

3. Does Clause 5 of [the framework agreement set out in the Annex to] Directive 1999/70/EC preclude the consequences of abuse from being made the responsibility of a third party, in this case, the user?

(¹) OJ 1999 L 175, p. 43.

Reference for a preliminary ruling from the Tartu Ringkonnakohus (Estonia) lodged on 11 June 2012 — Ragn-Sells AS v Sillamäe Linnavalitsus

(Case C-292/12)

(2012/C 243/18)

Language of the case: Estonian

Referring court

Tartu Ringkonnakohus

Parties to the main proceedings

Applicant: Ragn-Sells AS

Defendant: Sillamäe Linnavalitsus

Questions referred

- (a) Are Article 106(1) in conjunction with Article 102 of the Treaty on the Functioning of the European Union, the free movement of goods, the freedom of establishment and the freedom to provide services to be interpreted as meaning that it is not contrary to any of them for a Member State to permit an undertaking which operates a specific waste treatment facility to be granted an exclusive right to process municipal waste in a specified area, in return for consideration, where a number of competing undertakings owning a number of different waste treatment facilities which satisfy the environmental requirements and use equivalent technologies are operating within a radius of 260 km?
- (b) Is Article 106(2) of the Treaty on the Functioning of the European Union to be interpreted as meaning that it is not contrary thereto for a Member State to regard, first, the collection and transport of waste and, secondly, the processing of waste as services in the general economic interest, but to separate those services from each other, thereby restricting free competition in the waste treatment market?
- (c) In a procedure for the award of a concession for the service of collecting and transporting waste, a condition of which is that two undertakings are granted an exclusive right to treat waste in the area designated in the concession agreement, may the applicability of the provisions of competition law in the Treaty on the Functioning of the European Union be excluded?
- (d) Is Article 16(3) of Directive 2008/98/EC (¹) of the European Parliament and of the Council of 19 November 2008 to be interpreted as meaning that a Member State may, on the basis of the principle of proximity, restrict competition and

permit the undertaking operating the waste treatment facility nearest to the area in which the waste occurs to be granted an exclusive right to process the waste, in return for consideration, where a number of competing undertakings owning a number of different waste treatment facilities which satisfy the environmental requirements and use equivalent technologies are operating within a radius of 260 km?

(¹) Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3).

Appeal brought on 13 June 2012 by Telefónica S.A. and Telefónica de España, S.A.U. against the judgment of the General Court (Eighth Chamber) delivered on 29 March 2012 in Case T-336/07 Telefónica and Telefónica de España v Commission

(Case C-295/12 P)

(2012/C 243/19)

Language of the case: Spanish

Parties

Appellants: Telefónica S.A. and Telefónica de España, S.A.U. (represented by: F. González Díaz and J. Baño Fos, abogados)

Other parties to the proceedings: European Commission, France Telecom España, S.A., Asociación de Usuarios de Servicios Bancarios (Ausbanc Consumo) and European Competitive Telecommunications Association

Form of order sought

The appellants claim that the Court of Justice should:

— **Primarily,**

set aside, in its entirety or in part, the judgment of the General Court of 29 March 2012 in Case T-336/07 *Telefónica and Telefónica de España v Commission*;

on the basis of the information at its disposal, annul, in its entirety or in part, the decision of the European Commission of 4 July 2007 in Case COMP/38.784 — *Wanadoo España v Telefónica*;

revoke or reduce the fine pursuant to Article 261 TFEU;

revoke or reduce the fine as a result of the unjustifiable duration of the proceedings before the General Court; and

order the Commission and the parties intervening in support of the Commission to pay the costs of both these proceedings and those before the General Court.

— **In the alternative, if the above is not possible at this stage of the proceedings,**

set aside the judgment of the General Court and refer the case back to the General Court for it to be reheard in the light of the issues of law settled by the Court of Justice;

revoke or reduce the fine pursuant to Article 261 TFEU; and order the Commission and the parties intervening in support of the Commission to pay the costs of both these proceedings and those before the General Court.

— ***In any event,***

grant access, pursuant to Article 15 TFEU, to the transcript or recording of the oral hearing which took place before the General Court on 23 May 2011, and hold an oral hearing.

Grounds of appeal and main arguments

The appellants claim that the General Court:

1. Infringed Telefónica's rights of defence:

- as a result of the disproportionate duration of the proceedings;
- by failing to admit claims supported by annexes;
- by failing to admit claims relating to the fact that the inputs were not indispensable as a relevant factor when determining the effects of Telefónica's conduct;
- by admitting new facts which were not included in the statement of objections.

2. Committed an error of law in its definition of the wholesale markets at issue.

3. Committed an error of law in its assessment of the alleged dominant position of Telefónica.

4. Committed an error of law and infringed the European Convention of Human Rights by allowing the impairment of Telefónica's property rights in relation to non-indispensable inputs.

5. Committed an error of law and manifestly distorted the facts in its assessment of the abuse and its alleged effects on competition in relation to:

- The choice of wholesale inputs;
- The discounted cash flow method;
- The 'period to period' method;
- The likely or concrete effects of the conduct.

6. Committed an error of law in its assessment of the Commission's *ultra vires* actions and infringed the principles of subsidiarity, proportionality, legal certainty, loyal cooperation and sound administration.

7. Infringed the principle of legal certainty in its definition of the type of legal infringement and erred in law in its assessment of the deliberate and negligent nature of Telefónica's conduct.

8. Committed an error of law and manifestly distorted the facts in calculating the amount of the fine, in, inter alia,

- characterising the conduct as a very serious infringement;
- its assessment of the infringement of the principles of equal treatment and proportionality and the principle that penalties must fit the offence; and
- failing to provide grounds.

9. Infringed Article 229 EC (now Article 261 TFEU).