JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

8 March 2007 *

In Case T-340/04,

France Télécom SA, established in Paris (France), represented by C. Clarenc and J. Ruiz Calzado, lawyers,

applicant,

v

Commission of the European Communities, represented by É. Gippini Fournier and O. Beynet, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision C (2004) 1929 of 18 May 2004 in Case COMP/C-1/38.916, ordering France Télécom SA and all undertakings directly or indirectly controlled by it, including Wanadoo SA, and all undertakings directly or indirectly controlled by Wanadoo SA, to submit to an inspection under

* Language of the case: French.

Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81[EC] and 82 [EC] (OJ 2003 L 1, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of H. Legal, President, I. Wiszniewska-Białecka and E. Moavero Milanesi, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 8 June 2006,

gives the following

Judgment

Legal background

1 Article 11(1) and (6) (entitled 'Cooperation between the Commission and the competition authorities of the Member States') of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) provides as follows:

'The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

...

The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 [EC] and 82 [EC]. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.'

2 Article 13 of Regulation No 1/2003 (entitled 'Suspension or termination of proceedings') provides as follows:

'1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 [EC] or Article 82 [EC] against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.

2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.'

3 Article 20 of Regulation No 1/2003 (entitled 'The Commission's powers of inspection') provides as follows:

'1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject-matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject-matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to

this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject-matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 [EC] and 82 [EC], as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.'

Facts of the dispute

4 In a decision of 16 July 2003 relating to a proceeding under Article 82 [EC] (Case COMP/38.233 — Wanadoo Interactive) ('the decision of 16 July 2003'), the Commission found that between March 2001 and October 2002 Wanadoo Interactive, at that time a 99.9% owned subsidiary of Wanadoo SA, itself a subsidiary of the applicant, which held between 70 and 72.2% of its capital during

the period covered by that decision, had abused its dominant position on the market for high-speed internet access services provided to residential customers by employing predatory pricing practices for its eXtense and Wanadoo ADSL services, and imposed a fine of EUR 10.35 million on Wanadoo Interactive.

5 In Articles 2 and 3 of that decision, the Commission also ordered Wanadoo Interactive:

— in the context of its eXtense and Wanadoo ADSL services, to refrain from any behaviour having an object or effect identical or similar to that of the infringement;

— to forward to the Commission, at the end of each year up to and including 2006, the revenue account for its different ADSL (Asymmetric Digital Subscriber Line) services, showing its accrued income, operating costs and customer acquisition costs.

6 On 11 December 2003, following a favourable opinion by the French telecommunications regulatory authority ('the ART'), the French Minister for the Economy, Finances and Industry approved a reduction in the wholesale rates charged by France Télécom for access to and reception of IP/ADSL, also referred to as 'Option 5'. Several internet service providers, including Wanadoo, decided to pass on that reduction in their wholesale rates in their retail offers.

7 On 12 December 2003, Wanadoo announced an initial reduction in its retail prices, available to both existing and new subscribers, for its high-speed services ('eXtense 512k' unlimited, 'eXtense 512k Fidélité' unlimited, 'eXtense 1024k' unlimited and 'eXtense 1024k Fidélité' unlimited), taking effect on 6 January 2004. The price of its 'eXtense 128k' unlimited offer remained unchanged.

8 On 9 January 2004, the Commission sent a letter to Wanadoo, reminding it of the terms of Article 2 of the decision of 16 July 2003 and requesting it to state whether, since the adoption of that decision, it had reduced its retail prices for the services covered by that decision or whether it was envisaging doing so. The Commission indicated that, in the event of a positive reply, it would send Wanadoo a formal request for information on the particulars of such price reductions. The Commission also asked to be informed of the date of the end of Wanadoo's financial year and of when the information required under Article 3 of the decision of 16 July 2003 would be communicated to it.

9 On 12 January 2004, AOL France SNC and AOL Europe Services SARL (hereinafter together referred to as 'AOL') lodged a complaint under Article 82 EC and Article L 420-2 of the French commercial code with the French Competition Council ('the Competition Council') concerning predatory pricing practices by Wanadoo in regard to the four new offers which it had announced on 12 December 2003. That complaint was accompanied by an application for interim measures seeking, in particular, suspension of the marketing of those offers under Article L 464-1 of the French commercial code.

10 By Decision No 263012 of 19 January 2004, the French Conseil d'État ('the Council of State'), upon a summary application by T-Online France for suspension of the decision of the French Minister for the Economy, Finances and Industry approving the reduction in the Option 5 tariffs, dismissed the application, stating inter alia that the ART had, 'following a detailed analysis, pointed out in support of its favourable opinion towards the tariffs offered by France Télécom that there were no anti-competitive effects such as to bar those tariffs'.

11 On 29 January 2004, Wanadoo announced the introduction, with effect from 3 February 2004, of an 'eXtense 128k Fidélité' unlimited offer and four flat-rate (or optional) offers, namely 'eXtense 128k/20h', 'eXtense 128k/20h Fidélité', 'eXtense 512k/5Go' and 'eXtense 512k/5Go Fidélité'.

12 By letter of 30 January 2004, Wanadoo replied to the Commission's letter of 9 January 2004 informing it of the launch in January of new ADSL subscription offers at more attractive rates, and of the forthcoming launch of new offers in February.

13 On 24 February 2004, AOL supplemented its complaint to the Competition Council with the offers launched by Wanadoo on 3 February 2004 and in that connection likewise applied for interim measures suspending the marketing of those offers.

14 In addition, the Commission met with competitors of Wanadoo, who drew the Commission's attention to the fact that in their view the new loss-leader price set by Wanadoo for access to 128 kbit/s generated a margin squeeze on the retail market.

15 At the beginning of March 2004, the Competition Council informed the Commission of the complaint lodged by AOL.

16 On 15 March 2004, under Article 3 of the decision of 16 July 2003, Wanadoo communicated to the Commission its operating accounts for the 2003 financial year.

17 On 22 March 2004, in the course of a meeting between the Commission's Competition Directorate-General (DG) and the Rapporteur responsible for the case at the Competition Council ('the Rapporteur'), it became apparent from a summary analysis based on the calculation method used by the Commission in its decision of 16 July 2003, and the estimated economic model drawn up by Wanadoo, corrected, where appropriate, by the Rapporteur's estimates, that certain of Wanadoo's new tariffs were predatory, particularly in the light of a plan indicating intent to oust its competitors. In view of that information, the Rapporteur proposed that the Competition Council adopt interim measures ordering Wanadoo to discontinue the offers in question.

18 On 2 April 2004, officials from the Competition DG met with AOL.

19 In the same period, the Commission contacted the Rapporteur by telephone several times, and on 21 April 2004 it had a second meeting with him.

20 On 11 May 2004, the Competition Council handed down its Decision No 04-D-17 on AOL's complaint and application for interim measures; it dismissed the application and referred the complaint for investigation ('the decision of the Competition Council').

21 On 18 May 2004, the Commission adopted Decision C (2004) 1929, in Case COMP/C-1/38.916, ordering the applicant and all undertakings directly or indirectly controlled by it, including Wanadoo, and all undertakings directly or indirectly controlled by Wanadoo, to submit to an inspection under Article 20(4) of Regulation No 1/2003 ('the contested decision').

22 That decision states, in the 1st and 3rd to 13th recitals in its preamble:

'The Commission ... has received information indicating that Wanadoo is charging rates for ADSL internet access aimed at the French public of which some do not cover variable costs and others are below total costs. According to the information available, those rates form part of a plan indicating an intention to oust competitors. Moreover, the information received indicates that the reduced financial margin between the retail tariffs concerned and France Télécom's wholesale prices ... (Option 5) gives rise to a margin squeeze vis-à-vis competing operators wishing to offer high-speed internet access to residential users on the basis of France Télécom's Option 5.

...

Wanadoo announced an initial reduction in its ADSL internet access tariffs aimed at the general public as from 5 January 2004. That reduction was implemented by means of the introduction of the "eXtense" unlimited offers, namely two offers at 128 kbit/s, the first with a 24-month commitment period at EUR 24.90 per month and the second with a 12-month commitment period at EUR 29.90 per month; two offers at 512 kbit/s, the first with a 24-month commitment period at EUR 29.90 per month and the second with a 12-month commitment period at EUR 34.90 per month; two offers at 1 024 kbit/s, the first with a 24-month commitment period at EUR 39.90 per month and the second with a 12-month commitment period at EUR 44.90 per month.

On 28 January 2004, Wanadoo further introduced four offers known as "optional" (namely two offers at 128 kbit/s limited to 20 hours per month, the first with a 24-month commitment period at EUR 14.90 per month and the second with a 12-month commitment period at EUR 19.90 and two offers at 512 kbit/s limited to 5 gigabytes per month, the first with a 24-month commitment period at EUR 24.90 per month and the second with a 12-month commitment period at EUR 29.90). This inspection relates specifically to these 10 new offers.

According to the information available to the Commission, an analysis based on estimated data shows that at least three of the above offers (the two 128 kbit/s optional offers and the 512 kbit/s 24-month optional offer) do not cover variable costs. At least two other offers at 512 kbit/s (the optional 12-month offer and the 24-month unlimited offer) do not cover total costs.

The Commission has also received information indicating that the offers concerned form part of a strategy of containing and driving off competitors.

In addition, according to the information available to the Commission, in spite of the January 2004 reduction in the Option 5 tariffs, the financial margin between Wanadoo's new retail tariffs and Option 5 is insufficient and prevents competitors who base their offer on Option 5 from competing with Wanadoo under equitable conditions.

In its decision ... of 16 July 2003, the Commission found that Wanadoo occupied a dominant position on the French market for high-speed internet access for residential customers. The information available to the Commission indicates that that finding remains valid today.

The below-cost offers applied by Wanadoo and the reduced margin between those offers and the Option 5 tariffs very probably constrained the entry of competitors — whether French or established in other Member States — onto the market and threatened those already present. According to the information available, most of Wanadoo's competitors had to align themselves with the new offer and the entire ADSL market in France is currently operating at a loss.

The kinds of practice described above amount to the imposition of unfair sales prices. If proved, such practices would constitute an abuse of a dominant position and therefore an infringement of Article 82 [EC].

In order to be able to assess all the relevant facts relating to the alleged practices and the context of the alleged abuse, the Commission has to undertake inspections under Article 20(4) of Regulation No 1/2003.

According to the information available to the Commission, it is very probable that all the information relating to the abovementioned practices, in particular the information establishing the extent to which costs are covered and that relating to the strategy of containing and driving off competitors, was communicated only to some members of France Télécom and/or Wanadoo staff. The documentation that exists with regard to the alleged practices is very probably limited to the absolute minimum and held in places and in a form enabling it to be concealed, retained or destroyed in the event of an investigation.

In order to guarantee the effectiveness of this inspection it is therefore essential that it be conducted without the addressees of this [d]ecision being forewarned. A [d]ecision must therefore be adopted under Article 20(4) of Regulation No 1/2003 ordering the undertakings to submit to an inspection.'

23 Article 1 of the contested decision provides as follows:

'France Télécom ... and Wanadoo ...:

are required to submit to an inspection relating to the alleged imposition of unfair selling prices in the field of high-speed internet access for residential customers, contrary to Article 82 [EC], with intent to contain and drive off competitors. The inspection may be carried out in any of the undertakings' premises ...

France Télécom ... and Wanadoo ... shall permit the officials and other accompanying persons authorised by the Commission to conduct the inspection, and the officials of the competent authority of the relevant Member State, and such officials as are authorised or appointed by it, to have access to all their premises, land and means of transport during normal office hours. The undertakings shall produce the books and other records related to the business requested by such officials and other persons irrespective of the medium on which they are stored, and shall permit them to examine such books and other records related to the business on the spot and to take or obtain copies or extracts therefrom in any form. They shall immediately, on the spot, provide any oral explanation requested by the officials and other persons on facts or documents relating to the subject-matter and purpose of the inspection and shall permit any representative or member of staff to provide such explanations. They shall permit [such] officials and other persons to record such explanations in any form.'

24 Finally, the contested decision states in Articles 2 and 3 respectively the date on which the inspection is to begin and the fact that the applicant and Wanadoo are the addressees thereof. At the end, it lists the circumstances in which the Commission may impose fines and penalties on any addressee of the contested decision pursuant to Articles 23 and 24 of Regulation No 1/2003, and states that, where an addressee opposes an inspection which has been ordered, the Member State concerned is to afford the officials and other accompanying persons authorised by the Commission the necessary assistance to enable them to conduct the inspection pursuant to Article 20(6) of Regulation No 1/2003. The decision also mentions the possibility of bringing an action against the decision before the Court of First Instance and contains certain excerpts from Regulation No 1/2003 in an annex.

25 On the basis of that decision, the Commission applied to the French authorities for assistance under Article 20(5) of Regulation No 1/2003. By an application for an investigation of 25 May 2004, the French Minister for the Economy, Finances and Industry instructed the director of the National Directorate for Competition, Consumer and Fraud Prevention Investigations to take all steps necessary for conducting the investigation described by the Commission in the contested decision. To that end, the director applied to the *juge des libertés et de la détention* of the Tribunal de grande instance (Regional Court), Paris ('the *juge des libertés*') for authorisation to conduct or have conducted an inspection of France Télécom and Wanadoo and to assist the Commission. That application was accompanied by the contested decision.

26 By order of 28 May 2004, the *juge des libertés* gave the authorisation sought, inter alia allowing the French investigators who were to be appointed to exercise their powers under Articles L 450-4 and L 470-6 of the French commercial code.

27 The inspection commenced on 2 June 2004 at the applicant's premises and was carried out on 2 and 3 June 2004. The applicant cooperated whilst expressing reservations about the principle of the inspection. Investigations were conducted at Wanadoo's premises from 2 to 4 June 2004.

Procedure and forms of order sought

28 By a document lodged at the Registry of the Court of First Instance on 11 August 2004, Wanadoo brought this action.

29 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure and, in the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of Court of First Instance, put a question in writing to the applicant, which replied within the prescribed period.

30 The parties submitted oral argument and their answers to the oral questions put by the Court at the public hearing on 8 June 2006.

31 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

33 In support of its action, the applicant raises four pleas based respectively on infringement of the duty to provide a statement of reasons, of the duty of

cooperation in good faith with national institutions, and of the principle of proportionality, and an infringement, prior to adoption of the contested decision, of Regulation No 1/2003, the Commission notice on cooperation within the network of competition authorities (OJ 2004 C 101, p. 43; 'the 'Notice'), and the principle of sound administration of justice, the latter plea being raised for the first time in the reply.

First plea: infringement of the duty to provide a statement of reasons

34 The applicant claims that the Commission on four occasions infringed the duty to provide a statement of reasons imposed on it by Article 253 EC, Regulation No 1/2003 and the case-law. First, the contested decision did not allow it to gain an understanding of the reasons why it was being subjected to the inspection; secondly, the contested decision is not reasoned in regard to certain contextual matters; thirdly, the contested decision is not based on the doubts expressed in the contested decision concerning the Option 5 tariffs; and, fourthly, the contested decision did not enable the *juge des libertés* to exercise his supervisory function.

First claim: the applicant was unable to gain an understanding of the reasons why it was the addressee of the contested decision and subject to the inspection

— Arguments of the parties

35 In general terms, the applicant maintains that it follows from Article 253 EC, Regulation No 1/2003 and the case-law that the scope of the duty to provide a statement of reasons is dependent upon the nature of the act at issue and of the

context in which it was adopted. Thus, the Commission should describe clearly and precisely the subject-matter and purpose of an inspection which it decides to order and the presumptions which it seeks to verify. Yet, in the present case, the contested decision is vitiated by the inadequacy of the statement of reasons, which did not enable the applicant to determine the precise subject-matter, the extent and justification for the inspection ordered. Owing to that fact, it was not possible for the applicant to ascertain the scope of its duty to cooperate and the rights of the defence were not upheld. In fact, it was not in a position to ascertain the presumptions on which the Commission was acting or the scope of its supposed involvement in the alleged abuse of a dominant position.

36 The contested decision attributed to Wanadoo the alleged practices to which the inspection related, in accordance with the approach adopted in the decision of 16 July 2003 in which the Commission acknowledged that Wanadoo was autonomous in relation to the applicant in its price-fixing policy on the French market for access to high-speed internet services for residential customers. Thus, the contested decision sought to verify practices attributed to an autonomous subsidiary of the applicant active on a market on which the applicant has no presence. In those circumstances, the Commission, in order to comply with its duty to provide a statement of reasons, ought to have set out the reasons why the applicant itself was being subjected to an inspection whose purpose was to verify the presumptions of infringements mentioned in Article 1 of the contested decision.

37 The contested decision did not allow the applicant to ascertain whether it was to regard itself as being presumed by the Commission to be personally involved in implementing the alleged practices mentioned in the contested decision and whether it is thus suspected of having personally infringed Article 82 EC, which is in breach of the requirement laid down by the judgment of the Court of Justice in Case C-94/00 *Roquette Frères* [2002] ECR I-9011, according to which the Commission should provide explanations as to the manner in which the undertaking subject to coercive measures is presumed to be involved in the infringement.

38 The fact that the applicant in 2004 acquired the whole of the share capital of Wanadoo does not justify the approach adopted by the Commission in the contested

decision. The applicant states that the prices mentioned in that decision were the offer prices launched in January 2004, when it held only around 70% of the capital in Wanadoo; the acquisition of the whole of the share capital in Wanadoo occurred only after the contested decision had been adopted. Moreover, the presumption that a subsidiary is under the decisive influence of its parent company is rebutted in cases where the subsidiary determines its policies in an autonomous manner. In the present case, Wanadoo's autonomy was established in the decision of 16 July 2003. The Commission was not entitled to go back on that finding on the sole implied ground of an increase in the applicant's share in Wanadoo's capital after the prices mentioned in the contested decision had been fixed.

39 Moreover, the Commission's position is contradictory. In fact, the Commission's attitude, until adoption of the contested decision, and Article 1 of that decision confirm that the offers and prices charged by Wanadoo were regarded as a policy matter for that company and not a matter of group policy.

40 The Commission replies first of all by setting out the requirements imposed on it by the case-law on the statement of reasons to be given for inspection decisions. Article 20(4) of Regulation No 1/2003 defines which aspects of the reasoning are to appear in a decision ordering an inspection when it provides that the decision must state the subject-matter and purpose of the inspection. Moreover, the case-law has determined, in regard to Article 14(3) of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), whose wording is substantially reproduced in Article 20(4) of Regulation No 1/2003, that the Commission is not required to inform the addressee of a verification decision of all the information in its possession concerning presumed infringements or to carry out a rigorous legal classification of those infringements, but must clearly indicate the presumptions which it is seeking to verify. The contested decision observed those requirements.

41 As to the first claim raised by the applicant, the Commission, first of all, stresses that the applicant is the parent company of the Wanadoo group, in which it held 95.94% of the share capital prior to adoption of the contested decision. The fact that the applicant is a legal person distinct from Wanadoo does not mean that it is a distinct undertaking from the point of view of Community competition law. Once an undertaking holds the whole of the share capital of another undertaking, there is a presumption that the former exercises control over the latter and, consequently, a presumption of its involvement in an infringement by the latter. The Commission was not obliged to explain these matters in its decision since the duty to provide a statement of reasons does not require that all the relevant matters of fact and of law are specified. Besides, the references by the applicant to the decision of 16 July 2003 are not material, as since that date the applicant has increased its share in the capital of Wanadoo.

42 Furthermore, although the increase of the applicant's share in Wanadoo's capital was not yet effective when the new offers were launched in January 2004, the markets expected that Wanadoo would be reintegrated within the France Télécom group. The Commission was legitimately entitled to assume that the process of integrating Wanadoo was at least already at the preparatory stage when the new offers were launched and that at that stage the applicant had an interest in controlling its subsidiary's pricing decisions more closely. Moreover, it is likely that, following a decision declaring a subsidiary's pricing policy unlawful, its parent company would engage more closely in fixing the subsidiary's prices.

43 Secondly, in order to carry out an inspection, the Commission does not need to be certain that the undertaking inspected is directly involved in the suspected infringement; nor does it need to be in a position to indicate the precise role in the infringement of each undertaking inspected. Since the applicant is the parent company of Wanadoo and the suspected infringements by the latter are clearly set out, the reason why the applicant is the subject of an inspection is obvious. Thus, it is logical to take the view that some of the material sought might also be found on the applicant's premises.

44 The fact that, in regard to the infringements established in the decision of 16 July 2003, there was nothing to show that Wanadoo acted on the instructions of its parent company is not relevant, since that finding cannot apply in regard to future situations.

45 Thirdly, the contested decision clearly states how the applicant is presumed to be involved in the suspected infringement. The pricing practices described, if proven, would amount to the imposition of unfair selling prices within the meaning of Article 82 EC, which could in the case of a group of undertakings such as the group in the present case be classified either as predatory pricing or as a margin squeeze. There is no requirement to provide a precise legal classification of the suspected infringements or to indicate the period over which the infringements have been committed. Moreover, the question of attributing the infringement committed by a subsidiary to its parent company is not relevant in the present case.

46 Lastly, and at all events, the Commission may order an inspection once it is legitimately entitled to assume that materials relevant to its investigation may be found on the premises of an undertaking, even if it subsequently transpires that the undertaking in question is not directly involved in the suspected infringement.

— Findings of the Court

47 As a preliminary matter, it is appropriate to recall the principles governing the duty imposed on the Commission to provide a statement of reasons when it adopts a decision ordering an inspection under Article 20(4) of Regulation No 1/2003.

48 The purpose of the requirement to give reasons for a particular decision, which arises generally under Article 253 EC, is to enable the Community judicature to exercise its power to review the legality of the decision and to provide the person concerned with sufficient information to ascertain whether or not the decision is well founded or whether it is vitiated by an error giving rise to a right to contest its validity, while the scope of the duty depends on the nature of the measure in question and on the context in which it was adopted (Case 185/83 *Instituut Electronenmicroscopie* [1984] ECR 3623, paragraph 38, and Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraphs 62 and 63).

49 In regard to Commission decisions ordering an inspection, Article 20(4) of Regulation No 1/2003 lays down the essential matters which must appear in such a decision, by requiring the Commission to provide a statement of the reasons for it, by stating the subject-matter and purpose of the inspection, the date on which it is to commence, the penalties provided for in Articles 23 and 24 of that regulation and the right to have the decision reviewed by the Community Courts.

50 The statement of the reasons for a decision ordering an inspection is thus intended to show that the investigation to be carried out on the premises of the undertakings concerned is justified and also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence (see, in relation to Regulation No 17, Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 29, and *Roquette Frères*, cited in paragraph 37 above, paragraph 47).

51 The requirement for the Commission to specify the subject-matter and purpose of the investigation therefore amounts to a basic guarantee of the rights of defence of the undertakings concerned and consequently the scope of the duty to give reasons in decisions ordering inspections cannot be limited on the basis of considerations relating to the effectiveness of the investigation. In that connection, whilst it is true that the Commission is not required to communicate to the addressee of such a decision all the information at its disposal concerning the presumed infringements, or to delimit precisely the relevant market, or to set out the exact legal nature of the

presumed infringements, or to indicate the period during which those infringements were committed, it must none the less state as precisely as possible the presumed facts which it intends to investigate, namely what it is looking for and the matters to which the investigation must relate (see, in relation to Regulation No 17, Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraph 10; *Hoechst* v *Commission*, cited in paragraph 50 above, paragraph 41; and *Roquette Frères*, cited in paragraph 37 above, paragraph 48).

52 To that end, the Commission is also required to state in a decision ordering an inspection the essential characteristics of the suspected infringement by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement of the undertaking concerned, the evidence sought and the matters to which the investigation must relate as well as the powers conferred on the Community investigators (see, in regard to Regulation No 17, Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 26, and *Roquette Frères*, cited in paragraph 37 above, paragraphs 81, 83 and 99).

53 In order to establish that the inspection is justified, the Commission is required to show, in a properly substantiated manner, in the decision ordering the inspection that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement of which the undertaking subject to the inspection is suspected (see, in relation to Regulation No 17, *Roquette Frères*, cited in paragraph 37 above, paragraphs 55, 61 and 99).

54 In the present case, although the contested decision is couched in general terms, it none the less contains the essential elements required by Article 20(4) of Regulation No 1/2003 and the case-law.

55 Thus, it appears from the essential terms of the contested decision reproduced in paragraphs 22 to 24 above that it states the subject-matter and the purpose of the inspection, setting out the essential characteristics of the suspected infringement, identifying the market thought to be affected (high-speed internet access for residential customers in France), the nature of the suspected restrictions on competition by the applicant (pricing practices contrary to Article 82 EC, indicating the importance of the applicant's Option 5 tariffs in the determination of those infringements), explanations as to Wanadoo's supposed degree of involvement in the infringement, the role which could have been played by the applicant (it could have been informed or could be in possession of certain elements which would enable the suspected infringement to be established), what was being sought and the matters to which the investigation was to relate (information relating to these practices, in particular information on the extent to which Wanadoo's costs were covered and on a strategy of containing and driving off competitors, which might have been communicated to only some members of the applicant's staff or of Wanadoo's staff, to be sought at any of the premises of both the applicant and Wanadoo, in the books and other documents related to the business and possibly orally), the powers conferred on the Community investigators, the date on which the inspection was to start (2 June 2004), the penalties provided for in Articles 23 and 24 of Regulation No 1/2003, and the possibility of bringing an action opposing the inspection before the Court of First Instance. Moreover, it was well known in France at the time that the applicant was the parent company of Wanadoo.

56 As to whether the inspection was justified, the contested decision states in a properly substantiated manner that the Commission had in its file information and evidence providing reasonable grounds for suspecting infringements of the competition rules by Wanadoo, the subsidiary of the applicant, and suspected that certain matters, in particular those relating to the strategy of containing and driving off competitors, might have been communicated to certain members of the applicant's staff.

57 The contested decision therefore appears to be adequately supported by a statement of reasons in terms of the requirements of Article 20(4) of Regulation No 1/2003 and the case-law. Moreover, in the light of the context in which the decision was adopted, the matters mentioned by the applicant in the context of this allegation cannot invalidate that conclusion.

58 First, it is true that the contested decision specifically provides that the inspection is to relate to Wanadoo's 10 offers mentioned therein. That being the case, as stated in paragraph 55 above, the reason for naming the applicant as an addressee of the contested decision and the reason for it being made personally subject to the inspection ordered are also set out, namely, in substance, the fact that the Commission suspected that certain items of evidence might be found on its premises or that it might have been informed of its subsidiary's strategy. In the light of the context in which the contested decision was adopted, which the applicant itself regards as relevant in determining the extent of the Commission's duty to provide a statement of reasons, those particulars were sufficient to satisfy the obligation to provide a statement of reasons in regard to the subject-matter and purpose of the inspection at issue.

59 First, it is undisputed that the applicant was, at the material time, the parent company of Wanadoo and that it could not but be aware of the fact that its subsidiary had been found by the decision of 16 July 2003 to have infringed Article 82 EC. The Commission was therefore entitled to suspect that certain evidential items could be concealed on the applicant's premises.

60 Secondly, the decision of 16 July 2003 shows that in this case requests for information had already been addressed to the applicant. Furthermore, the decision is based, specifically for the purpose of its analysis of the strategy of preempting the market for high-speed internet access services by Wanadoo, on contextual matters attesting a strategy of containing and driving off competitors and to Wanadoo's dominant position, of which some originate from the applicant and others were submitted to it by Wanadoo. The Commission also noted in the contested decision certain matters illustrating the overall policy of the France Télécom group towards competition in the market in question and rightly stresses that the strategy pursued by a subsidiary cannot be completely dissociated from the objectives of the parent company.

61 Thus, given, in particular, the role already played by certain of the applicant's documents and by the group strategy pursued by the applicant in establishing an

infringement by its subsidiary even though the subsidiary's autonomy in determining its retail prices was not in issue, it is not established that the statement of reasons for the contested decision was defective in so far as it named the applicant as an addressee of the contested decision and in so far as the applicant was personally subjected to the inspection.

62 The exact level of the applicant's shareholding in Wanadoo's capital is not relevant in that regard, since it was in any event sufficient to support a finding that the applicant was at the material time the parent company of Wanadoo. Moreover, for the sake of completeness, the Court notes from the applicant's reply to a written question put by the Court that, as at 28 April 2004, that is to say prior to adoption of the contested decision, the applicant held, directly or indirectly, 95.25% of the share capital of its subsidiary Wanadoo.

63 Nor is the fact that it may prove impossible to impute to the applicant the anti-competitive conduct of Wanadoo once that conduct has been established relevant either. That may indeed be the result of a substantive analysis of a case, but it does not constitute a ground for prohibiting an inspection on the premises of the parent company, which is intended precisely to establish the exact roles of the undertakings involved in the infringement at issue. In fact, the case-law does not require an exact legal classification of the suspected infringements in the decision ordering the inspection (see, in relation to Regulation No 17, *Dow Benelux* v *Commission*, cited in paragraph 51 above, paragraph 10). Moreover, it has already been established that in the present case the contested decision was justified to the requisite legal standard by the fact that the Commission was entitled to suspect that certain relevant items of evidence might be found on the applicant's premises. Nor, moreover, does the contested decision state that the autonomy of Wanadoo's conduct on the market concerned by the inspection, which was recognised by the decision of 16 July 2003, was called into question by the Commission.

64 Secondly, as to the argument that the alleged inadequacy of the statement of reasons did not allow the applicant to appraise whether it was to regard itself as personally involved in the infringement, it is sufficient to point out that, as has already been seen, both the content of the contested decision and the context in which it was adopted clearly indicate the manner in which the applicant is presumed to be involved in the infringement.

65 It also follows from the foregoing that the contested decision is not vitiated by any contradiction with the Commission's previous position such as to require a specific statement of reasons. Accordingly, this claim cannot be upheld.

Second claim: deficiencies in the contested decision's statement of reasons in regard to certain contextual matters

— Arguments of the parties

66 The applicant maintains that the Commission did not state its reasons for its decision to carry out the inspection at issue in the light of the decision of 16 July 2003, the proceedings before the Competition Council and the latter's decision.

67 First, the necessity and proportionality of the inspection, just like the reference to the risk of concealment or destruction of evidence, ought to have been substantiated by reference to the orders contained in the decision of 16 July 2003.

68 Secondly, since the Commission regarded the inspection as necessary notwithstanding the proceedings pending before the Competition Council and the rejection by the latter of the application for interim measures submitted by AOL, it was for the Commission to explain and justify the inspection, a fortiori in regard to the inspection ordered to be carried out on the applicant's premises.

69 The Commission's failure to fulfil its obligation to provide a statement of reasons is moreover borne out by the fact that the Commission made reference, amongst the contextual matters presented in the defence, to the decision of 16 July 2003, to the fact that the contested decision follows on from that decision, to the proceedings pending before the Competition Council and to its decision to deal with the substance of the case.

70 In any event, the explanations provided a posteriori in the defence cannot alleviate the deficiency in the reasoning vitiating the contested decision. The duty to provide a statement of reasons required the Commission to state in the reasoning that the presumption of an infringement put forward in it stemmed from exchanges with the French competition authority within the context of its investigation of the complaint lodged by AOL and that the contested decision stemmed from its prior decision to deal with the substance of that complaint. The failure in the present case is all the more serious since under paragraph 34 of the Notice the Commission ought to have informed the applicant of its decision to deal with the substance of the case.

71 The Commission replies first of all, in regard to the decision of 16 July 2003 and the supervisory measures imposed by it, that the contested decision mentions that the Commission had received information indicating that the offers in question formed part of a strategy of containing and driving off competitors. That information could not have been obtained by means of a simple request for information on costs and prices. Moreover, it emerges from the contested decision that the Commission suspected, on the basis of information received, that Article 82 EC had again been infringed, notwithstanding the supervision imposed by the decision of 16 July 2003, which implied that there was a major risk that the matters communicated by Wanadoo under that supervisory regime had been deficient or inaccurate.

72 Next, the failure to refer to the decision of the Competition Council and to the proceedings before it cannot constitute a serious defect in the statement of reasons, since the failure to mention those matters was not capable of occasioning loss to the applicant. Nor, in a decision ordering an inspection, is the Commission required to state its sources. In the alternative, the Commission adds that the Competition Council did not reject the application for interim measures for reasons going to the substance of the suspected infringement, but on grounds connected with the conditions governing the grant of interim measures. At all events, the applicant has not demonstrated in what way the fact that the Commission did not refer to the proceedings pending before the Competition Council prevented the applicant from comprehending the subject-matter and purpose of the inspection ordered.

73 Finally, the argument concerning the mention made in the defence to information which was not particularised in the contested decision is not germane. Specifically, the fact of not knowing that the Commission had decided to deal with the substance of the case did not mean that it was unable to comprehend the subject-matter and purpose of the inspection or the extent of what was sought. Nor, moreover, does paragraph 34 of the Notice require the Commission to inform the undertaking concerned by means of a decision.

— Findings of the Court

74 It follows from the analysis in paragraphs 47 to 57 above that the contested decision satisfies the general obligation to provide a statement of reasons imposed on the Commission by Article 20(4) of Regulation No 1/2003 and the case-law. It must therefore be determined whether, in the present case, the Commission was none the less obliged, in order to satisfy that obligation, also to provide a statement of reasons for the contested decision in regard to the matters mentioned by the applicant under this head of claim.

75 In that connection, it should be noted first that it is undisputed that the contextual matters which are relied on by the applicant were known to it when the contested decision was notified to it and the inspection took place. The omission to mention them in the contested decision cannot therefore have had the effect of infringing the applicant's rights of defence.

76 Secondly, in regard to the orders contained in the decision of 16 July 2003, it is apparent from the contested decision that, notwithstanding those orders, the Commission was in possession of information giving rise to a suspicion that Wanadoo was guilty of an infringement of Article 82 EC. In other words, the Commission had in its file evidence to indicate that Wanadoo was not complying with these orders. Moreover, the inspection also sought to obtain evidence indicative of an intention to drive out competitors, in relation to which it is difficult to imagine, even on the supposition that that evidence was covered by the orders at issue, that it would have been voluntarily communicated to the Commission, either by the applicant or by Wanadoo in the context of those orders. Thus, the existence of the orders contained in the decision of 16 July 2003 had no effect on whether it was appropriate to carry out the inspection ordered by the contested decision. Accordingly, the Commission was not required to provide a statement of reasons in regard to those orders.

77 Thirdly, the reference to the risk of concealment or destruction of evidence is not such as to demonstrate a failure by the Commission to comply with its duty to provide a statement of reasons. In fact, it is undisputed that, amongst the evidence sought, in particular evidence that may disclose a strategy of containing and driving off competitors, there are items which generally may be concealed or at risk of being destroyed in the event of an investigation. Moreover, as established above, it was also reasonable for the Commission to consider that such items would not be voluntarily communicated to it in the framework of the orders contained in the decision of 16 July 2003.

78 Fourthly, in regard to the proceedings pending before the Competition Council and the latter's dismissal of AOL's application for interim measures, Community law

does not in principle require the Commission to justify a decision to carry out an inspection in the light of any parallel national proceedings. Furthermore, the decision of the Competition Council in reality supports the investigative measure ordered by the Commission. It is true that in its decision the Competition Council notes that 'neither the sector nor the undertakings that comprise it appear to have suffered serious and immediate damage as a result of Wanadoo's pricing practices'. None the less, it takes the view that 'the possibility that certain pricing practices employed by Wanadoo fall within the scope ... of Article 82 [EC] if they affect a substantial part of national territory cannot be ruled out'. It thus justifies the dismissal of the application for interim measures by reference to the absence of serious and immediate damage to the sector or undertakings in the sector and the absence of direct harm to the consumer, in other words by the absence of urgency, and not on the ground that the complaint is manifestly unfounded. Moreover, that decision is silent as to the position which might or might not be adopted by the applicant in relation to the infringement of which its subsidiary is suspected. It does not therefore support an inference that the inspection ordered by the contested decision was not material; accordingly, the Commission was not obliged to provide in the statement of reasons specific reasoning in relation to the proceedings pending before the Competition Council or the latter's decision.

79 Nor, fifthly, is there any relevance in the fact that those matters were mentioned in the defence lodged by the Commission with the Court. The defence serves, in particular, to inform the Court of the factual and legal context of the case before it, which forms the backcloth to the contested decision and with which the Court, unlike the parties, is not familiar. The fact that a decision against which an action for annulment is brought omits to mention background matters which would subsequently be brought before the Court in the course of the presentation, by a party, of the circumstances in which the dispute before it has evolved does not therefore, as such, attest a failure to observe the duty to state the reasons for the contested decision.

80 Sixthly, it is plain from the contested decision that the Commission consulted the competent competition authority before carrying out the inspection. In addition, as already stated, the Commission is not required in a decision ordering an inspection

to state all the evidence available to it in relation to the alleged infringement. Finally, paragraph 34 of the Notice does indeed state that '[i]f a case is reallocated within the network [of competition authorities], the undertakings concerned ... are informed as soon as possible by the competition authorities involved'. However, paragraph 5 of the Notice expressly states that 'each network member retains full discretion in deciding whether or not to investigate a case' and paragraphs 4 and 31 state, respectively, that '[c]onsultations and exchanges within the network are matters between public enforcers' and that '[t]he allocation of cases therefore does not create individual rights for the companies involved in ... an infringement to have the case dealt with by a particular authority'. The Commission therefore remained entitled to carry out the inspection ordered and, whatever the content of the Commission's defence, the failure to fulfil the obligation to state reasons alleged by the applicant by reference to paragraph 34 of the Notice is not established.

81 Accordingly, the second claim cannot be upheld.

Third claim: the applicant could not understand the doubts expressed by the Commission concerning the Option 5 prices

— Arguments of the parties

82 The applicant maintains that the contested decision is in breach of the duty to provide a statement of reasons and the rights of the defence by mentioning Option 5 in the grounds of the decision and alleging that it had a margin-squeezing effect without citing Option 5 or the reduction in prices for that option in the operative part. The inspection cannot therefore be regarded as having been ordered for the purpose of verifying a presumed infringement on the applicant's part and the Commission omitted to state clearly and properly the suspicions directed against the new Option 5 tariffs.

83 As regards, in particular, the suspicion concerning the margin squeeze, it contradicts both the terms of Article 1 of the contested decision and the terms of the fourth recital thereto. The Commission suspected and verified the existence of a pricing practice, the applicant's Option 5 tariffs, which are not regarded as suspect by Article 1 of the contested decision and are excluded from the scope of verification by the fourth recital thereto.

84 Moreover, there is a fundamental difference between, on the one hand, taking into account the Option 5 tariffs as material to the determination, in the light of the cost of the tariffs, of whether the price of Wanadoo's retail offers is or is not predatory, and, on the other hand, mentioning those tariffs as being suspect in themselves, as the contested decision does.

85 Moreover, it is plain from the decision of 16 July 2003 that the applicant cannot be suspected of applying a margin squeeze on account of its Option 5 wholesale price by reference to the retail prices charged by Wanadoo, since those prices are charged by separate and independent undertakings operating in different markets. Furthermore, it is impossible to suspect the legality of the Option 5 tariffs and at the same time to treat them as the legal basis on which to suspect predatory pricing on the part of Wanadoo. Nor, moreover, can the lawfulness of Option 5 be made conditional on the level of retail prices charged by internet service providers including Wanadoo's prices. That being the case, the decision provides no explanation on this essential point and thus reveals a failure to comply with the duty to state reasons.

86 Finally, the Commission gives to understand that the Option 5 tariffs are too high, but at the same time casts doubt on the reduction of those tariffs in January 2004.

87 Besides, the doubts expressed by the Commission in the contested decision concerning the reduction in the Option 5 tariffs are inadequately reasoned. The Commission was aware, before adopting the contested decision, that the applicant was not free to alter the Option 5 tariffs and that the reduction in tariffs had been ratified by the competent French authorities.

88 The doubts expressed in the contested decision on the Option 5 tariffs ought therefore to have been specifically explained and justified. In particular, the applicant notes that the three French authorities consulted during the process leading to approval of the new tariffs ruled out any margin-squeezing effect in regard to those tariffs. The Option 5 tariffs were also denounced by AOL as producing a margin-squeezing effect, but the Competition Council did not uphold that complaint as prima facie made out.

89 The Commission replies, first of all, that the contested decision does not treat the Option 5 tariffs in isolation but deals with the new ADSL internet access tariffs intended for the general public in France, and thus the retail tariffs set by Wanadoo and/or France Télécom. Although the relationship of those prices with the Option 5 tariffs constitutes an essential element of the analysis, predatory pricing or margin squeezing cannot be ruled out merely because the Option 5 tariffs were approved by a public authority. The applicant's arguments must therefore be rejected. In particular, the fact that the ART ratified the price reductions for Option 5 does not mean that France Télécom, as a group, is unable to infringe Article 82 EC by means of a margin squeeze, given that the retail selling price is not regulated.

90 The applicant is confusing the anti-competitive practices against which the Commission's suspicions are directed, which are clearly set out in Article 1 of the contested decision and which delimit the scope of the contested decision, and the tariffs and other elements of fact which the Commission seeks to verify during the inspection. Within the legal category of unfair prices, the contested decision indicates that the Commission sought to verify, first, whether there was predatory pricing and, secondly, whether there was a margin squeeze, in which connection

wholesale tariffs are an essential part of the analysis. The Commission's suspicions do not therefore concern the Option 5 tariffs as such but the reduction in the financial margin between Option 5 and retail tariffs by way of a lowering of retail tariffs. There is therefore no contradiction between the grounds of the contested decision and Article 1 thereof.

91 In addition, in the context of an inspection decision, there is no need to demonstrate that there has been an infringement, but only suspicion of an infringement. The applicant, however, does not demonstrate either that the Commission could not reasonably have suspected an infringement or how mentioning the successive validations of the Option 5 tariffs at national level was necessary in order for the statement of reasons in the contested decision to meet the requisite legal standard.

92 Next, the reference to the decision of 16 July 2003 is not relevant. The Commission was entitled to take the view that, in the course of the process of the integration of Wanadoo by the applicant, and therefore during the period of the validity of the offers concerned, Wanadoo might have lost the capacity to fix its retail tariffs autonomously vis-à-vis the applicant.

93 Finally, provided that the requirements as to the statement of reasons for the contested decision are fulfilled, the Commission is not bound to set out in an exhaustive manner all the matters of which it is aware, and in particular the fact that the Option 5 tariffs had been approved at national level. In addition, the applicant was aware of those matters, and the fact that they were not mentioned could not have affected the rights of the defence.

— Findings of the Court

94 The applicant is essentially criticising the Commission for having taken the view in the contested decision that the Option 5 tariffs were suspect without clearly

explaining the suspicions it harboured in that regard or to substantiating its position in regard to its decision of 16 July 2003 and various national decisions.

95 However, as is clear from the essential terms of the contested decision reproduced in paragraphs 22 and 23 above, the decision states in relation to Option 5 that the reduced economic margin between Wanadoo's retail tariffs and the Option 5 tariffs caused a margin squeeze vis-à-vis Wanadoo's competitors who based their offers on Option 5, notwithstanding the reduction in the Option 5 tariffs that occurred in January 2004. It adds that that reduced margin constrained the entry onto the market of Wanadoo's competitors and threatened those already present. In addition, the contested decision states that Wanadoo practices below-cost offers. It concludes that these pricing practices are equivalent to imposing inequitable sales prices.

96 It must be held that the contested decision contains a clear statement of reasons and does not express any suspicion of infringement of Article 82 EC on the part of the applicant with regard to its Option 5 tariffs. Furthermore, the applicant's Option 5 tariffs are properly mentioned in the grounds of the contested decision but they do not appear in the matters to which the inspection relates as set out in Article 1 thereof. In fact, the contested decision confines itself to referring to them as a reference point which serves to determine, on the one hand, whether Wanadoo's retail prices were predatory, as the Option 5 tariffs have to be taken into account in calculating the costs borne by Wanadoo and, on the other hand, whether there was a margin squeeze as a result of Wanadoo's retail prices being too low. As has already been found, the case-law also indicates that at the inspection stage, which is the only relevant stage in this case, the Commission is not required to make a precise legal analysis of the suspected infringements (see, in relation to Regulation No 17, Joined Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165, paragraph 45).

97 The fact that the Commission may, at a later stage of the procedure, be unable to establish the existence of a margin squeeze is not relevant. First of all, that question involves an analysis of the merits, which is made on the basis of the information

collected during the inspection in question, and is not therefore to be examined in the context of a review of the Commission's observance of the obligation to give reasons. Secondly, the Commission is not in any event bound, in its substantive analysis of the information collected, by the legal classification which it may have made of certain infringements in a decision ordering an inspection; the only requirement on it in this connection is that the probability that the suspected infringements were present seems sufficiently high, in the light of the matters referred to in the decision ordering the inspection, to justify the inspection. It follows from the analysis made in particular in paragraphs 55 to 63 above that this requirement was met in this case.

98 The applicant's arguments that the Commission infringed its duty to give reasons by preventing it from understanding why the Commission was expressing doubts as to the legality of the Option 5 tariffs are therefore unfounded, as there is nothing in the contested decision to support the conclusion that the Commission expressed such doubts. It also follows that the approval of the Option 5 tariffs by the French authorities is irrelevant to the Commission's obligation to give reasons.

99 In the light of the foregoing, the third claim must be rejected.

Fourth claim: the *juge des libertés* was unable to carry out his supervisory function prior to authorising the inspection

— Arguments of the parties

100 The applicant contends that the competent national court must review the proportionality of the contested decision in the light of the principle of protection against arbitrary or disproportionate interference by the public authorities in the

private sphere of a legal person, which is a general principle of Community law. Under that principle, it is for the competent national court to determine whether the coercive measures envisaged are arbitrary or excessive having regard to the subject-matter of the verification and whether there are sufficiently serious indicia to found a suspicion that the undertaking in question has infringed the competition rules. The national court must have all the necessary information to enable it to carry out this function. It did not in this case.

101 In the first place, the information provided is not sufficient and does not suggest either very precise suspicions or the objective existence of indicia against the applicant. Secondly, the contested decision does not mention either Articles 2 and 3 of the decision of 16 July 2003, or the proceedings before the Competition Council, or the fact that the reduction in the Option 5 tariff was the subject of a favourable opinion of the ART, and was approved and then upheld by the Council of State. Yet these matters were relevant and were essential to enable the *juge des libertés* to carry out his review and, had they been disclosed to him, they might have led him to find the inspection ordered to be arbitrary and disproportionate, or in any event to request explanations from the Commission, in accordance with Article 20(8) of Regulation No 1/2003.

102 The fact that the decision of the *juge des libertés* was not implemented is irrelevant to this case, as the Commission's duty to give reasons and to cooperate in good faith with the national court is an objective obligation borne by the Commission when it adopts an inspection decision. The Commission cannot excuse a failure to provide reasons and to cooperate in good faith with the national court a posteriori on the ground that the latter's authorisation was of no practical application. In addition, the authorisation relied on as against the applicant was a decisive factor in the way in which the applicant conducted itself during the inspection.

103 Furthermore, the fact that the applicant did not challenge the legality of the order of the *juge des libertés* before the French courts cannot affect the scope of its arguments in this case. The Commission's alleged failure to state its reasons actually deprived the applicant of the power to challenge the legality of the authorisation of

the *juge des libertés* effectively. The latter cannot be criticised for having made an incorrect assessment on the basis of information which he did not have. The applicant further confirms that it brought an appeal against the order of the *juge des libertés*, which it subsequently withdrew.

104 The Commission replies, first of all, that this claim is inoperative. If the order of the *juge des libertés* adversely affected the applicant's rights, it should have challenged that order before the competent national court. The fact that the applicant appealed against the order is irrelevant. In addition, even if the national court had considered that it did not have enough information to be able to carry out its review, that cannot affect the legality of the contested decision, which is subject to review by the Community Courts only.

105 The fact that the order of the national court might have been a decisive factor in the applicant's cooperation is not conclusive either, as inspections ordered by the Commission are mandatory regardless of any national order, and any refusal to submit is punishable by substantial fines under Article 23(1)(b) of Regulation No 1/2003.

106 The Commission adds that the order was not implemented and that, consequently, the applicant's arguments under this head are without relevance, since the applicant consented to submit to the inspection decision and the inspection took place under the exclusive aegis of Community law.

107 In any event, the role of the national court in a case such as this is not to authorise the inspection ordered under Article 20 of Regulation No 1/2003 but to authorise

the national authority to use force in the event that the undertaking concerned refuses to submit to the inspection.

108 The Commission claims in the alternative that the contested decision in any event contained a sufficient statement of reasons for the *juge des libertés* to be able to review the proportionality of the measures.

— Findings of the Court

109 As a preliminary matter, it must be observed that, whilst the application is infelicitously worded in places, it none the less makes clear that the applicant is not challenging the legality of the order of the *juge des libertés*, nor arguing that the latter did not have the necessary information to assess the legality of the contested decision, but is essentially criticising the Commission for having provided a defective statement of reasons in the contested decision so that the *juge des libertés* was not able to carry out his review under Article 20(8) of Regulation No 1/2003.

110 It is true that, under Article 20(8) of Regulation No 1/2003, it is for the national judicial authority seised under Article 20(7) of that regulation to ensure that a Commission decision ordering an inspection is authentic and that the coercive measures envisaged for carrying out the inspection are not arbitrary or excessive having regard to the subject-matter of the inspection, and that the Commission is to this end under a duty to provide the national judicial authority with certain information. None the less, it is also clear from Article 20(8) of Regulation No 1/2003 and the case-law (see, in relation to Regulation No 17, *Roquette Frères*, cited in paragraph 37 above) that that information may appear elsewhere than just in the decision ordering the inspection, or may be communicated to the national judicial authority by the Commission otherwise than in that decision.

111 The fourth claim advanced by the applicant is therefore inoperative in so far as the purpose of the Commission's obligation to state its reasons is not to ensure that the national court whose authorisation is sought under Article 20(7) of Regulation No 1/2003 is properly informed but to enable the undertaking to be inspected to understand the scope of its duty to cooperate while preserving its rights of defence.

112 In the light of the foregoing, the Court finds that the Commission's alleged failure to fulfil its duty to state its reasons is not established and, accordingly, that the first plea must be rejected in its entirety.

Second plea: infringement of the duty to cooperate in good faith with national institutions

Arguments of the parties

113 The applicant argues first of all that the Commission infringed its duty to cooperate in good faith with the French institutions in two ways, and that those infringements ought to result in the contested decision being annulled.

114 First of all, it infringed its duty to cooperate in good faith with the *juge des libertés* to whom application for authorisation was made in respect of the inspection ordered at France Télécom; this obligation is founded on Article 10 EC as interpreted by the Court of Justice and it ought to govern and is necessary for the implementation of Regulation No 1/2003. The requirement imposed by the Court of Justice that the Commission provide the national court with information enabling it to exercise its power of review constitutes an essential obligation not only for the purposes of the requirement to give reasons but also for the purposes of the requirement to

cooperate in good faith with the competent court. The Commission's failure to refer to the provisions of Articles 2 and 3 and its decision of 16 July 2003, to the proceedings pending before the Competition Council and to the decision of the Council of State of 19 January 2004 constitutes a serious violation of its duty to cooperate in good faith with the *juge des libertés*.

115 Secondly, the Commission infringed its duty to cooperate in good faith with the Competition Council laid down in Article 11(1) of Regulation No 1/2003 and regulated by Article 11(6), Article 13(1) and recital 18 in the preamble to that regulation, by adopting the contested decision even though the Competition Council had been seised of the matter and had handed down a decision refusing the interim measures sought. In this case, the Commission failed to consult the Competition Council. In addition, it is clear from the provisions of Regulation No 1/2003 referred to above that if a national competition authority is already seised of a case, the Commission may initiate proceedings only after consulting that authority. Finally, it is the competition authority best placed to act which should deal with the complaint, and in the light of the three cumulative conditions listed in recital 8 in the preamble to Regulation No 1/2003, the Competition Council is better placed than the Commission to examine the presumptions of infringement.

116 The Commission replies first of all that in so far as this plea concerns an alleged failure to cooperate with the *juge des libertés*, it in fact repeats in another form the argument as to the alleged defective statement of reasons to which it has already responded. In so far as this plea concerns an alleged failure to cooperate with the Competition Council, it betrays a misunderstanding of Regulation No 1/2003. Within the scheme of the EC Treaty and Regulation No 1/2003, powers to apply the rules run in parallel and Regulation No 1/2003 does not contain any criterion allocating cases or competences. The national authorities remain competent to apply Articles 81 EC and 82 EC so long as the Commission has not initiated proceedings for the purposes of Article 11(6) of Regulation No 1/2003, and the Commission's power to act at any time against any infringement of Articles 81 EC and 82 EC is preserved.

117 Next, certain matters militated in favour of the Commission dealing with the case.

118 Finally, the Commission's decision to carry out an inspection and to deal with the substance of the case was the subject of close dialogue with the French authorities in the spirit of Article 11(1) of Regulation No 1/2003.

Findings of the Court

119 With regard, first of all, to the duty to cooperate in good faith with the national judicial authorities, the Court observes that the methods for implementing the obligation of cooperation in good faith which flows from Article 10 EC and which is binding on the Commission in its relations with the Member States (Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, paragraph 37, and order in Case C-2/88 Imm *Zwartveld and Others* [1990] I-3365, paragraph 17) have, with regard to relations established in the context of inspections carried out by the Commission to uncover infringements of Articles 81 EC and 82 EC, been defined in Article 20 of Regulation No 1/2003, which sets out the procedures by which the Commission, the national competition authorities and the national judicial authorities are to cooperate where the Commission has decided to carry out an inspection in the context of that regulation.

120 So, Article 20 of Regulation No 1/2003 authorises the Commission to conduct inspections either on production of a written authorisation under Article 20(3), or on the basis of a decision requiring the undertakings to submit to such an inspection under Article 20(4). Where the Commission carries out an inspection under Article 20(3), it is required by that provision, in good time before the inspection, to give

notice of the inspection to the competition authority of the Member State in whose territory the inspection is to be conducted. Where the Commission carries out an inspection under Article 20(4), that provision requires it to consult the competition authority of the Member State in whose territory the inspection is to be conducted before adopting the decision ordering the inspection.

121 According to Article 20(6) of Regulation No 1/2003, the assistance of the national authorities is necessary to conduct the inspection where the undertaking to be inspected opposes it, and where that assistance requires the authorisation of a judicial authority, such authorisation is to be applied for, in accordance with Article 20(7). By virtue of Article 20(8), the national judicial authority is then required to control that the Commission decision ordering the inspection is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject-matter of the inspection; the lawfulness of the Commission's decision is, however, subject to review only by the Community Courts.

122 It follows that Article 20 of Regulation No 1/2003 establishes a clear distinction between the decisions adopted by the Commission under Article 20(4) and an application to the national judicial authority for assistance under Article 20(7).

123 Although the Community Courts alone have jurisdiction to review the legality of a decision adopted by the Commission under Article 20(4) of Regulation No 1/2003, as is clear, in particular, from Article 20(8) in fine, it is, conversely, solely for the national court whose authorisation to employ coercive measures is sought under Article 20(7) of Regulation No 1/2003, possibly assisted by the Court of Justice should the matter be referred to it for a preliminary ruling, and subject to any

national remedies, to determine whether the information sent by the Commission in connection with that request enables it to perform the control required by Article 20(8) of Regulation No 1/2003, and so properly to determine the application presented to it (see, in this respect, with regard to Regulation No 17, *Roquette Frères*, cited in paragraph 37 above, paragraphs 39, 67 and 68).

124 The national judicial authority to which application is made under Article 20(7) of Regulation No 1/2003 may, under Article 20(8) and the case-law (see, in relation to Regulation No 17, *Roquette Frères*, paragraph 37 above), request information from the Commission about, in particular, the grounds on which it suspects an infringement of Articles 81 EC and 82 EC, the gravity of the suspected infringement and the nature of the involvement of the undertaking concerned. A review by the Court of First Instance, which might in theory give rise to a finding that the information provided by the Commission to the authority was insufficient, would entail a reappraisal by the Court of First Instance of the findings concerning the sufficiency of that information already made by the national judicial authority. Such a review cannot be permitted, as the national judicial authority's findings are amenable to review solely in accordance with the domestic remedies available in respect of the decisions of that authority.

125 The arguments raised by the applicant in support of its second plea must therefore be rejected in their entirety as inoperative in so far as, by challenging the content of the contested decision by reference to the Commission's obligation to cooperate in good faith, they entail a re-examination by the Court of First Instance of the assessment made by the *juge des libertés*, in the context of Article 20(8) of Regulation No 1/2003, of the sufficiency of the information presented to him by the Commission in order to obtain the authorisation applied for under Article 20(7) of the regulation. The Court of First Instance has no jurisdiction to oversee the way in which the national court to which application is made under Article 20(7) discharges the task conferred on it by Article 20(8).

126 Furthermore, it must be borne in mind that the legality of an act must be assessed by reference to the law and facts as they existed at the time when the act was adopted (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, and Case T-384/02 *Valenzuela Marzo* v *Commission* [2004] ECR-SC I-A-235 and II-1035, paragraph 98). Accordingly, the use to which a decision ordering an inspection may have been put, or the assessment which may have been made by the national judicial authority of the information in the decision in the context of an application by the Commission under Article 20(7) of Regulation No 1/2003, has no bearing on the legality of the decision ordering the inspection.

127 In the context of this plea, therefore, it is purely in the light of the information required by Article 20(4) of Regulation No 1/2003, as interpreted by the case-law, that the Court must determine whether the applicant's arguments alleging a failure by the Commission to fulfil its duty to cooperate in good faith with the national judicial authorities are well founded. It is clear from the analysis of the first plea that no infringement of Article 20(4) of Regulation No 1/2003 on the part of the Commission has been established. The first part of the applicant's arguments in support of its second plea must therefore be rejected.

128 With regard, secondly, to the duty to cooperate in good faith with the national competition authorities under the various provisions relied on by the applicant, it must first of all be pointed out that Article 11(1) of Regulation No 1/2003 does indeed lay down a general rule to the effect that the Commission and the national authorities are required to cooperate closely, but it does not require the Commission to refrain from making an inspection in a case which is being dealt with by a national competition authority in parallel.

129 Nor can it be inferred from that provision that where a national competition authority has begun an investigation into particular facts the Commission is immediately prevented from taking action in the case or taking a preliminary interest therein. On the contrary, it follows from the requirement of close

collaboration laid down by that provision that both those authorities may, at least in the preliminary stages such as investigations, work in parallel. So, it is clear from Article 11(6) of Regulation No 1/2003, on which the applicant relies, that the principle of cooperation implies that the Commission and the national competition authorities may, at least at the preliminary stages of cases in respect of which they have received a complaint, work in parallel. That provision in effect provides that, subject only to consulting the national authority concerned, the Commission retains the option of initiating proceedings with a view to adopting a decision even where a national authority is already dealing with the case. Therefore, the Commission must, a fortiori, be able to carry out an inspection such as that ordered in this case. A decision ordering an inspection is a step that is merely preliminary to dealing with the substance of the case, and does not have the effect of formally initiating proceedings within the meaning of Article 11(6) of Regulation No 1/2003; an inspection decision does not in itself demonstrate the Commission's intention to adopt a decision on the substance of the case (see, to that effect, in relation to Regulation No 17, Case 48/72 *Brasserie de Haecht* [1973] ECR 77, paragraph 16). Recital 24 in the preamble to Regulation No 1/2003 also states that the Commission should be empowered to undertake such inspections as are necessary to detect any infringement of Article 82 EC, and Article 20(1) of that regulation expressly provides that, in order to carry out the duties assigned to it by the regulation, the Commission may conduct all necessary inspections.

130 Secondly, it is clear from Article 13(1) of Regulation No 1/2003 and from recital 18 in the preamble to that regulation that the fact that a competition authority is dealing with a case merely gives any other authority that is involved the option of suspending proceedings or rejecting the complaint. It is therefore merely a reason entitling another authority to suspend its own proceedings or to reject the complaint made to it. It does not impose an obligation on the Commission to refrain from investigating because another authority is already involved in dealing with the same matter. Nor can it be said that these provisions establish a criterion for allocating or dividing up cases or competences between the Commission and the national authority or authorities that may have an interest in the case in question. Not

exercising the mere option provided for under that article cannot therefore constitute a failure by the Commission to fulfil its duty to cooperate in good faith in its relations with the competition authorities of the Member States.

131 Thirdly, with regard to the applicant's claim that the Commission does not appear to have consulted the Competition Council, the Court finds on the contrary that the contested decision states in the citations that the competent authority of the relevant Member State was consulted pursuant to Article 20(4) of Regulation No 1/2003. Accordingly, having regard to the presumption of lawfulness attaching to acts of the Community institutions (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48), whereby it is for the person claiming unlawfulness in regard to such an act to provide evidence thereof, and having regard to the fact that the applicant has not adduced evidence that the French competition authority was not in fact consulted, this argument cannot succeed.

132 Fourthly, it must be held that recital 8 in the preamble to Regulation No 1/2003 does not support the claim that the Competition Council is better placed than the Commission in this case to examine the presumptions in question. That recital is confined to setting out the principles which ought to govern the concurrent application of national law and Community rules on competition law and they do not deal with the question of identifying which competition authority is better placed than another to deal with a matter. It is therefore not relevant to this case.

133 In the light of the foregoing, the Commission did not, by adopting the contested decision, infringe any of the provisions relied on by the applicant under which its duty to cooperate in good faith with the national competition authorities arises. It follows that none of the arguments advanced by the applicant in support of its second plea can be upheld and that this plea must therefore be rejected as unfounded.

Third plea: infringement of the principle of proportionality

Arguments of the parties

134 The applicant claims that, according to the case-law, under the principle of proportionality, acts of the Community institutions may not go beyond what is appropriate or necessary to attain the end in view, and where there is a choice between several appropriate measures, the least onerous is to be selected.

135 The applicant submits generally that the defective reasoning described in the context of the first plea makes a review of proportionality impossible. In any event, the inspection in question is not an adequate or reasonable means of enabling the Commission to verify its presumptions and the contested decision must therefore be annulled.

136 In the first place, the contested decision is manifestly disproportionate having regard to the context of the case. First of all, the contested decision states that the doubts expressed by the Commission in relation to the January 2004 reduction in the Option 5 tariffs did not constitute a ground for carrying out an inspection of the applicant with a view to obtaining information on that tariff reduction. Next, the Commission obtained a considerable amount of information from the applicant in the context of the proceedings which resulted in the decision of 16 July 2003 without having to inspect its premises. Article 3 of that decision also enabled it to verify Wanadoo's prices. The inspection was therefore not a measure which was absolutely necessary for the purpose of obtaining information on alleged unfair pricing practices. Finally, the proceedings before the Competition Council and the decision of that council imposed a duty on the Commission not to carry out an inspection and if appropriate to use less onerous measures.

137 In the second place, the inspection was manifestly disproportionate having regard to the fact that there was no evidence of a real risk that evidence would be destroyed or concealed. In addition, the applicant has previously cooperated with the Commission in good faith. The document taken by the Commission, and which is alleged to have confirmed that it was correct to suspect concealment, is not conclusive. In addition, the information relating to the prices appears on documents which a listed and controlled company could not cause to disappear without committing serious accounting and company irregularities.

138 Thirdly, it is even more disproportionate to use a verification procedure and apply for assistance from the public authorities as a precautionary measure when Article 20(6) of Regulation No 1/2003 provides for the Member States to assist the officials authorised by the Commission only where an undertaking opposes an inspection. Although Article 20(7) allows assistance to be requested as a precautionary measure, the Court of Justice has held that it may be requested only where there are reasons for anticipating opposition to the verification, and the Commission must provide an explanation on this point to the national court to which application for such assistance is made. That is not the position in this case.

139 The Commission contends that this plea is unfounded. In the first place, since the Competition Council collected provisional information which it considered in part to be unreliable, the Commission cannot be criticised for having taken the view that it could not be sure of obtaining accurate information other than by undertaking an inspection. Nor does the decision of the Competition Council allay the suspicions of an infringement or state in what respect an inspection would be disproportionate. Moreover, the Competition Council, unlike the Commission, did not have evidence of any intention to oust competitors or of predatory behaviour and it would be illusory to claim that an undertaking might provide such evidence voluntarily.

140 Furthermore, the fact that the Commission requested or obtained information by means of a request for information under Article 11 of Regulation No 17 in the course of proceedings initiated in 2001 cannot diminish its powers of investigation under Article 20 of Regulation No 1/2003 in 2004.

141 Finally, since the Commission's suspicions did not relate to the applicant's Option 5 tariffs, there was no need to justify the proportionality of the inspection with respect to those tariffs.

142 In the second place, the Commission emphasises that the 12th recital in the preamble to the contested decision sets out the reasons why it took the view that there was a risk that useful evidence would be destroyed.

143 In addition, an undertaking may cooperate when called upon to reply to requests for information yet still intend to conceal evidence useful to the Commission's investigation. The objective risks are, in the Commission's experience, considerable in a case such as this one, as the evidence uncovered by the inspection shows. The fact that certain accounting documents may be difficult to destroy is not relevant since this is not the only type of document sought in this case.

144 It is thus clear from the circumstances and the nature of the evidence sought that the inspection was the means of investigation that offered the highest probability of obtaining evidence capable of showing an intention to oust competitors.

145 In the third place, the alleged lack of a sufficient reason for applying to the *juge des libertés* to use coercive measures is immaterial to an assessment of the legality of the contested decision.

Findings of the Court

146 As a preliminary matter, the Court must reject the applicant's general argument that the failure to give reasons for the contested decision makes review of the proportionality of the contested decision impossible. It has been found above that the Commission did not fail in its obligation to state reasons. As to the principle of proportionality, which is one of the general principles of Community law, this requires that acts of Community institutions should not exceed the limits of what is appropriate and necessary to attain the aim pursued, and when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, and Case C-180/00 *Netherlands* v *Commission* [2005] ECR I-6603, paragraph 103).

147 In the area to which this case relates, observance of the principle of proportionality presumes that the inspection envisaged does not constitute, in relation to the aims thereby pursued, a disproportionate and intolerable interference (see, in relation to Regulation No 17, *Roquette Frères*, cited in paragraph 37 above, paragraph 76). However, the choice to be made by the Commission between an investigation by straightforward authorisation and an investigation ordered by a decision does not depend on matters such as the particular seriousness of the situation, extreme urgency or the need for absolute discretion, but rather on the need for an appropriate inquiry, having regard to the special features of the case. Therefore where an investigation decision is solely intended to enable the Commission to gather the information needed to assess whether the Treaty has been infringed, such a decision is not contrary to the principle of proportionality (see, in relation to Regulation No 17, *National Panasonic* v *Commission*, cited in paragraph 52 above, paragraphs 28 to 30, and *Roquette Frères*, cited in paragraph 37 above, paragraph 77).

148 It is in principle for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules and even if it already has some indicia, or indeed proof, of the existence of an infringement, the Commission may legitimately take the view that it is necessary to order further investigations enabling it to better define the scope of the infringement or to determine its duration (see, in relation to Regulation No 17, Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 15, and *Roquette Frères*, cited in paragraph 37 above, paragraph 78).

149 In addition, Articles 18 and 20 of Regulation No 1/2003, relating respectively to requests for information and the Commission's powers of inspection, establish two entirely independent procedures, and the fact that an investigation under one of those articles has already taken place cannot in any way diminish the powers of investigation available to the Commission under the other article (see, in relation to Articles 11 and 14 of Regulation No 17, *Orkem* v *Commission*, cited in paragraph 148 above, paragraph 14).

150 In this case, firstly, the purpose of the contested decision is to collect information on the pricing practices employed by Wanadoo in order to assess whether there has been an infringement of the EC Treaty and, to that end, the decision imposes the inspection ordered on the applicant, notably because the Commission suspects that certain information relevant to establishing such practices might be found on the applicant's premises. It is certainly true that the contested decision states that the Commission already has some information. However, under the case-law, the Commission was entitled to seek to collect more information in order to establish that the suspected infringement did exist. Further, the evidence sought in this case also included information relating to a strategy of containing and driving off competitors which might have been communicated to the applicant, the parent company of the undertaking suspected of the infringement in question, and it is difficult to imagine how that information might have come into the Commission's possession other than by inspection. Secondly, given that the information sought included evidence that would show a possible intention to eliminate competitors and would determine whether the applicant could have known about such an intention, it was acceptable, to ensure an appropriate inquiry into the case, to order the inspection by decision so as to guarantee the effectiveness of the inspection. Thirdly, the inspection ordered by the contested decision was confined to the undertaking's premises, even though in some circumstances Regulation No 1/2003 now allows for the inspection of other premises, including the homes of certain members of staff of the undertaking concerned. In the light of these factors, in this case the Commission does not appear to have acted in a disproportionate manner having regard to the aim pursued, and thus to have failed to observe the principle of proportionality, because it was appropriate to order an inspection by decision having regard to the particular circumstances of the case.

151 The applicant's arguments do not invalidate that conclusion.

152 In the first place, the inspection ordered does not appear to be disproportionate in relation to its context. Firstly, since the Commission expressed no doubts about the legality of the Option 5 tariffs in the contested decision and the contested decision was not adopted in order to verify the legality thereof, it cannot be disproportionate on this point.

153 Secondly, the fact that the Commission had obtained information from the applicant in the course of the proceedings that resulted in the decision of 16 July 2003 by means other than an inspection is not relevant either since, as is clear from the analysis above, the decision to make an inspection was not disproportionate. In addition, the Commission cannot be considered to be bound to use a method of collecting evidence which it has used in regard to a particular undertaking in previous proceedings. Furthermore, at least some of the evidence sought, such as that relating to the strategy of containing and driving off competitors, which might potentially have revealed an intention to commit an infringement and might have been on the applicant's premises, was certainly not communicated to the Commission voluntarily.

154 Nor, thirdly, did the orders contained in the decision of 16 July 2003 enable all the information sought by the Commission at the inspection to be collected.

155 Fourthly, the decision of the Competition Council indicates that certain evidence relating to costs communicated by Wanadoo in the context of the complaint made to that council seemed unreliable and makes no finding as to the possible role played by the applicant in the infringement of which its subsidiary is suspected.

156 It cannot therefore be concluded that the decision to carry out an inspection was disproportionate. In this regard, the Court also notes that in the case that gave rise to the decision of 16 July 2003 the applicant's group strategy had been analysed and used as background evidence relevant to establishing the infringement committed by its subsidiary, Wanadoo, and that that decision refers in its analysis to various documents originating from the applicant or sent to it. The applicant's argument that the procedure before the Competition Council required the Commission not to carry out an inspection must therefore also be rejected.

157 In the second place, the argument that there is no evidence showing a real risk that evidence would be destroyed or concealed, in particular because the applicant had cooperated in good faith with the Commission in the past, is not conclusive. Firstly, this was not the only reason for the Commission's decision to carry out the inspection, as the main reason was to seek evidence capable in particular of revealing a strategy of containing and driving off competitors which might be in the possession of either the applicant or its subsidiary and which, as has already been pointed out, is generally concealed or at risk of being destroyed in the event of an inquiry. Secondly, the fact that the applicant is a quoted company and subject to strict accounting and financial rules is irrelevant. Even if evidence as to the prices of the various services mentioned in the contested decision, including the applicant's, was sought, the fact remains that, under Article 1 of the contested decision, evidence that might disclose an intention to eliminate competitors was also sought. However, such evidence is not among the records that have to be retained for accounting or financial purposes.

158 In the third place, the fact that the assistance of the public authorities was requested as a precautionary measure is also irrelevant to the proportionality of the contested decision, at least because, as already stated in paragraph 126 above, the legality of a decision can be assessed only by reference to the legal and factual circumstances as they existed at the time when the act was adopted, and it is undisputed that authorisation to use the public authorities was requested only after the adoption of the contested decision.

159 It is clear from the foregoing that the alleged infringement of the principle of proportionality has not been established and that the third plea must therefore be rejected.

Fourth plea: the contested decision was unlawful because it was the result of a prior decision that infringed Regulation No 1/2003, the Notice and the principle of the sound administration of justice

160 As this plea was raised for the first time in the reply, it must first of all be examined as to admissibility.

Arguments of the parties

161 The applicant claims that the Commission revealed new evidence in its defence. Thus, according to the Commission, in the course of contacts between it and officials of the Competition Council, it became apparent that the inspection was

necessary. As a result of those contacts, the view was formed that it would be appropriate for the Commission to deal with the substance of the case. The applicant submits that the contested decision was therefore the direct result of those exchanges with the French competition authorities and that had they not taken place the inspection would not have been ordered.

162 Although the applicant was aware of the proceedings before the Competition Council, it was not aware that the inspection was the result of the Commission's decision to deal with the substance of the case. That amounts to a matter of law or fact which came to light in the course of the procedure within the meaning of Article 48(2) of the Rules of Procedure and thus capable of justifying the introduction of a new plea in law in the course of the proceedings.

163 The Commission replies that that plea is inadmissible, since no matter of fact or law was disclosed by the applicant in the defence. First of all, given the fact that representatives of the French competition authority were present at the inspection, and given the wording of Article 20(4) and Article 11 of Regulation No 1/2003, it is difficult to believe that it was in the course of the proceedings that the applicant became aware of the contacts between the French competition authorities and the Commission before the inspection. Next, the fact that an inspection is arranged does not mean that the Commission in fact intends to deal with the substance of the case. In any event, the fact that the Commission is conducting an inquiry into the substance of the case cannot constitute a new fact. In this case, the Commission merely decided to institute a measure of inquiry. Finally, the applicant's interpretation that the contested decision was the result of exchanges between the Commission and the French competition authorities and that the inspection would not have been undertaken had these not occurred is open to question since the defence contains no such assertion.

Findings of the Court

164 It is clear from the provisions of Articles 44(1)(c) and 48(2) of the Rules of Procedure of the Court of First Instance, taken together, that the application initiating proceedings must indicate the subject-matter of the dispute and set out in summary form the pleas raised and that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. The fact that the applicant became aware of a factual matter during the course of the procedure before the Court of First Instance does not mean that that element constitutes a matter of fact which came to light in the course of the procedure. A further requirement is that the applicant was not in a position to be aware of that matter previously (Case T-139/99 *AICS* v *Parliament* [2000] ECR II-2849, paragraphs 59 and 62).

165 In this case, the applicant essentially claims that the matter that gave rise to the contested decision was a previous decision by the Commission to deal with the substance of the case and that the existence of that decision was disclosed to it in the Commission's defence. The alleged earlier decision thus amounts to a matter of fact or law that came to light during the course of the proceedings and justifies the introduction of this plea for the first time at the reply stage; according to this plea, the contested decision is unlawful because it is the result of a previous decision of the Commission which itself is unlawful because it was adopted in violation of Regulation No 1/2003, the Notice and the principle of the sound administration of justice.

166 In this connection, it must be observed that the Commission did indeed state in its defence that the 'decision of the Commission to make an inspection and to deal itself with the substance of the case was, contrary to the applicant's contention ...,

the subject of close dialogue with the French authorities in the spirit of Article 11(1) of Regulation No 1/2003'. However, the Commission further states, also in its defence, that it was in the course of telephone contacts and a meeting between the Commission and the Competition Council's Rapporteur that it became apparent that an inspection would be necessary in order, in particular, to collect any evidence capable of establishing predatory behaviour and that the contacts between Competition Council officials and Commission officials resulted in the view being formed that it would be appropriate for the Competition Council to determine the issue of interim measures and for the Commission to deal with the substance of the case, having regard in particular to the decision of 16 July 2003. However, taken in context, the Commission's assertion, which the applicant considers to disclose a new fact, is rather a general consideration relating to the appropriateness of carrying out an inspection and then, logically, making an investigation on the basis of the evidence collected in the course of that inspection. Thus, the contested decision itself reveals that the Commission had decided to deal with the substance of the case, and a measure of investigation such as the inspection in question is in fact the starting point for 'dealing with the substance of the case'.

167 The word 'decision' used in the defence is certainly infelicitous but does not in itself justify the contention that this really constitutes disclosure of a new matter of fact or law of which the applicant could not have previously been aware. The applicant adduces no further evidence. Further, even on the assumption that the Commission did take such a decision, the contested decision was an expression of that decision, since a measure of inquiry is by definition a preliminary but necessary step to an examination of the substance. The applicant cannot therefore be regarded as not having been in a position to be aware of that decision before the Commission lodged its defence, especially since, having regard to the provisions of Article 20(4) of Regulation No 1/2003, it could not have been unaware of the contacts between the

Commission and the French competition authorities prior to the adoption of the contested decision. That is a fortiori true at the time when the application was lodged; the contested decision expressly states that the Commission heard argument from the competent authority of the relevant Member State in accordance with Article 20(4) of Regulation No 1/2003 and an annex to the application establishes that the applicant was already aware at the time of the inspection of the proceedings pending before the Competition Council.

168 The alleged decision on which the applicant relies, and which in its submission was disclosed in the Commission's defence, therefore in reality is confused with the contested decision. It follows that no new matter of law or fact was disclosed to it by the defence. Further, the applicant was quite capable of relying on the infringements raised in the context of this plea in its application.

169 It follows from these matters that this plea must be rejected as inadmissible, without there being any need to adjudicate on its merits, and in the light of all of the foregoing the application must be dismissed in its entirety.

Costs

170 Under Article 87(2) of the Rules of Procedure, 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 applicant has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Legal Wiszniewska-Białecka Moavero Milanesi

Delivered in open court in Luxembourg on 8 March 2007.

E. Coulon H. Legal

Registrar President