercise its power to do so or, at the very least, grant a period of notice, since Albany had concluded arrangements for a supplementary pension scheme for its staff several years earlier and the latter arrangements had, since 1 January 1989, been similar to those introduced by the Fund.

The Fund did not follow the advice of the Insurance Board and on 11 November 1992 served Albany with a demand for payment of the sum of NLG 36 700.29, representing all statutory contributions payable since 1989 together with interest, collection charges, non-judicial expenses and legal aid costs.

Albany challenged that demand before the Kantongerecht, Arnhem. It contended in particular that the system of compulsory affiliation to the Fund was contrary to Article 3(g) of the Treaty, Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC), and Articles 85, 86 and 90 of the Treaty.

According to Albany, the Fund's refusal to grant it an exemption is detrimental to it. Its insurance company would grant it less favourable conditions if it had to join the supplementary pension scheme set up by the Fund. Moreover, contrary to the Fund's contention, other sectoral pension funds, such as the Bedrijfspensioenfonds voor de Bouwnijverheid and the Bedrijfspensioenfonds voor de Schildersbedrijf, had granted an exemption to undertakings which had at an earlier stage concluded supplementary pension arrangements.

The Fund maintained that in this case there was no legal obligation to grant an exemption. Accordingly, the court could only exercise limited review in that respect. Under Article 5(3) of the BPW, an exemption had to be granted only where an undertaking had established an equivalent pension scheme at least six months before affiliation was made compulsory. The obligation to grant such an exemption arises only upon initial affiliation to the Fund and does not arise in the event of a change to the pension arrangements. The Fund also emphasised that it was important to maintain a proper pension scheme based on the principle of solidarity for all workers and undertakings in the textile industry and stressed in that connection that the grant of an exemption to Albany would entail the departure of 110 people from its membership of about 8800.

The Kantongerecht accepted the Insurance Board's argument that since 1 January 1989 Albany's supplementary scheme had been similar to the pension scheme introduced by the Fund. It emphasised that relations between a sectoral pension fund and its members are governed by requirements of reasonableness and equity as well as by the general principles of sound administration. Accordingly, a sectoral pension fund should give considerable weight to the opinion of a statutorily appointed independent expert authority such as the Insurance Board when asked to grant an exemption.

36 The Kantongerecht observed that in its judgment in Joined Cases C-430/93 and C-431/93 Van Schijndel and Van Veen [1995] ECR I-4705 the Court had not examined the last three questions concerning the compatibility with the Community competition rules of the Netherlands system of compulsory affiliation to an occupational pension scheme.

37 In those circumstances the Kantongerecht, Arnhem, referring to its interlocutory judgments of 19 April 1993, 17 January 1994 and 9 January 1995, stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

`1. Is a sectoral pension fund within the meaning of Article 1(1)(b) of the [BPW] an undertaking within the meaning of Articles 85, 86, or 90 of the EC Treaty?

2. If so, is the fact of making membership of the sectoral pension fund for industrial undertakings compulsory a measure adopted by a Member State which nullifies the effectiveness of the competition rules applicable to undertakings?

3. If Question 2 must be answered in the negative, can other circumstances render compulsory membership incompatible with Article 90 of the Treaty, and if so, which?'

2.2.3. Admissibility

The Netherlands and French Governments and the Commission query the admissibility of the questions submitted, taking the view that the national court has not, in its order for reference, sufficiently explained the factual and legal context of the main proceedings. In the absence of a detailed account from the national court of the legal provisions applicable to the main proceedings, the circumstances in which the Fund was set up and the management rules of the Fund, the Court cannot give a useful interpretation of Community law and the Member States and other interested parties are not in a position to submit written observations suggesting answers to the questions on which a ruling is sought.

According to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. Those requirements are of particular importance in certain areas, such as that of competition, where the factual and legal situations are often complex.45

The information provided and the questions raised in orders for reference must not only be such as to enable the Court to reply usefully but must also give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 20 of the EC Statute of the Court of Justice. It is the Court's duty to ensure that the opportunity to submit

45 See in particular Joined Cases C-320/90, C-321/90 and C-322/90 Telemarsicabruzzo and Others [1993] ECR I-393, paras 6 and 7, Case C-284/95 Safety High-Tech v S. & T. [1998] ECR I-4301, paras 69 and 70, and Case C-341/95 Bettati [1998] ECR I-4355, paras 67 and 68.

observations is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties.46

In this case, it is clear from the observations submitted under Article 20 of the EC Statute of the Court of Justice by the governments of the Member States and the other interested parties that the information contained in the orders for reference was sufficient to enable them to take a position on the questions referred to the Court.

In its observations, the French Government refers to those which it submitted in Joined Cases C-115/97, C-116/97 and C-117/97 Brentjens [1999] ECR I-6025, which refer expressly to Case C-219/97 Drijvende Bokken [1999] ECR I-6121, and the Commission refers in its observations directly to the latter case. The order for reference in Drijvende Bokken, which also concerns the compatibility with the Community competition rules of compulsory affiliation to a sectoral pension fund, contains a detailed account of the legislation applicable to the main proceedings.

Furthermore, even though the French and Netherlands Governments may have taken the view in this case that the information provided by the national court was not sufficient to enable them to take a position on certain aspects of the questions submitted to the Court, it must be emphasised that further information was made available in the documents forwarded by the national court, the written observations and the answers given to the questions raised by the Court. All that information, which was included in the Report for the Hearing, was brought to the notice of the governments of the Member States and the other interested parties for the purposes of the hearing, at which they had an opportunity, if necessary, to amplify their observations.

Finally, the information supplied by the referring court, supplemented as necessary by the abovementioned details, sufficiently apprises the Court of the factual and legislative background to the main proceedings to enable it to interpret the competition rules in the light of the circumstances of those proceedings.

It follows that the questions referred are admissible.

The second question

By its second question, which it is appropriate to consider first, the national court seeks essentially to ascertain whether Article 3(g) of the Treaty, Article 5 of the EC Treaty (now Article 10 EC) and Article

46 See, in particular, the order of 30 April 1998 in Joined Cases C-128/97 and C-137/97 Testa and Modesti [1998] ECR I-2181, para 6, and the order of 11 May 1999 in Case C-325/98 Anssens [1999] ECR I-2969, para 8.

85 of the Treaty prohibit a decision by the public authorities to make affiliation to a sectoral pension fund compulsory at the request of organisations representing employers and workers in a given sector.

Albany contends that the request by management and labour to make affiliation to a sectoral pension fund compulsory constitutes an agreement between the undertakings operating in the sector concerned, contrary to Article 85(1) of the Treaty.

Such an agreement, in its view, restricts competition in two ways. First, by entrusting the operation of a compulsory scheme to a single manager, it deprives the undertakings operating in the sector concerned of the possibility of affiliation to another pension scheme managed by other insurers. Second, that agreement excludes the latter insurers from a substantial part of the pension insurance market.

The effects of such an agreement on competition are `appreciable' because it affects the entire Netherlands textile sector. They are aggravated by the cumulative effect of making affiliation to pension schemes compulsory in numerous sectors of the economy and for all undertakings in those sectors.

Moreover, such an agreement affects trade between Member States in so far as it concerns undertakings which engage in cross-frontier business and deprives insurers established in other Member States of the opportunity to offer a full pension scheme in the Netherlands either by virtue of cross-frontier services or through branches or subsidiaries.

Therefore, according to Albany, by creating a legal framework for, and acceding to a request from, the two sides of industry to make affiliation to the sectoral pension fund compulsory, the public authorities favoured or furthered the implementation and operation of agreements between undertakings operating in the sectors concerned which are contrary to Article 85(1) of the Treaty, thereby infringing Articles 3(g), 5 and 85 of the Treaty.

It is necessary to consider first whether a decision taken by the organisations representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make affiliation to that fund compulsory for all workers in that sector is contrary to Article 85 of the Treaty.

It must be noted, first, that Article 85(1) of the Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The importance of that rule prompted the authors of the

Treaty to provide expressly in Article 85(2) of the Treaty that any agreements or decisions prohibited pursuant to that article are to be automatically void.

Next, it is important to bear in mind that, under Article 3(g) and (i) of the EC Treaty (now, after amendment, Article 3(1)(g) and (j) EC), the activities of the Community are to include not only a `system ensuring that competition in the internal market is not distorted' but also `a policy in the social sphere'. Article 2 of the EC Treaty (now, after amendment, Article 2 EC) provides that a particular task of the Community is `to promote throughout the Community a harmonious and balanced development of economic activities' and `a high level of employment and of social protection'.

In that connection, Article 118 of the EC Treaty provides that the Commission is to promote close cooperation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers.

Article 118b of the EC Treaty adds that the Commission is to endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.

Moreover, Article 1 of the Agreement on social policy47 states that the objectives to be pursued by the Community and the Member States include improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combatting of exclusion.

Under Article 4(1) and (2) of the Agreement, the dialogue between management and labour at Community level may lead, if they so desire, to contractual relations, including agreements, which will be implemented either in accordance with the procedures and practices specific to management and labour and the Member States, or, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between

47 OJ 1992 C 191, p. 91.

management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.

The next question is therefore whether the nature and purpose of the agreement at issue in the main proceedings justify its exclusion from the scope of Article 85(1) of the Treaty.

First, like the category of agreements referred to above which derive from social dialogue, the agreement at issue in the main proceedings was concluded in the form of a collective agreement and is the outcome of collective negotiations between organisations representing employers and workers.

Second, as far as its purpose is concerned, that agreement establishes, in a given sector, a supplementary pension scheme managed by a pension fund to which affiliation may be made compulsory. Such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration.

Consequently, the agreement at issue in the main proceedings does not, by reason of its nature and purpose, fall within the scope of Article 85(1) of the Treaty.

It must also be borne in mind that, as the Court has held, in particular in Case 267/86 Van Eycke v ASPA [1988] ECR 4769, paragraph 16, Article 85 of the Treaty itself concerns only the conduct of undertakings and not legislation or regulations adopted by Member States. However, according to settled case-law of the Court of Justice, Article 85 of the Treaty, read in conjunction with Article 5, requires the Member States not to introduce or maintain in force measures, whether legislative or regulatory, which may render ineffective the competition rules applicable to undertakings. Such is the case, according to the same case-law, where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85 of the Treaty or reinforces their effects or deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.48

In that connection, the request made to the public authorities by the organisations representing employers and workers to make affiliation to the sectoral pension fund set up by them compulsory is part of a regime established under a number of national laws, designed to exercise regulatory authority in the social sphere. Since the agreement at issue in the main proceedings does not fall within the scope

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48 See also Case C-2/91 Meng [1993] ECR I-5751, para 14; Case C-185/91 Reiff [1993] ECR I-5801, para 14; Case C-245/91 Ohra Schadeverzekeringen [1993] ECR I-5851, para 10; Case C-35/96 Commission v Italy [1998] ECR I-3851, paras 53-54; and Case C-266/96 Corsica Ferries France v Gruppo Antichi Ormeggiatori del Porto di Genova and Others [1998] ECR I-3949, para 35-36, 49.

of Article 85(1) of the Treaty, as is clear from paragraphs 52 to 64 of this judgment, the Member States are free to make it compulsory for persons who are not bound as parties to the agreement.

Moreover, Article 4(2) of the Agreement on social policy expressly provides that, at Community level, management and labour may apply jointly to the Council for the implementation of social agreements.

The decision of the public authorities to make affiliation to such a fund compulsory cannot therefore be regarded as requiring or favouring the adoption of agreements, decisions or concerted practices contrary to Article 85 of the Treaty or reinforcing their effects.

It follows from the foregoing considerations that the decision of the public authorities to make affiliation to a sectoral pension fund compulsory does not fall within the categories of legislative measures which, according to the case-law of the Court, undermine the effectiveness of Articles 3(g), 5 and 85 of the Treaty.

The answer to the second question must therefore be that Articles 3(g), 5 and 85 of the Treaty do not prohibit a decision by the public authorities to make affiliation to a sectoral pension fund compulsory at the request of organisations representing employers and workers in a given sector.

The first question

By its first question, the national court seeks essentially to ascertain whether a pension fund responsible for managing a supplementary pension scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector and to which affiliation has been made compulsory by the public authorities for all workers in that sector is an undertaking within the meaning of Article 85 et seq. of the Treaty.

According to the Fund and the governments which have intervened, such a fund does not constitute an undertaking within the meaning of Article 85 et seq. of the Treaty. They describe the various characteristics of the sectoral pension fund and of the supplementary pension scheme which it manages.

First, compulsory affiliation of all workers in a given sector to a supplementary pension scheme pursues an essential social function within the pension system applicable in the Netherlands because of the extremely limited amount of the statutory pension calculated on the basis of the minimum statutory wage. Provided that a supplementary pension scheme has been established by a collective agreement within a framework laid down by law and affiliation to that scheme has been made compulsory by the public authorities, it constitutes an element of the Netherlands system of social protection and the sectoral pension fund responsible for management of it must be regarded as contributing to the management of the public social security service.

Second, the sectoral pension fund is non-profit-making. It is managed jointly by both sides of the industry, who are equally represented on its management committee. The sectoral pension fund collects an average contribution fixed by that committee which strikes a balance, collectively, between the amount of the premiums, the value of the benefits and the extent of the risks. Moreover, the contributions may not fall below a certain level, so as to establish adequate reserves, and may not, in order to preserve its non-profit-making status, exceed an upper limit, observance of which is ensured by management and labour and by the Insurance Board. Even though the contributions levied are invested on a capitalisation basis, the investments are made under the supervision of the Insurance Board and in accordance with the provisions of the PSW and the statutes of the sectoral pension fund.

Third, operation of the sectoral pension fund is based on the principle of solidarity. Such solidarity is reflected by the obligation to accept all workers without a prior medical examination, the continuing accrual of pension rights despite exemption from contributions in the event of incapacity for work, the discharge by the fund of arrears of contributions due from an employer in the event of the latter's insolvency and by the indexing of the amount of the pensions in order to maintain their value. The principle of solidarity is also apparent from the absence of any equivalence, for individuals, between the contribution paid, which is an average contribution not linked to risks, and pension rights, which are determined by reference to an average salary. Such solidarity makes compulsory affiliation to the supplementary pension scheme essential. Otherwise, if `good' risks left the scheme, the ensuing downward spiral would jeopardise its financial equilibrium.

On that basis, the Fund and the intervening governments consider that the sectoral pension fund is an organisation charged with the management of social security schemes of the kind referred to in the judgment in Joined Cases C-159/91 and C-160/91 Poucet and Pistre [1993] ECR I-637, and is unlike the organisation at issue in Case C-244/94 Fédération Française des Sociétés d'Assurance and Others v Ministère de l'Agriculture et de la Pêche [1995] ECR I-4013, which was regarded as an undertaking within the meaning of Article 85 et seq. of the Treaty.

It should be borne in mind that, in the context of competition law, the Court has held that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.49

Moreover, in Poucet and Pistre, cited above, the Court held that that concept did not encompass organisations charged with the management of certain compulsory social security schemes, based on

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49 See, in particular, Case C-41/90 Höfner and Elser [1991] ECR I-1979, para 21; Poucet and Pistre, cited above, para 17; and Fédération Française des Sociétés d'Assurance, cited above, para 14.

the principle of solidarity. Under the sickness and maternity scheme forming part of the system in question, the benefits were the same for all beneficiaries, even though contributions were proportional to income; under the pension scheme, retirement pensions were funded by workers in employment; furthermore, the statutory pension entitlements were not proportional to the contributions paid into the pension scheme; finally, schemes with a surplus contributed to the financing of those with structural financial difficulties. That solidarity made it necessary for the various schemes to be managed by a single organisation and for affiliation to the schemes to be compulsory.

In contrast, in Fédération Française des Sociétés d'Assurance, cited above, the Court held that a non-profit-making organisation which managed a pension scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation, was an undertaking within the meaning of Article 85 et seq. of the Treaty. Optional affiliation, application of the principle of capitalisation and the fact that benefits depended solely on the amount of the contributions paid by the beneficiaries and on the financial results of the investments made by the managing organisation implied that that organisation carried on an economic activity in competition with life assurance companies. Neither the social objective pursued, nor the fact that it was non-profit-making, nor the requirements of solidarity, nor the other rules concerning, in particular, the restrictions to which the managing organisation was subject in making investments altered the fact that the managing organisation was carrying on an economic activity.

The question whether the concept of an undertaking, within the meaning of Article 85 et seq. of the Treaty, extends to a body such as the sectoral pension fund at issue in the main proceedings must be considered in the light of those considerations.

The sectoral pension fund itself determines the amount of the contributions and benefits and the Fund operates in accordance with the principle of capitalisation.

Accordingly, by contrast with the benefits provided by organisations charged with the management of compulsory social security schemes of the kind referred to in Poucet and Pistre, cited above, the amount of the benefits provided by the Fund depends on the financial results of the investments made by it, in respect of which it is subject, like an insurance company, to supervision by the Insurance Board.

In addition, as is apparent from Article 5 of the BPW and Articles 1 and 5 of the Guidelines for exemption from affiliation, a sectoral pension fund is required to grant exemption to an undertaking where the latter has already made available to its workers for at least six months before the request was lodged on the basis of which affiliation to the fund was made compulsory, a pension scheme granting them rights at least equivalent to those which they would acquire if affiliated to the fund. Moreover, under Article 1 of the abovementioned Guidelines, that fund is also entitled to grant

exemption to an undertaking which provides its workers with a pension scheme granting them rights at least equivalent to those deriving from the fund, provided that, in the event of withdrawal from the fund, compensation considered reasonable by the Insurance Board is offered for any damage suffered by the fund, from the actuarial point of view, as a result of the withdrawal.

It follows that a sectoral pension fund of the kind at issue in the main proceedings engages in an economic activity in competition with insurance companies.

In those circumstances, the fact that the fund is non-profit-making and the manifestations of solidarity referred to by it and the intervening governments are not sufficient to deprive the sectoral pension fund of its status as an undertaking within the meaning of the competition rules of the Treaty.

Undoubtedly, the pursuit of a social objective, the abovementioned manifestations of solidarity and restrictions or controls on investments made by the sectoral pension fund may render the service provided by the fund less competitive than comparable services rendered by insurance companies. Although such constraints do not prevent the activity engaged in by the fund from being regarded as an economic activity, they might justify the exclusive right of such a body to manage a supplementary pension scheme.

The answer to the first question must therefore be that a pension fund charged with the management of a supplementary pension scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector, to which affiliation has been made compulsory by the public authorities for all workers in that sector, is an undertaking within the meaning of Article 85 et seq. of the Treaty.

The third question

88 By its third question, the national court seeks essentially to ascertain whether Articles 86 and 90 of the Treaty preclude the public authorities from conferring on a pension fund an exclusive right to manage a supplementary pension scheme in a given sector.

89 The Netherlands Government contends that the order making affiliation compulsory has the sole effect of requiring workers in the sector concerned to be affiliated to the Fund. The order does not, in its view, confer on the Fund an exclusive right in the area of supplementary pensions. Nor does the Fund hold a dominant position within the meaning of Article 86 of the Treaty.

90 It must be observed at the outset that the decision of the public authorities to make affiliation to a sectoral pension fund compulsory, as in this case, necessarily implies granting to that fund an exclusive right to collect and administer the contributions paid with a view to accruing pension rights. Such a fund must therefore be regarded as an undertaking to which exclusive rights have been granted by the public authorities, of the kind referred to in Article 90(1) of the Treaty.

91 Next, it should be noted that according to settled case-law an undertaking which has a legal monopoly in a substantial part of the common market may be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty.50

A sectoral pension fund of the kind at issue in the main proceedings, which has an exclusive right to manage a supplementary pension scheme in an industrial sector in a Member State and, therefore, in a substantial part of the common market, may therefore be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty.

It must not be forgotten, however, that merely creating a dominant position by granting exclusive rights within the meaning of Article 90(1) of the Treaty is not in itself incompatible with Article 86 of the Treaty. A Member State is in breach of the prohibitions contained in those two provisions only if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or when such rights are liable to create a situation in which that undertaking is led to commit such abuses.51

Albany contends in that connection that the system of compulsory affiliation to the supplementary pension scheme managed by the Fund is contrary to the combined provisions of Articles 86 and 90 of the Treaty. The pension benefits available from the Fund do not, or no longer, match the needs of the undertakings. The benefits are too low, are not linked to wages and, consequently, are generally inadequate. Employers have therefore to make other pension arrangements. The system of compulsory affiliation deprives those employers of any opportunity of arranging for comprehensive pension cover from an insurance company. Pension arrangements spread over a number of insurers would increase administrative costs and reduce efficiency.

It should be remembered that, in Höfner and Elser, cited above, paragraph 34, the Court held that a Member State which conferred on a public employment agency an exclusive right of recruitment was in breach of Article 90(1) of the Treaty where it created a situation in which that office could not avoid infringing Article 86 of the Treaty, in particular because it was manifestly incapable of satisfying the demand prevailing on the market for such activities.

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50 See Case C-179/90 Merci Convenzionali Porto di Genova [1991] ECR I-5889, para 14; Case C-18/88 GB-Inno-BM [1991] ECR I-5941, para 17.

51 Höfner and Elser, cited above, para 29; Case C-260/89 ERT [1991] ECR I-2925, para 37; Merci Convenzionali Porto di Genova, cited above, paras 16-17; Case C-323/93 Centre d'Insémination de la Crespelle [1994] ECR I-5077, para 18; and Case C-163/96 Raso and Others [1998] ECR I-533, para 27.

In the present case, it is important to note that the supplementary pension scheme offered by the Fund is based on the present norm in the Netherlands, namely that every worker who has paid contributions to that scheme for the maximum period of affiliation receives a pension, including the State pension under the AOW, equal to 70% of his final salary.

Doubtless, some undertakings in the sector might wish to provide their workers with a pension scheme superior to the one offered by the Fund. However, the fact that such undertakings are unable to entrust the management of such a pension scheme to a single insurer and the resulting restriction of competition derive directly from the exclusive right conferred on the sectoral pension fund.

It is therefore necessary to consider whether, as contended by the Fund, the Netherlands Government and the Commission, the exclusive right of the sectoral pension fund to manage supplementary pensions in a given sector and the resultant restriction of competition may be justified under Article 90(2) of the Treaty as a measure necessary for the performance of a particular social task of general interest with which that fund has been charged.

Albany contends that compulsory affiliation to the sectoral pension fund is not necessary to ensure an adequate level of pension for workers. That aim could be attained by minimum requirements for pensions, to be laid down either by the two sides of industry at the instigation of the public authorities or directly by the latter. Collective employment agreements frequently include an obligation on employers to provide a minimum pension scheme, whilst leaving them free to establish a pension fund for their own undertaking, to join a sectoral pension fund or to make arrangements with an insurance company.

According to Albany, the fact that members pay `average contributions' likewise does not justify compulsory affiliation. First, neither the BPW nor the order making affiliation compulsory requires a system based on such contributions. Second, a number of sectoral pension funds to which affiliation is not compulsory operate perfectly well on the basis of `average contributions'.

As regards acceptance of all workers in the same area of activity without a prior medical examination so that `bad' risks cannot be refused, Albany observes that in practice the pension insurance contracts concluded with insurers require the employer to declare all his workers and an obligation on the insurer to accept any worker declared without prior medical examination.

It is important to bear in mind first of all that, under Article 90(2) of the Treaty, undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

In allowing, in certain circumstances, derogations from the general rules of the Treaty, Article 90(2) of the Treaty seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and preservation of the unity of the common market.52

In view of the interest of the Member States thus defined they cannot be precluded, when determining what services of general economic interest they entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavouring to attain them by means of obligations and constraints which they impose on such undertakings.53

The supplementary pension scheme at issue in the main proceedings fulfils an essential social function within the Netherlands pensions system by reason of the limited amount of the statutory pension, which is calculated on the basis of the minimum statutory wage.

Moreover, the importance of the social function attributed to supplementary pensions has recently been recognised by the Community legislature's adoption of Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community.54

107 Next, it is not necessary, in order for the conditions for the application of Article 90(2) of the Treaty to be fulfilled, that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject or that maintenance of those rights is necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions.55

If the exclusive right of the fund to manage the supplementary pension scheme for all workers in a given sector were removed, undertakings with young employees in good health engaged in non-dangerous activities would seek more advantageous insurance terms from private insurers. The

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52 Case C-202/88 France v Commission [1991] ECR I-1223, para 12; Case C-157/94 Commission v Netherlands [1997] ECR I-5699, para 39.

53 Commission v Netherlands, cited above, para 40.

54 OJ 1998 L 209, p. 46.

55 Case C-320/91 Corbeau [1993] ECR I-2533, paras 14-16, and Commission v Netherlands, cited above, para 53.

progressive departure of `good' risks would leave the sectoral pension fund with responsibility for an increasing share of `bad' risks, thereby increasing the cost of pensions for workers, particularly those in small and medium-sized undertakings with older employees engaged in dangerous activities, to which the fund could no longer offer pensions at an acceptable cost.

Such a situation would arise particularly in a case where, as in the main proceedings, the supplementary pension scheme managed exclusively by the Fund displays a high level of solidarity resulting, in particular, from the fact that contributions do not reflect the risk, from the obligation to accept all workers without a prior medical examination, the continuing accrual of pension rights despite exemption from the payment of contributions in the event of incapacity for work, the discharge by the Fund of arrears of contributions due from an employer in the event of insolvency and the indexing of the amount of pensions in order to maintain their value.

Such constraints, which render the service provided by the Fund less competitive than a comparable service provided by insurance companies, go towards justifying the exclusive right of the Fund to manage the supplementary pension scheme.

It follows that the removal of the exclusive right conferred on the Fund might make it impossible for it to perform the tasks of general economic interest entrusted to it under economically acceptable conditions and threaten its financial equilibrium.

Referring to GB-Inno-BM, cited above, Albany considers, however, that the fact that the Fund fulfils a dual role, as manager of the pension scheme and as the authority vested with the power to grant exemptions, might give rise to arbitrary exercise of the power of exemption.

In paragraph 28 of GB-Inno-BM, cited above, the Court held that Articles 3(g), 86 and 90 of the Treaty preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment.

In paragraph 25 of that judgment, the Court stated that the vesting in such a company of powers both to authorise or refuse the connection of telephones to the network and to lay down the technical standards to be met by such equipment and verify whether devices not manufactured by it conformed with the specifications adopted by it was tantamount to conferring upon it the power to determine at will which terminal equipment might be connected to the public network, thereby placing it at an obvious advantage over its competitors.

However, the situation in the main proceedings differs from that in GB-Inno-BM.

In the first place, under Article 5(1) of the Guidelines for exemption from affiliation, a sectoral pension fund is required to grant an exemption to an undertaking where the latter has already made available to its workers for at least six months before the request was lodged on the basis of which affiliation to the fund was made compulsory, a pension scheme granting them rights at least equivalent to those which they would acquire if affiliated to the fund.

Provided that the abovementioned provision is binding on the sectoral pension fund regarding the exercise of its power of exemption, it cannot be regarded as likely to lead the fund to abuse that power. In such circumstances, the fund merely checks that the conditions laid down by the competent minister are complied with.56

Next, under Article 1 of the Guidelines for exemption from affiliation, a sectoral pension fund is entitled to grant an exemption to an undertaking which provides its workers with a pension scheme granting them rights at least equivalent to those deriving from the fund, provided that, in the event of withdrawal from the fund, compensation considered reasonable by the Insurance Board is offered for any damage suffered by the fund, from the actuarial point of view, as a result of the withdrawal.

The provision thus enables a sectoral pension fund to exempt from the obligation of affiliation an undertaking which provides its workers with a pension scheme equivalent to the one managed by it if such an exemption does not threaten its financial equilibrium. Exercise of that power of exemption involves an evaluation of complex data relating to the pension schemes involved and the financial equilibrium of the fund, which necessarily implies a wide margin of appreciation.

In view of the complexity of such an evaluation and of the risks which exemptions involve for the financial equilibrium of a sectoral pension fund and, therefore, for performance of the social task entrusted to it, a Member State may consider that the power of exemption should not be attributed to a separate entity.

It should be noted, however, that national courts adjudicating, as in this case, on an objection to a requirement to pay contributions must subject to review the decision of the fund refusing an exemption from affiliation, which enables them at least to verify that the fund has not used its power to grant an exemption in an arbitrary manner and that the principle of non-discrimination and the other conditions for the legality of that decision have been complied with.

Finally, as regards Albany's argument that an adequate level of pension for workers could be assured by laying down minimum requirements to be met by pensions offered by insurance companies, it must

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56 See, to that effect, Joined Cases C-46/90 and C-93/91 Lagauche and Others [1993] ECR I-5267, para 49.

be emphasised that, in view of the social function of supplementary pension schemes and the margin of appreciation enjoyed, according to settled case-law, by the Member States in organising their social security systems,57 it is incumbent on each Member State to consider whether, in view of the particular features of its national pension system, laying down minimum requirements would still enable it to ensure the level of pension which it seeks to guarantee in a sector by compulsory affiliation to a pension fund. The answer to the third question must therefore be that Articles 86 and 90 of the Treaty do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme in a given sector.

3. Decision on Costs

The costs incurred by the Netherlands, German, French and Swedish Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

4. Operative Part

On those grounds, the Court, in answer to the questions referred to it by the Kantongerecht, Arnhem, by judgment of 4 March 1996, hereby rules:

1. Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC) do not prohibit a decision by the public authorities to make affiliation to a sectoral pension fund compulsory at the request of organisations representing employers and workers in a given sector.

2. A pension fund charged with the management of a supplementary pension scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector, to which affiliation has been made compulsory by the public authorities for all workers in that sector, is an undertaking within the meaning of Article 85 et seq. of the Treaty.

3. Articles 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC) do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme in a given sector.

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57 Case 238/82 Duphar and Others [1984] ECR 523, para 16; Poucet and Pistre, cited above, paragraph 6; and Case C-70/95 Sodemare and Others [1997] ECR I-3395, para 27.

D. Deutsche Telekom AG v European Commission

Case C-280/08P

ECR I – 9601

Decided Oct 14, 2010

1. Summary of the Judgment

The facts of the case were set out by the General Court in paragraphs 1 to 24 of the judgment under appeal as follows:s

> The applicant, Deutsche Telekom AG, is the incumbent telecommunications operator in Germany. The applicant operates the German fixed telephone network. Before the full liberalisation of telecommunications markets, it enjoyed a legal monopoly in the retail provision of fixed-line telecommunications services. The German markets in the provision of infrastructure and in the provision of telephone services have been liberalised since 1 August 1996, when the Telekommunikationsgesetz (German Law on telecommunications; "TKG") of 25 July 199658 came into force. Since then, the applicant has faced varying degrees of competition from alternative operators on the two markets. The applicant's local networks each consist of a number of local loops for subscribers. The term "local loop" signifies the physical circuit connecting the network termination point at a subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network. The applicant offers access to its local networks to other telecommunications operators and to subscribers. As regards the applicant's access services and charges, it is therefore necessary to distinguish between the local network access services which the applicant offers its competitors ("wholesale [local loop] access [services]") and the local network access services which the applicant offers its subscribers ("[end-user access services]").

1.1. Wholesale local loop access services

By Decision No 223a of the Federal Ministry of Post and Telecommunications … of 28 May 1997, the applicant was required to offer its competitors fully unbundled access to the local loop with effect from June 1997.

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58 BGBl. 1996 I, p. 1120.

The applicant's charges for wholesale [local loop] access [services] are made up of two components: a monthly subscription charge, and a one-off charge.

Under Paragraph 25(1) of the TKG, the applicant's wholesale [charges for local loop access services] must be approved in advance by the Regulierungsbehörde für Telekommunikation und Post (German regulatory authority for telecommunications and post; "RegTP").

In that context, RegTP checks whether the wholesale [charges for local loop access services] proposed by the applicant satisfy the requirements laid down by Paragraph 24 of the TKG. Thus, under Paragraph 24(1) of the TKG, "[r]ates shall be based on the costs of efficient service provision".

1.2. End-user access services

As regards [end-user access services], the applicant offers two basic variants: the traditional analogue connection … and the digital narrowband connection. Both these variants of end-user access can be provided over the applicant's existing copper pair network (narrowband connections). The applicant also offers end-users a broadband connection (ADSL), for which it had to upgrade the existing [narrowband] networks so as to be able to offer broadband services such as faster Internet access.

The applicant's retail prices [for end-user access services] are made up of two components: a basic monthly charge, which depends on the quality of the line and services supplied, and a one-off charge for a new connection or takeover of a line.

1.2.1. Charges for retail analogue lines and digital narrowband lines

Retail prices for analogue and [digital narrowband] lines are regulated under a price cap system. Under point 2 of Paragraph 27(1) and Paragraph 25(1) of the TKG, retail prices for connection to the applicant's network and for telephone calls are not regulated separately for each service, according to the individual cost of that service; they are regulated for a block of services at a time, with different services being grouped together in "baskets".

The system was taken over by RegTP on 1 January 1998, whereupon RegTP established two baskets, one for services to residential customers and the other for services to business customers. Each basket contained both [end-user access services] and the full range of telephone products offered by the applicant, such as local, regional, long-distance and international calls.

Under the terms of the decision of the [Federal Ministry of Post and Telecommunications] of 17 December 1997, the applicant was to reduce the aggregate price for each of the two baskets by 4.3% in the period from 1 January 1998 to 31 December 1999 (first price cap period). When that first period ended on 31 December 1999, RegTP – by decision of 23 December 1999 – essentially maintained the composition of the baskets

and lowered the prices by a further 5.6% in the period from 1 January 2000 to 31 December 2001 (second price cap period).

Within this framework of binding price reductions, the applicant could modify the charges for individual components of each basket after obtaining prior authorisation from RegTP. The system thus enabled the charges for one or more components of a basket to be increased, provided that the price ceiling for the basket was not exceeded. In the first two price cap periods [from 1 January 1998 to 31 December 2001], the applicant reduced the retail prices in both baskets substantially, going far beyond the mandatory reductions. Those price reductions essentially applied to call charges. Retail prices for analogue lines, on the other hand, remained unchanged throughout both price cap periods, As regards retail prices for [digital narrowband] lines, the applicant lowered basic monthly charges during the same period.

A new price cap system has been in effect since 1 January 2002. In place of the two baskets for residential and business customers, the new system uses four baskets, for end-user lines (basket A), local calls (basket B), domestic long-distance calls (basket C), and international calls (basket D). On 15 January 2002, the applicant informed RegTP that it proposed to increase its monthly charges for analogue and [digital narrowband] lines That increase was authorised by RegTP. On 31 October 2002, the applicant made a further application to increase its retail charges. RegTP partly refused that application.

1.2.2. Charges for ADSL lines

ADSL charges are not subject to advance regulation under the price cap system. Under Paragraph 30 of the TKG, those charges may be reviewed subsequently.

On 2 February 2001, following a number of complaints from competitors of the applicant, RegTP initiated a retrospective investigation of the applicant's ADSL prices in order to determine whether there was any practice of below-cost selling, contrary to the German rules on competition. RegTP closed the proceeding on 25 January 2002, having found that the price increase which the applicant had announced on 15 January 2002 did not give rise to a suspicion of price dumping.'

Following the lodging in 1999 of complaints from competitors of the appellant, the Commission of the European Communities adopted the decision at issue by which it found, particularly in recitals 57, 102, 103 and 107 of that decision, that the appellant had committed an abuse in the form of a 'margin squeeze' generated by an inappropriate spread between wholesale charges for local loop access services and retail charges for end-user access services.

In regard to that margin squeeze the General Court recalled, in paragraph 38 of the judgment under appeal, the terms of recitals 102 to 105 of the decision at issue, which are as follows:

> ‘A margin squeeze exists if the charges to be paid to [the applicant] for wholesale [local loop] access [services], taking monthly charges and one-off charges together, are so expensive that competitors are forced to charge their end-users prices higher than the prices [the applicant] charges its own end-users for similar services. If wholesale charges [for local loop access services] are higher than retail charges [for end-user access services], [the applicant’s] competitors, even if they are at least as efficient as [the applicant], can never make a profit, because on top of the wholesale charges [for local loop access services] they pay to [the applicant] they also have other costs such as marketing, billing, debt collection …
>
> If [the applicant] charges its competitors [wholesale] prices for [local loop] access [services] that are higher than its own prices for retail local network access, [the applicant] prevents its competitors from offering access via the local loop in addition to call services. …
>
> [The applicant] takes the view that there cannot be abusive pricing in the form of a margin squeeze in the present case, because wholesale charges [for local loop access services] are imposed by [RegTP]. …
>
> Contrary to [the applicant’s] view, however, the margin squeeze is a form of abuse that is relevant to this case. On related markets on which competitors buy wholesale [local loop access] services from the established operator, and depend on the established operator in order to compete on a [retail] product or service market, there can very well be a margin squeeze between regulated wholesale [prices for local loop access services] and retail prices [for end-user access services]. To show that there is a margin squeeze it is sufficient that there should be a disproportion between the two charges such that competition is restricted. …’

Under Article 1 of the decision at issue, the Commission therefore found that ‘[the applicant] has since 1998 infringed Article 82(a) of the EC Treaty by charging its competitors and [its] end-users unfair monthly and one-off charges for access to the local loop, thus significantly impeding competition on the market for access to the local network’.

Under Article 3 of the decision at issue, the Commission imposed a fine of EUR 12.6 million on the appellant for that infringement.

2. The proceedings before the General Court and the judgment under appeal

By application lodged at the Registry of the General Court on 30 July 2003, the appellant brought an action, principally, for annulment of the decision at issue and, in the alternative, for a reduction of the fine imposed by that decision. In support of its application for annulment of the decision at issue, the appellant put forward, inter alia, a plea in law alleging infringement of Article 82 EC and a plea in law alleging misuse of

powers and infringement of the principles of proportionality, legal certainty and protection of legitimate expectations.

The plea alleging infringement of Article 82 EC was in several parts, of which three are relevant for the purposes of the present appeal: the first alleging the absence of an abuse as the appellant did not have sufficient scope to avoid a margin squeeze; the second complaining that the method used by the Commission to establish the margin squeeze was unlawful; and the fourth alleging that the margin squeeze had no effect on the market.

The General Court rejected all those parts of the plea, noting in particular in its review, in paragraphs 150 and 242 of the judgment under appeal, that the appellant had not, in its application, challenged the definition of the relevant markets that was accepted in the decision at issue, according to which it is appropriate to distinguish, on the one hand, between a wholesale market for local loop access services and, on the other, a retail market for access to the local loop, which includes a market for narrowband access and a market for broadband access, all of which have a national dimension.

As regards the first part of that plea, the General Court found, in paragraphs 140 and 151 of the judgment under appeal, that the Commission had been entitled to find in the decision at issue that the appellant had sufficient scope during the period in question to reduce the margin squeeze identified in that decision by adjusting retail prices for end-user access services.

As regards the second part of that plea, in paragraph 168 of the judgment under appeal the General Court rejected the appellant's complaint that the abusive nature of the margin squeeze could arise only from the abusive nature of its retail prices for end-user access services. It went on to state, in paragraphs 193, 203 and 206 of its judgment, that the Commission had been correct to analyse the abusive nature of the appellant's pricing practices solely – in accordance with the as-efficient-competitor test – on the basis of the appellant's particular situation, namely on the basis of the appellant's charges and costs, and by taking into account only revenues from access services while excluding revenues from other services, such as call services, and comparing the wholesale price for local loop access services to retail prices for all end-user access services, namely narrowband and broadband access.

As regards the fourth part of the plea, the General Court noted, in particular, in paragraph 237 of the judgment under appeal that the margin squeeze at issue will, in principle, hinder the growth of competition in the retail markets for end-user access services.

The plea in law alleging misuse of powers and infringement of the principles of proportionality, legal certainty and protection of legitimate expectations was also rejected in its entirety by the General Court. As regards the complaint that the Commission was subjecting the appellant's charges to double regulation, thereby infringing the principles of proportionality and legal certainty, the General Court stated, in particular, in paragraph 265 of the judgment under appeal:

> 'While it is not inconceivable that the German authorities also infringed Community law – particularly the provisions of [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10)], as amended by [Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13)] – 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.'

Furthermore, as regards the complaint of infringement of the principle of protection of legitimate expectations, the General Court found, in paragraph 269 of the judgment under appeal, that RegTP's decisions could not have created such a legitimate expectation for the appellant.

Lastly, as regards the complaint as to misuse of powers, the General Court held in paragraph 271 of its judgment:

> 'In the [decision at issue], the Commission refers only to the applicant's pricing practices and not to the decisions of the German authorities. Even if RegTP had infringed a Community rule and even if the Commission could have initiated proceedings against the Federal Republic of Germany for failure to fulfil obligations, such possibilities cannot affect the lawfulness of the [decision at issue]. In that decision, the Commission merely found that the applicant had committed an infringement of Article 82 EC, a provision which concerns only economic operators, not the Member States. The Commission did not therefore misuse its powers by making that finding on the basis of Article 82 EC.'

In support of its claim for a reduction of the fine imposed, the appellant put forward six pleas in law, including, in particular, a third plea based on the lack of negligence and intentional fault, a fourth plea alleging that insufficient account was taken of the regulation of charges in calculating the level of the fine and a sixth plea alleging a failure to take account of attenuating circumstances. The General Court rejected those three pleas in paragraphs 290 to 321 of the judgment under appeal. Consequently, the General Court dismissed the whole action and ordered the appellant to bear its own costs and to pay those incurred by the Commission.

3. Forms of order sought

By its appeal, the appellant claims that the Court should:

– set aside the judgment under appeal;

– annul the decision at issue;

– in the alternative, in the exercise of its unlimited jurisdiction, reduce the fine imposed on it under Article 3 of the decision at issue; and

– order the Commission to pay the costs.

The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs. Vodafone D2 GmbH, formerly Vodafone AG & Co. KG, formerly Arcor AG & Co. KG ('Vodafone'), contends that the Court should dismiss the appeal as inadmissible or, at the very least, unfounded, and order the appellant to pay the costs. Versatel NRW GmbH, formerly Tropolys NRW GmbH, formerly CityKom Münster GmbH Telekommunikationsservice and TeleBeL Gesellschaft für Telekommunikation Bergisches Land mbH, EWE TEL GmbH, HanseNet Telekommunikation GmbH, Versatel Nord GmbH, formerly Versatel Nord-Deutschland GmbH, formerly KomTel Gesellschaft für Kommunikations- und Informationsdienste mbH, NetCologne Gesellschaft für Telekommunikation mbH, Versatel Süd GmbH, formerly Versatel Süd-Deutschland GmbH, formerly tesion Telekommunikation GmbH, and Versatel West GmbH, formerly Versatel West-Deutschland GmbH, formerly Versatel Deutschland GmbH & Co. KG (together 'Versatel') also contended at the hearing that the Court should dismiss the appeal, endorsing the forms of order sought by the Commission and by Vodafone.

4. Appeal

4.1. Admissibility

Vodafone and Versatel plead, as a preliminary point, that the appeal is inadmissible in that it is limited – under the first ground of appeal and the first and second parts of the second ground of appeal which, in essence, challenge the General Court's findings concerning the application of Article 82 EC to the relevant pricing practices of the appellant and concerning observance of the principles of proportionality, legal certainty and protection of legitimate expectations – to reproducing the arguments on which the appellant relied in the proceedings at first instance for the sole purpose of securing a re-examination of those arguments by the Court of Justice.

In that regard, it should be borne in mind that it is apparent from Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. That requirement is not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the contested judgment, merely reproduces the pleas in law and arguments previously submitted to the General Court. Such an appeal amounts in reality to no more than a request for

re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake.59

However, provided that the appellant challenges the interpretation or application of European Union law ('EU law') by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose.60

In the present case, the first and second grounds of appeal, taken as a whole, are such that the appeal does indeed seek to call into question the position adopted by the General Court in relation to a number of points of law put to it at first instance concerning the application of Article 82 EC to the relevant pricing practices of the appellant and observance of certain general principles of EU law. The appeal includes a precise indication of those aspects of the judgment under appeal which are being contested and of the pleas in law and complaints on which it is based.

It follows from this that the first and second grounds of appeal, viewed as a whole, cannot be regarded as inadmissible. It will, however, be necessary to examine the admissibility of specific complaints put forward in support of those grounds when examining them in turn.

4.2. Substance

In support of its appeal, the appellant puts forward three pleas in law alleging, respectively, (i) errors of law concerning the manner in which the regulation of its activities by RegTP as the competent national regulatory authority was dealt with, (ii) errors of law in the application of Article 82 EC, and (iii) errors of law in the calculation of fines owing to a failure to take such regulation into account. It must be borne in mind in that regard that, by the judgment under appeal, the General Court dismissed in its entirety the action brought by the appellant against the decision at issue, holding, in essence, as can be seen from paragraphs 3 to 6 of the present judgment, that the Commission was entitled to impose a fine on the appellant for infringement of Article 82 EC on account of the implementation of an unfair pricing practice, resulting for competitors who are at least as efficient as the appellant in a margin squeeze generated by an inappropriate spread between wholesale charges for local loop access services and retail charges for end-user access services, preventing them from competing effectively with the appellant for the provision of the latter services.

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59 See, in particular, Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paras 34-35; Case C-76/01 P *Eurocoton and Others* v *Council* [2003] ECR I-10091, paras 46-47.

60 See, in particular, Case C-321/99 P *ARAP and Others* v *Commission* [2002] ECR I-4287, para 49.

By its three grounds of appeal, the appellant seeks to challenge, in essence, the General Court's findings in the judgment under appeal with regard to:

– the attributability to the appellant of the infringement on the basis of the appellant's scope to adjust its retail prices for end-user access services and the relevance to the application of Article 82 EC of the regulation of prices for telecommunications services by national regulatory authorities;

– the appropriateness, for the purpose of establishing an abuse within the meaning of Article 82 EC, of the margin squeeze test in the circumstances of the case, having regard to the national regulatory authorities' regulation of wholesale prices for local loop access services, as well as the lawfulness of the method of calculating that margin squeeze and the analysis of its effects in the light of Article 82 EC; and

– whether the amount of the fine is justified in the light of the national regulatory authorities' regulation of the telecommunications sector.

By contrast, the appellant does not challenge in principle the proposition that a pricing practice adopted by a dominant undertaking which results in a margin squeeze of its competitors who are at least as efficient is to be regarded as unfair in the light of Article 82 EC. Indeed, the appellant does not criticise the General Court's view that an undertaking abuses its dominant position within the meaning of Article 82 EC if, owing to an inappropriate spread between its wholesale prices for local loop access services and its retail prices for end-user access services in the markets in which it is dominant, its pricing practices lead to such a margin squeeze. It merely submits in that regard, by its second ground of appeal, that, in the present case, margin squeeze is not a relevant basis for establishing that it has committed an infringement of Article 82 EC, since its wholesale prices for local loop access services are subject to regulation by the national regulatory authorities.

That being the case, the Court will consider the grounds of appeal in the order in which they have been presented by the appellant, which corresponds to the order in which the pleas in law at first instance were presented and considered by the General Court in the judgment under appeal.

4.2.1. Preliminary observations

In order to consider the substance of the appellant's grounds of appeal against that judgment, it should, in the first place, be pointed out that, according to Article 113(2) of the Rules of Procedure of the Court of Justice, the subject-matter of the proceedings before the General Court may not be changed in the appeal. The Court's jurisdiction in an appeal is confined to a review of the findings of law on the pleas argued before the General Court. A party may not, therefore, put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court, since to do so would be to allow it to bring

before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court.61

Both in its appeal and at the hearing, the appellant argued that it did not have any scope to determine wholesale prices for local loop access services, since those were set by the national regulatory authority, namely RegTP. The margin squeeze at issue was said to be caused, in reality, by the excessive wholesale prices set by RegTP. In order to end that margin squeeze, the Commission should, therefore, have brought an action for failure to fulfil obligations under Article 226 EC against the Federal Republic of Germany for breach of EU law, instead of adopting a decision against the appellant under Article 82 EC. Furthermore, it is wrong, according to the appellant, to take the view that wholesale prices for local loop access services are set on the basis of the appellant's costs. Those prices are determined by RegTP on the basis of the cost of efficient service provision in accordance with a model laid down by the national regulatory authority.

By contrast, the Commission and Versatel contend that wholesale prices for local loop access services are attributable to the appellant since, according to the provisions of the TKG, those prices are set by RegTP on the basis of an application made by the appellant by reference to its own costs. The appellant cannot, therefore, complain that those prices are excessive. As is apparent from the decision at issue, the appellant is, moreover, legally obliged to make a fresh application to RegTP for a reduction of wholesale prices for local loop access services if its costs decrease.

In that regard, Versatel also claimed at the hearing that the appellant had, since 1997, systematically sought to undermine the proper conduct of the national procedure for setting wholesale prices for local loop access services by withdrawing its applications for approval and by failing to produce any proof or evidence of the costs that might justify those wholesale prices, in spite of the obligation to that effect under national law.

With regard to those points at issue between the parties, it must nevertheless be observed, first of all, that the question of the appellant's scope to adjust its wholesale prices for local loop access services was not argued before the General Court, which handed down the judgment under appeal having accepted the premiss, undisputed before it, that the appellant did not have the necessary scope.

In paragraph 93 of the judgment under appeal, the General Court observed that although, in the decision at issue, the Commission did not rule out that the appellant had the possibility of reducing its wholesale prices for local loop access services, it confined its examination to the question whether the appellant had real room for manoeuvre to adjust its retail prices for end-user access services.

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61 See, to that effect, in particular Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, para 59; Case C-68/05 P *Koninklijke Coöperatie Cosun* v *Commission* [2006] ECR I-10367, para 96; and Case C-564/08 P *SGL Carbon* v *Commission* [2009] ECR I-0000, para 22.

Since that approach was not challenged before the General Court, the latter accordingly confined itself, in paragraphs 85 to 152 of the judgment under appeal, to considering – for the purpose of determining whether the margin squeeze identified in the decision at issue was attributable to the appellant – whether the Commission had been entitled to conclude in that decision that the appellant had real scope to adjust its retail prices for end-user access services in order to end or reduce that margin squeeze. It concluded in that regard, in paragraphs 140 and 151 of the judgment under appeal, that the Commission had been entitled to take the view that there was such leeway, notwithstanding RegTP's regulation of retail prices for end-user access services.

Similarly, before rejecting, in paragraphs 183 to 213 of the judgment under appeal, the complaints put forward by the appellant in contesting the abusive nature of and method of calculating the margin squeeze identified in the decision at issue, the General Court stated in paragraph 167 of its judgment that the Commission had established only that the appellant had scope to adjust its retail prices for end-user access services.

In those circumstances it is not for the Court of Justice, in the context of the present appeal, to consider to what extent the appellant could, where appropriate, have adjusted wholesale prices for local loop access services, as claimed by the Commission and Versatel, since to do so would be to go beyond the pleas in law that were argued before the General Court. According to the case-law cited in paragraph 34 of the present judgment, any plea or complaint on that issue is beyond the scope of the present appeal and, therefore, inadmissible.

In order to assess the substance of the complaints put forward by the appellant to call into question the lawfulness of the judgment under appeal, in particular those by which it denies responsibility for the infringement and the abusive nature of the margin squeeze identified in the decision at issue – complaints put forward by the first and second grounds of appeal – it is accordingly necessary to rely solely on the premiss accepted in that judgment: that the appellant had scope only to adjust its retail prices for end-user access services, scope whose existence is undisputed in the context of the present appeal. Second, it should be stressed that, if the subject-matter of the proceedings before the General Court is not to be changed, it is not possible in the context of the present appeal to accuse the General Court of failure to censure the Commission for not calling into question the conduct of the national regulatory authorities on the premiss that those authorities, having set an excessive wholesale price for local loop access services, may be said to be solely responsible for the margin squeeze identified in the decision at issue. Admittedly, according to the case-law of the Court, it is for each Member State to take all appropriate measures, whether general or particular, to ensure the fulfilment by the national regulatory authorities of the obligations which are binding

under EU law.62 Furthermore, Articles 81 EC and 82 EC, in conjunction with Article 10 EC, require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.63 However, as regards the possibility of the Commission bringing an action for failure to fulfil obligations against the Member State concerned, since the judgment under appeal in the present case relates solely to the lawfulness of a decision adopted against the appellant by the Commission pursuant to Article 82 EC, the Court must, in the context of that appeal, confine itself to ascertaining whether the complaints put forward in support of that appeal show that the General Court's examination of the lawfulness of such a decision is vitiated by errors of law, irrespective of whether the Commission could, simultaneously or alternatively, have adopted a decision finding that the Member State in question had infringed EU law.

Consequently, as the General Court itself found in substance, inter alia, in paragraphs 265 and 271 of the judgment under appeal, even if it is not inconceivable that the national regulatory authorities infringed EU law in this instance, and the Commission could indeed therefore have chosen to bring an action for failure to fulfil obligations against the Federal Republic of Germany under Article 226 EC, such possibilities are irrelevant at the stage of the present appeal, not least because, according to the case-law of the Court, under the system laid down by Article 226 EC, the Commission has a discretion to bring an action for failure to fulfil obligations, and it is not for the Courts of the European Union ('Courts of the Union') to assess whether it was appropriate to do so.64

As regards the appellant's claim that the wholesale prices for local loop access services were excessive, it must be observed furthermore that the appellant did not, in its application to the General Court, in any way attempt to call into question the lawfulness of those prices in the light of EU law. The appellant confined itself in that respect to submitting that, if wholesale prices for local loop access services are set by the national regulatory authorities and cannot be adjusted by the appellant, only the retail prices for end-user access services can be abusive within the meaning of Article 82 EC and, moreover, that if the pricing policy of those authorities in respect of those services is contrary to EU law, it is incumbent on the Commission to bring an action against those authorities for failure to fulfil obligations.

Consequently, the Court cannot, in the present appeal, review complaints which challenge the lawfulness of wholesale prices for local loop access services, particularly on the basis of their allegedly excessive nature as

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62 See, to that effect, Case C-268/06 *Impact* [2008] ECR I-2483, para 85.

63 See, in particular, Case 13/77 *GB-Inno-BM* [1977] ECR 2115, para 31; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, para 20.

64 See, in particular, Case C-233/00 *Commission* v *France* [2003] ECR I-6625, para 31.

compared with the costs incurred by the appellant in supplying them.65 Such complaints go beyond the pleas argued at first instance and are, therefore, in accordance with the case-law of the present judgment, inadmissible in this appeal.

Third, it must be noted that, in the proceedings at first instance, the appellant did not, as the General Court observed in paragraphs 150 and 242 of the judgment under appeal, challenge the Commission's definition of the relevant markets in the decision at issue, according to which (i) the relevant geographic market is the German market and (ii) as regards the markets for the services at issue, the wholesale market in local loop access services is a single market, distinct from the retail market in end-user access services which comprises two separate segments, namely access to narrowband lines, on the one hand, and access to broadband lines, on the other.

Similarly it must be observed that the appellant did not at any time call into question before the General Court the Commission's finding in the decision at issue that the appellant had a dominant position within the meaning of Article 82 EC on all those service markets.

It follows from this that, in accordance with the case-law cited in paragraph 34 of the present judgment, neither the definition of the relevant markets that was accepted by the General Court in the judgment under appeal, nor the finding that the appellant had a dominant position on all those markets can be called into question in the examination of the present appeal.

In the second place, it should be recalled, concerning specifically the assessment of market data and the competitive situation, that it is not for the Court of Justice, on an appeal, to substitute its own assessment for that of the General Court. In accordance with Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice, the appeal must be limited to questions of law. Assessment of the facts does not, save where there may have been distortion of the facts or evidence, which has not been pleaded here, constitute a question of law which is subject, as such, to review by the Court of Justice.66

The pleas in law put forward by the appellant in support of the present appeal will be examined by the Court in the light of those considerations.

4.2.2. The first ground of appeal, alleging errors of law concerning the manner in which the regulation of the appellant's activities by RegTP as the competent national regulatory authority was dealt with

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65 See, on that point, Case C-55/06 *Arcor* [2008] ECR I-2931, para 69.

66 See Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, para 78 and the case-law cited.

The first ground of appeal relied on by the appellant is subdivided into three parts concerning, respectively, the attributability of the infringement, the principle of protection of legitimate expectations and the intentional or negligent nature of the infringement of Article 82 EC.

4.2.2.1. The first part of the first ground of appeal, concerning the attributability of the infringement

4.2.2.1.1. Judgment under appeal

As regards the appellant's scope to avoid the margin squeeze, the General Court recalled in paragraphs 85 to 89 of the judgment under appeal the principles identified by the relevant case-law of the Court, and went on to consider, in paragraphs 97 to 152 of its judgment, whether the German legal framework, in particular the TKG and the decisions taken by RegTP during the period covered by the decision at issue, removed any possibility of competitive activity by the appellant, or whether it gave the appellant sufficient scope to set its prices at a level which would have enabled it to end or reduce the margin squeeze identified in the decision at issue.

As regards, first of all, the period from 1 January 1998 to 31 December 2001 within the applicable legislative framework, the appellant was able to adjust its prices after obtaining the prior authorisation of RegTP, the General Court concluded its judgment that the Commission was correct to find that, having regard to the six applications for reductions in call charges in that period, the appellant had scope during that period to apply for increases in the retail prices of its narrowband access services to end-users, while respecting the overall ceilings for baskets of residential and business services.

Next, the General Court considered the judgment under appeal whether, notwithstanding that scope, RegTP's intervention in the setting of the appellant's retail prices for end-user access services had the effect that the appellant was no longer governed by Article 82 EC. In that respect, it held in paragraph 107 of its judgment that the fact that those retail prices have to be approved by RegTP does not absolve the appellant from responsibility under Article 82 EC, since the appellant influences the level of its retail prices for end-user access services through applications to RegTP for authorisation. In that regard, the General Court, in paragraphs 108 to 124 of the judgment under appeal, rejected the appellant's argument that it does not have any responsibility under Article 82 EC because RegTP checks the compatibility with Article 82 EC of its retail prices for end-user access services in advance.

In paragraphs 109 to 114 of the judgment under appeal, the General Court stated that the retail prices for access to analogue lines were based on decisions taken under the legislation in force before the adoption of the TKG by the Federal Ministry of Post and Telecommunications, that the provisions of the TKG do not indicate that RegTP considers whether applications for the adjustment of retail prices for access to

narrowband services are compatible with Article 82 EC, that the national regulatory authorities operate under national law, that national law may, as regards telecommunications policy, have objectives which differ from those of European Union competition policy and that the various decisions of RegTP to which the appellant refers do not include any reference to Article 82 EC. As to the fact that RegTP has considered, in a number of decisions, the question of the existence of a margin squeeze, the General Court stated in paragraphs 116 to 119 of the judgment under appeal that the fact that, having found a negative spread between wholesale prices for local loop access services and the appellant's retail prices for end-user access services, RegTP took the view in each case that other operators should be able to offer their end-users competitive prices by resorting to cross-subsidised charges for access services and call charges shows that RegTP did not consider the compatibility of the charges in question with Article 82 EC or, at any rate, that it applied Article 82 EC incorrectly.

The General Court pointed out in paragraph 120 of the judgment under appeal that, in any event, even on the assumption that RegTP is obliged to consider whether the retail prices for end-user access services proposed by the appellant are compatible with Article 82 EC, the Commission cannot be bound by a decision taken by a national body pursuant to that article. Furthermore, the General Court noted in paragraphs 121 to 123 of the judgment under appeal that the attribution of any infringement to the appellant depends on whether the latter had sufficient scope at the material time to fix its retail prices for narrowband access services to end-users at a level that would have enabled it to end or reduce the margin squeeze at issue. The General Court reiterated in that regard that the appellant was able to influence the level of those retail prices through applications to RegTP for authorisation. It also observed that, in its judgment of 10 February 2004, the Bundesgerichtshof had expressly confirmed the appellant's responsibility to make such applications and that the German legal framework did not preclude RegTP from having authorised prices which are contrary to Article 82 EC.

Consequently, the General Court found in paragraph 124 of the judgment under appeal that, notwithstanding RegTP's intervention in the setting of the appellant's retail prices for narrowband access services to end-users, the appellant had sufficient discretion during the period from 1 January 1998 to 31 December 2001 for its pricing policy to fall within the scope of Article 82 EC. As regards, in the second place, the period from 1 January 2002, having noted in paragraphs 144 and 145 of the judgment under appeal that the appellant does not deny that it could have increased its retail prices for broadband access services (ADSL) from that date and that, since it fixes those prices at its own discretion, within the limits imposed under German law, its pricing practices in that area are capable of being caught by Article 82 EC, the General Court considered in paragraphs 147 to 151 of its judgment whether the appellant could have reduced the margin squeeze by increasing its retail prices for broadband access services. Paragraphs 148 and 149 of the judgment under appeal are worded as follows:

'It must be noted in that regard that since wholesale [local loop] access services can provide end-users with the whole range of … access services, the applicant's scope to increase its [retail prices for broadband access services] is capable of reducing the margin squeeze between wholesale prices [for local loop access services], on the one hand, and retail prices for the whole range of [end-user] access services, on the other. A combined analysis, at end-user level, of … access services is required not only because they amount to a single supply of services at wholesale level, but also because, as the Commission explained in the [decision at issue] without having been challenged by the applicant on that point, ADSL cannot be offered to end-users on its own because, for technical reasons, it always involves an upgrading of … narrowband connections.

The applicant's observations concerning the purported cross-price elasticity between ADSL and narrowband connections and between the different ADSL variants must be rejected. First, those observations do not preclude the existence of scope for the applicant to increase its ADSL charges. Second, a limited increase in ADSL charges would have led to a higher average retail price for narrowband and associated broadband access services, and would thus have reduced the margin squeeze identified. In view, in particular, of the advantages of broadband as regards data transmission, end-users of broadband access services would not automatically choose to revert to a narrowband connection when ADSL retail access charges are increased.'

4.2.2.1.2. Arguments of the parties

As regards, in the first place, the period from 1 January 1998 to 31 December 2001, the appellant submits by its first complaint that the General Court erred in relying on the premiss that the existence of scope to adjust its retail prices for end-user access services is a necessary and sufficient requirement in order for an infringement to be attributable. The existence of such leeway does not resolve the issue whether the failure on the appellant's part to apply to RegTP for authorisation to increase those retail prices amounted to wrongful conduct.

According to the appellant, the General Court did not take into account the fact that RegTP considered the purported margin squeeze and took the view that it did not restrict competition. Where a dominant undertaking is subject to regulation by a national regulatory authority created for that purpose in a legal framework geared towards competition, and particular conduct is reviewed, and not challenged, by the national regulatory authority which has the relevant power within that framework, the dominant undertaking's responsibility for preserving the structure of the market is supplanted by the responsibility of that authority. In such a situation, the responsibility of the dominant undertaking is limited to the obligation to send the national regulatory authority all the information necessary in order for its conduct to be reviewed.

In those circumstances, the appellant maintains that paragraph 113 of the judgment under appeal is incorrect since RegTP was obliged to respect European Union competition law ('EU competition law'). Likewise, paragraph 123 of that judgment is vitiated by an error. The Bundesgerichtshof did not hold that the appellant's responsibility to make applications for the adjustment of its charges means that it has to substitute its own assessment of the application of Article 82 EC for that of the national regulatory authority. Furthermore, paragraph 120 of the judgment under appeal, according to which the appellant must be responsible for the margin squeeze on the ground that the Commission cannot be bound by a decision taken by a national body pursuant to Article 82 EC is not compelling. First, the issue in the present case is solely that of attributability, not whether RegTP's assessment binds the Commission as to the substance. Second, the national regulatory authorities have an autonomous role in the creation of a competition regime in the telecommunications sector. Lastly, the principle of legal certainty requires that a dominant undertaking which is subject to regulation at national level should be able to rely on the correctness of that regulation.

By its second complaint, the appellant claims that the considerations in paragraphs 111 to 119 of the judgment under appeal are irrelevant or are vitiated by errors of law. The General Court's reasoning leads to an unlawful vicious circle as a result of the inference from the alternative conclusion reached that the appellant was not entitled to rely on the outcome of the review carried out by RegTP. Furthermore, the concept of 'cross-subsidisation' used by RegTP did not give rise to any doubt as to the correctness of its findings. In addition, paragraphs 111 to 114 of that judgment contain errors of law for the reasons already set out in paragraph 66 of the present judgment.

By its third complaint, the appellant submits that, contrary to what the General Court held in paragraphs 109 and 110 of the judgment under appeal, the fact that its retail prices for analogue lines were based on authorisation by the Federal Ministry of Post and Telecommunications is irrelevant to the consideration of attributability. RegTP's rejection of the complaint of a margin squeeze restricting competition is, by contrast, decisive. As regards, in the second place, the period from 1 January 2002 to 21 May 2003, the appellant submits by its first complaint that the judgment under appeal is erroneous in so far as, just as in the case of the previous period, the margin squeeze cannot be attributed to the appellant.

By its second complaint, the appellant takes the view that in the judgment under appeal there is a contradiction between the examination of the attributability of the infringement and the calculation of the margin squeeze. The General Court required 'cross-subsidisation' between two markets, namely the narrowband access market, on the one hand, and the broadband access market, on the other. Yet, in the context of the calculation of the margin squeeze, the General Court failed to take into account the revenues which competitors obtain from call services, in particular on the ground that they cannot be subject to the possibility of cross-subsidisation between two markets, namely the end-user access services market, on the one hand, and the call services market, on the other.

By its third complaint, the appellant claims that the General Court erred in law in making unfounded assumptions as to the possibility of a reduction of the margin squeeze. The finding in paragraph 149 of the judgment under appeal that cross-price elasticity does not remove the appellant's scope to increase its ADSL prices is accurate but irrelevant. However, the General Court did not consider whether, and to what extent, an end-user of a narrowband line would decline to switch to a broadband line as a result of an increase in its price. The Commission points to the erroneous nature of the appellant's key argument that the infringement cannot be attributed to the appellant because the matter is within the remit of the national regulatory authority and that the Commission cannot issue proceedings directly against a regulated undertaking in a case in respect of which RegTP has already taken a decision. It contends that the appellant's complaints should, therefore, be rejected in their entirety.

Vodafone contends that the first part of the first ground of appeal is inadmissible because the appellant merely reproduces the arguments on which it relied during the proceedings before the General Court, solely for the purpose of securing a re-examination of that argument by the Court of Justice. In the alternative, the appellant's complaints should be rejected as unfounded. Versatel also contended at the hearing that the General Court had correctly held that the appellant had sufficient scope to increase its retail prices for end-user access services.

4.2.2.1.3. Findings of the Court

As a preliminary point it must be observed that, although, by the first part of the present ground of appeal, the appellant largely reiterates the arguments put forward before the General Court, it claims, in essence, that the General Court erred in law by adopting a legally incorrect test in respect of the attributability of the infringement of Article 82 EC. Contrary to Vodafone's contention, that part of the first ground of appeal is, therefore, admissible in accordance with the case-law cited in paragraph 25 of the present judgment.

As regards the substance of the first part of the first ground of appeal, it must be noted that the appellant claims, in essence, that the General Court considered the margin squeeze identified in the decision at issue to be attributable to the appellant under Article 82 EC solely on the ground that it had the scope to adjust its retail prices for end-user access services. The whole of that part of the first ground of appeal is based on the premiss that such scope is not a sufficient condition for the application of Article 82 EC where, as in this instance, the relevant pricing practice was approved by the national regulatory authority responsible for the regulation of the telecommunications sector, RegTP. However, that premiss is incorrect. According to the case-law of the Court of Justice, it is only 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, 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 EC 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.67

The possibility of excluding anti-competitive conduct from the scope of Articles 81 EC and 82 EC on the ground that it has been required of the undertakings in question by existing national legislation or that the legislation has precluded all scope for any competitive conduct on their part has thus been accepted only to a limited extent by the Court of Justice.68

Thus, the Court has held that if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles 81 EC and 82 EC.69 According to the case-law of the Court, dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market.70 It follows from this that the mere fact that the appellant was encouraged by the intervention of a 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.71

Since, notwithstanding such interventions, the appellant had scope to adjust its retail prices for end-user access services, the General Court was entitled to find, on that ground alone, that the margin squeeze at issue was attributable to the appellant. In the present case, it must be noted that the appellant does not deny the existence of such scope in the arguments put forward in the first part of the first ground of appeal. In particular, the appellant does not challenge the General Court's findings in paragraphs 97 to 105 and 121 to 151 of the judgment under appeal that, in essence, the appellant was able to make applications to RegTP for authorisation to adjust its retail prices for end-user access services, specifically retail prices for narrowband access services for the period between 1 January 1998 and 31 December 2001, and retail prices for broadband access services for the period from 1 January 2002.

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67 Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paras 33-34 and the case-law cited.

68 See Case 41/83 *Italy* v *Commission* [1985] ECR 873, para 19; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paras 27-29; and Case C-198/01 *CIF* [2003] ECR I-8055, para 67.

69 Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paras 36-73, and *CIF*, para 56.

70 Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, para 57.

71 See, to that effect, Case 123/83 *Clair* [1985] ECR 391, paragraphs 21-23.

Instead, in its various complaints and arguments the appellant merely underlines the encouragement provided by RegTP's intervention, and states, in particular, that RegTP itself considered and approved the margin squeeze at issue in the light both of national and European Union telecommunications law and of Article 82 EC and, moreover, that the Bundesgerichtshof held in a judgment of 10 February 2004 that the appellant cannot take the place of RegTP in assessing whether a pricing practice is contrary to Article 82 EC. For the reasons set out in paragraphs 80 to 85 of the present judgment, such arguments cannot, however, in any way alter the fact that that pricing practice is attributable to the appellant, since it is common ground that the appellant had scope to adjust its retail prices for end-user access services, and, therefore, such arguments are ineffective as a means of challenging the General Court's findings on that point. In particular, the appellant cannot complain that the General Court did not consider whether there was 'fault' on its part by failing to use the scope which it had to apply to RegTP for authorisation to adjust its retail prices for end-user access services. The existence or otherwise of any 'fault' in such conduct cannot alter the finding that the appellant had scope to adopt that conduct, and can be taken into account only in determining whether that conduct was an infringement and at the stage of setting the level of the fines.

Moreover, as the General Court held in paragraph 120 of the judgment under appeal, the Commission cannot, in any event, be bound by a decision taken by a national body pursuant to Article 82 EC.72 In the present case, the appellant does not, indeed, deny that RegTP's decisions are not binding on the Commission. Admittedly 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. However, that circumstance also does not affect the scope which the appellant had to adjust its retail prices for end-user access services and, accordingly, it is, as paragraphs 44 to 49 of the present judgment have already shown, ineffective in the present appeal for the purpose of challenging the General Court's findings as to whether the infringement can be attributed to the appellant. The same applies to the appellant's claim that the purpose of RegTP's regulation is to open the relevant markets up to competition. It is common ground that that regulation did not in any way deny the appellant the possibility of adjusting its retail prices for end-user access services or, therefore, of engaging in autonomous conduct that is subject to Article 82 EC, since the competition rules laid down by the EC Treaty supplement in that regard, by an *ex post* review, the legislative framework adopted by the Union legislature for *ex ante* regulation of the telecommunications markets.

Similarly, the Court must reject the complaint that, by reason of the cross-price elasticity of retail prices for broadband access services and retail prices for narrowband access services, the General Court erred in law

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72 See, to that effect, Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, para 48.

in paragraph 149 of the judgment under appeal with regard to the possibility of the appellant reducing the margin squeeze from 1 January 2002 by increasing its retail prices for broadband access services. As the General Court stated in the same paragraph, that complaint does not in any way preclude the existence of scope for the appellant to adjust its retail prices for broadband access services. Furthermore, in so far as the appellant also seeks to deny that that increase led to a higher average retail price for narrowband and broadband access services taken together, the present complaint must, in accordance with the case-law cited in paragraph 53 of the present judgment, be rejected as inadmissible, since it seeks to call into question the General Court's definitive assessment of the facts in the judgment under appeal, while making no claim as to distortion of those facts.

Finally, the complaint as to contradictory grounds, mentioned in paragraph 72 of the present judgment, cannot be upheld because it is founded on an incorrect premiss. While it is true that, particularly in paragraphs 119 and 199 to 201 of the judgment under appeal, the General Court rejected the possibility of cross-subsidisation between two separate markets – namely the market in end-user access services and that in call services for subscribers – at the stage of calculating the margin squeeze, it is wrong to take the view that the General Court required such cross-subsidisation when it was examining the attributability of the infringement. In paragraphs 148 to 150 of the judgment under appeal, the General Court merely found in that regard that the appellant's scope to increase its retail prices for broadband access services was capable of reducing the margin squeeze generated by the spread between wholesale prices for local loop access services and retail prices for all end-user access services. In doing so, the General Court did not in any way require there to be a practice of cross-subsidisation between narrowband and broadband access services, particularly since – as stated in paragraph 148 of the judgment under appeal, which the appellant has not challenged in the present appeal – there is a single, separate services market at the level of wholesale local loop access services, the access services provided at that level allowing the appellant's competitors to supply both narrowband and broadband access services to their end-users, whereas for technical reasons the latter services cannot be offered on their own to end-users. Consequently, the first part of the first ground of appeal must be rejected in its entirety as, in part, inadmissible and, in part, ineffective or unfounded.

4.2.2.2. The second part of the first ground of appeal, concerning the principle of the protection of legitimate expectations

4.2.2.2.1. Judgment under appeal

RegTP had taken the view in a number of decisions adopted in the period at issue that, even though there was a negative spread between the appellant's wholesale prices for local loop access services and its retail prices for end-user access services, other operators should be able to offer their end-users competitive prices by resorting to cross-subsidisation of access services and call services, the General Court found that RegTP's decisions do not include any reference to Article 82 EC, and that it follows implicitly but

necessarily from RegTP's decisions that the appellant's pricing practices have an anti-competitive effect, since the appellant's competitors have to resort to cross-subsidisation in order to be able to remain competitive on the market in access services.

The General Court concluded from this in paragraph 269 of the judgment under appeal:

> 'In those circumstances, RegTP's decisions could not have created for the applicant a legitimate expectation that its pricing practices were compatible with Article 82 EC. It must be observed furthermore that, in its judgment of 10 February 2004 setting aside the judgment of the Oberlandesgericht Düsseldorf of 16 January 2002, the Bundesgerichtshof confirmed that "the administrative examination procedure [undertaken by RegTP] does not preclude the possibility in practice of an undertaking submitting a charge by which it abuses its dominant position and obtains authorisation for it because the abuse is not revealed during the examination procedure".'

4.2.2.2.2. Arguments of the parties

The appellant takes the view that the General Court applied the principle of the protection of legitimate expectations incorrectly. RegTP's decisions repeatedly denied the existence of a margin squeeze that restricted competition, and this created a legitimate expectation on the part of the appellant that its charges were lawful. In that regard, the appellant claims, by its first complaint, that whether or not RegTP's decisions expressly refer to Article 82 EC is irrelevant, since RegTP had in any event found that there was no margin squeeze that restricted competition.

By its second complaint, the appellant submits that, contrary to the view taken by the General Court, it follows neither from RegTP's statement concerning the possibility of 'cross-subsidisation' with the prices of call services, nor from the use of the term 'cross-subsidisation', that its pricing practices have an anti-competitive effect. By its third complaint, the appellant submits that the Bundesgerichtshof of 10 February 2004 is of no relevance. That judgment was delivered after the reference period and cannot, therefore, determine whether the appellant was entitled to rely on the accuracy of RegTP's decisions during that period. On the contrary, the appellant could have inferred from a judgment of the Oberlandesgericht Düsseldorf of 16 January 2002 that it was entitled to rely on the decisions of RegTP, since that court held that RegTP's decisions precluded any infringement of Article 82 EC.

The Commission contends that, while RegTP's pronouncements do not anticipate its assessment with regard to Article 82 EC, neither can they form the basis of a legitimate expectation that the Commission will share the opinion of RegTP. The appellant's complaints should, therefore, be rejected as ineffective or unfounded. Vodafone takes the view that the second part of the first ground of appeal is inadmissible, since the appellant, in essence, merely repeats the complaints already raised before the General Court concerning the significance of RegTP's earlier decisions, its statements concerning the possibility of cross-subsidisation and the meaning of a judgment of the Oberlandesgericht Düsseldorf. In any event, that part of the ground of

appeal is unfounded since a legitimate expectation can be created only by the authority responsible for the legal situation at issue.

4.2.2.2.3. Findings of the Court

By the present complaints, the appellant merely claims that decisions adopted by RegTP or handed down by certain national courts were capable of creating for the appellant a legitimate expectation that its pricing practices were compatible with Article 82 EC, reiterating or developing the arguments relied on at first instance before the General Court in order to show that the Commission infringed the principle of the protection of legitimate expectations, but it fails to expound any legal arguments to demonstrate why the judgment under appeal are vitiated by an error of law. The appellant thereby seeks, by calling into question the decision at issue in this way, to secure a re-examination of the application that was made before the General Court. Consequently, the complaints are inadmissible on that point.

As to the remainder, in so far as the appellant denies, in its second complaint, that it could have inferred from the decisions of RegTP that its pricing practices had had a restrictive effect on competition, it must be held that the appellant seeks to call into question the General Court's assessment of the facts without alleging any distortion of those facts, and that, therefore, such a complaint must also be considered inadmissible. Finally, in so far as the third complaint seeks to call into question the relevance of the judgment delivered by the Bundesgerichtshof on 10 February 2004, it must be rejected as ineffective since it concerns a ground that was included in the judgment purely for the sake of completeness in support of other findings made by the General Court.73

As the use of the word 'furthermore' near the beginning of the second sentence of paragraph 269 of the judgment under appeal shows, the General Court referred to findings in that Bundesgerichtshof judgment solely in order to confirm the conclusion drawn from the grounds in paragraphs 267 and 268 of the judgment under appeal and which is set out in the first sentence of paragraph 269: that RegTP's decisions could not have created for the appellant a legitimate expectation that its pricing practices were compatible with Article 82 EC. Consequently, the second part of the first ground of appeal must be dismissed as, in part, inadmissible and, in part, ineffective.

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73 See, to that effect, Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, para 148 and the case-law cited.

4.2.2.3. The third part of the first ground of appeal, concerning the intentional or negligent nature of the infringement of Article 82 EC

4.2.2.3.1. Judgment under appeal

The General Court rejected the appellant's plea alleging a failure to state reasons in relation to the intentional or negligent nature of the infringement, noting, in paragraph 286 of the judgment under appeal, that the decision at issue contains a reference to Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty,74 the first subparagraph of which lays down the conditions which must be fulfilled to enable the Commission to impose fines, including the condition that the infringement was committed intentionally or negligently.

Furthermore, the General Court stated that, in the decision at issue, the Commission set out in detail the grounds on which it considers the appellant's pricing practices to be abuses within the meaning of Article 82 EC and the grounds on which the appellant must be deemed responsible for the infringement found, even though the German authorities have to approve the appellant's charges.

The General Court also rejected the appellant's plea regarding the absence of any negligence or intentional misconduct. In that regard, the General Court stated that the appellant could not be unaware that, notwithstanding the authorisation decisions of RegTP, it had genuine scope to reduce the margin squeeze, nor that that margin squeeze entailed serious restrictions on competition, particularly in view of its monopoly on the market in wholesale local loop access services and its virtual monopoly on the market in end-user access services. In addition, the General Court held, in paragraph 298 of the judgment under appeal, that the initiation of a pre-litigation procedure against the Federal Republic of Germany did not affect the conditions in the first subparagraph of Article 15(2) of Regulation No 17, since the appellant could not have been unaware that it had genuine scope to increase its retail prices for end-user access services and that its pricing practices were hindering the growth of competition in the market in local loop access services, a market in which the degree of competition was already weakened as a result, in particular, of its presence. Lastly, the General Court rejected the complaint based on RegTP's examination of the margin squeeze.

4.2.2.3.2. Arguments of the parties

The appellant submits by its first complaint that, the General Court misconstrues the requirements of Article 253 EC by proceeding, erroneously, on the principle that the allegation of negligence or intentional misconduct was sufficiently reasoned in the decision at issue. In fact that decision does not include any finding of law or of fact in relation to the question of negligence or fault. In the first place, the appellant submits that it is not sufficient, from a legal perspective, for the Commission to refer to Article 15(2) of

74 OJ, English Special Edition 1959-1962, p. 87.

Regulation No 17 in the second citation of the decision at issue. The citation does not form part of the statement of reasons for the decision; it merely indicates the legal basis. In any event, such a citation does not disclose why the Commission takes the view that the infringement was committed intentionally or negligently.

In the second place, the appellant takes the view that the Commission's substantive findings, to which the General Court refers, do not support the complaint of an intentional or negligent infringement of Article 82 EC, since they are unrelated to the issue of the individual attributability of the conduct, that is to say to the question whether the appellant could or could not have been unaware of the anti-competitive nature of its conduct. By its second complaint, the appellant submits that the General Court's assessment of fault is vitiated by a failure to state reasons, and, moreover, the grounds of the judgment under appeal are based on a misapplication of the first subparagraph of Article 15(2) of Regulation No 17. The imputability to the appellant of any infringement of Article 82 EC is lacking. In the light of RegTP's decisions, and in the absence of any precedent in the European Union, the appellant was unaware of the purportedly anti-competitive nature of its conduct.

According to the appellant, the considerations relating to the decisions of RegTP which appear in paragraphs 267 to 269 of the judgment under appeal and to which the General Court refers its judgment do not support the conclusion that the appellant acted wrongfully. The fact that RegTP does not expressly refer to Article 82 EC is not conclusive, since the assessment of fault does not depend on whether the undertaking concerned is aware that its conduct infringes Article 82 EC. Furthermore, it cannot be inferred either from the concept of cross-subsidisation used by RegTP or from the judgment of the Bundesgerichtshof of 10 February 2004 that the appellant acted wrongfully. Lastly, the General Court failed to consider the conclusions which the appellant was entitled to draw from the Commission's overall conduct as a result not only of the initiation of proceedings for failure to fulfil obligations against the Federal Republic of Germany, but also from the fact that the Commission informed the appellant of its intention not to pursue the procedure initiated against it.

The Commission contends that the regulation of the industry is relevant only to the issue whether the appellant knew that its actions were unlawful and not to the determination of the intentional nature of the infringement. The third part of the first ground of appeal is, therefore, ineffective or, in any event, unfounded. Vodafone takes the view that the appellant is again reproducing the arguments relied on before the General Court in order to argue that there was no fault. In any event, the appellant's arguments are inadmissible in so far as they require the Court of Justice, on the grounds of fairness, to substitute its own assessment for that of the General Court in the context of its review of the grounds of the General Court's judgment. As to the remainder, the third part of the first ground of appeal is unfounded.

4.2.2.3.3. Findings of the Court

As a preliminary point, it must be noted that the present complaints, while repeating in part the arguments put before the General Court, are admissible because they criticise the General Court for having adopted an incorrect legal test in relation to the application of the condition that an infringement be negligent or intentional, and in relation to the review of the Commission's observance of that condition in the light of its obligation to state reasons. Furthermore, it must be borne in mind that the question whether the grounds of a judgment of the General Court are adequate is a question of law which is amenable, as such, to judicial review on appeal.75

As regards, in the first place, the complaints as to whether the General Court's findings are well founded, it must be borne in mind, in relation to the question whether the infringements were committed intentionally or negligently and are, therefore, liable to be punished by a fine in accordance with the first subparagraph of Article 15(2) of Regulation No 17, that it follows from the case-law of the Court that that condition is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty. 76

In the present case, the General Court took the view that that condition was satisfied, since the appellant could not have been unaware that, notwithstanding the authorisation decisions of RegTP, it had genuine scope to set its retail prices for end-user access services and, moreover, the margin squeeze entailed serious restrictions on competition, particularly in view of its monopoly on the wholesale market in local loop access services and its virtual monopoly on the retail market in end-user access services.

It must be held that such reasoning, which is based on findings of fact which, in the absence of any allegation of distortion, are for the General Court alone to assess, is not vitiated by any error of law. In so far as the appellant complains that the General Court did not take RegTP's decisions or the lack of any precedent in the European Union into account, it is sufficient to note that such arguments are merely intended to show that the appellant was unaware that the conduct complained of in the decision at issue was unlawful in the light of Article 82 EC. Such arguments must, therefore, be rejected as unfounded.

The same applies to the complaint concerning the General Court's failure to take into account the initiation of the pre-litigation procedure against the Federal Republic of Germany pursuant to Article 226 EC, which, even if it is accepted that the Commission informed the appellant of its intention not to pursue the

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75 See, in particular, Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies* v *Council and Commission* [2008] ECR I-6513, para 90.

76 See Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, para 45, and *Nederlandsche Banden-Industrie-Michelin* v *Commission*, para 107.

infringement procedure under Article 82 EC in respect of the appellant, does not in any way alter the finding that the appellant could not have been unaware of the anti-competitive nature of its conduct. The General Court did not, therefore, commit an error of law when it held that the initiation of the procedure in question had no bearing on the intentional or negligent nature of an infringement for the purposes of Article 15(2) of Regulation No 17.

As to the complaint put forward by the appellant, it must be rejected as ineffective, since it concerns a ground that was included in the judgment purely for the sake of completeness to support the findings, which suffice to demonstrate the intentional or negligent nature of the infringement. As regards, in the second place, the complaints concerning the General Court's review of the statement of reasons for the decision at issue in relation to the intentional or negligent nature of the infringement, it must be noted that the obligation to provide a statement of reasons laid down in Article 253 EC is an essential procedural requirement which must be distinguished from the question whether the reasoning is well founded, which is concerned with the substantive legality of the measure at issue. To that end, the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent European Union judicature to exercise its power of review.77

The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.78

In the present case, as regards the statement of reasons for the decision at issue, the General Court held in paragraph 286 of the judgment under appeal that that decision contained a reference to Article 15(2) of Regulation No 17 which refers to the conditions required to be fulfilled to enable the Commission to impose fines, including the condition that the infringement was committed intentionally or negligently, and, moreover that the Commission set out in detail in its decision the grounds on which it considers the

77 Case C-17/99 *France* v *Commission* [2001] ECR I-2481, para 35.

78 See, in particular, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, para 63, and Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, para 166.

appellant's pricing practices to be abuses and those on which the appellant must be deemed responsible for the infringement found, in spite of the approval of its charges by the national regulatory authorities.

Those findings disclose the grounds on which the decision at issue was taken and enabled the appellant to ascertain the Commission's reasoning for the application to the appellant of the conditions laid down by Article 15(2) of Regulation No 17 for the imposition of fines. The General Court was able, therefore, without infringing Article 253 EC, to infer from them that the decision at issue contained sufficient reasoning on that point in the light of the requirements laid down by that provision. The appellant's complaint in that respect is, therefore, unfounded. In so far as the appellant further submits in that regard that the Commission's findings, which are irrelevant to the determination of the intentional or negligent nature of an infringement, it is sufficient to note that that complaint, which seeks to call into question the substance of the statement of reasons adopted in the decision at issue, is inadmissible in the present appeal.

As regards, in the third place, the grounds of the judgment under appeal, it must be observed that the obligation to state the reasons on which a judgment is based arises under Article 36 of the Statute of the Court of Justice, which applies to the General Court by virtue of the first paragraph of Article 53 of the Statute, and Article 81 of the Rules of Procedure of the General Court.79 It has consistently been held that the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the General Court's reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review.80 In that regard, suffice it to note that, the judgment under appeal clearly and unequivocally disclose the General Court's reasoning in regard to the negligent or intentional nature of the alleged infringement. Consequently, the complaint alleging a failure to state reasons for the judgment under appeal in that respect is without substance. Therefore, the third part of the first ground of appeal must be rejected as, in part, inadmissible and, in part, ineffective or unfounded.

4.2.2.3.4. Conclusion as to the first ground of appeal

It follows from all of the foregoing that the first ground of appeal must be rejected in its entirety.

4.1.3. The second ground of appeal, alleging errors of law in the application of Article 82 EC

The second ground of appeal put forward by the appellant is divided into three parts relating, respectively, to the relevance of the margin squeeze test for the purpose of establishing abuse within the meaning of

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79 See judgment of 4 October 2007 in Case C-311/05 P *Naipes Heraclio Fournier* v *OHIM*, para 51 and the case-law cited.

80 See, in particular, Case C-259/96 P *Council* v *de Nil and Impens* [1998] ECR I-2915, paras 32-33; Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, para 70.

Article 82 EC, the adequacy of the method of calculating the margin squeeze and the effects of the margin squeeze.

4.1.3.1. Judgment under appeal

The General Court rejected the appellant's complaints concerning the unlawfulness of the method used by the Commission to find that a margin squeeze existed.

First, the General Court rejected the appellant's complaint that the abusive nature of a margin squeeze can arise only from the abusive nature of its retail prices for end-user access services. Having found in paragraph 166 of its judgment that, according to the decision at issue, the abuse committed by the appellant consists in the imposition of unfair prices in the form of a margin squeeze to the detriment of the appellant's competitors, with the Commission taking the view that such a margin squeeze exists if the difference between the retail prices charged by a dominant undertaking 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 to end-users, the General Court held in paragraph 167:

> 'It is true that, in the [decision at issue], the Commission establishes only that the applicant has scope to adjust its retail prices [for end-user access services]. However, the abusive nature of the applicant's conduct is connected with the unfairness of the spread between its [wholesale] prices for [local loop] access [services] and its retail prices [for end-user access services], which takes the form of a margin squeeze. Therefore, in view of the abuse found in the [decision at issue], the Commission was not required to demonstrate in that decision that the applicant's retail prices were, as such, abusive.'

Second, the General Court rejected the appellant's complaint that the Commission had calculated the margin squeeze on the basis of the charges and costs of a vertically integrated dominant undertaking, disregarding the particular situation of competitors on the market. The General Court pointed out in paragraph 185 of its judgment that its review of complex economic appraisals made by the Commission is limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers, and went on to hold, inter alia, as follows:

> 'It must be observed first of all that the Commission considered in the [decision at issue] whether the pricing practices of the dominant undertaking could have the effect of removing from the market an economic operator that was just as efficient as the dominant undertaking. The Commission therefore relied exclusively on the applicant's charges and costs, instead of on the particular situation of the applicant's actual or potential competitors, in order to assess whether the applicant's pricing practices were abusive.

According to the Commission, "there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking 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 [retail] market". In the present case, the margin squeeze is said to be abusive because the applicant itself "would have been unable to offer its own retail services without incurring a loss if it had had to pay the wholesale access price as an internal transfer price for its own retail operations" … In those circumstances, "competitors [who] are just as efficient" as the applicant cannot "offer retail access services at a competitive price unless they find additional efficiency gains". [I]t must be noted that, although the Community judicature has not yet explicitly ruled on the method to be applied in determining the existence of a margin squeeze, it nevertheless follows clearly from the case-law that the abusive nature of a dominant undertaking's pricing practices is determined in principle on the basis of its own situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors.

It must be added that any other approach could be contrary to the general principle of legal certainty. If the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly their cost structure – information which is generally not known to the dominant undertaking – the latter would not be in a position to assess the lawfulness of its own activities.

The Commission was therefore correct to analyse the abusive nature of the applicant's pricing practices solely on the basis of the applicant's particular situation and therefore on the basis of the applicant's charges and costs. Since it is necessary to consider whether the applicant itself, or an undertaking just as efficient as the applicant, would have been in a position to offer retail services otherwise than at a loss if it had first been obliged to pay wholesale access [services] charges as an internal transfer price, the applicant's argument that its competitors are not seeking to replicate its own customer pattern and can acquire additional revenue from innovative products which they alone supply on the market (as to which the applicant provides no details however) is ineffective. For the same reasons, the argument that competitors can exclude the possibility of (pre)selection cannot succeed.'

Third, the General Court rejected the complaint that the Commission had taken into account only revenues from all access services and excluded revenues from other services, particularly those from call services. In that regard, the General Court stated, first of all, that Directive 96/19 which, as regards the tariff structure of incumbent operators, makes a distinction between the initial connection, the monthly rental, local calls, regional calls and long-distance calls, aimed to effect tariff rebalancing between those different elements on the basis of actual costs in order to ensure full competition in telecommunications markets, and that,

specifically, that operation had to take the form of a reduction in the charges for regional and international calls and an increase in connection charges, the monthly rental and local call rates. The General Court concluded from this that the Commission had therefore correctly observed that separate consideration of access charges and call charges is in fact therefore required by the EU law principle of tariff rebalancing.

Next, the General Court noted that a system of undistorted competition between the appellant and its competitors can be guaranteed only if equality of opportunity is secured as between the various economic operators. In that regard, it held:

> 'While it is true that, from the point of view of the end-user, access services and call services constitute a whole, the fact remains that, as far as the applicant's competitors are concerned, the provision of call services to end-users via the applicant's fixed network requires access to the local loop. Equality of opportunity as between the incumbent operator and owner of the fixed network, such as the applicant, on the one hand, and its competitors, on the other, therefore means that prices for access services must be set at a level which places competitors on an equal footing with the incumbent operator as regards the provision of call services. Equality of opportunity is secured only if the incumbent operator sets its retail prices [for end-user access services] at a level which enables competitors – presumed to be just as efficient as the incumbent operator – to reflect all the wholesale costs [in respect of local loop access services] in their retail prices. However, if the incumbent operator does not adhere to that principle, new entrants can only offer access services to their end-users at a loss. They would then be obliged to offset losses incurred in relation to local network access by higher call charges, which would also distort competition in telecommunications markets.
>
> Therefore it follows that, even if, as the applicant claims, it were true that access services and telephone calls constitute a "cluster" as far as the end-user is concerned, the Commission was entitled to conclude that, in order to assess whether the applicant's pricing practices distort competition, it was necessary to consider the existence of a margin squeeze in relation to access services alone, and thus without including telephone call charges in its calculation.
>
> Furthermore, the calculation offsetting access charges and call charges to which the applicant itself refers confirms that the applicant and its competitors are not on an equal footing as regards local network access, which is, however, a prerequisite for undistorted competition in the telephone calls market.
>
> In any event, since the applicant significantly lowered its telephone call charges in the period covered by the [decision at issue], it is conceivable that competitors did not even have the economic opportunity to offset charges suggested by the applicant. In fact, the competitors, already at a competitive disadvantage by comparison with the applicant in relation to local network access, had

to apply even lower call charges than the applicant in order to encourage potential customers to discontinue their subscription to the applicant and to subscribe to them instead.'

The General Court concluded that, for the purposes of calculating the margin squeeze, the Commission was entitled to take account only of revenues from access services and to exclude revenues from other services, such as call services.

In addition, after stating that the Commission's calculation error in relation to the calculation of the appellant's product-specific costs did not affect the lawfulness of the decision at issue owing to the fact that the unfair – within the meaning of Article 82 EC – nature of the appellant's pricing practices is linked to the very existence of the margin squeeze rather than to its precise spread, the General Court rejected the appellant's complaints concerning the lack of any effect on the market, stating, in particular:

'According to the Commission, the applicant's pricing practices restricted competition in the market for [end-user] access services. It reaches that conclusion in the [decision at issue] on the basis of the very existence of the margin squeeze. It maintains that it is not necessary to demonstrate an anti-competitive effect, although, in the alternative, it examines that effect in recitals 181 to 183 [of] the [decision at issue].

Given that, until the entry of a first competitor on the market for [end-user] access services, in 1998, the applicant had a monopoly on that retail market, the anti-competitive effect which the Commission is required to demonstrate relates to the possible barriers which the applicant's pricing practices could have created for the growth of competition in that market.

In that respect it must be borne in mind that the applicant owns the fixed telephone network in Germany and, moreover, that it is not disputed that, as the Commission notes in recitals 83 to 91 [of] the [decision at issue], there was no other infrastructure in Germany at the time of the adoption of the decision that would have enabled competitors of the applicant to make a viable entry onto the market in retail access services.

Having regard to the fact that the applicant's wholesale [local loop access] services are … indispensable to enabling a competitor to enter into competition with the applicant on the [retail] market in [end-user] access services, a margin squeeze between the applicant's wholesale [charges for local loop access services] and retail charges [for end-user access services] will in principle hinder the growth of competition in the [retail] markets. If the applicant's retail prices [for end-user access services] are lower than [the] wholesale charges [for its local loop access services], or if the spread between the applicant's wholesale [charges for those wholesale services] and [those] retail charges is insufficient to enable an equally efficient operator to cover its product-specific costs of supplying [end-user] access services, a potential competitor who is just as efficient as the applicant would not be able to enter the [end-user] access services market without suffering losses.

Admittedly, as the applicant maintains, its competitors will normally resort to cross-subsidisation, in that they will offset the losses suffered on the [end-user] access [services] market with the profits made on other markets, such as the telephone calls markets. However, in view of the fact that, as the owner of the fixed network, the applicant does not need to rely on wholesale [local loop access] services in order to be able to offer [end-user] access services and therefore, unlike its competitors, does not have to try to offset losses suffered on the retail access market on account of the pricing practices of a dominant undertaking, the margin squeeze identified in the [decision at issue] distorts competition not only on the [end-user] access market but also on the telephone calls market.

Furthermore, the small market shares acquired by the applicant's competitors in the [end-user] access [services] market since the market was liberalised by the entry into force of the TKG on 1 August 1996 are evidence of the restrictions which the applicant's pricing practices have imposed on the growth of competition in those markets.

In addition, it is not disputed that, taking only analogue connections into consideration – which, at the time of adoption of the [decision at issue], accounted for 75% of all connections in Germany – the applicant's competitors' share fell from 21% in 1999 to 10% in 2002.

In any event, the applicant, which fails to quantify the extent to which competitors are present on the national market, does not produce any evidence to rebut the findings in recitals 180 to 183 [of] the [decision at issue] that its pricing practices actually restrict competition on the German [end-user] access [services] market.'

4.1.3.2. The first part of the second ground of appeal, concerning the relevance of the margin squeeze test for the purpose of establishing an abuse within the meaning of Article 82 EC

4.1.3.2.1. Arguments of the parties

By its first complaint, the appellant submits that the judgment under appeal is vitiated by a failure to state reasons, owing to a failure to consider the appellant's argument that the Commission should not have applied the margin squeeze test because charges for wholesale local loop access services are set by RegTP. The judgment under appeal is, in that respect, based on a vicious circle. The General Court applied the test chosen by the Commission itself to determine matters which should be covered by an examination of the appellant's charges. However, the appellant's objection relates to an earlier stage of reasoning, namely the issue of whether the margin squeeze test chosen by the Commission is appropriate in any event.

By its second complaint, the appellant submits that the General Court applied Article 82 EC incorrectly in paragraphs 166 to 168 of the judgment under appeal, in that the analysis of the margin squeeze does not establish that its charges are an abuse, since wholesale charges for local loop access services are imposed by the competent national regulatory authority. The appellant takes the view that, in such a situation, the

appropriateness of the test of the effect of the margin squeeze depends on the level of the wholesale charge for local loop access services set by the authority which, as such, cannot – in the absence of any leeway on the part of the regulated undertaking – be criticised for an abuse. If the national regulatory authority sets an inflated wholesale charge for local loop access services, the dominant undertaking that is subject to regulation is obliged, in turn, to set an inflated retail price for end-user access services in order to ensure an appropriate margin. In that case, the undertaking would be obliged to choose between two different forms of abuse, namely a margin squeeze or an abusive price increase. The dominant undertaking could not, therefore, avoid committing an abuse.

According to the appellant, in a situation such as that in the present case, the dominant undertaking commits an abuse only if the retail price for end-user access services is, in itself, so low as to constitute an abuse. The Commission takes the view that the judgment under appeal is sufficiently reasoned and that the appellant's other arguments are unfounded. According to Vodafone, whether or not the complaints in the first part of the second ground of appeal are inadmissible because they are a repetition of the arguments put forward at first instance and concern a factual assessment that is incorrect, they are both factually and legally irrelevant.

4.1.3.2.2. Findings of the Court

As a preliminary point it must be noted that, contrary to Vodafone's contention, the first part of the second ground of appeal is admissible, since the appellant, while essentially repeating the arguments which it advanced before the General Court, complains that the latter committed an error of law by adopting an incorrect legal test for the application of Article 82 EC and by failing to provide sufficient reasoning for the judgment under appeal in that respect. As to whether the first part of the second ground of appeal is well founded, it should be noted as regards, in the first place, the complaint concerning a failure to state reasons for the judgment under appeal, that the appellant is wrong to complain that the General Court failed to respond in a reasoned manner in its judgment to the appellant's argument that the margin squeeze test is irrelevant where, as in the present case, wholesale prices for local loop access services are set by a national regulatory authority and, therefore, that the General Court failed to give proper reasons for the appropriateness of the Commission's choice of the margin squeeze test in finding an abuse under Article 82 EC.

In paragraphs 166 to 168 of the judgment under appeal, the General Court stated that, in the decision at issue, the Commission established only that the appellant had scope to adjust its retail prices for end-user access services and, moreover, found that the abusive nature of the appellant's conduct – consisting in the margin squeeze of its competitors who are at least as efficient as the appellant – was connected with the unfairness of the spread between its wholesale prices for local loop access services and those retail prices, and therefore that the Commission was not required to demonstrate the abusive nature of those retail prices. In addition, in paragraphs 183 to 213 of its judgment, the General Court explained why it had to reject the

appellant's complaints about the method adopted by the Commission in order to calculate that margin squeeze. It must be observed that, in so doing, the General Court implicitly but necessarily indicated why the national regulatory authorities' purported regulation of wholesale prices for local loop access services did not, in the present case, preclude the appellant's pricing practices from being categorised as abusive for the purposes of Article 82 EC. It is clear from the various considerations in paragraphs 166 to 168 and 183 to 213 of the judgment under appeal that, according to the General Court, it is not the level of the wholesale prices for local loop access services – which, as has already been stated in paragraphs 48 and 49 of the present judgment, cannot be challenged in the present appeal – or the level of retail prices for end-user access services which is contrary to Article 82 EC, but the spread between them.

In accordance with the case-law cited in paragraphs 135 and 136 of the present judgment, the appellant was therefore in a position, on reading those passages of the judgment under appeal, to ascertain why the national regulatory authorities' purported regulation of wholesale prices for local loop access services was, according to the General Court, irrelevant to the application in the present case of Article 82 EC to the appellant's pricing practices. It follows from this that paragraphs 166 to 168 of the judgment under appeal, read in conjunction with paragraphs 183 to 213 thereof, contain sufficient reasoning for the grounds on which the General Court held that, notwithstanding the setting by the national regulatory authorities of wholesale prices for local loop access services, the Commission's choice of the margin squeeze test was appropriate for the purpose of determining whether the appellant's pricing practices were abusive within the meaning of Article 82 EC.

The complaint concerning a failure to state the grounds for the judgment under appeal must, therefore, be rejected as unfounded. As regards, in the second place, the complaint concerning the erroneous nature of the margin squeeze test for determining an abuse within the meaning of Article 82 EC, it will be recalled that, as already indicated at the outset in paragraphs 31 and 32 of the present judgment, the appellant is not, by that complaint, contesting the notion that a dominant undertaking's pricing practice resulting in a margin squeeze of its equally efficient competitors is capable, in principle, of constituting an abusive practice for the purposes of Article 82 EC. By contrast, it submits by that complaint that, in the circumstances of this case, since its wholesale prices for local loop access services are set by the national regulatory authorities, the margin squeeze test applied by the judgment under appeal is not appropriate for the purpose of determining that its pricing practices are abusive within the meaning of Article 82 EC.

Admittedly, as is apparent from paragraphs 38 to 43 of the present judgment, it is necessary in the present appeal to adopt the premiss that was accepted by the General Court in the judgment under appeal and by the Commission in the decision at issue that the appellant does not have any scope to adjust those wholesale prices. That being the case, the appellant cannot, in connection with the present complaint, rely on the premiss that the wholesale prices for local loop access services set by the national regulatory authorities are excessive in order to demonstrate the inappropriateness of the margin squeeze test. Even if it were to be

accepted that, as the appellant claimed at the hearing, the complaints of competitors which led to the adoption of the decision at issue were based on that circumstance, such a premiss, as has already been stated in paragraphs 48 and 49 of the present judgment, must be regarded as being outside the scope of the present appeal.

Consequently, there is no need to consider the appellant's complaint that the erroneousness of the margin squeeze test stems from the fact that, in order to avoid the abuse complained of, it had no choice in the present case – given the excessive level of its wholesale prices for local loop access services which were set by the national regulatory authorities – but to increase, in a manner amounting to an abuse, its retail prices for end-user access services to an excessive level, since such a complaint is based on a hypothetical premiss which falls outside the scope of the Court's review in the present appeal.

Furthermore, in so far as the appellant submits that the appropriateness of the margin squeeze test depends on the level of wholesale prices for local loop access services set by the national regulatory authority, it must be stated that, as is apparent from paragraphs 166 to 168 of the judgment under appeal, the abusive nature for the purpose of Article 82 EC of the appellant's pricing practices at issue in that judgment arises from the unfairness of the spread – resulting in a margin squeeze of its equally efficient competitors – between the wholesale prices in question and its retail prices for end-user access services. As the General Court explained in paragraph 223 of its judgment, which has not been challenged in the present appeal, the unfairness for the purpose of Article 82 EC of the appellant's pricing practices is therefore linked to the very existence of the margin squeeze and not to its precise spread.

It follows from this that the level of wholesale prices for local loop access services is, in itself, irrelevant to any challenge of the substance of the General Court's finding with regard to the application of Article 82 EC to the pricing practices at issue. By contrast, in order to consider whether the present complaint is well founded, the Court must consider whether the General Court was right, in particular in paragraphs 166 and 168 of the judgment under appeal, to find that, even if the appellant does not have scope to adjust its wholesale prices for local loop access services, its pricing practices can nevertheless be categorised as an abuse within the meaning of Article 82 EC where, irrespective of whether those wholesale prices and the retail prices for end-user access services are, in themselves, abusive, the spread between them is unfair, namely, according to that judgment, where that spread is either negative or insufficient to cover the appellant's product-specific costs of providing its own services, so that a competitor who is as efficient as the appellant is prevented from entering into competition with the appellant for the provision of end-user access services.

In that regard, it has consistently been held that Article 82 EC is an application of the general objective of European Community action, namely the institution of a system ensuring that competition in the common market is not distorted. Thus, the dominant position referred to in Article 82 EC relates to a position of

economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.81

In the present case, it must be borne in mind that, as is apparent from paragraphs 50 to 52 of the present judgment, the appellant does not deny that it enjoys a dominant position on all the relevant service markets, namely both on the wholesale market in local loop access services and on the retail market in end-user access services. As regards the abusive nature of the appellant's pricing practices, it must be noted that subparagraph (a) of the second paragraph of Article 82 EC expressly prohibits a dominant undertaking from directly or indirectly imposing unfair prices. Furthermore, the list of abusive practices contained in Article 82 EC is not exhaustive, so that the practices there mentioned are merely examples of abuses of a dominant position. The list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position prohibited by the Treaty.82

In that regard, it must be borne in mind that, in prohibiting the abuse of a dominant position in so far as trade between Member States is capable of being affected, Article 82 EC refers to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.83

It is apparent from the case-law of the Court that, in order to determine whether the undertaking in a dominant position has abused such a position by its pricing practices, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or to strengthen the dominant position by distorting competition.84 Since Article 82 EC thus refers not only

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81 See Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, para 38; Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-2369, para 103.

82 See *British Airways* v *Commission*, para 57 and the case-law cited.

83 See, to that effect, *Hoffman-La Roche* v *Commission*, para 91; *Nederlandsche Banden-Industrie-Michelin* v *Commission*, para 70; Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, para 69; *British Airways* v *Commission*, para 66; and *France Télécom* v *Commission*, para 104.

84 See, to that effect, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, para 73; *British Airways* v *Commission*, para 67.

to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition, a dominant undertaking, as has already been observed in paragraph 83 of the present judgment, has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.85

It follows from this that Article 82 EC prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors, that is to say practices which are capable of making market entry very difficult or impossible for such competitors, and of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners, thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits. From that point of view, therefore, not all competition by means of price can be regarded as legitimate.86

In the present case, it must be noted that the appellant does not deny that, even on the assumption that it does not have the scope to adjust its wholesale prices for local loop access services, the spread between those prices and its retail prices for end-user access services is capable of having an exclusionary effect on its equally efficient actual or potential competitors, since their access to the relevant service markets is, at the very least, made more difficult as a result of the margin squeeze which such a spread can entail for them.

At the hearing the appellant submitted, however, that the test applied in the judgment under appeal for the purpose of establishing an abuse within the meaning of Article 82 EC required it, in the circumstances of the case, to increase its retail prices for end-user access services to the detriment of its own end-users, given the national regulatory authorities' regulation of its wholesale prices for local loop access services.

It is true, as paragraphs 175 to 177 of the present judgment have already shown, that Article 82 EC aims, in particular, to protect consumers by means of undistorted competition.87 However, the mere fact that the appellant would have to increase its retail prices for end-user access services in order to avoid the margin squeeze of its competitors who are as efficient as the appellant cannot in any way, in itself, render irrelevant the test which the General Court applied in the present case for the purpose of establishing an abuse under Article 82 EC. By further reducing the degree of competition existing on a market – the end-user access services market – already weakened precisely because of the presence of the appellant, thereby strengthening its dominant position on that market, the margin squeeze also has the effect that consumers suffer detriment

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85 See, to that effect, *France Télécom* v *Commission*, para 105 and the case-law cited.

86 See, to that effect, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, para 73; *AKZO* v *Commission*, para 70; and *British Airways* v *Commission*, para 68.

87 See Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Siaand Others* [2008] ECR I-7139, para 68.

as a result of the limitation of the choices available to them and, therefore, of the prospect of a longer-term reduction of retail prices as a result of competition exerted by competitors who are at least as efficient in that market.88

In those circumstances, in so far as the appellant has scope to reduce or end such a margin squeeze, as observed in paragraphs 77 to 86 of the present judgment, by increasing its retail prices for end-user access services, the General Court correctly held in paragraphs 166 to 168 of the judgment under appeal that that margin squeeze is capable, in itself, of constituting an abuse within the meaning of Article 82 EC in view of the exclusionary effect that it can create for competitors who are at least as efficient as the appellant. The General Court was not, therefore, obliged to establish, additionally, that the wholesale prices for local loop access services or retail prices for end-user access services were in themselves abusive on account of their excessive or predatory nature, as the case may be. It follows from this that the appellant's complaint that the test applied by the General Court in order to establish an abuse within the meaning of Article 82 EC was erroneous must be rejected as, in part, inadmissible and, in part, unfounded. Consequently, the first part of the second ground of appeal must be rejected.

4.1.3.2.3. The second part of the second ground of appeal, concerning the adequacy of the method of calculating the margin squeeze

The appellant submits that, in its analysis of the method used by the Commission to calculate the margin squeeze, the judgment under appeal is vitiated by several errors of law, in so far as the General Court relies, in respect of several key aspects of the issue, on criteria which are not compatible with Article 82 EC. The appellant puts forward two complaints concerning, first, the misapplication of the as-efficient-competitor test and, second, an error of law in that call services and other telecommunications services were not taken into account in calculating the margin squeeze.

4.1.3.2.3.1. The complaint concerning the misapplication of the as-efficient-competitor test

– Arguments of the parties

The appellant claims that, given that the General Court fails to take account of the fact that, as a dominant undertaking, the appellant is not subject to the same regulatory conditions as its competitors and that, on material grounds, its competitive situation differs from that of its competitors, the General Court misapplied to the facts of the present case the as-efficient-competitor test, which relates to the dominant undertaking's own charges and costs. According to the appellant, contrary to the General Court's finding in paragraph 188

88 See, to that effect, *France Télécom* v *Commission*, para 112.

of the judgment under appeal, it is not the situation of the dominant undertaking that is decisive for the assessment of conduct from the point of view of Article 82 EC, but that of competitors and their opportunities to compete with that undertaking on services in the light of the particular conditions of competition in the relevant market. In that regard, the appellant explains that the situation of the dominant undertaking can be a reliable indicator if historical, material and legal market conditions of competition in the market are the same for the dominant undertaking and its competitors, and that the as-efficient-competitor test can be a useful tool in such cases in so far as it lessens the advancement of inefficient competitors and increases legal certainty for the dominant undertaking. Nevertheless, such is not the case where competitors are subject to different legal or material conditions. If such a situation arises, the as-efficient-competitor test should be adjusted.

In the present case, the appellant states that it was obliged to accept all end-users, regardless of their economic attractiveness. In addition, from a legal perspective, it was obliged to offer its customers operator (pre)selection, or 'call-by-call' selection. Its competitors are not subject to those obligations and, in general, exclude operator (pre)selection and accordingly market connections and calls as a single product. The appellant takes the view that the as-efficient-competitor test should have been modified on account of those specific features of the case. Although the actual wholesale charges for local loop access services and retail charges for end-user access services as well as the appellant's product-specific costs could be relied upon in order to determine the average costs and revenue of the appellant's competitors, there is no justification for relying on the appellant's customer structure. In addition, calls and other telecommunications services should have been incorporated in the margin squeeze analysis.

According to the appellant, the principle of legal certainty does not mean that obvious anomalies in the appellant's customer structure or differences between the regulatory conditions under which the dominant undertaking and its competitors do business should be disregarded. The Commission points out that the appellant cannot defend itself by asserting that it was not as efficient as its competitors, since competition law does not protect inefficient undertakings. The appellant's arguments are, therefore, unfounded. Vodafone contends that the present complaint is inadmissible. The appellant is reproducing the complaints on which it relied before the General Court and during the Commission procedure. In addition, it is, in essence, raising complaints which are not subject to review by the Court. In any event, the as-efficient-competitor test is the appropriate test for ascertaining whether certain conduct can have an exclusionary effect on the market. The appellant's arguments are, therefore, unfounded.

– Findings of the Court

As a preliminary point, it must be noted that, contrary to Vodafone's contention, the present complaint is admissible even though it partly reiterates the arguments put forward at first instance, since the complaint is that, by resorting to the as-efficient-competitor test notwithstanding the fact that the appellant is not

subject to the same legal and material conditions as its competitors, the General Court applied an incorrect legal test to the application of Article 82 EC to the pricing practices at issue and, therefore, committed an error of law on that point.

As to whether that complaint is well founded, the as-efficient-competitor test used by the General Court in the judgment under appeal consists in considering whether the pricing practices of a dominant undertaking could drive an equally efficient economic operator from the market, relying solely on the dominant undertaking's charges and costs, instead of on the particular situation of its actual or potential competitors.

In the present case, as is apparent from paragraph 169 of the present judgment, the appellant's costs were taken into account by the General Court in order to establish the abusive nature of the appellant's pricing practices where the spread between its wholesale prices for local loop access services and its retail prices for end-user access services was positive. In such circumstances, the General Court considered that the Commission was entitled to regard those pricing practices as unfair within the meaning of Article 82 EC, where that spread was insufficient to cover the appellant's product-specific costs of providing its own services.

In that regard, it must be borne in mind that the Court has already held that, in order to assess whether the pricing practices of a dominant undertaking are likely to eliminate a competitor contrary to Article 82 EC, it is necessary to adopt a test based on the costs and the strategy of the dominant undertaking itself.89

The Court pointed out, inter alia, in that regard that a dominant undertaking cannot drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.90 In the present case, since, as is apparent from paragraphs 178 and 183 of the present judgment, the abusive nature of the pricing practices at issue in the judgment under appeal stems in the same way from their exclusionary effect on the appellant's competitors, the General Court did not err in law when it held, in paragraph 193 of the judgment under appeal, that the Commission had been correct to analyse the abusive nature of the appellant's pricing practices solely on the basis of the appellant's charges and costs.

As the General Court found, in essence, in paragraphs 187 and 194 of the judgment under appeal, since such a test can establish whether the appellant would itself have been able to offer its retail services to end-users otherwise than at a loss if it had first been obliged to pay its own wholesale prices for local loop access services, it was suitable for determining whether the appellant's pricing practices had an exclusionary effect on competitors by squeezing their margins. Such an approach is particularly justified because, as the General

89 See *AKZO* v *Commission*, para 74, and *France Télécom*v *Commission*, para 108.

90 See *AKZO* v *Commission*, para 72.

Court indicated, in essence, in paragraph 192 of the judgment under appeal, it is also consistent with the general principle of legal certainty in so far as the account taken of the costs of the dominant undertaking allows that undertaking, in the light of its special responsibility under Article 82 EC, to assess the lawfulness of its own conduct. While a dominant undertaking knows what its own costs and charges are, it does not, as a general rule, know what its competitors' costs and charges are.

Those findings are not affected by what the appellant claims are the less onerous legal and material conditions to which its competitors are subject in the provision of their telecommunications services to end-users. Even if that assertion were proved, it would not alter either the fact that a dominant undertaking, such as the appellant, cannot adopt pricing practices which are capable of driving equally efficient competitors from the relevant market, or the fact that such an undertaking must, in view of its special responsibility under Article 82 EC, be in a position itself to determine whether its pricing practices are compatible with that provision. The appellant's complaint concerning the misapplication of the as-efficient-competitor test must, therefore, be rejected.

4.1.3.2.3.2. The complaint concerning an error of law in that call services and other telecommunications services were not taken into account in calculating the margin squeeze

– Arguments of the parties

By this complaint, the appellant claims that the General Court erred in law in failing to take into account in its analysis of the pricing practice at issue, in addition to end-user access services, call services and other telecommunications services provided to end-users. That approach is said not to be compatible with current economic thinking or with the decision-making practice of comparable authorities in Europe and in the United States. It is also said to be at odds with the realities of the market, given that end-users do not consider connections in isolation when choosing their operator, and nor do operators when structuring the range of their services.

In the first place, the appellant submits that, from an economic standpoint, the analysis of the margin squeeze does not give any indication of a restriction of competition unless account is taken of all the revenue and costs associated with the provision of wholesale services. In the case of undertakings which provide several products and which offer wholesale services which can be used for various end-user services, the margin squeeze must be analysed at different levels of aggregation. In the present case, the analysis of the margin squeeze adopted by the General Court is, therefore, incomplete. The appellant's competitors are entitled to exclude operator (pre)selection and to offer bundles of connections, calls and other services provided via the local loop.

In the second place, the appellant submits that paragraphs 196 to 202 of the judgment under appeal are based on several errors of law. The issue whether, in determining the existence of a margin squeeze, the

Commission was entitled not to take call charges into account depends on the legal question of principle concerning the method to be used to determine the existence of a margin squeeze where undertakings provide a range of products. The General Court cannot avoid that assessment by emphasising the restricted nature of its review.

First, the appellant submits that paragraphs 196 and 197 of the judgment under appeal, concerning the principle of EU law in relation to tariff rebalancing, are wrong in law. In that regard, the appellant takes the view that the judgment under appeal contradicts its own paragraph 113 in which the General Court stated, in order to justify attributing the infringement to the appellant, that the objectives of the legislation relating to the telecommunications sector may differ from those of European Union competition policy. In paragraphs 196 and 197 of its judgment, the General Court infers from a regulatory principle that access services and call services must be analysed separately in order to calculate the margin squeeze in the light of Article 82 EC. Also, the appellant submits that paragraphs 196 and 197 of the judgment under appeal are insufficiently reasoned in so far as the General Court does not explain why its understanding is correct or consider the objections raised by the appellant, in particular the fact that the principle of tariff rebalancing applies only to the appellant and that its competitors provide bundled access and call services.

The appellant claims further in that regard that paragraphs 196 and 197 of the judgment under appeal are wrong in substance and infringe Article 82 EC. The principle of tariff rebalancing is not a means of testing the application of Article 82 EC but is intended only to ensure that the Member States ease the financial burden on undertakings responsible for universal service provision. Moreover, since the appellant is not subject to the same regulatory conditions as its competitors, the principle of tariff rebalancing applies only to the appellant. That principle does not, however, reveal anything about its competitors' competitive opportunities. Therefore, the principle of tariff rebalancing does not support the conclusion that the bundling of access services and local loop telecommunications services must be ruled out, on normative grounds, for the purposes of a margin squeeze analysis.

Second, the appellant submits that paragraphs 199 to 202 of the judgment under appeal, concerning equality of opportunity, are wrong in law. In that regard, the appellant takes the view that paragraph 199 of the judgment under appeal is not sufficiently reasoned in so far as the General Court should have considered which services are based on the local loop as wholesale services, as it is only on the basis of the result of that examination that the General Court could have drawn any conclusions as to the equality of opportunity of the appellant and one or other competitor. Equality of opportunity is assured where an overall analysis of all charges and costs of all telecommunications services based on the local loop shows that wholesale prices for local loop access services together with product-specific costs do not exceed retail prices for end-user access services. Next, the appellant claims that the General Court acted contrary to the laws of logic. In paragraph 238 of the judgment under appeal, the General Court assumes that the appellant suffers no loss as a result of the provision of telephone connections to end-users, and that it is not, therefore, obliged to

offset any losses by means of call revenues. Yet the General Court considers that the prices of the appellant's access services to its end-users are lower than wholesale prices for local loop access services and recognises that those are set on the basis of the appellant's costs. The General Court's assumption that the appellant does not incur any costs for access services is, therefore, manifestly incorrect and incompatible with the premisses accepted by the General Court.

Furthermore, the appellant claims that the General Court's statement in paragraph 202 of the judgment under appeal is contradictory. The view that its competitors had to apply even lower call charges than the appellant's own in order to encourage potential customers to discontinue their subscription to the appellant is directly at odds with the as-efficient-competitor test, according to which only the appellant's cost and tariff structure is decisive. Lastly, the appellant submits that the General Court applies an incorrect legal test with regard to the allocation of the burden of proof in so far as, in paragraphs 201 and 202 of the judgment under appeal, it merely allows that 'it is conceivable' that competitors did not have an opportunity to offset any losses generated by telephone connections by means of call revenues, whereas the appellant sought to demonstrate in its application at first instance that cross-subsidisation was possible.

The Commission takes the view that the General Court did not err in law in confirming the Commission's approach. It contends, therefore, that the appellant's arguments should be rejected. Vodafone claims that the present complaint is inadmissible. The appellant is reproducing the submissions it made before the General Court and during the procedure before the Commission. Moreover, it is essentially raising complaints which are not subject to review by the Court. In any event, the General Court has given sufficient consideration to the appellant's complaints.

– Findings of the Court

As a preliminary point it must be noted that, contrary to Vodafone's contention and for the same reasons as those held in paragraph 155 of the present judgment, the present complaint is admissible – notwithstanding the fact that it partly repeats the arguments put forward at first instance – in so far as it criticises the General Court for having adopted an incorrect legal test for the application of Article 82 EC to the pricing practices at issue by resorting to the criteria of tariff rebalancing and equality of opportunity. As to whether that complaint is well founded, it must be observed that, since it relates, in the first place, to the alleged incompleteness of the General Court's analysis of the margin squeeze, on the ground that it failed to recognise that access to wholesale local loop access services enables competitors to provide their end-users with bundled services including calls, that complaint is based on a misreading of the judgment under appeal.

As is clear from paragraphs 199 and 200 of its judgment, the General Court did not in any way, contrary to the appellant's submission, rule out the notion that, from the point of view of the end-user, access services

and call services can indeed constitute a whole, but considered that, even if that were the case, the Commission was entitled to consider the existence of a margin squeeze in relation to access services alone, without call services being included. As is apparent from the judgment under appeal, the General Court came to that conclusion, inter alia, as a result of the Commission's consideration of the principles of tariff rebalancing and equality of opportunity. It follows from this that the present complaint must, to that extent, be rejected as unfounded.

In the second place, in so far as the present complaint concerns the General Court's findings in respect of the principle of tariff rebalancing, it must be held, first of all, that the General Court did not commit any error of law in taking account of the judgment under appeal of such a principle, which arises from the legislation relating to the telecommunications sector, in order to consider the merits of the Commission's application of Article 82 EC to the appellant's pricing practices.

Since the legislation relating to the telecommunications sector defines the legal framework applicable to it and, in so doing, contributes to the determination of the competitive conditions under which an undertaking such as the appellant carries on its business in the relevant markets, it is, as has already been shown in paragraphs 80 to 82 of the present judgment, a relevant factor in the application of Article 82 EC to the conduct of that undertaking, whether for the purposes of defining the relevant markets, assessing the abusive nature of such conduct or setting the amount of the fines. That finding is not affected by the fact, as alleged by the appellant, that the tariff rebalancing principle applies only to the appellant itself and not to its competitors. For the reasons set out in the present judgment, the General Court was fully entitled to rely, in accordance with the as-efficient-competitor test, on the situation and the costs of the dominant undertaking for the purpose of determining whether the pricing practices at issue constituted an abuse in the light of Article 82 EC.

Consequently, since the General Court held in the judgment under appeal – unchallenged by the appellant in the present appeal – that the tariff rebalancing referred to in European Union legislation in relation to the telecommunications sector had to take the form, in particular, of a reduction in the charges for regional and international calls and an increase in the monthly rental and local call rates, it could lawfully infer from this, in that the principle of tariff rebalancing does require that retail prices for access services and retail prices for call services be considered separately for the purpose of determining whether the relevant pricing practices of the appellant are abusive. Contrary to the appellant's submission, there is no contradiction in the grounds for the latter findings and the finding according to which national legislation relating to the telecommunications sector may have different objectives from those envisaged by European Union competition policy. That point has no bearing on the issue whether legislation relating to the telecommunications sector may be taken into account for the purpose of the application of Article 82 EC to the conduct of a dominant undertaking. In particular, contrary to what is claimed by the appellant, it does

not in any way suggest that that legislation could be disregarded altogether in the application of Article 82 EC.

The appellant is also incorrect in claiming that the General Court gave insufficient grounds for the judgment under appeal on that point. As is apparent from the foregoing review, the General Court clearly stated in paragraphs 196 and 197 of its judgment how the principle of tariff rebalancing enables the Commission to disregard call services in its calculation of the margin squeeze. Furthermore, as is apparent from paragraph 221 of the present judgment, the General Court addressed the appellant's argument that its competitors provide bundled access and call services in paragraphs 199 and 200 of the judgment under appeal. Likewise, it set out in paragraphs 186 to 194 of its judgment why the Commission was entitled to base its analysis of the abusive nature of the pricing practices at issue solely on the appellant's particular situation. In so doing, the General Court observed the requirements of Article 36 of the Statute of the Court of Justice, which apply to the General Court by virtue of the first paragraph of Article 53 of the Statute, and Article 81 of the Rules of Procedure of the General Court.

It follows from this that, on those various points, the present complaint must be rejected as unfounded.

In the third place, in so far as the present complaint relates to the General Court's findings as to equality of opportunity, it should be noted that the Court of Justice has consistently held that a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators.91

In the present case, the appellant does not deny that, as the General Court in essence held in the absence of an alternative infrastructure, its competitors' wholesale access to the local loop on the fixed network held by the appellant is indispensable to enabling them to make a viable entry onto the retail markets in services to end-users and to compete effectively with the appellant in those markets.92 Furthermore, the appellant does not deny that the wholesale market in local loop access services and the retail market in end-user access services are separate markets, particularly as against retail markets for the provision of other telecommunications services. Nor, moreover, does the appellant deny having a dominant position on the wholesale market in local loop access services and on the retail market in end-user access services.

In those circumstances, the General Court did not err in law in ruling that equality of opportunity means that the appellant and its equally efficient competitors are placed on an equal footing in the retail market in

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91 See, in particular, Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, para 25; Case C-462/99 *Connect Austria* [2003] ECR I-5197, para 83; Joined Cases C-327/03 and C-328/03 *ISIS Multimedia Net and Firma O2* [2005] ECR I-8877, para 39; and Case C-49/07 *MOTOE* [2008] ECR I-4863, para 51.

92 See, to that effect, *Arcor*, para 103.

end-user access services, and that such is not the case where wholesale prices paid to the appellant for local loop access services cannot be reflected in their retail prices for end-user access services other than by providing those services at a loss.

Since the retail market for end-user access services constitutes a separate market, and wholesale local loop access services are indispensable to enabling competitors who are at least as efficient as the appellant to enter into effective competition on that market with an undertaking which, as in the appellant's case, has a dominant position largely as a result of the legal monopoly it enjoyed before the liberalisation of the telecommunications sector, the establishment of a system of undistorted competition requires that the dominant undertaking should not be able – by means of its pricing practices on that retail market – to impose on all its equally efficient competitors a competitive disadvantage such as to prevent or restrict their access to that market or the growth of their activities on it.

That is particularly the case given that, since any provision by those competitors of other telecommunications services to end-users across the appellant's fixed network also requires them to acquire wholesale local loop access services from the appellant, that competitive disadvantage on the retail market for end-user access services is necessarily reflected in the markets for those other telecommunications services, as the General Court noted in essence in the judgment under appeal. Contrary to the appellant's submission, that last point does not, however, mean that revenues from those other telecommunications services have to be taken into account in order to ascertain whether competitors who are at least as efficient as the appellant are subject to inequality in competitive conditions on the retail market for end-user access services. Those other telecommunications services fall within markets that are distinct from the latter market. The General Court was therefore entitled, not to include them in its analysis for the purpose of ascertaining whether there was equality of opportunity in the relevant market.

Neither can the appellant properly plead a failure to state reasons in that regard. The arguments set out by the General Court are not vitiated by any failure to state reasons, since they allow the appellant to ascertain the reasons for the General Court's finding that equality of opportunity had to be secured on the retail market for end-user access services. The Court must also reject the allegation of a failure to observe the laws of logic in so far as paragraph 238 of the judgment under appeal is said to show that the General Court relied on the false and contradictory premiss that the appellant suffers no loss on the market for end-user access services that it would have to offset on other markets, while finding that the appellant's retail prices for those services are lower than the wholesale prices for local loop access services set on the basis of its costs.

First, it must be borne in mind that the factual premiss of that line of argument cannot be regarded as having been established in the present appeal, since the question whether wholesale prices for local loop access

services are consistent with the appellant's costs is not among the pleas that were discussed before the General Court.

Second, it must be held that the appellant's pricing practices on the retail market for end-user access services places all of its equally efficient competitors on an unequal footing on that market by comparison with the appellant, resulting, as is apparent in a margin squeeze of those competitors in relation to access services, the General Court demonstrated sufficiently that equality of opportunity was not observed on the relevant market and, therefore, that a system of undistorted competition was not assured on that market. The General Court was not, therefore, in any way required, additionally, to consider whether that equality was observed on other, separate, markets, such as the call services market, or, therefore, whether an infringement of Article 82 EC could also be identified on those markets. It follows from this that the General Court's findings are included for the sake of completeness.

Consequently, the appellant's present line of argument must be rejected as ineffective. Similarly, since they are directed against grounds which were included for the sake of completeness, the appellant's criticisms must also be rejected. Those grounds, introduced by the expressions 'furthermore' and 'in any event', respectively, also relate to the question included for the sake of completeness of the extent to which the pricing practices at issue were able to affect competitive conditions on the retail markets other than the retail market in end-user access services. It follows from this that the present complaint must, on those various points, therefore, be rejected as ineffective or unfounded, as the case may be.

Finally, as to the remainder, in so far as the appellant complains in the second part of the second ground of appeal that the General Court's review of the decision at issue was much too limited and that it adopted a method incompatible with current economic thinking, the decision-making practices of comparable authorities and the realities of the market, the present complaint is inadmissible since it does not identify the error of law which the General Court is said to have committed. The Court must, therefore, reject the second part of the second ground of appeal as, in part, inadmissible and, in part, ineffective or unfounded.

4.1.3.2.4. The third part of the second ground of appeal, concerning the effects of the margin squeeze

4.1.3.2.4.1. Arguments of the parties

By its first complaint, the appellant submits that the General Court correctly rejects the Commission's view that it is not necessary for any anti-competitive effect to be demonstrated. However, in its analysis of the effects, the General Court relied on a margin squeeze that took into account only charges relating to access services. In addition, the General Court relied on the mistaken premiss that the appellant's competitors are disadvantaged by comparison with the appellant with regard to the practice of cross-subsidisation between access services and call services to end-users.

By its second complaint, the appellant claims that the General Court's findings regarding the anti-competitive effects of the practice at issue are vitiated by errors of law. The General Court merely indicated that the market share of the appellant's competitors in the broadband access services and narrowband access services markets remained small, but made no finding as regards the causal connection between those market shares and the purported margin squeeze. It is not surprising that network operators' market penetration is slow in the field of telecommunications, given the investment required for the network infrastructure of the local loop.

Furthermore, the appellant takes the view that the General Court misread recital 182 of the decision at issue, since that recital refers to the decline in the share of analogue lines in all access services to end-users provided by those competitors, not to the decline in the competitors' market share in the field of analogue lines. The Commission challenges the appellant's assertion that the General Court rejected its view that there was no need for proof of an anti-competitive effect in the case of a margin squeeze. In any event, the appellant's complaints are unfounded.

4.1.3.2.4.2. Findings of the Court

With regard to the third part of the second ground of appeal, it must be held at the outset that the General Court correctly rejected the Commission's arguments to the effect that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors constitutes an abuse within the meaning of Article 82 EC, and that it is not necessary for an anti-competitive effect to be demonstrated.

It should be borne in mind that by prohibiting the abuse of a dominant position in so far as trade between Member States is capable of being affected, Article 82 EC refers to the conduct of a dominant undertaking which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

The General Court therefore held of the judgment under appeal, without any error of law, that the anti-competitive effect which the Commission is required to demonstrate, as regards pricing practices of a dominant undertaking resulting in a margin squeeze of its equally efficient competitors, relates to the possible barriers which the appellant's pricing practices could have created for the growth of products on the retail market in end-user access services and, therefore, on the degree of competition in that market.

As is already apparent of the present judgment, a pricing practice such as that at issue in the judgment under appeal that is adopted by a dominant undertaking such as the appellant constitutes an abuse within the meaning of Article 82 EC if it has an exclusionary effect on competitors who are at least as efficient as the dominant undertaking itself by squeezing their margins and is capable of making market entry more difficult

or impossible for those competitors, and thus of strengthening its dominant position on that market to the detriment of consumers' interests.

Admittedly, where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze of its equally efficient competitors, with the purpose of driving them from the relevant market, the fact that the desired result is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 82 EC. However, in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue cannot be classified as exclusionary if it does not make their market penetration any more difficult.

In the present case, since the wholesale local loop access services provided by the appellant are indispensable to its competitors' effective penetration of the retail markets for the provision of services to end-users, the General Court was entitled to hold that a margin squeeze resulting from the spread between wholesale prices for local loop access services and retail prices for end-user access services, in principle, hinders the growth of competition in the retail markets in services to end-users, since a competitor who is as efficient as the appellant cannot carry on his business in the retail market for end-user access services without incurring losses.

The appellant has not challenged that finding. The complaint concerning the failure to take into account revenues from any provision of other telecommunications services to end-users must be rejected as unfounded. The argument concerning the possibility of cross-subsidisation must be rejected as ineffective for the reasons stated in paragraphs 238 to 241 of the present judgment. In addition, in paragraph 239 of the judgment under appeal, the General Court found – as, in the absence of an allegation of distortion, it is for the General Court alone to do – that 'the small market shares acquired by … competitors in the retail … market [in end-user access services] since the market was liberalised by the entry into force of the TKG on 1 August 1996 are evidence of the restrictions which the applicant's pricing practices have imposed on the growth of competition in those markets'. In that regard, contrary to what is claimed by the appellant, it is clear from the expression 'have imposed' that the General Court did find a causal connection between the appellant's pricing practices and the small market shares acquired by competitors. The appellant's complaint on that point is, therefore, unfounded.

Furthermore, the General Court concluded in paragraph 244 of its judgment, which also remained unchallenged in the present appeal, that the appellant had not produced any evidence to rebut the findings in the decision at issue that its pricing practices actually restricted competition in the retail market in end-user access services. In those circumstances, it must be concluded that the General Court was correct to hold that the Commission had established that the particular pricing practices of the appellant gave rise to actual exclusionary effects on competitors who were at least as efficient as the appellant itself.

That conclusion is not altered by the appellant's objection in relation to paragraph 240 of the judgment under appeal. Even if the General Court were, in that respect, to have misread the decision at issue, the error would be ineffective in the context of the present appeal because it relates to a ground that was included for completeness' sake to support paragraphs 237 and 239 of that judgment, and it is apparent from the foregoing review that those paragraphs adequately show that the General Court was entitled to hold that the pricing practice at issue had an exclusionary effect in the retail market in end-user access services. Consequently, the third part of the second ground of appeal must be rejected as, in part, ineffective and, in part, unfounded.

4.1.3.2.4. Conclusion as to the second ground of appeal

It follows from all the foregoing that the second ground of appeal must be rejected in its entirety.

4.1.4. The third ground of appeal, alleging errors of law in the calculation of the fines owing to the failure to take the regulation of charges into account

4.1.4.1. Judgment under appeal

In the judgment under appeal, the General Court rejected the appellant's pleas that insufficient account was taken of the regulation of charges in the calculation of the amount of the fine, and that insufficient account was taken of mitigating circumstances. As regards the gravity of the infringement, the General Court held of the judgment under appeal:

> 'It must be held that, contrary to the applicant's claim, the Commission was entitled to characterise the infringement as serious for the period from 1 January 1998 to 31 December 2001 .... The pricing practices complained of strengthen the barriers to entry to the recently liberalised markets and thus jeopardise the proper functioning of the common market. In that regard, it must be borne in mind that the Guidelines [on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty93 describe the exclusionary behaviour of dominant firms as serious infringements, or even very serious infringements if committed by undertakings holding a virtual monopoly.
>
> As regards the intervention of RegTP in setting the applicant's tariffs, it must be borne in mind that, when the level of the penalty is set, the conduct of the undertakings concerned may be assessed in the light of the national legal framework, which is a mitigating factor. At the hearing, the Commission explained that the 10% reduction of the fine to take account of the fact that 'the [applicant's] retail [charges for end-user access services] and wholesale charges [for local loop access services] were

93 OJ 1998 C 9, p. 3; 'the Guidelines'.

subject to sector specific regulation … on national level' relates to RegTP's intervention in setting the applicant's prices and to the fact that that national authority has, on several occasions during the period covered by the [decision at issue], considered the question of the existence of a margin squeeze resulting from the applicant's tariff practices.

Having regard to the Commission's discretion when determining the amount of a fine …, it must be held that the Commission duly took into account the matters referred to in the preceding paragraph when reducing the basic amount of the fine by 10%.'

The General Court went on to reject the appellant's arguments that, as in the case of the dominant undertaking in Commission Decision 2001/892/EC of 25 July 2001 relating to a proceeding under Article 82 of the EC Treaty,94 the Commission should have imposed a symbolic fine on the appellant. In that regard, the General Court held, the judgment under appeal:

'It must be held that the applicant's situation is fundamentally different from that of the undertaking referred to in the Deutsche Post decision. The Commission deemed it appropriate to impose only a symbolic fine on the undertaking referred to in that decision on three grounds: (1) the undertaking concerned had behaved in accordance with the case-law of German courts; (2) there was no Community case-law relating specifically to the cross-border letter mail services concerned; and (3) the undertaking concerned had undertaken to introduce a procedure for the processing of incoming cross-border letter mailings which would avoid practical difficulties and facilitate the detection of future interference with free competition, should it occur.

In the present case, first, it must be noted that the only judgment of the German courts to which the applicant refers is the judgment of the Oberlandesgericht Düsseldorf, which was delivered on 16 January 2002, thus in the period during which the infringement was characterised in the [decision at issue] as minor … In any event, that judgment was set aside by the judgment of the Bundesgerichtshof of 10 February 2004. Second, it follows from the [decision at issue] that the Commission applied the same principles as those underlying.95 In its Notice of 22 August 1998 on the application of the competition rules to access agreements in the telecommunications sector – framework, relevant markets and principles,96 the Commission had already announced that it

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94 COMP/C-1/36.915 – Deutsche Post AG – Interception of cross-border mail; OJ 2001 L 331, p. 40; 'The Deutsche Post decision'.

95 Commission Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article [82] of the EEC Treaty (Case No IV/30.178 Napier Brown – British Sugar); OJ 1988 L 284, p. 41.

96 OJ 1998 C 265, p. 2.

proposed to apply the principles in the telecommunications sector. Finally, third, the applicant in the present case has not given any undertaking to avoid any other future infringement.'

4.1.4.2. Arguments of the parties

The appellant's third ground of appeal is divided into three parts relating to the serious nature of the infringement, the failure to take the regulation of charges into appropriate consideration as an attenuating circumstance and the imposition of a symbolic fine, respectively.

4.1.4.2.1. The first part of the third ground of appeal, concerning the serious nature of the infringement

– Arguments of the parties

The appellant claims that the General Court infringed Article 15(2) of Regulation No 17 in that neither the Commission's arguments nor the grounds of the judgment under appeal, in paragraphs 306 to 310 thereof, support the assertion that, as regards the period from 1 January 1998 to 31 December 2001, it committed a serious infringement within the meaning of the Guidelines.

In addition, the appellant submits that the General Court disregarded the fact that, according to Section 1A of the Guidelines, exclusion may indeed constitute a serious infringement but will not necessarily do so. The General Court failed, therefore, to consider the arguments against categorisation as a serious infringement, in particular the small contribution of the appellant to the infringement that was acknowledged in paragraph 312 of the judgment under appeal by a 10% reduction of the basic amount.

The Commission contends that those arguments should be rejected as ineffective or unfounded.

– Findings of the Court

It must be borne in mind that, according to settled case-law, the Commission enjoys a broad discretion as regards the method for calculating fines. That method, set out in the Guidelines, displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 15(2) of Regulation No 17.97 Within that framework, it is for the Court of Justice to verify whether the General Court has correctly assessed the Commission's exercise of that discretion.98

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97 See Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191, para 112 and the case-law cited.

98 Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 48; Case C-407/04 *P Dalmine v Commission* [2007] ECR I-829, para 134.

It is apparent from settled case-law that the gravity of the infringements of EU competition law must be assessed in the light of numerous factors, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up.99 The factors capable of affecting the assessment of the gravity of infringements include the conduct of the undertaking concerned, the role it played in the establishment of the practice in question, the profit which it was able to derive from that practice, its size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the European Union.100

In the present case, the General Court did not, therefore, commit any error of law in holding that the Commission had been entitled to characterise the infringement committed by the appellant as serious for the period from 1 January 1998 to 31 December 2001, since, by strengthening the barriers to entry to the recently liberalised markets, the pricing practices at issue were jeopardising the proper functioning of the internal market. As is apparent from the case-law of the Court, exclusionary practices of dominant undertakings, such as the practice at issue in the present case, are particularly serious infringements of Article 82 EC.101

Thus, according to the second paragraph of Section 1A of the Guidelines, such exclusion of competitors from the market can, quite rightly, be described as a serious infringement, or even a very serious infringement, if committed by an undertaking holding a virtual monopoly. The appellant's small contribution to the purported infringement in the light of the regulation of its charges by RegTP cannot alter those findings, since the role played by the undertaking concerned in the infringement is, in principle, not a mandatory factor but just one of a number of other factors to be taken into account in assessing the gravity of the infringement.102 In addition, it is apparent from the case-law of the Court of Justice that, as the General Court noted in paragraph 311 of the judgment under appeal, when the level of the penalty is

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99 See, in particular, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, para 241; *Dalmine* v *Commission*, para 129; and Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, para 54.

100 See, by analogy, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, para 129, and *Dansk Rørindustri and Others* v *Commission*, para 242.

101 See, to that effect, Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223, para 51, and *AKZO* v *Commission*, para 162.

102 See, to that effect, *Dalmine* v *Commission*, para 132.

set, the conduct of the undertaking concerned may be assessed in the light of the national legal framework, which is a mitigating factor.103

Accordingly, the General Court was also correct to consider that having regard to the Commission's discretion when determining the amount of a fine, the Commission had duly taken into account the appellant's limited role, in view of RegTP's intervention in setting the appellant's charges, when it reduced the basic amount of the fine by 10%. Furthermore, as is apparent from the foregoing, in drawing such conclusions under appeal, the General Court gave sufficient reasons for its judgment, in so far as it clearly indicated why the infringement was serious and did not merit any other description on account of the limited role played by the appellant. Consequently, the first part of the third ground of appeal must be rejected as unfounded.

4.1.4.2.2. The second part of the third ground of appeal, concerning the failure to take the regulation of charges into appropriate consideration as a mitigating circumstance

– Arguments of the parties

The appellant observes that the Commission took account only of the existence of sector-specific regulation on a national level but not of the content of that regulation, namely, in particular, RegTP's consideration and denial of the existence of any margin squeeze restricting competition.

The appellant takes the view that the General Court erred in law by failing to criticise the Commission's disregard of two other attenuating circumstances for the purposes of Section 3 of the Guidelines. It was as a result of the review and denial of the existence of an anti-competitive margin squeeze in a series of decisions that the appellant was convinced that its conduct was lawful. Furthermore, the infringement was committed, at most, negligently. The Commission contends that those complaints of the appellant must be rejected as unfounded.

– Findings of the Court

With regard, in the first place, to the complaint concerning a failure to take into account the fact that RegTP ruled out the existence of a margin squeeze, it must be held that that complaint is based on a misreading of the judgment under appeal.

The General Court explicitly found – which, in the absence of an allegation of distortion, it is for the General Court alone to do – that the Commission's 10% reduction of the fine in the decision at issue to take account

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103 See, to that effect, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, para 620, and *CIF*, para 57.

of the fact that the appellant's retail prices for end-user access services and wholesale prices for local loop access services are subject to sector-specific regulation on a national level related both to RegTP's intervention in setting the appellant's prices and to the fact that, on several occasions during the period concerned, RegTP had considered the question of the existence of a margin squeeze resulting from the appellant's pricing practices. In those circumstances, the Court must reject the present complaint of the appellant as unfounded.

With regard, in the second place, to the complaint concerning the negligent nature of the infringement, it must be recalled that the General Court set out the grounds on which the complaint that there was no negligence or intention on the part of the appellant had to be rejected. As is apparent from paragraphs 124 to 137 of the present judgment, the review of the complaints raised by the appellant in relation to the third part of the first ground of appeal did not reveal any error of law or failure to state reasons that might vitiate those grounds. By the present complaint, the appellant merely submits that the infringement was committed, at most, negligently. In so doing, it asks the Court to assess the facts itself, although no distortion is alleged. In accordance with the case-law cited in paragraph 53 of the present judgment, that complaint is, therefore, inadmissible in the present appeal. Consequently, the second part of the third ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

4.1.4.2.3. The third part of the third ground of appeal, concerning the imposition of a symbolic fine

– Arguments of the parties

The appellant claims that the General Court failed to have regard to the right to equal treatment by failing to impose on it a symbolic fine, as in the Deutsche Post decision, even though the three conditions which the Commission set to that end in that decision have also been fulfilled in the present case.

The appellant states, first of all, that it behaved in a manner that is consistent with the case-law of the German courts, since RegTP has, on a number of occasions during the period in question, ruled that the purported margin squeeze is not anti-competitive. It is irrelevant that the judgment of the Oberlandesgericht Düsseldorf, delivered on 16 January 2002, was set aside by the Bundesgerichtshof in 2004, since that setting aside was the result of the possibility of an objection which is not applicable in the present case and it is only after the delivery of the judgment of the Bundesgerichtshof that the appellant could proceed on the basis that it might be liable under Article 82 EC. Second, there was no relevant case-law from the Courts of the Union during the period in question. The Notice of 22 August 1998 referred to the judgment under appeal cannot be described as 'case-law' and reveals nothing about the crucial issue in the present case of whether a margin squeeze can be established in the case of regulated charges. Furthermore, the General Court contradicts itself in so far as it states in paragraph 188 of the judgment under appeal that the Courts of the Union have not yet explicitly ruled on the method to be applied in order to determine the existence of a

margin squeeze. Third, a commitment to end the infringement cannot constitute a binding condition for the imposition of a symbolic fine where, as in the present case, detection of the purported infringement poses no difficulty, since it is only the assessment of the conduct that is being contested. The Commission contends that the appellant's allegation is irrelevant and, in the alternative, that it is unfounded.

– Findings of the Court

According to the case-law of the Court, the fact that the Commission, in the past, imposed fines of a certain level for particular types of infringement does not mean that it is stopped from raising that level within the limits indicated in Regulation No 17, if that is necessary to ensure the implementation of European Union competition policy. The proper application of the European Union's competition rules requires that the Commission be able at any time to adjust the level of fines to the needs of that policy.104 In any event, in the present case, the General Court set out in detail in paragraphs 317 to 320 of the judgment under appeal the reasons why the appellant's situation had to be regarded as fundamentally different from that of the undertaking referred to in the Deutsche Post decision.

By its present arguments, the appellant confines itself, in essence, to challenging the General Court's assessment in that regard, claiming that it is in the same situation as the undertaking referred to in the Deutsche Post decision in so far as the three grounds on which the Commission imposed a symbolic fine in that decision also obtain in the present case; it does not, however, allege any distortion of the facts or indicate why that assessment is vitiated by one or more errors of law. It follows from this that, by those arguments which essentially reiterate those already advanced before the General Court, the appellant is really seeking to secure a re-examination of the application submitted at first instance, which, in accordance with the case-law cited in paragraph 24 of the present judgment, is outside the jurisdiction of the Court of Justice in the present appeal.

Furthermore, in so far as the appellant relies on a contradiction between the grounds and paragraph 188 of the judgment under appeal, its complaint must be rejected as unfounded. The fact, noted by the General Court in that paragraph, that the Courts of the Union have not yet explicitly ruled on the method to be applied in determining the existence of a margin squeeze in no way contradicts the finding in paragraph 319 of the same judgment that, for its part, the Commission had already applied the principles contained in the decision at issue and announced their application to the telecommunications industry. Consequently, the third part of the third ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

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104 *Musique Diffusion française and Others* v *Commission*, para 109.

4.1.4.3. Conclusion as to the third ground of appeal

It follows from all the foregoing that the third ground of appeal must be rejected in its entirety. It follows from this that the present appeal must be dismissed.

5. **Costs**

In accordance with the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court shall make a decision as to costs. Under Article 69(2) of those Rules, which apply to the procedure on appeal by virtue of Article 118 of those Rules, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission, Vodafone and Versatel have applied for costs against the appellant, and the latter has been unsuccessful, the appellant must be ordered to pay the costs of the present appeal.

On those grounds, the Court (Second Chamber) hereby

1. **Dismisses the appeal;**

2. **Orders Deutsche Telekom AG to pay the costs.**

E. Höfner and Elser v Macrotron GmbH

Case C-41/90

ECR 1991 I-01979 – ECLI:EU:C:1991:161

Decided Apr 23, 1991

1. Summary of the Judgment

A public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules since, in the context of competition law, that classification applies to every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.

As an undertaking entrusted with the operation of services of general economic interest, a public employment agency engaged in employment procurement activities is, pursuant to Article 90(2) of the Treaty, subject to the prohibition contained in Article 86 of the Treaty, so long as the application of that provision does not obstruct the performance of the particular task assigned to it. A Member State which has granted it an exclusive right to carry on that activity is in breach of Article 90(1) of the Treaty where it creates a situation in which that agency cannot avoid infringing Article 86 of the Treaty. That is the case, in particular, where the following conditions are satisfied:

- the exclusive right extends to executive recruitment activities;

- the public employment agency is manifestly incapable of satisfying demand prevailing on the market for such activities;

- the actual pursuit of those activities by private recruitment consultants is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void;

- the activities in question may extend to the nationals or to the territory of other Member States.

The provisions of the Treaty on freedom of movement cannot be applied to activities which are confined in all respects within a single Member State and therefore a recruitment consultant in a Member State may not rely on Articles 7 and 59 of the Treaty regarding the procurement of nationals of that Member State for posts in undertakings in the same State.

2. Judgment

2.1. Parties

Reference to the Court under Article 177 of the EEC Treaty by the Oberlandesgericht Muenchen, Federal Republic of Germany, for a preliminary ruling in the proceedings pending before that court between Klaus Hoefner and Fritz Elser and Macrotron GmbH.

2.2. Grounds

By order of 31 January 1990, which was received at the Court Registry on 14 February 1990, the Oberlandesgericht Muenchen (Higher Regional Court, Munich) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 7, 55, 56, 59, 86 and 90 of the EEC Treaty. The questions were raised in proceedings brought by Messrs Hoefner and Elser, recruitment consultants, against Macrotron GmbH, a company governed by German law, established in Munich. The dispute concerns fees claimed from that company by Messrs Hoefner and Elser pursuant to a contract under which the latter were to assist in the recruitment of a sales director.

Employment in Germany is governed by the Arbeitsfoerderungsgesetz (Law on the promotion of employment, hereinafter referred to as "the AFG"). According to Paragraph 1, measures taken under the AFG are intended, within the economic and social policy of the Federal Government, to achieve and maintain a high level of employment, constantly to improve job distribution and thus to promote economic growth. Paragraph 3 entrusts the attainment of the general aim described in Paragraph 2 to the Bundesanstalt fuer Arbeit (Federal Office for Employment, hereinafter referred to as "the Bundesanstalt"), whose activity consists essentially in bringing prospective employees into contact with employers and administering unemployment benefits.

The first of the abovementioned activities, defined in Paragraph 13 of the AFG, is carried out by the Bundesanstalt by virtue of the exclusive right granted to it for that purpose by Paragraph 4 of the AFG (hereinafter referred to as the "exclusive right of employment procurement"). However, Paragraph 23 of the AFG provides for the possibility of a derogation from the exclusive right of employment procurement. The Bundesanstalt may, in exceptional cases and after consulting the workers' and employers' associations concerned, entrust other institutions or persons with employment procurement for certain professions or occupations. However, their activities remain subject to the supervision of the Bundesanstalt.

The Bundesanstalt must, by virtue of Paragraphs 20 and 21 of the AFG, exercise its exclusive right of employment procurement impartially and without charging a fee. Paragraph 167 of the AFG, contained in the sixth title thereof, which deals with the financial resources enabling the Bundesanstalt to carry out its activities on that basis, allows the Bundesanstalt to collect contributions from employers and workers.

The eighth title of the AFG contains provisions concerning penalties and fines. Paragraph 228 provides that fines may be imposed for the conduct of any employment procurement activity in breach of the AFG. Notwithstanding the Bundesanstalt' s exclusive right to undertake employment procurement, specific recruitment and employment procurement activity has developed in Germany for business executives. That activity is carried on by recruitment consultants who assist undertakings regarding personnel policy.

The Bundesanstalt reacted to that development in two ways. First, in 1954 it decided to set up a special agency for the placement of highly qualified executives in management posts in undertakings. Secondly, it published circulars in which it declared that it was prepared, under an agreement between the Bundesanstalt, the Federal Ministry of Employment and several professional associations, to tolerate certain activities on the part of recruitment consultants concerning business executives. That tolerant attitude is also apparent in the fact that the Bundesanstalt has not systematically invoked Paragraph 228 of the AFG and prosecuted recruitment consultants for activities undertaken by them.

Whilst the activities of recruitment consultants are thus to some extent tolerated by the Bundesanstalt, the fact remains that any legal act which infringes a statutory prohibition is void under Paragraph 134 of the German Civil Code and, according to German case-law, that prohibition applies to employment procurement activities carried out in breach of the AFG.

The dispute in the main proceedings concerns the compatibility of the recruitment contract concluded between Messrs Hoefner and Elser, on the one hand, and Macrotron, on the other, with the AFG. As required by the contract, Messrs Hoefner and Elser presented Macrotron with a candidate for the post of sales director. He was a German national who, according to the recruitment consultants, was perfectly suitable for the post in question. However, Macrotron decided not to appoint that candidate and refused to pay the fees stipulated in the contract.

Messrs Hoefner and Elser then commenced proceedings against Macrotron before the Landgericht (Regional Court) Munich I in order to obtain payment of the agreed fees. The Landgericht dismissed their claim by judgment of 27 October 1987. The plaintiffs appealed to the Oberlandesgericht, Munich, which considered that the contract at issue was void by virtue of Paragraph 134 of the German Civil Code (Bundesgesetzbuch), since it was in breach of Paragraph 13 of the AFG. That court nevertheless considered that the outcome of the dispute ultimately depended on an interpretation of Community law and it therefore submitted the following questions for a preliminary ruling:

> "Does the provision of business executives by personnel consultants constitute a service within the meaning of the first paragraph of Article 60 of the EEC Treaty and is the provision of executives bound up with the exercise of official authority within the meaning of Articles 66 and 55 of the EEC Treaty?
>
> Does the absolute prohibition on the provision of business executives by German personnel consultants, laid down in Paragraphs 4 and 13 of the Arbeitsfoerderungsgesetz, constitute a professional rule justified by the public interest or a monopoly, justified on grounds of public policy and public security (Articles 66 and 56(1) of the EEC Treaty)?

Can a German personnel consultant rely on Articles 7 and 59 of the EEC Treaty in connection with the provision of German nationals to German undertakings?

In connection with the provision of business executives is the Bundesanstalt fuer Arbeit [Federal Employment Office] subject to the provisions of the EEC Treaty, and in particular Article 59 thereof, in the light of Article 90(2) of the EEC Treaty, and does the establishment of a monopoly over the provision of business executives constitute an abuse of a dominant position on the market within the meaning of Article 86 of the EEC Treaty?"

Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

In its first three questions and the part of its fourth question concerning Article 59 of the Treaty, the national court seeks essentially to determine whether the Treaty provisions on the free movement of services preclude a statutory prohibition of the procurement of employment for business executives by private recruitment consultancy companies. The fourth question is concerned essentially with the interpretation of Articles 86 and 90 of the Treaty, having regard to the competitive relationship existing between those companies and a public employment agency enjoying exclusive rights in respect of employment procurement.

The latter question raises the problem of the scope of that exclusive right and, therefore, of the statutory prohibition of employment procurement by private companies of the kind at issue in the main proceedings. It is therefore appropriate to consider that question first.

2.2.1. The interpretation of Articles 86 and 90 of the EEC Treaty

In its fourth question, the national court asks more specifically whether the monopoly of employment procurement in respect of business executives granted to a public employment agency constitutes an abuse of a dominant position within the meaning of Article 86, having regard to Article 90(2). In order to answer that question, it is necessary to examine that exclusive right also

in the light of Article 90(1), which is concerned with the conditions that the Member States must observe when they grant special or exclusive rights. Moreover, the observations submitted to the Court relate to both Article 90(1) and Article 90(2) of the Treaty.

According to the appellants in the main proceedings, an agency such as the Bundesanstalt is both a public undertaking within the meaning of Article 90(1) and an undertaking entrusted with the operation of services of general economic interest within the meaning of Article 90(2) of the Treaty. The Bundesanstalt is therefore, they maintain, subject to the competition rules to the extent to which the application thereof does not obstruct the performance of the particular task assigned to it, and it does not in the present case. The appellants also claim that the action taken by the Bundesanstalt, which extended its statutory monopoly over employment procurement to activities for which the establishment of a monopoly is not in the public interest, constitutes an abuse within the meaning of Article 86 of the Treaty. They also consider that any Member State which makes such an abuse possible is in breach of Article 90(1) and of the general principle whereby the Member States must refrain from taking any measure which could destroy the effectiveness of the Community competition rules.

The Commission takes a somewhat different view. The maintenance of a monopoly on executive recruitment constitutes, in its view, an infringement of Article 90(1) read in conjunction with Article 86 of the Treaty where the grantee of the monopoly is not willing or able to carry out that task fully, according to the demand existing on the market, and provided that such conduct is liable to affect trade between Member States.

The respondent in the main proceedings and the German Government consider on the other hand that the activities of an employment agency do not fall within the scope of the competition rules if they are carried out by a public undertaking. The German Government states in that regard that a public employment agency cannot be classified as an undertaking within the meaning of Article 86 of the Treaty, in so far as the employment procurement services are provided free of charge. The fact that those activities are financed mainly by contributions from employers and employees does not, in its view, mean that they are not free, since those contributions are general and have no link with each specific service provided.

Having regard to the foregoing considerations, it is necessary to establish whether a public employment agency such as the Bundesanstalt may be regarded as an undertaking within the meaning of Articles 85 and 86 of the Treaty. It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity. The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment.

It follows that an entity such as a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules. It must be pointed out that a public employment agency which is entrusted, under the legislation of a Member State, with the operation of services of general economic interest, such as those envisaged in Article 3 of the AFG, remains subject to the competition rules pursuant to Article 90(2) of the Treaty unless and to the extent to which it is shown that their application is incompatible with the discharge of its duties.[105]

As regards the manner in which a public employment agency enjoying an exclusive right of employment procurement conducts itself in relation to executive recruitment undertaken by private recruitment consultancy companies, it must be stated that the application of Article 86 of the Treaty cannot obstruct the performance of the particular task assigned to that agency in so far as the latter is manifestly not in a position to satisfy demand in that area of the market and in fact allows its exclusive rights to be encroached on by those companies.

Whilst it is true that Article 86 concerns undertakings and may be applied within the limits laid down by Article 90(2) to public undertakings or undertakings vested with exclusive rights or specific rights, the fact nevertheless remains that the Treaty requires the Member States not to take or maintain in force measures which could destroy the effectiveness of that provision.[106] Article

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[105] See judgment in Case 155/73 Sacchi [1974] ECR 409.

[106] See judgment in Case 13/77 Inno [1977] ECR 2115, paras 31-32.

90(1) in fact provides that the Member States are not to enact or maintain in force, in the case of public undertakings and the undertakings to which they grant special or exclusive rights, any measure contrary to the rules contained in the Treaty, in particular those provided for in Articles 85 to 94.

Consequently, any measure adopted by a Member State which maintains in force a statutory provision that creates a situation in which a public employment agency cannot avoid infringing Article 86 is incompatible with the rules of the Treaty. It must be remembered, first, that an undertaking vested with a legal monopoly may be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty[107] and that the territory of a Member State, to which that monopoly extends, may constitute a substantial part of the common market.[108]

Secondly, the simple fact of creating a dominant position of that kind by granting an exclusive right within the meaning of Article 90(1) is not as such incompatible with Article 86 of the Treaty.[109] A Member State is in breach of the prohibition contained in those two provisions only if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position.

Pursuant to Article 86(b), such an abuse may in particular consist in limiting the provision of a service, to the prejudice of those seeking to avail themselves of it. A Member State creates a situation in which the provision of a service is limited when the undertaking to which it grants an exclusive right extending to executive recruitment activities is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind and when the effective pursuit of such activities by private companies is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void.

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[107] See judgment in Case 311/84 CBEM [1985] 3261.

[108] Judgment in Case 322/81 Michelin [1983] ECR 3461, para 28.

[109] See Case 311/84 CBEM, above, para 17.

It must be observed, thirdly, that the responsibility imposed on a Member State by virtue of Articles 86 and 90(1) of the Treaty is engaged only if the abusive conduct on the part of the agency concerned is liable to affect trade between Member States. That does not mean that the abusive conduct in question must actually have affected such trade. It is sufficient to establish that that conduct is capable of having such an effect.[110]

A potential effect of that kind on trade between Member States arises in particular where executive recruitment by private companies may extend to the nationals or to the territory of other Member States. In view of the foregoing considerations, it must be stated in reply to the fourth question that a public employment agency engaged in employment procurement activities is subject to the prohibition contained in Article 86 of the Treaty, so long as the application of that provision does not obstruct the performance of the particular task assigned to it. A Member State which has conferred an exclusive right to carry on that activity upon the public employment agency is in breach of Article 90(1) of the Treaty where it creates a situation in which that agency cannot avoid infringing Article 86 of the Treaty. That is the case, in particular, where the following conditions are satisfied:

- the exclusive right extends to executive recruitment activities;

- the public employment agency is manifestly incapable of satisfying demand prevailing on the market for such activities;

- the actual pursuit of those activities by private recruitment consultants is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void;

- the activities in question may extend to the nationals or to the territory of other Member States.

2.2.2. The interpretation of Article 59 of the EEC Treaty

In its third question, the national court seeks essentially to determine whether a recruitment consultancy company in a Member State may rely on Articles 7 and 59 of the Treaty regarding the

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[110] See Case 322/81 Michelin, above, para 104.

procurement of nationals of that Member State for posts in undertakings in the same State. It must be recalled, in the first place, that Article 59 of the EEC Treaty guarantees, as regards the freedom to provide services, the application of the principle laid down in Article 7 of that Treaty. It follows that where rules are compatible with Article 59 they are also compatible with Article 7.[111]

It must then be pointed out that the Court has consistently held that the provisions of the Treaty on freedom of movement cannot be applied to activities which are confined in all respects within a single Member State and that the question whether that is the case depends on findings of fact which are for the national court to make.[112]

The facts, as established by the national court in its order for reference, show that in the present case the dispute is between German recruitment consultants and a German undertaking concerning the recruitment of a German national. Such a situation displays no link with any of the situations envisaged by Community law. That finding cannot be invalidated by the fact that a contract concluded between the recruitment consultants and the undertaking concerned includes the theoretical possibility of seeking German candidates resident in other Member States or nationals of other Member States.

It must therefore be stated in reply to the third question that a recruitment consultant in a Member State may not rely on Articles 7 and 59 of the Treaty regarding the procurement of nationals of that Member State for posts in undertakings in the same State.

In view of the above answer, it is unnecessary to consider the first two questions and the part of the fourth question concerned with the question whether Article 59 of the Treaty precludes a statutory prohibition of the pursuit, by private recruitment consultancy companies in a Member State, of the business of executive recruitment.

3. Decision on costs

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[111] Judgment in Case 90/76 Van Ameyde [1977] ECR 1091, para 27.

[112] See, in particular, the judgment in Case 52/79 Debauve]1980] ECR 833, para 9.

The costs incurred by the German Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

4. Operative part

On those grounds, the Court (Sixth Chamber), in reply to the questions referred to it by the Oberlandesgericht Muenchen by order of 31 January 1990, hereby rules:

1. A public employment agency engaged in employment procurement activities is subject to the prohibition contained in Article 86 of the Treaty, so long as the application of that provision does not obstruct the performance of the particular task assigned to it. A Member State which has conferred an exclusive right to carry on that activity upon the public employment agency is in breach of Article 90(1) of the Treaty where it creates a situation in which that agency cannot avoid infringing Article 86 of the Treaty. That is the case, in particular, where the following conditions are satisfied:

- the exclusive right extends to executive recruitment activities;

- the public employment agency is manifestly incapable of satisfying demand prevailing on the market for such activities;

- the actual pursuit of those activities by private recruitment consultants is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void;

- the activities in question may extend to the nationals or to the territory of other Member States.

2. A recruitment consultant in a Member State may not rely on Articles 7 and 59 of the Treaty regarding the procurement of nationals of that Member State for posts in undertakings in the same State.

F. SELEX Sistemi Integrati SpA v Commission

C-113/07 P

ECR 2009 I-02207 – ECLI:EU:C:2009:191

Decided Mar 26, 2009

1. Judgment

1.1. Parties

SELEX Sistemi Integrati SpA, established in Rome (Italy), appellant, the other parties to the proceedings being: Commission of the European Communities, defendant at first instance, European Organisation for the Safety of Air Navigation (Eurocontrol), intervener at first instance.

1.2. Grounds

By its appeal, SELEX Sistemi Integrati SpA ('Selex') requests the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-155/04 SELEX Sistemi Integrati v Commission [2006] ECR II-4797 ('the judgment under appeal'), by which that court dismissed the application for annulment or amendment of the decision of the Commission of the European Communities of 12 February 2004 rejecting the appellant's complaint concerning an alleged infringement by the European Organisation for the Safety of Air Navigation (Eurocontrol) of the provisions of the EC Treaty relating to competition ('the contested decision').

1.2.1. Background to the Dispute

Selex has been operating in the sector of air traffic management systems since 1961. On 28 October 1997, it lodged a complaint with the Commission under Article 3(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty[113] in which it criticised Eurocontrol for abusing its dominant position and distorting competition.

The complaint stated that the regime of intellectual property rights governing contracts, concluded by Eurocontrol, for the development and acquisition of prototypes of new systems and equipment for applications in the field of air traffic management was liable to create de facto monopolies in

[113] (OJ, English Special Edition 1959-1962, p. 87)

the production of systems which are subsequently standardised by that organisation. It claimed that that situation was all the more serious because Eurocontrol had failed to observe the principles of transparency, openness and non-discrimination in connection with the acquisition of the prototypes. In addition, the complaint stated that, as a result of assistance provided by Eurocontrol to national administrations, at the latters' request, undertakings which had supplied prototypes were in a particularly advantageous position as compared with their competitors in tendering procedures organised by national authorities seeking to acquire equipment.

The Commission rejected the complaint in the contested decision. After stating that the Community competition rules apply in principle to international organisations, provided that the activities concerned can be described as economic activities, it stated, first of all, that the activities which were the subject of the complaint could not be so described, so that Eurocontrol could not be considered to be an undertaking within the meaning of Article 82 EC and, in any event, those activities were not contrary to that provision. It then went on to state that Eurocontrol's regulation, standardisation and validation activities did not constitute 'activities of an undertaking', that no breach of the competition rules had been established with regard to the activities of that organisation connected with the acquisition of prototypes and management of intellectual property rights and, lastly, that assisting national administrations was not an economic activity.

1.2.2. Procedure before the Court of First Instance and the judgment under appeal

1.2.2.1. Procedure before the Court of First Instance

By application lodged at the Registry of the Court of First Instance on 23 April 2004, Selex brought an action for the annulment or amendment of the contested decision. By order of 25 October 2004, Eurocontrol was granted leave, pursuant to Article 116(6) of the Rules of Procedure of the Court of First Instance, to intervene in support of the form of order sought by the Commission by making its submissions at the hearing. On 5 April 2005, Eurocontrol was invited to lodge a statement in intervention, pursuant to Article 64 of the Rules of Procedure. On 4 May 2005, it was authorised, in addition, to receive a copy of the pleadings in the case.

Further to an application by the applicant that the defendant be requested, by way of measures of organisation of procedure, to produce, inter alia, a letter of 3 November 1998 in which the defendant had invited Eurocontrol to submit its observations on the complaint ('the letter of 3 November 1998'), the Commission produced the letter and stated that it did not possess any other relevant documents. By document lodged at the Registry of the Court of First Instance on 27 April 2005, the applicant then made an application for witnesses to

be heard and documents to be produced by the Commission and introduced three new pleas in law.

1.2.2.2. The judgment under appeal

The Court of First Instance dismissed the action in the judgment under appeal.

First of all, the Court of First Instance ruled that Selex's application for amendment of the contested decision was inadmissible. It also rejected as inadmissible, on the basis of the first subparagraph of Article 48(2) of the Rules of Procedure of the Court of First Instance, the new pleas in law introduced by Selex, rejecting the latter's argument that the letter of 3 November 1998 constituted a new fact which came to light in the course of the procedure as a result of a letter from the director of Eurocontrol of 2 July 1999 which was annexed to the defence.

At paragraphs 41 to 44 of the judgment under appeal, the Court of First Instance also rejected as inadmissible the plea raised by Eurocontrol seeking a ruling that, by virtue of its immunity under international public law, the rules of the European Union did not apply to it on the ground that, under the fourth paragraph of Article 40 of the Statute of the Court of Justice, applicable to the Court of First Instance, and Article 116(3) of the Rules of Procedure of the Court of First Instance, the intervener did not have standing to raise that plea, which had not been put forward by the Commission.

As regards the substantive application, in dismissing the action, the Court of First Instance then rejected the three pleas in law raised by Selex alleging, respectively, manifest error of assessment as to the applicability of the Community competition rules to Eurocontrol, manifest error of assessment as to the existence of an infringement of the Community competition rules and breach of essential procedural requirements and did so on grounds that will be summarised below.

By way of preliminary point, the Court of First Instance stated that annulment of the contested decision presupposed that the applicant's first two pleas would be upheld. It pointed out, first, that 'where the operative part of a Commission decision is based on several pillars of reasoning, each of which would in itself be sufficient to justify that operative part, that decision should, in principle, be annulled only if each of those pillars is vitiated by an illegality' and, second, that the contested decision was based on the double finding that Europol was not an undertaking and that the conduct complained of was not contrary to Article 82 EC.

Examining the first plea, the Court of First Instance drew attention to the case-law of the Court of Justice on the concepts of 'undertaking' and 'economic activity' and rejected the Commission's argument claiming, by reference to Case C-364/92 SAT Fluggesellschaft [1994] ECR I-43, that Eurocontrol could not in any case be considered to be an undertaking for the purposes of Community competition law. It stated that, since the Treaty provisions on competition are applicable to the activities of an entity which can be severed from those in which it engages as a public authority, the various activities of an entity must be considered individually and, accordingly, the judgment relied on did not preclude Eurocontrol from being regarded as an undertaking within the meaning of Article 82 EC in relation to other activities than those referred to in that judgment.

In examining that plea, the Court of First Instance therefore made a distinction between the various activities in question in the present case, namely the activity of technical standardisation, the activity of research and development and that of assisting the national administrations. With regard, first, to the activity of technical standardisation, the Court of First Instance considered that, while the adoption of standards by the Council of Eurocontrol was a legislative activity and therefore a public task performed by that organisation, the preparation and production of technical standards could be separated from its tasks of managing airspace and developing air safety but could not be deemed to be an economic activity, since the applicant had failed to demonstrate that that activity consisted in offering goods or services on a given market.

In that context, the applicant's arguments that, first, it could be inferred from the economic nature of the activity of acquiring prototypes that technical standardisation was also an economic activity and, second, the reasoning employed in Case T-319/99 FENIN v Commission [2003] ECR II-357 could not be applied in the present case were rejected at paragraphs 63 to 68 of the judgment under appeal. Citing the judgment in FENIN , the Court of First Instance stated, in essence, that whether or not the activity of purchasing was an economic activity depended on the subsequent use to which the goods acquired was put, so that, in the present case, the fact that technical standardisation was not an economic activity implied that the acquisition of prototypes in connection with that activity was not an economic activity either.

Second, with regard to research and development, the Court of First Instance stated first of all, there was no basis in the contested decision for the applicant's assertion that the Commission had not disputed the economic nature of that activity. It then went on to state

in particular that the acquisition of prototypes in that context and the related management of intellectual property rights were not capable of making that activity an economic one, since the acquisition did not involve the offer of goods or services on a given market. Pointing out, in that connection, that that activity consisted in granting public subsidies to undertakings in the relevant sector and acquiring ownership of the prototypes and the property rights resulting from the subsidised research in order to make the results of that research available at no cost to the sector concerned, the Court of First Instance found that '[that] activity [was] ancillary to the promotion of technical development, forming part of the aims of Eurocontrol's public service tasks and not being pursued in its own interest, separable from those aims'.

Third, with regard to the activity of assisting the national administrations, the Court of First Instance considered on the other hand, at paragraph 86 of the judgment under appeal, that it was separable from Eurocontrol's tasks of airspace management and development of air safety, on the ground that that activity had a very indirect relationship with air navigation safety, pointing out in that connection that the assistance provided by Eurocontrol only covered technical specifications in the implementation of tendering procedures, was provided only on the request of the national administrations and was therefore in no way essential or indispensable to ensuring the safety of air navigation.

Moreover, with regard to assistance to the national administrations, the Court of First Instance found that this was a case of an offer of services on the market for advice, a market on which private undertakings specialising in that area could also very well offer their services. In that context, the Court of First Instance pointed out that the fact that an activity may be exercised by a private undertaking is a further indication that the activity in question may be described as a business activity, the fact that activities are normally entrusted to public offices cannot necessarily affect the economic nature of such activities and the fact that the assistance provided is not remunerated may constitute an indication that it is not an economic activity, although it is not in itself decisive, as may the fact that that assistance is given in pursuit of a public service objective. The Court of First Instance therefore considered that that activity constituted an economic activity and that, accordingly, Eurocontrol was, in the exercise of that activity, an undertaking within the meaning of Article 82 EC.

However, after considering the second plea raised by the applicant in relation to that activity, the Court of First Instance rejected the plea that the national administrations alone have the power to award contracts and are therefore responsible for compliance with the relevant

provisions on tendering procedures, Eurocontrol's contribution being neither mandatory nor systematic. It went on to point out, at paragraphs 105 to 108 of that judgment, that the applicant had failed to adduce any evidence of the definition of the relevant market or the dominant position and had also failed to demonstrate the existence of conduct that fulfilled the criteria of abuse of such a position. Finally, the Court of First Instance rejected the applicant's claims that the letter of 3 November 1998 proved that the Commission itself was persuaded that Eurocontrol had abused a dominant position.

Lastly, after rejecting the complaints alleging a failure to provide reasoning and breach of the rights of defence put forward by the applicant in the third plea, the Court of First Instance also rejected the applicant's request for measures of inquiry.

1.2.3. Forms of order sought by the parties

Selex claims that the Court should:

– reject the plea of immunity raised by Eurocontrol as inadmissible;

– reject the Commission's applications for amendment of the grounds of the judgment of the Court of First Instance;

– set aside the judgment under appeal and refer the case back to the Court of First Instance; and

– order the Commission to pay the costs of the appeal proceedings and those of the proceedings at first instance.

The Commission contends that the Court should:

– dismiss the appeal in its entirety, if necessary on the basis of a partial amendment of the grounds of the judgment of the Court of First Intance; and

– order the appellant to pay the costs.

Eurocontrol contends that the Court should:

– dismiss the appeal; and

– order the appellant to pay the costs, including the costs relating to its intervention.

1.2.4. Appeal

In support of its appeal, Selex puts forward 4 pleas in law relating to the procedure before the Court of First Instance and 12 pleas relating to the substance of the case. The latter pleas

allege that the Court of First Instance erred in law as regards, first, the applicability of Article 82 EC to the activities of Eurocontrol at issue in these proceedings, namely the activities of assisting the national administrations, technical standardisation and research and development and, second, the infringement of that provision by Eurocontrol

The Commission contends that the appeal should be dismissed but seeks an amendment of the grounds of the judgment under appeal rejecting the applicant's pleas relating to the activity of assisting the national administrations and that of technical standardisation. While equally contending that the appeal should be dismissed, Eurocontrol also criticises the judgment under appeal for rejecting as inadmissible the plea that it enjoys immunity under international public law. It also submits that its immunity, which precludes the application of Community competition law to the activities in question, forms the basis a plea which must be considered by the Community judicature of its own motion and should be upheld by the Court in order to dismiss the appeal.

1.2.4.1. The pleas relating to the procedure before the Court of First Instance

The four pleas relating to the procedure before the Court of First Instance raised by Selex allege, respectively, infringement of Article 116(6) of the Rules of Procedure of the Court of First Intance, infringement of Article 48(2) of those rules (second and third pleas) and infringement of Article 66(1) of those rules.

1.2.4.1.1. The first plea, alleging infringement of Article 116(6) of the Rules of Procedure of the Court of First Instance

By this plea, Selex submits that, by permitting Eurocontrol to lodge a statement and to receive a copy of the pleadings in the case even though it had established that its application to intervene had been submitted after the six-week period prescribed in Article 115(1) of the Rules of Procedure of the Court of First Instance, that court infringed Article 116(6) of those rules. It maintains that the Court of First Instance could not rely on the provisions in Article 64 of its Rules of Procedure in order to 'circumvent the time-limits imposed for taking steps in proceedings'.

In response, the Commission and Eurocontrol submit that the Court of First Instance has a wide margin of discretion in exercising the power conferred on it by Article 64 of its Rules of Procedure, the provisions of which are unconnected with those in the Article 116(6), infringement of which is alleged, and that the appellant has failed to show that that power was exercised in those proceedings for a different purpose than that set out in Article 64(2)

and has also failed to demonstrate that, in the light of Article 58 of the Statute of the Court of Justice, the breach of procedure alleged has in fact adversely affected its interests. They point out that it has not been established in particular that that breach of procedure, or any of the other alleged irregularities, could have had any effect on the outcome of the proceedings.

According to Article 115(1) of the Rules of Procedure of the Court of First Instance, an application to intervene must be made either within six weeks of the publication in the Official Journal of the European Union of the notice of initiation of the action or, subject to Article 116(6) of those rules, before the decision to open the oral procedure. Article 116(2) of the Rules of Procedure of the Court of First Instance provides that if an intervention for which application has been made within the period of six weeks prescribed in Article 115(1) is allowed, the intervener is to receive a copy of every document served on the parties. Article 116(4) of the Rules of Procedure of the Court of First Instance states that, in the cases referred to in Article 116(2), the President is to prescribe a period within which the intervener may submit a statement in intervention containing a statement of the form of order sought by the intervener in support of or opposing, in whole or in part, the form of order sought by one of the parties, the pleas in law and arguments relied on by the intervener and, where appropriate, the nature of any evidence offered. Article 116(6) of those rules provides that, where the application to intervene is made after the expiry of the period of six weeks prescribed in Article 115(1), the intervener may, on the basis of the Report for the Hearing communicated to him, submit his observations during the oral procedure.

It is apparent from those provisions that the intervener's procedural rights differ according to whether the application to intervene is made before the expiry of the period of six weeks prescribed in Article 115(1) of the Rules of Procedure of the Court of First Instance or after the expiry of that period but before the decision to open the oral procedure. Where the intervener has made his application before the expiry of that period, he is entitled to participate in both the written and the oral procedure, to receive a copy of the pleadings in the case and to submit a statement in intervention. On the other hand, where the intervener has made an application after the expiry of that period, he is entitled only to participate in the oral procedure, to receive a copy of the Report for the Hearing and to submit his observations on the basis of that report at the hearing.

In the present case, it is apparent from the indications given in the judgment under appeal and the documents on the case file that, although Eurocontrol was given leave by order of

25 October 2004 to intervene in the proceedings before the Court of First Instance in support of the form of order sought by the Commission pursuant to Article 116(6) of the Rules of Procedure of the Court of First Instance and was thus authorised only to submit its observations during the oral procedure in the light of the Report for the Hearing, it was subsequently invited, by decision of 5 April 2005, taken on the basis of Articles 49 and 64 of those rules, to submit a statement in intervention. Moreover, by decision of 4 May 2005, it was authorised to receive a copy of the application, the defence, the reply and the rejoinder. It is therefore apparent that, notwithstanding the fact that Eurocontrol intervened in the proceedings before the Court of First Instance after the expiry of the six-week period prescribed in Article 115(1) of those rules, it was ultimately permitted to participate in both the written and the oral procedure.

While, in accordance with Article 64 of the Rules of Procedure of the Court of First Instance, that court may, inter alia, by way of measures of organisation of procedure, invite the parties, including the intervener, to make written submissions on certain aspects of the dispute, that provision does not in any way contemplate the possibility that an intervener who has intervened in the proceedings after the aforementioned period should be invited to submit a statement in intervention or that he should be given access to the pleadings in the case, since such measures do not in any event correspond to the purpose of measures of organisation of procedure, as set out in Article 64(2) of those rules.

It follows that, by inviting Eurocontrol to submit a statement in intervention and authorising it to receive a copy of the pleadings in the case, the Court of First Instance failed to comply with the provisions in Article 116(6) of its Rules of Procedure and the judgment under appeal is, therefore, vitiated on account of a defect.

However, under Article 58 of the Statute of the Court of Justice, an appeal can succeed only if the breach of procedure committed by the Court of First Instance has adversely affected the appellant's interests. In the present case, Selex has failed to demonstrate that the breach on which it relies has adversely affected its interests. Moreover, there is absolutely no indication that that breach could have had any effect whatsoever on the outcome of the proceedings.

As a consequence, the plea in question cannot succeed.

1.2.4.1.2. The second and third pleas, alleging infringement of Article 48(2) of the Rules of Procedure of the Court of First Instance

By its second plea, Selex submits that the Court of First Instance infringed Article 48(2) of its Rules of Procedure by distorting in a serious and manifest fashion the matters of fact which led it to reject as inadmissible the new pleas which the appellant introduced on the basis of the content of the letter of 3 November 1998 lodged by the Commission in the course of the proceedings. It maintains that, the Court of First Instance distorted the content of a letter of 12 November 1998 addressed by the Commission to the appellant, which did not make any reference at all to the letter of 3 November 1998, in order to assert that there was no justification for its submission that it was only as a result of reading the letter from the Director of Eurocontrol of 2 July 1999 annexed to the defence that it had become aware of the fact that the letter of 3 November 1998 was not merely a cover note accompanying the dispatch of the complaint but also contained an analysis of the complaint signed by two Directors-General.

By its third plea, Selex complains that the Court of First Instance rejected its new pleas without taking account of the Commission's conduct during the administrative procedure and the procedure before the Court of First Instance, even though the introduction of the new pleas was the result of the Commission's refusal dutifully to produce all relevant documents, in particular the letter of 3 November 1998. The Court of First Instance therefore interpreted and applied Article 48(2) of its Rules of Procedure restrictively.

However, it is clear from reading the letter of 12 November 1998 referred to above that the Commission informed the appellant in that letter that, further to its complaint and a letter of 29 September 1998 from the appellant, it had assessed the legal and economic aspects raised in the complaint and, without prejudice to the application of Community competition rules, contact had been made with Eurocontrol in order to invite it to submit its comments on the facts and conclusions set out in the complaint. That letter stated that, by letter signed by two Directors-General, namely those of the Directorate-General for Competition and the Directorate-General for Transport, the Commission had drawn Eurocontrol's attention to certain aspects of its standardisation policy and that Eurocontrol had, in particular, been invited to define, in conjunction with Commission staff, a neutral and consistent approach to its relationships with undertakings.

While its letter of 12 November 1998 does not specify the date of the letter sent to Eurocontrol or refer to the contact made with that organisation, so that the appellant could

not have been aware as a result of reading it that what was being referred to was the letter of 3 November 1998 and, while the letter of 12 November 1998 refers only to Eurocontrol's technical standardisation activity, it is none the less abundantly clear from that letter that, after assessing the complaint, the Commission had invited Eurocontrol to submit its comments on all the matters referred to in the complaint and had informed it in that letter of certain analytical data.

Therefore, after referring in particular to various factors set out at paragraphs 35 to 37 of the judgment under appeal, the Court of First Instance concluded, without distorting the content of the letter of 12 November 1998 or any other matters of fact, that the appellant was not justified in submitting that it was only as a result of reading the letter of 2 July 1999 that it had been able to be aware of the fact that the letter sent by the Commission to Eurocontrol was not merely a cover note accompanying the dispatch of the complaint but that it also contained an analysis of its complaint signed by two Directors-General.

In the absence of matters of law or of fact which came to light in the course of the procedure, the Court of First Instance therefore correctly rejected as inadmissible, pursuant to Article 48(2) of its Rules of Procedure, the pleas in law introduced by the appellant by means of a document lodged at the Registry of the Court of First Instance on 27 April 2005, that is, after the closure of the written procedure. Moreover, in the absence of such matters, it cannot be maintained that the introduction of new pleas in the course of the proceedings was the result of a refusal or omission on the part of the Commission to communicate earlier the letters of 2 July 1999 and 3 November 1998 or any other document. Nor can the Court of First Instance be criticised for having applied Article 48(2) of its Rules of Procedure strictly, since the Rules of Procedure are mandatory. Both the second and third pleas must therefore be rejected.

1.2.4.1.3. The fourth plea, alleging infringement of Article 66(1) of the Rules of Procedure of the Court of First Instance

In its fourth plea, Selex submits that, by giving its decision not by way of order but only in the judgment under appeal on the request for measures of inquiry which it made in the application and in the document lodged on 27 April 2005, the Court of First Instance infringed Article 66(1) of its Rules of Procedure. It is sufficient to point out that that provision requires an order to be made to prescribe the measures of inquiry that the Court of First Instance considers appropriate but not to reject requests seeking an order for such measures, on which that court can therefore, in such a case, give a ruling in the final judgment

in the proceedings.[114] It follows that the fourth and last plea relating to the procedure before the Court of First Instance must also be rejected.

1.2.4.2. The plea alleging that Eurocontrol enjoys immunity

1.2.4.2.1. Whether the plea alleging immunity is inadmissible

Eurocontrol maintains that, contrary to the assessment made by the Court of First Instance, its plea claiming immunity does not constitute a new plea which alters the context of the dispute and it therefore complies with the fourth paragraph of Article 40 of the Statute of the Court of Justice and Article 116(3) of the Rules of Procedure of the Court of First Instance. It states, first of all, that it had already raised that plea in its observations on the complaint of 2 July 1999 and that the Commission itself referred to the principle of immunity in the contested decision. Next, it submits, in essence, that the plea of immunity and the discussion concerning its standing as an undertaking have the same purpose and are based on the same matters of law and of fact, since its immunity simply forms the basis of a further legal argument in addition to those put forward by the Commission in support of its submission that Article 82 EC does not apply to the activities in question and that the application should be dismissed.

However, as the Court of First Instance pointed out in the judgment under appeal, under Article 116(3) of the Rules of Procedure an intervener must accept the case as he finds it at the time of his intervention and, under the fourth paragraph of Article 40 of the Statute of the Court of Justice, the submissions made in an application to intervene are to be limited to supporting the submissions of one of the parties. According to established case-law, those provisions do not prevent an intervener from using arguments that are new or different to those used by the party it supports, provided the intervener seeks to support that party's submissions.[115]

In that regard, it should be borne in mind, first, that the Commission submitted before the Court of First Instance that Selex's action should be dismissed. Second, the contested decision concluded that Community law was applicable to Eurocontrol and rejected the

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[114] See, to that effect, the order of 12 January 2006 in Case C-162/05 P Entorn v Commission , paras 54-55.

[115] See Case 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authorithy [1961] ECR 1, and Case C-245/92 P Chemie Linz v Commission [1999] ECR I-4643, para 32.

complaint principally on the ground that the activities that were the subject of the complaint were not economic in nature, so that Eurocontrol could not be regarded as an undertaking for the purpose of Article 82 EC. The pleas put forward by the Commission before the Court of First Instance in support of its submission that Selex's action against that decision should be dismissed were based on the same grounds.

Accordingly, it is apparent that Eurocontrol's plea of immunity cannot be regarded as seeking to support the Commission's submissions since, in actual fact, that plea seeks a ruling that the activities of Eurocontrol are not subject to Community law and that that international organisation enjoys, in particular, immunity as regards investigations carried out by the Commission in competition matters. As the Advocate General observed at point 30 of her Opinion, acceptance of that plea would render the contested decision unlawful, which might lead to it being annulled but not to the action being dismissed, as the Commission contended it should be before the Court of First Instance.

The reasons set out above are sufficient to justify the conclusion arrived at by the Court of First Instance at paragraph 44 of the judgment under appeal that the plea raised by Eurocontrol was inadmissible in the light of the fourth paragraph of Article 40 of the Statute of the Court of Justice and Article 116(3) of the Rules of Procedure of the Court of First Instance.

1.2.4.2.2. Eurocontrol's submissions that its plea of immunity is a plea which must be considered by the Community judicature of its own motion and should be upheld by the Court in order to dismiss the appeal

Eurocontrol considers that the appellant's complaint should in any event have been rejected since, under international public law, its activities are not subject to Community law and, in particular, enjoy immunity as regards investigations carried out by any contracting party in relation to competition matters. It points out that both it and the European Commission are international organisations whose members are States which are, to some extent, dif ferent and operate within two separate independent legal systems, so that, on the basis of the general principle par in parem non habet imperium (an equal has no authority over an equal), the Community does not have the power to make it subject to its own rules.

The Community, which approved the protocol on accession to Eurocontrol by Council Decision 2004/636/EC of 29 April 2004 on the conclusion by the European Community of the Protocol on the accession of the European Community to the European Organisation

for the Safety of Air Navigation[116] and agreed with the other contracting parties to apply Articles 1 to 7 of the protocol on a provisional basis, must, in accordance with the principle of good faith recognised in Article 18 of the Vienna Convention of 23 May 1969 on the Law of Treaties, refrain from any act which could defeat the object and purpose of the 'Eurocontrol' International Convention on Cooperation for the Safety of Air Navigation signed in Brussels on 13 December 1960, as revised and consolidated by the Protocol of 27 June 1997 ('the Convention on the Safety of Air Navigation'). Moreover, the Community can exercise its powers only in accordance with the limits imposed by international public law.

Eurocontrol submits that the same conclusion follows from the customary rule of international public law under which inter-governmental organisations enjoy immunity, which confers absolute protection and, at the very least, protects the activities in question in the present proceedings, since those activities form an essential part of Eurocontrol's institutional objectives and are not, in any event, acts of a commercial nature. Eurcontrol points out that, if the Community had the right to undertake investigations in competition cases concerning the exercise of Eurocontrol's public powers, it could, in point of fact, determine unilaterally the manner in which Eurocontrol pursues its institutional activities, disregard the principles laid down in the Convention on the Safety of Air Navigation concerning decision making and infringe the rights of the other contracting parties.

Eurocontrol considers that the question of its immunity, set out in such terms, falls within the same category as that of fundamental questions of public policy which the Community judicature must raise of its own motion. At the hearing, it presented that question expressly from the angle that the Commission lacked competence to give a substantive view on the measures sought by the appellant. It should be noted that the Court held in SAT Fluggesellschaft that it had jurisdiction, under Article 234 EC, to rule on the interpretation of the Treaty provisions in a case involving a dispute before the national court between a private company and Eurocontrol concerning, inter alia, the application of Community competition rules. In that judgment, the Court held that the question whether the rules of Community law may be relied upon as against Eurocontrol is connected with the substance of the case and has no bearing on the jurisdiction of the Court.

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[116] OJ 2004 L 304, p. 209.

Since the Commission is required under Article 211 EC to ensure that the provisions of the Treaty are applied, it also acted within its powers in examining Selex's complaint and rejecting it by taking the view that Article 82 EC was not applicable to Eurocontrol. Accordingly, there is no need for the Court to examine of its own motion the submissions made by Eurocontrol regarding its immunity.

1.2.4.3. The pleas relating to the substantive merits

As regards the substantive merits, Selex raises a number of pleas alleging errors of law made by the Court of First Instance relating to the applicability of Article 82 EC to the activities of Eurocontrol at issue, namely the activities of assisting the national administrations, technical standardisation and research and development, and to the infringement of that provision. The Commission contends that the appeal should be dismissed but seeks an amendment of the grounds of the judgment under appeal as regards the first two activities.

1.2.4.3.1. The pleas relating to the applicability of Article 82 EC to the activity of assisting the national administrations and alleging infringement of that provision

With regard to the assistance provided by Eurocontrol to the national administrations, Selex puts forward five pleas in law in support of its appeal, the first of which alleges distortion of the content of the contested decision, the second and third that the reasoning is contradictory, the fourth infringement of Community case-law on the limits of judicial review and the fifth manifest error of assessment as regards the infringement of Article 82 EC. Taking the view that the Court of First Instance erred in law by regarding the activity as an economic one, the Commission seeks an amendment of the grounds of the judgment under appeal, which would render the examination of the grounds of appeal nugatory, and, in the alternative, submits that those grounds should be rejected.

Clearly, if such an error in law had been made, the very premiss underlying the reasons on which the judgment under appeal is based, which are criticised in the five grounds of appeal under consideration, would be undermined. In that case, there would be absolutely no basis for that reasoning and the five grounds of appeal in question would therefore be redundant.

It follows that the Court cannot rule on the five pleas in question without considering whether or not the reasoning which led the Court of First Instance to consider that the assistance provided by Eurocontrol to the national administrations was to be regarded as an economic activity was incorrect. It should be borne in mind in this regard, as the Court of

First Instance observed at paragraph 87 of the judgment under appeal, that any activity consisting in offering goods or services on a given market is an economic activity.[117]

It should also be borne in mind that, according to the case-law of the Court of Justice, activities which fall within the exercise of public powers are not of an economic nature justifying the application of the Treaty rules of competition.[118]

In SAT Fluggesellschaft , the Court, while not specifically ruling on Eurocontrol's activity of assisting the national administrations, considered at paragraph 30 of that judgment that, taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space, which are typically those of a public authority and are not of an economic nature. The Court therefore held that Articles 86 and 90 of the Treaty (now Articles 82 EC and 86 EC) must be interpreted as meaning that an international organisation such as Eurocontrol is not an undertaking for the purposes of those provisions.

Contrary to what Selex maintains, that conclusion also applies with regard to the assistance which Eurocontrol provides to the national administrations, when so requested by them, in connection with tendering procedures carried out by those administrations for the acquisition, in particular, of equipment and systems in the field of air traffic management. It is apparent from Article 1 of the Convention on the Safety of Air Navigation that, in order to achieve harmonisation and integration with the aim of establishing a uniform European air traffic management system, the purpose of Eurocontrol is to strengthen cooperation among the contracting parties and to develop their joint activities in the field of air navigation, making due allowance for defence needs and providing maximum freedom for all airspace users consistent with the required level of safety.

To that end, under Article 1(e), (f) and (h) of that convention, the functions of Eurocontrol are, inter alia, to adopt and apply common standards and specifications, to harmonise air traffic services regulations and to encourage common procurement of air traffic systems and facilities. Article 2(2)(a) of the Convention on the Safety of Air Navigation provides that

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[117] Case 118/85 Commission v Italy [1987] ECR 2599, para 7; Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451, para 75; and Case C-49/07 MOTOE [2008] ECR I-0000, para 22.

[118] See, to that effect, Case 107/84 Commission v Germany [1985] ECR 2655, paras 14-15; SAT Fluggesellschaft , para 30; and MOTOE , para 24.

Eurocontrol may, at the request of one or more contracting parties and on the basis of a special agreement or agreements between it and the contracting parties concerned, assist such contracting parties in the planning, specification and setting up of air traffic systems and services.

It can be inferred from the Convention on the Safety of Air Navigation that the activity of providing assistance is one of the instruments of cooperation entrusted to Eurocontrol by that convention and plays a direct role in the attainment of the objective of technical harmonisation and integration in the field of air traffic with a view to contributing to the maintenance of and improvement in the safety of air navigation. That activity takes the form, inter alia, of providing assistance to the national administrations in the implementation of tendering procedures for the acquisition of air traffic management systems or equipment and is intended to ensure that the common technical specifications and standards drawn up and adopted by Eurocontrol for the purpose of achieving a harmonised European air traffic management system are included in the tendering specifications for those procedures. It is therefore closely linked to the task of technical standardisation entrusted to Eurocontrol by the contracting parties in the context of cooperation among States with a view to maintaining and developing the safety of air navigation and is thus connected with the exercise of public powers.

The Court of First Instance therefore made an assessment that was erroneous in law in finding that the activity of assisting the national administrations was separable from Eurocontrol's tasks of air space management and development of air safety by considering that that activity had an indirect relationship with air navigation safety, on the ground that the assistance provided by Eurocontrol covered only technical specifications in the implementation of tendering procedures and therefore affected air navigation safety only as a result of those procedures.

The other grounds set out in the judgment under appeal in that connection, to the effect that Eurocontrol provides assistance to the national administrations only on their request and the activity is therefore not essential or indispensable to ensuring the safety of air navigation, are not capable of demonstrating that the activity in question is not connected with the exercise of public powers.

The fact that the assistance provided by Eurocontrol is optional and that, as the case may be, only certain Member States have recourse to it cannot preclude such a connection or alter the nature of the activity. Moreover, in order for there to be a connection with the exercise

of public powers, it is not necessary for the activity concerned to be essential or indispensable to ensuring the safety of air navigation, since what matters is that the activity is connected with the maintenance and development of air navigation safety, which constitute public powers.

It follows from all the foregoing considerations that the Court of First Instance erred in law by regarding Eurocontrol's activity of assisting the national administrations as an economic activity and, as a consequence, on the basis of grounds that were erroneous in law, considering that Eurocontrol was, in the exercise of that activity, an undertaking within the meaning of Article 82 EC. Consequently, it erred in upholding, to that extent, the first plea in law expounded before it by the appellant alleging a manifest error of assessment as to the applicability of Article 82 EC to Eurocontrol.

However, it must be borne in mind that, if the grounds of a judgment of the Court of First Instance disclose an infringement of Community law but its operative part is shown to be well founded on other legal grounds, the appeal must be dismissed.[119] In the present case, it is apparent from the grounds set out at paragraphs 72 to 79 above that Eurocontrol's activity of assisting the national administrations is connected with the exercise of public powers and that, in any event, it is not in itself economic in nature, so that, in carrying out that activity, the organisation is not an undertaking within the meaning of Article 82 EC. The contested decision is not, therefore, vitiated by any error in that regard. It follows that the operative part of the judgment under appeal, which dismissed the action, remains well founded in law and, accordingly, the fact that there is an error in law in the grounds of the judgment under appeal does not mean that it must be set aside.

The five pleas put forward by Selex relate to the grounds of the judgment under appeal by which the Court of First Instance, after concluding that Eurocontrol's activity of assisting the national administrations was an economic activity and Eurocontrol was therefore, in the exercise of that activity, an undertaking within the meaning of Article 82 EC, rejected the second plea relied on by the appellant in support of its action, alleging a manifest error of assessment on the part of the Commission as to the existence of an infringement of Article 82 EC. It follows from the reasons set out above that, since Eurocontrol was not, in the

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[119] See, Case C-30/91 P Lestelle v Commission [1992] ECR I-3755, para 28; Case C-210/98 P Salzgitter v Commission [2000] ECR I-5843, para 58; and Case C-312/00 P Commission v Camar and Tico [2002] ECR I-11355, para 57.

exercise of its activity of assisting the national administrations, an undertaking within the meaning of Article 82 EC, that provision is not applicable to that activity. Therefore, the five pleas put forward by Selex criticising the grounds of the judgment under appeal relating to the alleged infringement of Article 82 EC must be rejected as they are redundant.

1.2.4.3.2. The pleas relating to the applicability of Article 82 EC to the activity of technical standardisation

With regard to the activity of technical standardisation exercised by Eurocontrol, Selex relies on four grounds in support of its appeal, alleging distortion of the content of the contested decision, the adoption of a concept of economic activity that is at variance with that established in Community case-law, misapplication of the case-law on social benefits and breach of the obligation to state adequate grounds. Taking the view that the distinction made in the judgment under appeal between the activity of adopting technical standards, which forms part of the task of managing air space and developing air safety, and that of the preparation and production of such standards, which does not form part of that task, was incorrect, the Commission seeks an amendment of the grounds on that point and, as to the remainder, contends that the grounds of the appeal should be dismissed.

Clearly, if such an error had been made, the very premiss underlying some of the reasons on which the judgment under appeal is based, which are criticised in the plea alleging that a concept of economic activity was adopted that is at variance with that established in Community case-law, would be undermined. In such a case, there would be absolutely no basis for that reasoning and the plea in question would therefore be redundant.

In those circumstances, the Court cannot rule on the plea in question without considering whether or not the reasoning which led the Court of First Instance to consider, in essence, that, unlike the activity of adopting technical standards, that of preparing and producing such standards was separable from the task of air space management and development of air safety, so that it could be regarded as an economic activity, was incorrect.

In order to draw the distinction complained of, the Court of First Instance first of all stated that the adoption by the Council of Eurocontrol of standards drawn up by the executive organ of that organisation is a legislative activity, since the Council of Eurocontrol is made up of directors of the civil aviation administration of each contracting Member State, appointed by their respective States for the purpose of adopting technical specifications which will be binding in all those States. According to the grounds of the judgment under appeal, that activity is directly connected with the exercise by those States of their powers of

public authority, Eurocontrol's role thus being akin to that of a minister who, at national level, prepares legislative or regulatory measures which are then adopted by the government. This activity therefore falls within the public tasks of Eurocontrol.

The Court of First Instance then stated, at paragraph 60 of the judgment under appeal, that the preparation and production of technical standards by Eurocontrol could, conversely, be separated from its tasks of managing air space and developing air safety. As justification for that assessment, it considered that the arguments advanced by the Commission to prove that Eurocontrol's standardisation activities were connected with that organisation's public service mission related, in fact, only to the adoption of those standards and not to the production of them, since the need to adopt standards at international level does not necessarily mean that the body which sets those standards must also be the one which subsequently adopts them.

However, Article 2(1)(f) of the Convention on the Safety of Air Navigation provides that Eurocontrol is responsible for developing, adopting and keeping under review common standards, specifications and practices for air traffic management systems and services. It is therefore clear that the contracting States entrusted Eurocontrol with both the preparation and production of standards and with their adoption, without separating those functions.

Moreover, the preparation and production of technical standards plays a direct role in the attainment of Eurocontrol's objective, defined in Article 1 of the Convention on the Safety of Air Navigation, which is to achieve harmonisation and integration with the aim of establishing a uniform European air traffic management system. Those activities form an integral part of the task of technical standardisation entrusted to Eurocontrol by the contracting parties in the context of cooperation among States with a view to maintaining and developing the safety of air navigation, which constitute public powers.

It follows that the judgment under appeal is vitiated by an error in law in that it states that the preparation and production of technical standards by Eurocontrol can be separated from its task of managing air space and developing air safety. However, that error does not affect the Court of First Instance's conclusion, which is based on other grounds, that the Commission did not make a manifest error of assessment in taking the view that Eurocontrol's technical standardisation activities were not economic activities and that the competition rules of the Treaty did not apply therefore to them. It must therefore be held once again that the fact that there is an error of law in the grounds of the judgment under appeal does not mean that that judgment must be set aside.

1.2.4.3.2.1. The plea alleging that a concept of economic activity was adopted that is at variance with that established in Community case-law

Selex states, in support of this plea, that the Court of First Instance's assessment that it had failed to show that there was a market for technical standardisation services has no bearing on the assessment as to whether that is an economic activity and is inaccurate, since, in the contested decision, the Commission accepted its proposed definition of the market in question. It submits that, contrary to the finding of the Court of First Instance, Eurocontrol does indeed offer to the States an independent service for the production of technical standards. In any event, the fact that the activity in question does not entail offering goods or services on a given market is irrelevant in the light of the case-law and the Commission's practice. What matters is that the activity may be regarded intrinsically and objectively as an economic activity. Moreover, the grounds set out at paragraph 61 of the judgment under appeal, by which the Court of First Instance held that the activity of producing standards was not an economic activity on the basis that those standards are subsequently adopted by the Council of Eurocontrol, contradict the grounds set out at paragraphs 59 and 60 of that judgment, by which that court made a distinction between the production of technical standards and their adoption.

It must be pointed out that it is apparent from the reasons given at paragraphs 91 and 92 above that Eurocontrol's technical standardisation activity, as a whole, is connected with the exercise of public powers and, consequently, is not economic in nature. It follows that the plea under consideration, by which Selex criticises the grounds of the judgment under appeal which led the Court of First Instance to conclude that the appellant had failed to demonstrate that the activity of technical standardisation consisted in offering goods or services on a given market, is redundant.

1.2.4.3.2.2. The plea alleging distortion of the content of the contested decision

By this plea, Selex maintains that the contested decision was based on the double finding that Eurocontrol was not an undertaking and that, in any event, the conduct complained of was not contrary to Article 82 EC, the Court of First Instance distorted the content of that decision, which is based solely on the assessment of the economic nature of the activity in question and does not contain any assessment as to whether there was abuse of a dominant position. What the Court of First Instance in fact did was to reproduce a stylistic formula used by the Commission, without considering whether such a formula contained even a basic

statement of reasons, and substituted its own reasoning for that which had in fact been adopted by the Commission.

It is sufficient to state, in that regard, that this plea is invalid, since the Court of First Instance rejected the action on the ground that the Treaty rules on competition were not applicable to Eurocontrol's technical standardisation activity and it did not, therefore, consider the second plea put forward by the appellant, alleging a manifest error of assessment as to whether Eurocontrol infringed Article 82 EC.

The plea in question must, therefore, be rejected.

1.2.4.3.2.3. The plea alleging misapplication of the Community case-law on social benefits

By this plea, Selex submits that the Court of First Instance wrongly rejected its argument that the reasoning employed in FENIN v Commission could not be applied to the present case, in which there is no element of solidarity present in the activity in question. However, according to the case-law, that element may be decisive, depending on the extent to which it is present, for the purpose of determining whether the activity concerned is that of an undertaking. However, first of all, the Court of First Instance did not err in law when it stated that it would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put and that the nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.[120] The Court of First Instance correctly concluded from this that the fact that technical standardisation is not an economic activity means that the acquisition of prototypes in connection with that standardisation is not an economic activity either.

Secondly, the Court of First Instance was also fully entitled to reject the appellant's argument that that reasoning could not be transposed to the present case. That reasoning can obviously be applied to activities other than those that are social in nature or are based on solidarity, since those factors do not constitute conditions for the purpose of determining that an activity is not of an economic nature but are simply factors to be taken into account, where appropriate, for the purpose of categorising an activity.

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[120] See Case C-205/03 P FENIN v Commission [2006] ECR I-6295, para 26.

It follows that the plea in question must be rejected.

1.2.4.3.2.4. The plea alleging breach of the obligation to state adequate grounds

Selex complains that adequate grounds are not given as regards the determination of the standardisation market. It observes that the Court of First Instance had available to it a definition of the market in question, proposed by the appellant and not challenged by the Commission in the contested decision, but disregarded that definition without providing any arguments in support of its own different assessment and without referring to the technical and legal aspects of the issue set out by the parties. It must be pointed out that, contrary to what Selex maintains, the Commission did not, in the contested decision, express a view on the definition of the market that would be pertinent but it did consider, as it subsequently also maintained before the Court of First Instance, that the activity of technical standardisation was not an economic one. Reaching the same conclusion, the Court of First Instance set out the grounds which led it to consider that the appellant had failed to show that the activity of technical standardisation consisted in offering goods or services on a given market.

The Court of First Instance was thus able, without there being any need to set out all the technical aspects and the arguments put forward by the parties, to give sufficient reasons for its conclusion, enabling the parties to be apprised of those reasons and the Court to exercise its power of review and it therefore follows that the plea must be rejected.

1.2.4.3.3. The pleas relating to the applicability of Article 82 EC to the activity of research and development

With regard to Eurocontrol's research and development activities, Selex relies on three pleas in support of its appeal, alleging distortion of the content of the contested decision, the adoption of a concept of economic activity which is at variance with that established in Community case-law and distortion of the evidence produced by it concerning the economic nature of the management of the regime of intellectual property rights.

1.2.4.3.3.1. The plea alleging distortion of the content of the contested decision

By this plea, Selex submits that the judgment under appeal manifestly distorts the content of the contested decision in so far as it states that there is no basis in that decision for the assertion that the Commission did not dispute the economic nature of the acquisition of prototypes and the management of intellectual property rights, whereas a simple reading of the decision shows that the Commission never disputed that point but simply disputed the

existence of an abuse of a dominant position. The Court of First Instance therefore ascribed to the contested decision a content that is not borne out by the facts and substituted its own reasoning for that in the decision.

It is sufficient to state that there is no basis for this plea, since the Commission expressly stated the contested decision that it considered Eurocontrol's activities that were the subject of the complaint not to be of an economic nature. Even if that plea had in fact been directed at a lack of reasoning in the contested decision, as the Commission observes, it is inadmissible since it was raised for the first time at the appeal stage.

That plea must therefore be rejected.

1.2.4.3.3.2. The plea alleging that a concept of economic activity was adopted that is at variance with that established in Community case-law

By this plea, Selex criticises, first, what is stated at paragraph 76 of the judgment under appeal, namely that the acquisition of prototypes is an activity which is subsidiary to their development, which is carried out by third parties. It points out that the activity in question is indeed that of acquiring prototypes, which precedes the definition of technical specifications, and it is therefore of little consequence that the development of prototypes is carried out by third parties.

It is clearly not on that ground that the Court of First Instance held that the Commission did not make a manifest error of assessment when it took the view that the research and development activity financed by Eurocontrol was not an economic activity and that the rules on competition were not applicable to it. Indeed, it is apparent from paragraph 75 of the judgment under appeal that the Court of First Instance considered that the acquisition of prototypes in the context of that activity and the related management of intellectual property rights did not make that activity an economic one, since the acquisition did not involve the offer of goods or services on a given market. Moreover, for the reasons set out at paragraph 102 above, that analysis is untainted by errors of law.

Next, Selex criticises the judgment under appeal for stating that intellectual property rights were not acquired for the purpose of their commercial exploitation and that the licences were granted at no cost. Those assertions, even if they were true, are in conflict with the case-law which states that the fact that an entity does not seek to make a profit is irrelevant for the purpose of determining whether it is an undertaking.

Contrary to those submissions, it is apparent from the case-law that the fact that a body is non-profit-making is a relevant factor for the purpose of determining whether or not an activity is of an economic nature but it is not sufficient of itself.[121]

Accordingly, the Court of First Instance did not err in law when, after pointing out that, when assessing whether a given activity is an economic activity, the absence of remuneration is only one indication among several others and cannot by itself exclude the possibility that the activity in question is economic in nature, it considered that the fact that Eurocontrol granted licences relating to the prototypes at no cost indicated that the management of intellectual property rights was not an economic activity, an indication that was also supported by other evidence.

Lastly, according to Selex, it was contrary to the case-law to state, at paragraph 77 of the judgment under appeal, that the management of intellectual property rights is ancillary to the promotion of technical development, forming part of the aims of Eurocontrol's public service tasks and not being pursued in its own interest, separable from those aims, which excludes the possibility that the activity in question is economic in nature. Selex submits, first, referring to the judgment in Enirisorse , that it has already been held that the task of developing new technologies may be economic in nature and, second, referring to that judgment and to the judgment in Case C-475/99 Ambulanz Glöckner [2001] ECR I-8089, paragraph 21, that the fact that an operator may have public service obligations does not prevent the activity in question from being regarded as an economic activity.

On that point, it must be noted that the grounds of the judgment under appeal that are the subject of criticism do not in any way preclude the possibility that technological development may be an economic activity and nor do they preclude the possibility that an entity which has public service obligations can pursue an activity of that nature. The Court of First Instance simply assessed the factors specific to the case and, without erring in law or falling foul of the case-law invoked, deduced from the fact that no charge was made for the management of intellectual property rights and the fact that Eurocontrol's mission was pursued purely in the interests of public service – the activity forming part of that mission and being ancillary to that of promoting technical development – that the activity was not economic in nature. Since there is no foundation for any of the arguments put forward, this plea must also be rejected.

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[121] See, inter alia, to that effect, Case C-244/94 Fédération française des sociétés d'assurance and Others [1995] ECR I-4013, para 21; Case C-67/96 Albany [1999] ECR I-5751, para 85; and Case C-237/04 Enirisorse [2006] ECR I-2843, para 31.

1.2.4.3.3.3. The plea alleging distortion of the evidence produced by the appellant concerning the economic nature of the management of the regime of intellectual property rights

By this plea, Selex complains that the Court of First Instance distorted assertions it made at the hearing concerning remuneration received by Eurocontrol when that court stated that those assertions were based on an internal Eurocontrol document entitled 'ARTAS Intellectual Property Rights and Industrial Policy', dated 23 April 1997, and sought to demonstrate that Eurocontrol received payment for the management of the licences. In point of fact, it referred to that document in its application simply to highlight the variety of roles played by Eurocontrol and the contradiction that exists between the system of managing intellectual property rights established by Eurocontrol and the content of that document. On the other hand, at the hearing, it referred to the most recent public version of that document, entitled 'ARTAS Industrial Policy', simply to point out that it had become obvious that the activity in question was an economic one. Accordingly, it submits that the Court of First Instance ascribed to its application a content that is not borne out by the facts.

It is sufficient to observe in that regard that, if the Court of First Instance understood that the appellant's assertion that the licences granted by Eurocontrol were not free of charge was based on the document referred to in its application and not on the document mentioned for the first time at the hearing, that does not in any way affect its assessment that those licences are free of charge or, ultimately, the conclusion it arrived at as a result of its examination of all the evidence relating to research and development.

The plea in question must therefore be rejected.

As a result of all the foregoing considerations, the appeal must be rejected.

2. Costs

Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs to be awarded against Selex and the latter has been unsuccessful in its appeal, Selex must be ordered to pay its own costs and those incurred by the Commission.

Under the first subparagraph of Article 69(3) of those rules, which also applies to appeal proceedings, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. In the present case, the Court has

decided that Selex must be ordered to pay half the costs incurred by Eurocontrol, which must therefore bear half its own costs.

3. Operative part

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the appeal;

2. Orders SELEX Sistemi Integrati SpA to pay, in addition to its own costs, those incurred by the Commission of the European Communities and half the costs incurred by the European Organisation for the Safety of Air Navigation (Eurocontrol);

3. Orders the European Organisation for the Safety of Air Navigation to pay half its own costs.

G. Slovak Telekom, a.s. v European Commission

Case C-165/19P

ECLI:EU:C:2021:239

Decided Mar 25, 2021

1. Judgment

By its appeal, Slovak Telekom a.s. requests, first, that the Court set aside, in whole or in part, the judgment of the General Court of the European Union of 13 December 2018, Slovak Telekom v Commission,[122] by which the General Court partially dismissed its action seeking the annulment of Commission Decision C(2014) 7465 final of 15 October 2014 relating to proceedings under Article 102 [TFEU] and Article 54 of the EEA Agreement (Case AT.39523 – Slovak Telekom), as rectified by Commission Decision C(2014) 10119 final of 16 December 2014 and by Commission Decision C(2015) 2484 final of 17 April 2015 ('the decision at issue'), second, the annulment, in whole or in part, of the decision at issue, and, third, in the alternative, the annulment or the reduction of the fine imposed on the appellant by that decision.

2. Legal Context

2.1. Regulation EC No 2887/2000

Recitals 3, 6 and 7 of Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop[123] stated:

> 'The "local loop" is the physical twisted metallic pair circuit in the fixed public telephone network connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility. As noted in the [European] Commission's Fifth Report on the implementation of the telecommunications regulatory package, the local access network remains one of the least competitive segments of the liberalised telecommunications market.

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[122] T-851/14, EU:T:2018:929.

[123] OJ 2000 L 336, p. 4.

New entrants do not have widespread alternative network infrastructures and are unable, with traditional technologies, to match the economies of scale and the coverage of operators designated as having significant market power in the fixed public telephone network market. This results from the fact that these operators rolled out their metallic local access infrastructures over significant periods of time protected by exclusive rights and were able to fund investment costs through monopoly rents.

It would not be economically viable for new entrants to duplicate the incumbent's metallic local access infrastructure in its entirety within a reasonable time. Alternative infrastructures such as cable television, satellite, wireless local loops do not generally offer the same functionality or ubiquity for the time being, though situations in Member States may differ.

Unbundled access to the local loop allows new entrants to compete with notified operators in offering high bit-rate data transmission services for continuous internet access and for multimedia applications based on digital subscriber line (DSL) technology as well as voice telephony services. A reasonable request for unbundled access implies that the access is necessary for the provision of the services of the beneficiary, and that refusal of the request would prevent, restrict or distort competition in this sector.'

Article 1 of that regulation, entitled 'Aim and scope', provided:

'This Regulation aims at intensifying competition and stimulating technological innovation on the local access market, through the setting of harmonised conditions for unbundled access to the local loop, to foster the competitive provision of a wide range of electronic communications services.'

Article 2 of that regulation contained the following definitions:

'(a) "notified operator" means operators of fixed public telephone networks that have been designated by their national regulatory authority as having significant market power in the provision of fixed public telephone networks ...

...

(c) "local loop" means the physical twisted metallic pair circuit connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network.'

Article 3 of that regulation read as follows:

> 'Notified operators shall publish from 31 December 2000, and keep updated, a reference offer for unbundled access to their local loops and related facilities, which shall include at least the items listed in the Annex. The offer shall be sufficiently unbundled so that the beneficiary does not have to pay for network elements or facilities which are not necessary for the supply of its services, and shall contain a description of the components of the offer, associated terms and conditions, including charges.
>
> Notified operators shall from 31 December 2000 meet reasonable requests from beneficiaries for unbundled access to their local loops and related facilities, under transparent, fair and non-discriminatory conditions. Requests shall only be refused on the basis of objective criteria, relating to technical feasibility or the need to maintain network integrity. ... Notified operators shall provide beneficiaries with facilities equivalent to those provided for their own services or to their associated companies, and with the same conditions and time-scales…'

2.2. Directive 2002/21/EC

Article 8 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ('Framework Directive') (OJ 2002 L 108, p. 33), as amended by Directive 2009/140, provides:

> The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:
>
> …
>
> (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector, including the transmission of content;
>
> ...

> The national regulatory authorities shall, in pursuit of the policy objectives referred to in paragraphs 2, 3 and 4, apply objective, transparent, non-discriminatory and proportionate regulatory principles by, inter alia:
>
> > (f) imposing *ex ante* regulatory obligations only where there is no effective and sustainable competition and relaxing or lifting such obligations as soon as that condition is fulfilled.'

3. Background to the Dispute

The background to the dispute, as set out in paragraphs 1 to 53 of the judgment under appeal, may be summarised as follows.

The appellant is the incumbent telecommunications operator in Slovakia. During the period between 12 August 2005 and 31 December 2010, Deutsche Telekom AG ('DT'), the incumbent telecommunications operator in Germany and the company at the helm of the Deutsche Telekom group, held a 51% shareholding in the appellant. The appellant, which enjoyed a legal monopoly on the Slovak telecommunications market until 2000, is the largest telecommunications operator and broadband provider in Slovakia. The appellant's copper and mobile networks cover almost the entire Slovak territory.

Following a market analysis, in 2005 the Slovak regulatory authority for telecommunications ('the TUSR') designated the appellant as an operator with significant power on the wholesale market for unbundled access to the local loop within the meaning of Regulation No 2887/2000. Consequently, the TUSR imposed on the appellant, inter alia, the requirement to grant all reasonable and justified requests for unbundling of its local loop in order to enable alternative operators to use that loop with a view to offering their own services on the retail mass market for broadband internet access services at a fixed location in Slovakia. In order to make it possible to fulfil that obligation, the appellant published its reference unbundling offer which set out the contractual and technical conditions for access to its local loop.

Following an investigation of the Commission, opened on its own initiative, into, inter alia, the conditions for unbundled access to the appellant's local loop, a statement of objections sent to the appellant and DT on 7 and 8 May 2012, respectively, a proposal for commitments and various meetings and exchanges of correspondence, the Commission adopted the decision at issue on 15 October 2014. By that decision, the Commission found that the undertaking comprising the

appellant and DT had committed a single and continuous infringement of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area of 2 May 1992,[124] concerning broadband internet access services in Slovakia between 12 August 2005 and 31 December 2010.

In particular, it stated that the appellant's local loop network could be used to supply broadband internet access services after its lines had been unbundled and that it covered 75.7% of all Slovak households between 2005 and 2010. However, during that same period, only very few of the appellant's local loops were unbundled, as from 18 December 2009, and used only by a single alternative operator to provide retail broadband services to undertakings. According to the Commission, the infringement committed by the undertaking comprising the appellant and DT consisted in, first, withholding from alternative operators network information necessary for the unbundling of local loops, second, reducing the scope of the appellant's obligations regarding unbundled local loops, third, setting unfair terms and conditions in the appellant's reference unbundling offer regarding collocation, qualification, forecasting, repairs and bank guarantees, and fourth, applying unfair tariffs which did not allow a competitor as efficient as the appellant relying on wholesale access to the unbundled local loops of that operator to replicate the retail broadband services offered by that operator without incurring a loss.

By the decision at issue, the Commission imposed for that infringement, first, a fine of EUR 38 838 000 on the appellant and DT, jointly and severally, and second, a fine of EUR 31 070 000 on DT.

3.1. The procedure before the General Court and the judgment under appeal

By application lodged at the Registry of the General Court on 26 December 2014, the appellant brought an action seeking, primarily, the annulment of the decision at issue in so far as it concerned it and, in the alternative, the reduction of the fine which had been imposed on it. In support of its action, the appellant relied on five pleas in law alleging, first, manifest errors of assessment and of law in the application of Article 102 TFEU, second, infringement of its rights of defence as regards the assessment of the practice resulting in the margin squeeze, third, errors in the finding of the margin squeeze, fourth, manifest errors of assessment and of law by the Commission in finding that the appellant constituted a single undertaking with DT and that they were both liable for the

[124] OJ 1994 L 1, p. 3.

infringement in question and, fifth and in the alternative, errors in determining the amount of the fine.

By the judgment under appeal, the General Court rejected all the pleas put forward by the appellant, apart from the third plea in law which it upheld in part on the ground that the Commission had not provided proof that the appellant had engaged in the practice resulting in a margin squeeze between 12 August 2005 and 31 December 2005. The General Court thus partially annulled the decision at issue and set the amount of the fine for the payment of which DT and the appellant were held jointly and severally liable at EUR 38 061 963. It dismissed the action as to the remainder. In particular, by its first plea in law, which contained five complaints, the appellant, in the first and fifth complaints, took issue with the Commission for classifying as a refusal to supply access to its local loop, first, its withholding from alternative operators of information relating to its network, which was necessary for the unbundling of the local loop, second, its reduction of obligations relating to unbundling under the applicable regulatory framework and, third, its establishment of a number of unfair terms and conditions in its reference offer relating to unbundling, without having previously verified the indispensability of such access for the purposes of the judgment of 26 November 1998, *Bronner.*[125] The General Court rejected those complaints in paragraphs 107 to 129 of the judgment under appeal, stating, in essence, that the legislation relating to the telecommunications sector applicable in the case at hand acknowledged the need for access to the appellant's local loop in order to allow the emergence and development of effective competition in the Slovak market for high-speed internet services with the result that the Commission was no longer required to demonstrate that such access was indispensable.

By the second complaint of the first plea in law, the appellant claimed that, by failing to apply the conditions of the judgment in *Bronner*, the decision at issue was at odds with the guidance derived from the judgment of 9 September 2009, *Clearstream* v *Commission.*[126] The General Court rejected that complaint in paragraphs 138 to 140 of the judgment under appeal on the ground that the case before it was not comparable to the case which gave rise to that judgment.

By the third complaint of the first plea in law, the appellant claimed that if a constructive refusal to supply access were not subject to verification of indispensability, in accordance with the conditions

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[125] C-7/97, EU:C:1998:569.

[126] T-301/04, EU:T:2009:317.

laid down by the Court of Justice in the judgment in *Bronner*, it would be easier to establish a constructive refusal to supply access than an outright refusal to supply access. The General Court rejected that complaint on the ground that the gravity of an infringement was likely to depend on numerous factors independent of the explicit or implicit nature of that refusal, so that the appellant could not rely on the form of an infringement in order to assess its seriousness.

As regards the fourth complaint of the first plea in law, alleging errors of law and fact relating to the justifications put forward by the Commission with a view to derogating from the conditions of the judgment in *Bronner* on the ground that they do not apply where the network concerned has its historical origins in a State monopoly, the General Court rejected it in paragraphs 153 and 154 of the judgment under appeal, on the basis of settled case-law according to which the existence of a dominant position resulting from a legal monopoly must be taken into consideration in the context of the application of Article 102 TFEU.

By its second plea in law, the appellant claimed, inter alia, that its rights of defence had been infringed inasmuch as it had not been heard by the Commission regarding the methodology, principles and data used by the Commission in order to calculate the appellant's 'long run average incremental costs' ('LRAIC'), intended to establish to what extent the appellant had engaged in a margin squeeze. The General Court rejected that plea, holding, inter alia, that the Commission had duly communicated to the appellant its calculation method and principles and that it was not required to disclose its final calculations of margins before sending the decision at issue to the appellant.

By its third plea, the appellant claimed that the Commission's finding as regards the practice resulting in the margin squeeze was incorrect, in particular because of the failure to take into account the appellant's optimisation adjustments in the calculation of the LRAIC. The General Court rejected that plea, stating, in essence, that the rejection of the optimisation adjustments proposed by the appellant was justified inasmuch as taking those adjustments into account would have led, during the calculation of the margin squeeze, to the costs incurred by the appellant itself during the infringement period being incorrectly disregarded.

3.2. Forms of order sought

By its appeal, the appellant claims that the Court should:

– set aside the judgment under appeal, in whole or in part;

– annul the decision at issue, in whole or in part;

– in the alternative, annul or further reduce the fine imposed on it, and

– order the Commission to pay the costs of the present proceedings and of the proceedings before the General Court.

The Commission contends that the Court should:

– dismiss the appeal and

– order the appellant to pay the costs.

3.3. The appeal

The appellant raises three grounds in support of its appeal. The first ground of appeal alleges that the General Court erred in law in its classification of the restrictions imposed by the appellant on access to its local loop network as an abuse of a dominant position within the meaning of Article 102 TFEU. The second ground of appeal alleges infringement of its rights of defence in the assessment of a margin squeeze. The third ground of appeal alleges errors of law in the General Court's assessment of the existence of a margin squeeze.

In addition, the appellant requests that success by DT in its grounds of appeal in the related Case C-152/19 P, concerning the appeal brought by DT against the judgment of the General Court of 13 December 2018, *Deutsche Telekom* v *Commission*,[127] in which DT denies that it formed a single undertaking with the appellant, be extended to the appellant.

3.3.1. The first ground of appeal

- Arguments of the parties

By its first ground of appeal, which consists of five parts, the appellant claims that the General Court erred in law in holding that, in order to demonstrate that the appellant had abused its dominant position, within the meaning of Article 102 TFEU, in limiting access to its local loop network, the Commission was not required to prove that such access was indispensable to carrying on the business of the economic operators concerned, within the meaning of the judgment in

[127] T-827/14, EU:T:2018:930.

Bronner, because the appellant was already under a regulatory obligation to grant access to its local loop network.

By the first part of the first ground of appeal, the appellant submits that, by deciding, in paragraph 121 of the judgment under appeal, that the conditions of the judgment in *Bronner* did not apply in the case before it, the General Court wrongly failed to take account of the difference between the *ex post* review carried out under Article 102 TFEU, aimed at stopping abusive conduct, and that carried out *ex ante* by a regulatory authority in the telecommunications field, aimed at fostering specific forms of competition. Moreover, the markets in question are not identical. The regulatory access obligation relates to the indispensable nature of access to the wholesale market for unbundled access to the local loop, whereas the abuse found by the Commission relates to a much wider retail market than that for local loop services, in which it was not established that access to that loop was indispensable. Lastly, the appellant claims that the finding that breach of a regulatory obligation automatically constitutes an infringement of Article 102 TFEU is based on an incorrect interpretation of that provision, that interpretation being stricter and leading to the differentiated treatment of a dominant undertaking subject to a pre-existing regulatory condition.

By the second part of the same ground of appeal, the appellant claims that the General Court wrongly inferred from the judgment of 17 February 2011, *TeliaSonera Sverige*[128] that the conditions of the judgment in *Bronner* were not applicable in the present case. According to the appellant, the judgment in *TeliaSonera* did not concern a refusal to deal as in the present case, but a margin squeeze. Furthermore, the Court answered questions which do not arise in the present case.

By the third part of the first ground of appeal, the appellant submits that the General Court erred in law in paragraphs 138 and 139 of the judgment under appeal by holding that the judgment of 9 September 2009, *Clearstream* v *Commission*[129] was not relevant. According to the appellant, first, it does not follow from that latter judgment that the existence of a former State monopoly or a regulatory obligation would have made any difference to the General Court's analysis in that judgment. Second, that judgment is based on an *ex ante* regulatory condition, as in the present case. Third, in the case which gave rise to that judgment, Clearstream still held a monopoly at the time when it abused its dominant position, whereas the appellant's monopoly situation had ended five

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[128] C-52/09, EU:C:2011:83.

[129] T-301/04, EU:T:2009:317.

years before the alleged abuse began. Fourthly and lastly, the refusals of Clearstream and the appellant are similar.

By the fourth part of the first ground of appeal, the appellant submits that the General Court made an error of law, a manifest error or failed to state adequate reasons in finding, that a constructive refusal was not necessarily less serious than an actual refusal and that an assessment on a case-by-case basis was required. According to the appellant, there is no basis for the General Court's approach that, in order to be classified as abusive for the purposes of Article 102 TFEU, the constructive refusal at issue in the present case need not satisfy the conditions of the judgment in *Bronner*, whereas an explicit or outright refusal must satisfy those conditions. Such an approach would lead to more serious conduct being treated more favourably than less serious conduct.

By the fifth and last part of that ground of appeal, the appellant submits that the General Court erred in finding that the fact that it held a former State monopoly could justify the non-application of the conditions laid down in the judgment in *Bronner*. According to the appellant, that approach is not compatible with the guidance given in the judgment of 27 March 2012, *Post Danmark*,[130] is contrary to the obligation to take into account the conditions at the time of the alleged abuse, infringes the principles of legal certainty and non-discrimination and does not take into account investments which it made in its network.

The Commission submits, in essence, that the criteria of the judgment in *Bronner* did not apply in the case under consideration, given that the abuse of a dominant position in question in the case which gave rise to that judgment was different from that at issue in the present case.

- Findings of the Court

By its first ground of appeal, the appellant criticises in which the General Court upheld the merits of the decision at issue in that it was not for the Commission to establish that access to the appellant's local loop network was indispensable to alternative operators in order to classify as 'abusive' the practices of the appellant which that institution regarded as constituting a constructive refusal to supply in recital 365 of the decision at issue. Those practices consisted, first, in withholding from alternative operators network information necessary for the unbundling of local loops, second, reducing the scope of its obligations regarding unbundled local loops deriving from

[130] C-209/10, EU:C:2012:172.

the applicable regulatory framework, and third, setting several unfair terms and conditions in its reference unbundling offer ('the practices at issue').

In particular, the General Court found that given that the relevant regulatory framework applicable to telecommunications clearly acknowledged the need for access to the appellant's local loop, in order to allow the emergence and development of effective competition in the Slovak market for high-speed internet services, the demonstration, by the Commission, that such access was indeed indispensable for the purposes of the last condition set out in paragraph 41 of the judgment in *Bronner* was not required. It added, in essence that the conditions deriving from the judgment in *Bronner*, and more specifically the condition relating to the indispensability of a service or infrastructure belonging to a dominant undertaking, did not apply to practices other than a refusal of access, such as the practices at issue.

In order to assess whether those considerations are vitiated by an error of law, as asserted by the appellant, it is important to recall that Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, in so far as it may affect trade between Member States. A dominant undertaking therefore has a special responsibility not to allow its behaviour to impair genuine, undistorted competition in the internal market.[131]

In accordance with the Court's settled case-law, the concept of 'abuse of a dominant position', within the meaning of Article 102 TFEU, is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[132]

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[131] Judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, para 153 and the case-law cited.

[132] Judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, para 148 and the case-law cited.

The examination of the abusive nature of a dominant undertaking's practice pursuant to Article 102 TFEU must be carried out by taking into consideration all the specific circumstances of the case.[133]

As follows from paragraph 37 of the judgment in *Bronner*, the case which gave rise to that judgment concerned the question whether the refusal of the owner of the only nationwide home-delivery scheme in the territory of a Member State, which uses that scheme to distribute its own daily newspapers, to allow the publisher of a rival newspaper access to it constituted an abuse of a dominant position, within the meaning of Article 102 TFEU, on the ground that such refusal deprives that competitor of a means of distribution judged essential for the sale of its products.

In response to that question, the Court found, in paragraph 41 of that judgment, that for that refusal to have constituted an abuse of a dominant position, it would have been necessary not only that the refusal of the service comprised in home delivery were likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal were incapable of being objectively justified, but also that the service in itself were indispensable to carrying on that person's business, inasmuch as there was no actual or potential substitute in existence for that home-delivery scheme.

The imposition of those conditions was justified by the specific circumstances of that case which consisted in a refusal by a dominant undertaking to give a competitor access to infrastructure that it had developed for the needs of its own business, to the exclusion of any other conduct.

In that regard, as the Advocate General also noted, in essence, in points 68, 73 and 74 of his Opinion, a finding that a dominant undertaking abused its position due to a refusal to conclude a contract with a competitor has the consequence of forcing that undertaking to conclude a contract with that competitor. Such an obligation is especially detrimental to the freedom of contract and the right to property of the dominant undertaking, since an undertaking, even if dominant, remains,

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[133] See, to that effect, judgment in *TeliaSonera*, para 68; and judgments of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, para 68, and of 19 April 2018, *MEO – Serviços de Comunicações e Multimédia*, C-525/16, EU:C:2018:270, paras 27-28.

in principle, free to refuse to conclude contracts and to use the infrastructure it has developed for its own needs.[134]

Furthermore, while, in the short term, an undertaking being held liable for having abused its dominant position due to a refusal to conclude a contract with a competitor has the consequence of encouraging competition, by contrast, in the long term, it is generally favourable to the development of competition and in the interest of consumers to allow a company to reserve for its own use the facilities that it has developed for the needs of its business. If access to a production, purchasing or distribution facility were allowed too easily, there would be no incentive for competitors to develop competing facilities. In addition, a dominant undertaking would be less inclined to invest in efficient facilities if it could be bound, at the mere request of its competitors, to share with them the benefits deriving from its own investments.

Consequently, where a dominant undertaking refuses to give access to an infrastructure that it has developed for the needs of its own business, the decision to oblige that undertaking to grant that access cannot be justified, at a competition policy level, unless the dominant undertaking has a genuinely tight grip on the market concerned.

The application, to a particular case, of the conditions laid down by the Court of Justice in the judgment in *Bronner*, set out in paragraph 44 of the present judgment, and in particular the condition relating to the indispensability of the access to the dominant undertaking's infrastructure, allows the competent authority or national court to determine whether that undertaking has a genuinely tight grip on the market by virtue of that infrastructure. Thus, that undertaking may be forced to give a competitor access to an infrastructure that it has developed for the needs of its own business only where such access is indispensable to the business of such a competitor, namely where there is no actual or potential substitute for that infrastructure.

By contrast, where a dominant undertaking gives access to its infrastructure but makes that access, provision of services or sale of products subject to unfair conditions, the conditions laid down by the Court of Justice in paragraph 41 of the judgment in *Bronner* do not apply. It is true that where access to such an infrastructure – or service or input – is indispensable in order to allow competitors of the dominant undertaking to operate profitably in a downstream market, this increases the likelihood that unfair practices on that market will have at least potentially anticompetitive effects

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[134] See, by analogy, judgment of 5 October 1988, *Volvo*, 238/87, EU:C:1988:477, para 8.

and will constitute abuse within the meaning of Article 102 TFEU.[135] Nevertheless, as regards practices other than a refusal of access, the absence of such an indispensability is not in itself decisive for the purposes of the examination of potentially abusive practices on the part of a dominant undertaking.[136]

While such practices can constitute a form of abuse where they are able to give rise to at least potentially anticompetitive effects, or exclusionary effects, on the markets concerned, they cannot be equated to a simple refusal to allow a competitor access to the infrastructure, since the competent competition authority or national court will not have to force the dominant undertaking to give access to its infrastructure, as that access has already been granted. The measures that would be taken in such a context will thus be less detrimental to the freedom of contract of the dominant undertaking and to its right to property than forcing it to give access to its infrastructure where it has reserved that infrastructure for the needs of its own business.

To that effect, the Court of Justice has previously held, in paragraphs 75 and 96 of the judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*,[137] that the conditions laid down by the Court of Justice in paragraph 41 of the judgment in *Bronner*, and in particular the condition relating to the indispensability of the access, did not apply in the case of abuse in the form of a margin squeeze of competitor operators in a downstream market.

To the same effect, the Court of Justice held, in paragraph 58 of the judgment in *TeliaSonera*, in essence, that it cannot be required that the examination of the abusive nature of any type of conduct of a dominant undertaking towards its competitors be systematically carried out in the light of the conditions laid down by the Court of Justice in the judgment in *Bronner*, which concerned a refusal to provide a service. Therefore, the General Court was right to find that, in paragraph 58 of the judgment in *TeliaSonera*, the Court of Justice was not referring only to the particular form of abuse constituted by a margin squeeze of competitor operators in a downstream market when it assessed the practices to which the conditions of the judgment in *Bronner* did not apply.

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[135] See, to that effect, judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, para 234, and judgment in *TeliaSonera*, paras 70-71.

[136] See, to that effect, the judgment in *TeliaSonera*, para 72.

[137] C-295/12 P, EU:C:2014:2062.

In the present case, the appellant's situation was characterised in particular by the fact that it was subject to a telecommunications regulatory obligation, in accordance with which it was required to give access to its local loop network. Following the decision of 8 March 2005 of the TUSR, confirmed by the director of that authority on 14 June 2005, the appellant was required to grant, in its capacity as operator with significant market power, all alternative operators' reasonable and justified requests for unbundling of its local loop, in order to enable those operators, on that basis, to offer their own services on the retail mass market for broadband services at a fixed location in Slovakia.

Such an obligation meets the objectives of development of effective competition on the telecommunications markets laid down by the EU legislature. As indicated in recitals 3, 6 and 7 of Regulation No 2887/2000, the imposition of such an access obligation is justified by the fact that, first, as operators with significant market power were able, over significant periods of time, to roll out their local access networks protected by exclusive rights and fund investment costs through monopoly rents, it would not be economically viable for new entrants to duplicate the incumbent's local access infrastructure and, second, alternative infrastructures do not constitute a viable substitute for those local access networks. Unbundled access to the local loop would therefore be such as to allow new entrants to compete with operators with significant market power. It follows that, as the General Court recalled in paragraph 119 of the judgment under appeal, the access obligation imposed in the present case by the TUSR resulted from the intention to encourage the appellant and its competitors to invest and innovate, whilst ensuring that competition in the market is maintained.

That regulatory obligation applied to the appellant during the entire infringement period taken into account by the Commission in the decision at issue, or from 12 August 2005 until 31 December 2010. In addition to the fact that, pursuant to Article 8(5)(f) of Directive 2002/21, as amended by Directive 2009/140, the telecommunications regulatory authorities may impose such an access obligation only where there is no effective and sustainable competition and are required to relax or lift it as soon as that condition is fulfilled, the appellant has neither alleged nor demonstrated that it has disputed that it was subject to such an obligation during the infringement period. Moreover, the Commission stated the reasons for the existence of such an access obligation in section 5.1 of the decision at issue and noted, in recital 377 of that decision, that it had carried out its own *ex post* analysis of the markets in question to find that the situation on those markets had not significantly changed in that regard during the infringement period.

By analogy with the Court of Justice's findings in paragraph 224 of the judgment of 14 October 2010, *Deutsche Telekom* v *Commission*,[138] it should be considered that a regulatory obligation can be relevant for the assessment of abusive conduct, for the purposes of Article 102 TFEU, on the part of a dominant undertaking that is subject to sectoral rules. In the context of the present case, while the obligation imposed on the appellant to give access to the local loop cannot relieve the Commission of the requirement of establishing that there is abuse within the meaning of Article 102 TFEU, by taking account in particular of the applicable case-law, the imposition of that obligation has the consequence that, during the entire infringement period taken into account in the present case, the appellant could not and did not actually refuse to give access to its local loop network.

However, the appellant retained, during that period, decision-making autonomy, notwithstanding the abovementioned regulatory obligation, in respect of the conditions for such access. Apart from certain guiding principles, the mandatory content of the local loop unbundling reference offer, referred to in Article 3 of Regulation No 2887/2000, was not prescribed by the regulatory framework or by the decisions of the TUSR. It was in accordance with that decision-making autonomy that the appellant adopted the practices at issue. Nevertheless, as the practices at issue did not constitute refusal of access to the appellant's local loop but related to the conditions for such access the conditions set out by the Court of Justice in paragraph 41 of the judgment in *Bronner* did not apply in the present case.

Therefore, the General Court did not err in law when it considered, in paragraph 121 of the judgment under appeal, that the Commission was not required to demonstrate 'indispensability', for the purposes of the last condition set out in paragraph 41 of the judgment in *Bronner*, in order to find an abuse of a dominant position on the part of the appellant by virtue of the practices at issue. In those circumstances, the first ground of appeal must be rejected in its entirety, since it is based on a premiss that is erroneous in law.

3.3.2. The second ground of appeal

- Arguments of the parties

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[138] C-280/08 P, EU:C:2010:603.

By its second ground of appeal, the appellant submits that the General Court erred in failing to find that its rights of defence had been infringed on the ground that the methodology, principles and data used by the Commission at the stage of the statement of objections in order to determine the costs used to verify the existence of a margin squeeze were based on historical cost data from the appellant's internal cost reporting system, namely '*účelové členenie nákladov*' ('classification of specific costs'; 'UCN data'), whereas, in the decision at issue, they were based on the LRAIC, without the Commission having allowed the appellant to comment effectively on that subject.

Furthermore, the appellant claims that the Commission reversed the burden of proof, in so far as that institution asked the appellant to set out its principles, methodology and data relating to the determination of the LRAIC, although as of the outset it failed to provide its own principles, methodology and data. The fact that the Commission did not as of the outset have at its disposal its own cost model to establish the existence of a margin squeeze should have been recognised by the General Court as constituting an unlawful reversal of the burden of proof. In that regard, the appellant submits that the considerations set out in paragraphs 186 and 189 of the judgment under appeal, according to which, first, the appellant had the opportunity to respond to the statement of objections and, second, the Commission had relied, in that document, on the LRAIC, are irrelevant and incorrect respectively, since, at the date of the statement of objections, there were no data relating to the LRAIC.

Similarly, the appellant claims that the General Court was wrong to hold that the Commission did not put forward any new objections in the decision at issue with respect to the margin squeeze. The fact that, in both the statement of objections and in the decision at issue, the Commission considered, first, that a competitor as efficient as the appellant would face negative margins and, second, that the conclusion as to the negative margins did not change if certain other services were included as revenues, together with the fact that the infringement period upheld in the decision at issue was shorter than that referred to in the statement of objections, is irrelevant for the purpose of determining whether the appellant's rights of defence had been infringed on the ground that the methodology, principles and data taken into account in the statement of objections did not correspond to those upheld by the Commission in the decision at issue.

In addition, the appellant criticises paragraph 190 of the judgment under appeal on the ground that, contrary to what the General Court held, the network costs, the methodology and the principles applied by the Commission differ significantly at the respective stages of the statement of objections and the decision at issue. The appellant also submits that the General Court erred in

finding that its rights of defence had been respected because the Commission had responded to its arguments. The appellant's communication, in its response to the statement of objections or in the documents submitted in 2013, of results from new work carried out on the LRAIC is, in that regard, irrelevant, since before the adoption of the decision at issue, the Commission did not set out all the elements of its principles, methodology and data concerning the calculation of the LRAIC.

Finally, the appellant submits that the General Court also erred in law and distorted the facts and the evidence in paragraph 209 of the judgment under appeal by disregarding the relevance of the 'state-of-play meeting' of 16 September 2014, to which that paragraph refers. The disclosure by the Commission for the first time at that meeting of its preliminary calculations of the LRAIC is an acknowledgment on its part of its failure to communicate them previously and its obligation to do so. That disclosure at that stage of the procedure also shows that the Commission was committed to adopting a prohibition decision, so that the appellant could no longer be heard correctly at that stage.

The Commission contends that the second ground of appeal must be rejected since, first, it has not been shown that the General Court distorted the facts which it took into account and, second, the appellant's rights of defence were respected.

- Findings of the Court

It should be recalled that, in accordance with Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, appeals against decisions of the General Court are limited to points of law. It is settled case-law that the General Court has exclusive jurisdiction to find and appraise the relevant facts and, in principle, to examine the evidence it accepts in support of those facts. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice.[139]

In the present case, the appellant does not claim that the General Court distorted the following facts.

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[139] Judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, para 84 and the case-law cited.

During the investigation which preceded the statement of objections, the Commission asked the appellant to provide it with the information necessary in order to calculate the costs relating to additional inputs which are necessary to transform its wholesale services into retail services. In reply, the appellant sent the Commission tables containing calculations of the costs for 2003 to 2010 based on UCN data. The costs included in those tables had therefore been calculated on the basis of fully allocated historical costs and differed from the LRAIC. The Commission therefore requested the appellant to provide it with profitability data for broadband services, recalculated using a methodology based on the LRAIC. Since the appellant replied that it did not calculate the profitability figures for broadband services according to the LRAIC methodology, the Commission used, at the statement of objections stage, the UCN data at its disposal in order to assess the margin squeeze that the appellant had engaged in. The Commission considered that, in the absence of data on the LRAIC, the UCN data constituted the best available source for carrying out that assessment. On the basis of those data, it concluded in the statement of objections that a competitor equally efficient to the appellant with access to its local loop would have faced significant negative margins if it had tried to replicate the appellant's retail portfolio over the years 2005 to 2010. In its response to the statement of objections, the appellant submitted new data to assess costs for the period from 2005 to 2010. That data was based on the data for 2011. The appellant submitted, in particular, in that response that, when calculating the LRAIC, it was appropriate, first, to re-evaluate its assets and, second, to take into account the inefficiencies of its network for broadband provision by making 'optimisation' adjustments, namely, (i) the replacement of existing assets with their modern, more efficient and less costly, equivalents, (ii) the maintenance, as far as possible, of technical coherence, and, (iii) asset reduction on the basis of currently used capacity as opposed to the installed capacity (together, 'the optimisation adjustments'). In the decision at issue, the Commission agreed to include in particular the appellant's asset re-evaluation in its margin squeeze analysis, but rejected the optimisation adjustments. In that respect, the Commission arrived at different results in the decision at issue and in the statement of objections as regards the extent of the margin squeeze by the appellant.

It is in the light of those facts, the distortion of which is not alleged, that it is necessary to assess whether the General Court committed the errors of law put forward by the appellant in its second ground of appeal.

– Reversal of the burden of proof

As regards the complaint that the General Court incorrectly endorsed a reversal of the burden of proof by the Commission, it must be recalled that it is for the authority alleging an infringement of the competition rules to prove it.[140]

Those facts show that, from the beginning of the administrative procedure, the Commission informed the appellant that it would base its assessment of the existence of a margin squeeze on the LRAIC methodology. Thus, following the appellant's communication of the UCN data, before the statement of objections, the Commission asked it to provide the profitability data for broadband services, recalculated using the LRAIC methodology. It is apparent from recital 870 of the decision at issue, to which paragraph 185 of the judgment under appeal refers, that, in response to that request, the appellant stated that it applied LRAIC for the calculation of the rates of interconnection services and that it had, once, in 2005, performed LRAIC calculations for broadband services. Furthermore, without any distortion being claimed in that regard, the General Court held, in paragraph 189 of the judgment under appeal, that it was apparent from paragraphs 996 to 1002 of the statement of objections that the Commission had set out the guidelines for the calculation of costs on the basis of the LRAIC. It follows from the foregoing that the Commission had set out its methodology for determining costs from the beginning of the administrative procedure and that the appellant was aware of that.

As regards the data taken into account, it should be recalled, as paragraph 73 above shows, that in order to establish the existence of a margin squeeze, the Commission relies, in principle, on the costs borne by the dominant undertaking. Consequently, the fact that the Commission asked the appellant to provide it with data relating to its costs does not constitute a reversal of the burden of proof. In the same way, nor does the Commission taking account of reworked data provided by the appellant following the statement of objections constitute such a reversal.

Lastly, contrary to what the appellant claims, the fact that the Commission was unable to apply its methodology based on LRAIC at the stage of the statement of objections, since it lacked adequate data, does not amount to a failure on the part of the Commission to draw up its own methodology for the purpose of meeting its obligation to adduce proof.

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[140] See, to that effect, judgment of 17 June 2010, *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, para 29 and the case-law cited.

Accordingly, the complaint that the General Court erred in law by not recognising an unlawful reversal of the burden of proof borne by the Commission must be rejected as unfounded.

– Infringement of the rights of the defence

As regards the complaint that the General Court erred in law by failing to acknowledge an infringement of the appellant's rights of defence, it should be recalled that the rights of the defence are fundamental rights forming an integral part of the general principles of law whose observance the Court ensures.[141] That general principle of EU law is enshrined in Article 41(2)(a) and (b) of the Charter of Fundamental Rights of the European Union and applies where the authorities are minded to adopt a measure which will adversely affect an individual.[142]

In the context of competition law, observance of the rights of the defence means that any addressee of a decision finding that that addressee has committed an infringement of the competition rules must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged as well as on the documents used by the Commission to support its claim that there has been such an infringement.[143]

In order to establish an abuse consisting of a margin squeeze, it is important specifically for the Commission to demonstrate that the spread between the wholesale prices for the services concerned and the retail prices for downstream services to end users was either negative or insufficient to cover the specific costs of those services which the company in a dominant position has to incur in order to supply its own retail services to end users, so that that spread does not allow a competitor which is as efficient as that undertaking to compete for the supply of those services to end users.[144]

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[141] Judgment of 25 October 2011, *Solvay* v *Commission*, C-109/10 P, EU:C:2011:686, para 52 and the case-law cited.

[142] See, to that effect, judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, para 28 and the case-law cited.

[143] See, to that effect, judgments of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, para 41, and of 14 September 2017, *LG Electronics and Koninklijke Philips Electronics* v *Commission*, C-588/15 P and C-622/15 P, EU:C:2017:679, para 43.

[144] See, to that effect, judgment in *TeliaSonera*, para 32.

The Court has also held that, in order to assess the lawfulness of the pricing policy applied by a dominant undertaking, reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy.[145]

In the present case, in the light of the facts noted by the General Court, it cannot be considered that the General Court endorsed a reversal of the burden of proof by failing to hold that the Commission had not set out, from the outset, its methodology and its data concerning the calculation of the LRAIC. To that effect, as the General Court rightly pointed out in paragraphs 179 to 183 of the judgment under appeal, Article 27(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU][146] provides that the parties are to be sent a statement of objections. As is apparent from the Court's settled case-law, that statement must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. However, that may be done summarily and the decision subsequently taken by the Commission is not necessarily required to be a replica of the statement of objections, since that statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature.[147]

It follows that, since the legal classification of the facts in the statement of objections must, by definition, be provisional, a subsequent Commission decision cannot be annulled on the sole ground that the definitive conclusions drawn from those facts do not correspond precisely with that provisional classification. The Commission is required to hear the addressees of a statement of objections and, where necessary, to take account of their observations made in response to the objections by amending its analysis specifically in order to respect their rights of defence. The Commission must therefore be permitted to clarify that classification in its final decision, taking into account the factors emerging from the administrative procedure, in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it raises, provided however that it relies only on facts on which those concerned have had an opportunity to make known their views and

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[145] Judgment in *TeliaSonera*, para 41 and the case-law cited.

[146] OJ 2003 L 1, p. 1.

[147] Judgment of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, para 42 and the case-law cited.

provided that, in the course of the administrative procedure, it has made available the evidence necessary for the defence of their interests.[148]

In the present case, in the first place the appellant takes issue with the General Court for failing to find that there had been an infringement of its rights of defence on the ground that, in order to assess to what extent a margin squeeze could be imputed to the appellant, the Commission relied, as regards the calculation of costs, on a methodology, principles and data which differed, respectively, in the statement of objections and in the decision at issue.

In that regard, it is apparent from the facts noted by the General Court before adopting the statement of objections, the Commission requested the appellant to provide it with profitability data recalculated using the LRAIC methodology. Since it did not obtain that data, the Commission in the statement of objections evaluated the existence of a margin squeeze on the basis of the UCN data which at that point it had at its disposal. As is apparent from recital 875 of the decision at issue, to which paragraph 185 of the judgment under appeal refers, the Commission considered that that data constituted a sufficiently reliable indicator for the purposes of the calculation of the LRAIC. Next, in its response to the statement of objections, the appellant provided new data and stated that, when calculating the LRAIC, it was necessary, first, to take into consideration a re-evaluation of its assets and, second, to take account of the inefficiencies of its network for broadband provision. Lastly, it is not disputed that, in the decision at issue, the Commission applied the LRAIC methodology.

In the light of those facts, in particular the fact that the appellant submitted estimates of LRAIC for the period from 2005 to 2011 in response to the statement of objections, as well as the considerations set out in paragraph 76 of the present judgment, it must be stated that, during the administrative procedure, the appellant was fully aware of the fact that the Commission was seeking to establish the existence of a margin squeeze on the basis of a methodology and principles based on the LRAIC.

Furthermore, it is apparent from the factual circumstances to which the General Court had regard that it was fully entitled to take the view that the Commission had applied the same methodology and the same principles of calculation of the LRAIC at the stage of the statement of objections as

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[148] Judgment of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paras 43-44 and the case-law cited.

at that of the decision at issue. The fact that, at the stage of the statement of objections, the Commission considered that the appellant's UCN data constituted a sufficiently reliable indicator for the establishment of the LRAIC does not mean that the Commission changed its methodology and its principles for calculating those costs.

Moreover, the General Court was correct in drawing attention to the correspondence between the tables set out in the statement of objections and in the decision at issue respectively in order to support the ground that the Commission used one and the same methodology during the procedure which led to the decision at issue. Having regard to their headings, the purpose of those tables is to collect equivalent data.

It follows that the appellant is wrong to allege an infringement of its rights of defence on the ground that the methodology and the principles of cost calculation in order to establish a margin squeeze were different at the respective stages of the statement of objections and the decision at issue. Accordingly, the appellant's complaint that the General Court erred in law by failing to acknowledge such an infringement of its rights of defence is unfounded. In the second place, the appellant alleges that the General Court failed to acknowledge an infringement of its rights of defence in view of the difference between the data on costs set out in the statement of objections and in the decision at issue respectively.

In that regard, it is apparent from paragraphs 187, 190 and 192 of the judgment under appeal that the differences between the costs and margins set out in the statement of objections and in the decision at issue respectively result from the Commission's taking into account certain adjustments proposed by the appellant itself in order to respect its rights of defence. As is apparent from paragraph 83 of this judgment, the principle of respect for the rights of the defence does not mean only that the Commission must hear the addressees of a statement of objections, but also, where appropriate, that it must take account of their observations made in response to the objections raised by amending its analysis specifically in order to respect their rights of defence. Therefore, in the present case, the differences referred to by the appellant cannot demonstrate an infringement of its rights of defence.

Furthermore, the fact that the Commission made those adjustments as regards the calculation of the appellant's margins without hearing the appellant again does not constitute an infringement of the latter's rights of defence. Those adjustments were made on the basis of data provided by the appellant itself in accordance with LRAIC principles and methodology, as stated by the Commission during the administrative procedure.

In the third place, as regards the criticisms directed against paragraph 209 of the judgment under appeal concerning the 'state-of-play meeting' of 16 September 2014, it must be stated that the General Court did not err in law in holding in that paragraph that the principle of respect for the rights of the defence did not require the Commission to disclose its final calculations of margins before sending the decision at issue to the appellant. That principle merely requires the Commission to give the appellant the opportunity to make known its views on the matters of fact and of law which it will take into consideration for the purpose of adopting its decision. The appellant has not shown that the data disclosed at that meeting were derived from matters of fact or of law on which it had not had an opportunity to make known its views during the administrative procedure preceding that meeting.

Accordingly, the General Court did not err in law in finding, in paragraph 209 of the judgment under appeal, that the appellant had been informed about all the material elements of the calculation of margins made by the Commission and had been given the opportunity to present its observations prior to the adoption of the decision at issue. In the light of all the foregoing considerations, the second ground raised by the appellant in support of its appeal must be rejected as unfounded.

3.3.3. The third ground of appeal

3.3.3.1. Admissibility

– Arguments of the parties

The Commission contends that the appellant's third ground of appeal is inadmissible in so far as, by that ground of appeal, the appellant submits that the Commission made a material error of assessment in failing to collect data from third parties or in failing to prepare its own calculation of the LRAIC for the purposes of applying the so-called 'equally efficient operator' test, since that complaint was not raised before the General Court.

The appellant denies that that complaint is inadmissible. It submits that, in its reply before the General Court, it criticised the Commission for failing to set out fully the LRAIC methodology, principles, and data on which it intended to rely.

– Findings of the Court

It should be borne in mind that, under Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the

appeal. The Court's jurisdiction in an appeal is confined to a review of the findings of law on the pleas argued before the General Court.

A party cannot therefore put forward for the first time before the Court of Justice, in an appeal, a plea in law which it has not raised before the General Court, since that would amount to allowing that party to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court.[149]

It must also be recalled that, when assessing whether a pricing practice which causes a margin squeeze is abusive, account should as a general rule be taken primarily of the prices and costs of the undertaking concerned on the retail services market. Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of its competitors on the same market be examined.[150] By its third ground of appeal, alleging errors of law vitiating the General Court's rejection of the appellant's argument that the Commission wrongly rejected its requests for optimisation adjustments, the appellant claims, inter alia, that the General Court erred in law by not deciding that, since the cost structure of the appellant's LRAIC was not precisely identifiable for objective reasons, the Commission should have collected the data of the appellant's competitors or set up its own consistent database for the purposes of developing a LRAIC model.

However, the appellant has not shown that it raised such a complaint before the General Court. When, before the General Court, the appellant took issue with the Commission for failing to set out fully the LRAIC calculation methodology, principles, and data on which it intended to rely in order to assess the existence of a margin squeeze in the present case, the appellant alleged only an infringement of its procedural rights. It did not claim that it was incorrect, for that purpose, to rely on its costs. Moreover, the appellant has not alleged that, the General Court distorted its arguments. In that paragraph, the General Court expressly found that the appellant had not claimed that it was necessary to examine the prices and costs of its competitors in the case under consideration on the ground that it was impossible to refer to its own prices and costs.

Therefore it has not been established that the appellant claimed before the General Court that the Commission could not rely on the appellant's data to establish the relevant costs or that only the

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[149] Judgment of 11 November 2004, *Ramondín and Others* v *Commission*, C-186/02 P and C-188/02 P, EU:C:2004:702, para 60.

[150] Judgment in *TeliaSonera*, para 46.

data of the appellant's competitors or entirely constructed data would have made it possible to establish those costs.

Accordingly, as is apparent from paragraph 98 of the present judgment, it is necessary to reject as inadmissible the complaint put forward by the appellant in support of its third ground of appeal, by which it claims that the Commission made a material error of assessment in failing to collect data from third parties or in failing to prepare its own calculation of the LRAIC for the purposes of applying the 'equally efficient operator' test.

3.3.2. Substance

– Arguments of the parties

The appellant submits that, when assessing whether there was abuse in the form of a margin squeeze, the General Court erred in law in its application of the 'equally efficient operator' test by rejecting its optimisation adjustments. According to the appellant, if the Commission accepted its figures for the LRAIC in the context of asset re-evaluation and depreciation, there was no reason to reject the optimisation adjustments, since they were also based on the costs that a network built at the date of the decision at issue would incur. In its view, that is a matter of consistency or equal treatment.

It submits that, in the absence of a cost model established by the Commission on the basis of the LRAIC and because of the fact that its LRAIC for the period from 2005 to 2010 were based on ratios stemming from its 2011 LRAIC analysis, there was no valid reason justifying the rejection of its optimisation adjustments. Thus, it argues, the General Court could not, without erring in law, hold that the optimisation adjustments would have resulted in the costs incurred by the appellant during the infringement period being 'disregarded' or suggest that they involved the taking into account of a modern network. Similarly, the consideration, that the issue of asset revaluation and depreciation, on the one hand, had a 'different objective' from that of the optimisation adjustments, on the other hand, is irrelevant in the absence of a model established by the Commission and incorrect because both those issues concern the calculation of the LRAIC. In addition, the appellant claims that, as regards the adjustments made in order to ensure that asset costs and depreciation are based on current cost accounting principles ('the CCA adjustments'), the Commission accepted the principle that it was necessary to take into consideration updating the equipment and operating costs entailed by the construction of a network at the time when the calculations based on those costs were made, whereas it rejected the optimisation adjustments, although these were based on the same principle. The appellant also disputes the assertion, in

paragraph 234 of the judgment under appeal, that its optimisation adjustments were based on a 'perfectly efficient operator' since, it argues, they were based on an equally efficient operator building a network in 2011 and on its LRAIC for 2011, which were the only ones available. The costs thus obtained were the costs that the appellant would avoid if it did not offer the relevant broadband services.

The Commission submits that the General Court did not err in law in paragraphs 233 to 235 of the judgment under appeal, since the appellant's position takes no account either of the nature and effects of each type of adjustment or of the reasons why the Commission accepted or rejected them.

– Findings of the Court

It should be borne in mind that the implementation, by a dominant undertaking, of a pricing practice which results in the margin squeeze of its competitors as efficient as itself constitutes an abuse, within the meaning of Article 102 TFEU, where it is capable of producing exclusionary effects in respect of those competitors by making more difficult, or impossible, the entry of those competitors onto the market concerned.[151]

In addition, in order to assess the lawfulness of the pricing policy applied by a dominant undertaking, reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy. In particular, as regards a pricing practice which causes the margin squeeze of its competitors, the use of such analytical criteria can establish whether the dominant undertaking itself would have been sufficiently efficient to offer its retail services to end users otherwise than at a loss if it had first been obliged to pay its own wholesale prices for the intermediary services.[152]

In the present case, it is apparent from paragraphs 186, 187 and 217 of the judgment under appeal that, in order to assess the costs of a competitor at least as efficient as the appellant offering broadband internet access services via its own network, the Commission took into account the costs of the assets comprising that network. As paragraph 70 above shows, in submitting those

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[151] See, to that effect, judgment in *TeliaSonera*, paras 63-65 and the case-law cited.

[152] See, to that effect, judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, para 201, and judgment in *TeliaSonera*, paras 41-42 and the case-law cited.

costs to the Commission, the appellant requested the Commission, first, to re-evaluate the assets and, second, to take account of the inefficiencies of its network by means of the optimisation adjustments. The Commission agreed to include in particular the appellant's asset re-evaluation in its margin squeeze analysis and to remove, as concerns the specific fixed costs, the joint and common costs. By contrast, it rejected the optimisation adjustments.

The General Court held that the Commission was correct to refuse to take the optimisation adjustments into account. The General Court justified that decision by considering, in particular, that those adjustments consisted in adjusting the assets to the approximate level of an efficient operator that would build an optimal network adapted to satisfy future demand based on 'today's' information and demand predictions. The General Court therefore considered that the optimisation adjustments were based on a forecast and on an optimal network model and not on an estimate reflecting the incremental costs of the appellant's existing assets.

The General Court concluded that the optimisation adjustments, in general, and the replacement of existing assets by their more modern equivalents, in particular, had a different objective from the re-evaluation of assets proposed by the appellant. Moreover, it considered that the taking into consideration, by the Commission, of the re-evaluation of current assets proposed by the appellant, due to the absence of other more reliable data on the appellant's LRAIC, did not suggest that the Commission had therefore necessarily accepted the optimisation adjustments, and therefore that institution was justified in treating differently, on the one hand, the replacement of existing assets by their more modern equivalents and, on the other hand, the re-evaluation of assets proposed by the appellant.

Furthermore, the General Court confirmed the Commission's conclusion that the optimisation adjustments would lead to a calculation of the LRAIC not on the basis of the appellant's assets, but on the basis of those of a hypothetical competitor. In particular, the General Court held, first, that the replacement of existing assets by their more modern equivalents sought to adjust the costs of assets by retaining the value of 'current' assets, without however properly adjusting the depreciations and, second, that taking into consideration the excess capacity of the networks on the basis of the 'currently' used capacity would result in excluding the appellant's assets which were not in productive use . The General Court inferred from this, that the Commission had not erred in finding that taking into account the optimisation adjustments would have resulted in the costs incurred by the appellant between 12 August 2005 and 31 December 2010 being disregarded. Lastly, the General Court found that the Commission had not infringed the principle that the

examination of a margin squeeze must be based on the 'equally efficient operator' test when it concluded, in essence, that it was inevitable that there sometimes remains unused capacity. The General Court considered that if the Commission had accepted the optimisation adjustments linked to the appellant's excess capacity, the calculations of the appellant's LRAIC would have reflected the costs associated with an optimal network corresponding to demand and not affected by the inefficiencies of that operator's network.

The appellant submits that the General Court misapplied that 'equally efficient operator' test and infringed the principle of equal treatment when it endorsed the Commission's rejection of the optimisation adjustments. In support of that complaint, the appellant submits, in essence, that those adjustments related to the only LRAIC data existing, namely its data for 2011, which were used as an indication in respect of the period from 2005 to 2011. In addition, it maintains that those adjustments were intended to reflect the current equipment and operating costs incurred by a network built at the date of the decision at issue ('today'), in the same way as the CCA adjustments which the Commission had agreed to take into consideration.

However, the fact that the LRAIC taken into account by the Commission in respect of the period from 2005 to 2010 had been estimated on the basis of the appellant's data concerning 2011 and that the optimisation adjustments were intended to update the equipment and operating costs in relation to a network built at the date of the decision at issue is not sufficient to establish as erroneous in law the General Court's assessment, in paragraphs 225 and 232 of the judgment under appeal, that those adjustments were intended to evaluate the costs of the existing assets by replacing them by their more modern equivalents, and accordingly such costs will no longer reflect the costs of a competitor as efficient as the appellant. Therefore, the General Court did not err in law in finding that taking into account the optimisation adjustments had a different objective from the re-evaluation of the assets and would have led to the costs incurred by the appellant between 12 August 2005 and 31 December 2010 being disregarded.

Similarly, the fact that the only data taken into account by the Commission in order to calculate the LRAIC were the appellant's data relating to 2011 and that the optimisation adjustments were intended to update the equipment and operating costs in relation to a network built at the date of the decision at issue is not sufficient to demonstrate that the General Court erred in law or erred in the legal classification of the facts, on account of its application to the circumstances of the present case of the 'equally efficient operator' test, by holding that taking into account the optimisation adjustments linked to excess capacity would have reflected the costs associated with

an optimal network corresponding to demand and not affected by the inefficiencies of the appellant's network.

Since it has not been shown that the General Court erred in law in confirming the validity of the Commission's exclusion of the optimisation adjustments proposed by the appellant under the 'equally efficient operator' test, the fact that those adjustments were made on the basis of the same data as those which were the subject of other adjustments taken into account by the Commission, such as the appellant's CCA adjustments, is irrelevant. The taking into account of costs and their adjustments in examining a pricing practice resulting in the margin squeeze of competitors of the dominant undertaking must be assessed in the light not of the fact that other adjustments to those costs have already been accepted by the Commission, but of the test of a competitor who is at least as efficient as the dominant undertaking. In any event, an incorrect application of that test as a result of certain cost adjustments being taken into account cannot, in itself, justify other adjustments being also taken into consideration for the sake of the principle of equal treatment. The principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his or her claim, on an unlawful act.[153]

Consequently, the General Court did not err in law, or in the legal classification of the facts, in confirming the validity of the Commission's refusal to take the optimisation adjustments into account. The third ground of appeal must therefore be rejected as in part inadmissible and in part unfounded.

3.4. The request for a potentially favourable ruling to be extended to the appellant

The appellant requests that a potentially favourable ruling upholding the ground of appeal raised by DT in support of its appeal in Case C-152/19 P against the judgment of the General Court of 13 December 2018, *Deutsche Telekom* v *Commission*,[154] by which DT criticises that judgment in so far as it held that the Commission was correct to find that the appellant and itself formed part of a single undertaking and that they were both liable for the infringement found in the decision at

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[153] Judgment of 13 September 2017, *Pappalardo and Others* v *Commission*, C-350/16 P, EU:C:2017:672, para 52 and the case-law cited.

[154] T-827/14, EU:T:2018:930.

issue, be extended to the appellant. In support of that request, the appellant claims that that ground of appeal has the same object as that of its fourth plea raised before the General Court.

The Commission contends that such a request should be rejected, since it is not a ground of appeal, that the appellant's liability does not arise from DT's conduct and that, in any event, DT's appeal in Case C-152/19 P must be dismissed. In that regard, it is sufficient to state that, by judgment delivered today, *Deutsche Telekom* v *Commission*,[155] the Court of Justice dismissed DT's appeal in that case, so that the appellant's request is ineffective, as it is devoid of purpose.

The appeal must therefore be dismissed in its entirety.

4. Costs

In accordance with Article 184(2) of its Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.

Since the appellant has been unsuccessful and the Commission has applied for costs, the appellant must, in addition to bearing its own costs, pay those incurred by the Commission.

On those grounds, the Court (Third Chamber) hereby:

1. Dismisses the appeal;

2. Orders Slovak Telekom a.s., in addition to bearing its own costs, to pay those incurred by the European Commission.

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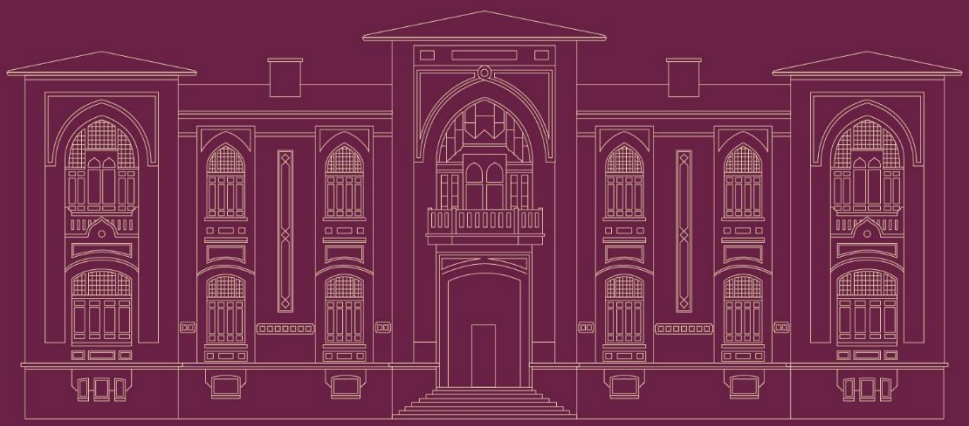
[155] C-152/19 P.



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