

OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 22 April 2010¹

1. In the present appeal Deutsche Telekom AG ('the appellant') asks the Court to set aside the judgment of the Court of First Instance (now 'the General Court')² which upheld the decision of the Commission relating to a proceeding under Article 82 EC (now Article 102 TFEU).³ It is the first time that the Court has been called upon to deal with an alleged abuse of a dominant position in the form of a margin squeeze.

I — Background to the dispute

2. The facts are set out in paragraphs 1 to 24 of the judgment under appeal. I shall confine

myself to the most essential points. The appellant is the incumbent telecommunications operator in Germany where it operates the fixed telephone network. The German markets in the provision of infrastructure and in the provision of telephone services have been liberalised since 1 August 1996, when the German Law on telecommunications ('TKG') came into force. The appellant's local networks each consist of a number of 'local loops for subscribers' (physical circuits connecting the network termination point at a subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network). It is necessary to distinguish between the local network access services the appellant offers its competitors ('wholesale access') and those the appellant offers its subscribers ('retail access'). The appellant was required to offer its competitors fully unbundled access to the local loop with effect from June 1997. The appellant's wholesale access charges must be approved in advance by the German regulatory authority for telecommunications and post ('RegTP'), which checks whether the wholesale access charges proposed by the appellant are inter alia based on the costs of efficient service provision and whether they do not contain discounts which prejudice the opportunities of competitors. As regards retail access, the appellant offers two basic variants: the traditional analogue connection and the digital narrowband connection (Integrated Services Digital Network, or ISDN). Both can be provided over the appellant's existing copper pair network. The appellant also offers end-users a broadband connection (Asymmetrical Digital Subscriber Line, or ADSL), for which it had to upgrade the existing networks so as

¹ — Original language: English.

² — Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477 ('the judgment under appeal').

³ — Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 EC (Case COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG) (OJ 2003 L 263, p. 9) ('the contested decision').

to be able to offer broadband services, that is faster internet access. The appellant's charges for retail access ('retail charges' or 'retail prices') for analogue and ISDN lines are regulated by a price cap system. The appellant sets its retail prices for ADSL at its own discretion, but these may be reviewed a posteriori.

Adjustments to charges would be authorised if the average price of a basket did not exceed the price cap index imposed. During that period, the appellant reduced the retail prices in both baskets; the reductions essentially applied to call charges. Retail prices for analogue lines, on the other hand, remained unchanged. A new price cap system, which introduced new baskets, has been in effect since 1 January 2002. On 15 January 2002, the appellant informed RegTP that it proposed to increase its monthly charges for analogue and ISDN lines. The increase was authorised. On 31 October 2002, the appellant made a further application to increase its retail charges. That request was partially rejected. ADSL charges are not subject to advance regulation under the price cap system, but may be reviewed subsequently. On 2 February 2001, following a number of complaints from competitors, RegTP initiated an ex post investigation of the appellant's ADSL prices under the German rules on competition. On 25 January 2002 it found that the relevant price increase did not give rise to a suspicion of 'price dumping' anymore.

3. Retail prices for connection to the appellant's network and for telephone calls are regulated for a block of services at a time, with different services being grouped together in 'baskets'. Under the terms of decisions of the Federal Ministry of Post and Telecommunications ('BMPT') and, then, RegTP the appellant had to lower the aggregate prices for each of the two baskets in the period from 1 January 2000 to 31 December 2001. Within this framework of binding price reductions, the appellant could modify the charges for individual components of each basket after obtaining prior authorisation from RegTP.

4. As regards the contested decision, its main parts are set out in paragraphs 34 to 46

of the judgment under appeal and I will not repeat all those points here. In essence, in 1999 the Commission received complaints from 15 of the appellant's competitors, challenging its pricing. Recital 102 to the contested decision essentially states that a margin squeeze exists if the charges to be paid to the appellant for wholesale access are so expensive that competitors are forced to charge prices higher than those the appellant charges its own end-users. Even if the competitors are as efficient as the appellant, they cannot make a profit. Recital 103 to the contested decision continues that the competitors are thus prevented from offering access via the local loop in addition to call services. Otherwise, they are forced to offset their losses on access services out of higher revenue on telephone calls, as the appellant itself does. But in recent years call charges have fallen substantially in Germany, so that competitors often have no realistic possibility of offsetting one price against another. For the purpose of calculating the margin squeeze, the Commission takes account only of charges for local network access, to the exclusion of telephone call charges. The conclusion is that there was a negative spread between the appellant's wholesale and retail prices between 1 January 1998 and 31 December 2001 ('the first period'). That spread was positive from 1 January 2002 to 21 May 2003 ('the second period'). However, as the positive spread was insufficient to cover the appellant's product-specific costs linked to the provision of retail services, there was an abusive margin squeeze also in 2002. The Commission recognises that the appellant's wholesale and retail charges are subject to sector-specific regulation. Nevertheless, the appellant had sufficient discretion to restructure its charges so as – depending on the relevant period – either to reduce or to put an end to the margin squeeze. The Commission assessed it as a serious infringement for the first period, and a minor infringement for the second period and imposed a fine of EUR 12.6 million.

II — The judgment under appeal

5. As regards the principal form of order sought – annulment of the contested decision – the first plea alleged infringement of Article 82 EC. With regard to its first part, I refer to paragraphs 70 to 152 of the judgment under appeal. I shall reproduce here only the most essential points. Concerning the first period, the General Court held that the Commission was correct to find that the appellant had scope to apply for increases in the prices of its access services for analogue and ISDN services, while respecting the overall ceilings for the baskets. The General Court did not accept the argument that due to RegTP's ex ante intervention the appellant should no longer be subject to Article 82 EC. It noted

that RegTP does not examine the compatibility of the applications with Article 82 EC. The National Regulatory Authorities ('NRAs') operate under (national) telecommunications law which may have objectives that differ from those of Community competition policy. At any rate, the Commission cannot be bound by a decision taken by a national body. As regards the second period, the appellant's scope to increase ADSL charges was capable of reducing the margin squeeze between wholesale prices, on the one hand, and retail prices for the whole range of analogue, ISDN and ADSL access services, on the other, because these services amount to a single supply of services at wholesale level and ADSL cannot be offered to end-users on its own.

solely on the basis of the appellant's particular situation – its charges and costs – and not on the basis of the situation of its actual or potential competitors. In addition, the Commission was entitled to conclude that access services alone were relevant and it could thus exclude telephone call charges. Such a method is compatible with the principle of tariff rebalancing and with equality of opportunity. Concerning the fourth part of the first plea – alleging that the margin squeeze had no effect on the market – I refer to paragraphs 225 to 245 of the judgment under appeal. In particular, in paragraph 237 the General Court held that since the appellant's 'wholesale services are ... indispensable to enabling a competitor to enter into competition with the [appellant] on the downstream market in retail access services, a margin squeeze [in circumstances such as those in the present case] will in principle hinder the growth of competition in the downstream markets'. The small market shares acquired by the competitors in the retail access market since the market was liberalised are evidence of the restrictions which the appellant's pricing practices have imposed on the growth of competition in those markets.

6. As regards the second part concerning the lawfulness of the Commission's methodology, I refer to paragraphs 153 to 213 of the judgment under appeal. In essence, the General Court considered that, because the appellant's conduct was connected with the unfairness of the spread between prices for wholesale access and retail prices, the Commission was not required to demonstrate that the appellant's retail prices were, as such, abusive. Then, as regards the calculation, the Commission was correct to analyse the abusive nature of the appellant's pricing practices

7. With regard to the third plea – alleging misuse of powers and infringement of the principles of proportionality, legal certainty

and protection of legitimate expectations – I refer to paragraphs 257 to 272 of the judgment under appeal. In particular, the General Court held that the principle of the protection of legitimate expectations was not infringed because the decisions of RegTP do not include any reference to Article 82 EC and because it follows implicitly but necessarily that the appellant's pricing practices had an anti-competitive effect, since the competitors had to resort to cross-subsidisation. In addition, the General Court rejected the claim that the Commission misused its powers, recalling that, even if RegTP had infringed a Community rule and even if the Commission could have initiated proceedings against Germany for failure to fulfil obligations, such possibilities cannot affect the lawfulness of the contested decision, not least because Article 82 EC concerns only economic operators and not the Member States.

Commission was entitled to characterise the infringement as serious for the first period. Next, the Commission duly took into account RegTP's intervention when reducing the basic amount of the fine by 10%. Finally, the Commission was right to decide against imposing a symbolic fine. In view of the above, the General Court dismissed the action.

III — The appeal

8. Under the alternative form of order sought the appellant solicited a reduction of the fine imposed. Concerning its third plea, I refer to paragraphs 290 to 300 of the judgment under appeal. In essence, the General Court held that the appellant could not be unaware that, notwithstanding the authorisation decisions of RegTP, it had genuine scope to fix and increase its retail prices and so reduce the margin squeeze. In addition, the appellant could not have been unaware that that margin squeeze entailed serious restrictions on competition. As regards the fourth and sixth pleas, I refer to paragraphs 301 to 321 of the judgment under appeal. In particular, the

9. On 25 November 2009, oral argument was presented to the Court by the appellant, Vodafone and the Commission as well as by Versatel, which had not submitted written observations.

10. First of all, it is necessary to deal here with Vodafone's argument that the first, second and third part of the first ground of appeal as well as the first and second part of the second ground of appeal are inadmissible because the appellant is merely reproducing the arguments already raised at first instance and now seeks a re-examination of those arguments. Suffice it to point out, however, that according to the case-law 'provided that an appellant

challenges the interpretation or application of Community law by the [General Court], the points of law examined at first instance may be discussed again in an appeal ... Indeed if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the [General Court], an appeal would be deprived of part of its purpose.⁴ I consider that in the present case the appellant is not merely requesting re-examination of the application submitted to the General Court in so far as, by essentially the same arguments, the appellant contests the interpretation and application of Article 82 EC by the General Court. The appellant's grounds of appeal are therefore admissible.

12. As regards the first period, the appellant submits that the General Court erred in ruling that the infringement may not be attributable to it only if the conduct originated solely in the national law and in the absence of discretion to apply for higher charges. By its first complaint, the appellant essentially contends that the existence of a margin of discretion is a necessary but not a sufficient condition for attributability. That does not answer the question whether the appellant could have applied for higher charges or whether it should indeed have done so. Moreover, RegTP repeatedly considered that the margin squeeze was not anti-competitive.

A — The first ground of appeal, alleging errors of law concerning the regulation by RegTP as the competent NRA

1. First part of the first ground of appeal concerning the attributability of the infringement

11. The Commission and Vodafone contend that this part of the first ground of appeal should be dismissed.

13. As regards attributability, the General Court correctly applied the relevant case-law. While the fact that RegTP did not oppose the appellant's abusive conduct may be regarded as inciting it in a way, the fact remains that, in and of itself, that does not exonerate the appellant from responsibility under Article 82 EC.⁵ According to the case-law,

⁴ — Case C-131/03 P *Reynolds Tobacco and Others v Commission* [2006] ECR I-7795, paragraphs 49 to 51 and the case-law cited.

⁵ — See Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraphs 36 to 73, and Case C-198/01 *CIF* [2003] ECR I-8055, paragraph 56. Cf. also Case 123/83 *BNIC* [1985] ECR 391, paragraphs 21 to 23.

‘[Article 82 EC] may apply ... if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition.’⁶ Hence, if the appellant had a margin of discretion, then it should have requested the NRA to increase its retail prices in order to put an end to the abusive conduct. The Grand Chamber of the Court has recently clearly confirmed that approach in *Sot. Lélos kai Sia and Others*.⁷ Paragraph 113 of the judgment under appeal rightly points out that NRAs are obliged, like all organs of the State, to respect the provisions of the EC Treaty. However, the decisions taken by NRAs cannot preclude the Commission from acting at a later stage and requiring Article 82 EC to be complied with under Regulation No 17 or, now, Regulation No 1/2003.⁸ Indeed, in *Masterfoods v HB* the Court essentially held that the Commission cannot be bound by a decision taken by a national body pursuant to Article 82 EC.⁹ On this point, as was noted in paragraph 265 of the judgment under appeal, I also consider that it is not inconceivable that in the present case the German authorities also infringed Community law. Their failure to act, if it were to be established, however, would not remove the scope which the appellant had to reduce the margin squeeze. Indeed, the possibility to initiate proceedings against the Member State concerned

for failure to fulfil obligations completes the Commission’s abovementioned competences but does not replace them.

14. Next, according to the appellant, in the present case the responsibility of the NRA overrides and restricts the regulated undertaking’s special responsibility which is limited to the obligation to transmit all information to the NRA in a correct and complete manner. The appellant notes, first, that in the present case the charges were subject to regulation which was aimed at creation of a telecommunications sector open to competition.¹⁰ In addition, the ‘Liberalisation’ Directive 90/388¹¹ is based on competition law, in particular on Article 86(3) EC. It follows that RegTP was obliged to respect Community competition law. Indeed, according to Paragraph 27(3) of the TKG, RegTP is to guarantee compatibility of the charges ‘with ... other legal provisions’,

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

7 — Joined Cases C-468/06 to C-478/06 [2008] ECR I-7139, paragraph 62 et seq.

8 — Respectively Council Regulation (EEC) No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87); and 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).

9 — Case C-344/98 [2000] ECR I-11369, paragraph 48.

10 — Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4).

11 — Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10).

that is including Article 82 EC. Furthermore, it follows from Article 10 EC that RegTP, as a body of a Member State, is required to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

15. As regards the alleged transfer of responsibility, it should be borne in mind that, for the purposes of competition law, what matters is the objective conduct of an undertaking.¹² The conduct of an undertaking should normally be attributed to it. Therefore the General Court correctly held in paragraphs 85 and 86 of the judgment under appeal that the Court's case-law recognises exceptions to that principle only under strict conditions. In any event, the fact that the undertaking acted *bona fide* should not play a role in that respect. Indeed as I stated at the outset, merely because a Member State may incite anti-competitive conduct, that alone does not change the fact that the infringement will still be attributed to the undertaking. Furthermore, while the appellant's argument is in itself correct, that in the case-law referred to in paragraphs 86 to 89 of the judgment under appeal the national provisions in question were aimed at restricting or prohibiting competition and the present regulatory framework is rather aimed at opening the

telecommunications sector to competition, in accordance with Directive 90/388 and Regulation No 2887/2000, the fact remains that the regulatory framework in question completes the Treaty provisions on competition and should guarantee a competitive context to an extent which Articles 81 EC and 82 EC alone could not with the same certainty.¹³ The Commission correctly pointed out in this respect that the Community legislature clearly expressed its wish to protect in particular competition on this market by adopting additional measures. It follows that Articles 81 EC and 82 EC should be considered to constitute a set of minimum criteria. Turning specifically to the appellant's first complaint above, as regards the period from 1 January 1998 to 31 December 2001, suffice it to point out that, according to Article 1 of the contested decision, the appellant's infringement is not due to an absence of applications presented to RegTP but rather to a pricing policy which is incompatible with Article 82 EC. Those applications were a necessary step, but only a formal one in order to use the available margin of discretion. In this connection, in paragraphs 125 to 131 of the judgment under appeal the General Court was right to confirm the Commission's approach on this point.

16. Secondly, the appellant submits that the Bundesgerichtshof (Federal Court of Justice,

12 — See Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 91. See also Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraph 29.

13 — In this connection, as regards Regulation No 2887/2000, see Case C-55/06 *Arcor* [2008] ECR I-2931, paragraphs 59 to 64.

Germany) did not consider in its judgment of 10 February 2004 that the appellant's responsibility to make applications for the adjustment of its charges implies that the appellant should substitute its assessment under Article 82 EC for that of the NRA. Instead, it confirmed that the responsibility for maintaining the structure of the market lies with the NRA.

competition regime in the telecommunications sector.

17. Suffice it to point out, however, as the Commission correctly noted with regard to the General Court's interpretation of the above judgment, that the appellant has not claimed any distortion of evidence and that, in any event, the Bundesgerichtshof indeed stated that there may well be an abuse even if the charges are subject to prior examination by RegTP.

19. Again, I consider that the appellant's arguments do not help its case. As stated above, the Commission may not be bound by a national body's decision and that body's authorisation may not preclude the Commission's finding of abuse under Article 82 EC merely on the basis of some alleged absence of attributability. Indeed, the Commission derives its competence directly from the Treaty and from Regulation No 17 and, now, from Regulation No 1/2003. As I also mentioned above the regulatory framework in question completes competition law provisions and the two sets of rules should be considered to be complementary.¹⁴ Finally, as the Commission correctly argued, a directive based on

18. Thirdly, with regard to paragraph 120 of the judgment under appeal, the appellant submits that the *Masterfoods v HB* judgment cannot be transposed to the present case. First, the question here is only about attributability and not about whether the Commission is bound by RegTP's assessment of the substance. Second, the NRAs play an autonomous role in the framework of the

14 — Cf. the Commission's Notice of 22 August 1998 on the application of the competition rules to access agreements in the telecommunications sector – framework, relevant markets and principles ('Access Notice') (OJ 1998 C 265, p. 2), paragraph 22: 'undertakings ... in the telecommunications sector should be aware that compliance with [EC] competition rules does not absolve them of their duty to abide by obligations imposed in the ONP context, *and vice versa*' (emphasis added). See also paragraph 60: '[Article 82 EC applies] in the normal manner to ... practices ... approved or authorised by an [NRA]'. Cf., in general, de Stree, A., *On the edge of antitrust: the relationship between competition law and sector regulation in European electronic communications*, EUI Florence, October 2006; Larouche, P., *Contrasting legal solutions and the comparability of EU and US experiences*, TILEC Discussion Paper, November 2006; Monti, G., 'Managing the intersection of utilities regulation and EC competition law', *Competition Law Review*, Vol. 4(2), July 2008, and Klotz, R. in Koenig, Ch., Bartosch, A., Braun, J.-D. and Romes, M. (eds.), *EC competition and telecommunications law*, 2nd edition, Wolters Kluwer, 2009, p. 108 et seq.

Article 86(3) EC cannot call into question, as regards application of Article 82 EC, the division of competences established at the level of primary law by Articles 83 EC and 85 EC. Finally, in its Guidelines for market analysis and assessment of significant market power¹⁵ the Commission has now clearly stated – something which was in fact already essentially true in the previous legal framework (see the Access Notice in footnote 14 above) – that, in practice, it cannot be ruled out that parallel procedures under *ex ante* regulation and competition law may arise and competition authorities may carry out their own market analysis and impose remedies alongside any sector-specific measures applied by NRAs.

20. Fourthly, the appellant considers that the principle of legal certainty requires a dominant undertaking subject to regulation to be able to rely on the correctness of that regulation. Where measures taken by the NRAs are not consistent with Article 82 EC, the Commission should initiate proceedings against the Member State for failure to

fulfil obligations and not against the dominant undertaking.

21. In my view the General Court correctly held that, even though RegTP was obliged like all organs of the State to respect the provisions of the EC Treaty, it was, at the material time, the German body responsible for regulating the telecommunications sector, rather than the competition authority of the Member State concerned. I consider the analogy of two barriers suggested by the Commission's argument to be quite apt in this respect. Regulation represents one of the barriers; it is respected if the appellant satisfies the provisions of regulation, and here it is RegTP which decides on this point. Article 82 EC represents a second barrier and – independently of the obligation to respect the provisions of the EC Treaty imposed on RegTP – it falls within the competence of the relevant competition authority, in this case the Commission, to decide where necessary whether that second barrier was respected or not. Moreover, the appellant could not be unaware of the fact that telecommunications regulation and application of Article 82 EC constitute separate instruments, even if ultimately they both seek to promote competition. The appellant is mistaken about the separation of the two instruments when it refers to paragraph 61 of the Commission's Access Notice and argues that if the Commission considers that the measures taken by the NRA are not consistent with Article 82 EC it should initiate proceedings against the Member State for failure to fulfil obligations. Indeed, it is open to the Commission to correct in this way errors of Member States made in the framework of regulation, that is to say

¹⁵ — Commission's guidelines for market analysis and assessment of significant market power under the Community regulatory framework for electronic communications networks and services (OJ 2002 C 165, p. 6), pp. 6 to 31 and, in particular, paragraph 31.

the insufficient application of the regulatory framework. However, it is not the purpose of the present proceedings to determine whether RegTP indeed made such an error or not. As the Commission rightly stated, the control of application of Article 82 EC is not devolved to the NRA, in lieu of the Commission.

finding that there was no margin squeeze. Indeed, as the judgment under appeal stated in paragraph 116, RegTP applied this concept not only with regard to call charges but also with regard to grouping of several types of access services at end-user level, a method which the General Court had to recognise constitutes 'cross-subsidisation'.

22. By its second complaint, the appellant submits that the considerations in paragraphs 111 to 119 of the judgment under appeal – investigation of a margin squeeze by RegTP – are irrelevant or vitiated by errors of law. RegTP has always denied the existence of an anti-competitive margin squeeze. The appellant contends, first, that for attributability it matters little that the General Court does not agree with RegTP's opinion. The reasoning leads to an unlawful vicious circle: because the General Court arrived at a different result from that previously reached by RegTP, the appellant had no right to rely on the result of RegTP's investigation. At the time there was no Community case-law or decision-making practice of the Commission pertaining to this point. Moreover, the concept of 'cross-subsidisation' used by RegTP in its decision of 29 April 2003 gave the appellant no reason to doubt the correctness of RegTP's

23. I consider that the Commission correctly pointed out that the statement of the General Court to the effect that RegTP did not examine Article 82 EC is a statement of fact which may not be challenged in this appeal. In any event, I agree with the General Court's point in paragraphs 114 and 268 of the judgment under appeal that it is relevant that none of RegTP's decisions cited by the appellant includes a reference to Article 82 EC. Therefore, it is clear that RegTP applied national law and not Community competition law. As the Commission pointed out, RegTP's statements with regard to margin squeeze did not concern the area where the appellant had a proven margin of discretion, that is to say modification of end-user access prices. I consider that the General Court rightly stated that RegTP did not consider the compatibility of the charges in question with Article 82 EC or – at any rate – it applied Article 82 EC

incorrectly. It follows that the General Court correctly held that RegTP did not examine Article 82 EC. Next, the appellant should not reproach the General Court for circular reasoning. The appellant could have inferred from RegTP's decision that its action did not replace or pre-empt a review of Article 82 EC by the Commission. Indeed, it is not only the result of RegTP's and the Commission's investigation that is different; importantly, the relevant criterion also differs. As regards the concept of cross-subsidisation, I consider that the General Court did not attribute a disproportionate weight to it. In fact, both RegTP and the General Court in paragraph 116 of the judgment under appeal clearly took the view that what was at issue was cross-subsidisation of 'charges for access services and call charges' and it was not a matter of grouping several types of access together.

that RegTP acted in a regulatory framework whose aim is to open the sector to competition and to make Community competition law applicable in it and that it investigated and decided against the existence of an anti-competitive margin squeeze.

25. The above argument is incorrect. Suffice it to point out in that respect that RegTP was applying telecommunications law and not competition law. The General Court rightly held in paragraph 113 of the judgment under appeal that NRAs operate under national law which may, as regards telecommunications policy, have objectives which differ from those of Community competition policy (see the Access Notice, paragraph 13).

24. Secondly, the appellant considers that the reasoning of the General Court in paragraphs 111 to 114 of the judgment under appeal – that RegTP was not required to examine the charges' compatibility with Article 82 EC – is also wrong in law for the reasons set out in its argumentation in point 14 above. That question, or whether RegTP expressly referred to Article 82 EC, is of little importance. What is decisive is the fact

26. By its third complaint, the appellant submits that, contrary to what the judgment under appeal states in paragraphs 109 and 110, the fact that its retail charges for analogue lines were based on an authorisation granted by the BMPT is irrelevant for the purposes of attributability. What is important is only that

RegTP examined and declared unfounded the alleged anti-competitive margin squeeze.

a possibility of 'cross-subsidisation' between two markets.

27. However, as follows from paragraphs 109 and 110 of the judgment under appeal, the appellant does not claim that the BMPT examined those charges' compatibility with Article 82 EC. In fact, as was pointed out by the Commission, the spread between the charges for analogue lines and the wholesale charges could not have been examined at the time because the wholesale charges were authorised only later, that is to say in March 1998, provisionally, and in February 1999, definitively.

28. As regards the second period, the appellant contends that the assumption that there existed a margin squeeze which was attributable to it and abusive is wrong. By its first complaint, the appellant considers that the judgment under appeal is incorrect because, as was the case for the previous period, the margin squeeze is not attributable to it by reason of RegTP's decisions. By its second complaint, the appellant submits that the judgment under appeal contains a contradiction between the assessment of the attributability of the infringement and the calculation of the margin squeeze. Indeed, the latter requires a 'cross-subsidisation' between two markets, but during the calculation of the margin squeeze no account was taken of revenues which competitors obtain from call services, because competitors may not be referred to

29. In my view, the General Court did not proceed in a contradictory manner. Indeed, the separation between a market for broadband access and a market for narrowband access is only valid for the retail market. On the other hand, as regards the wholesale market, there is only a single market for access to fixed local networks. Importantly, the appellant did not contest paragraphs 148 to 150 of the judgment under appeal and I consider the General Court's statements in those paragraphs to be correct. Indeed, in this respect it is relevant that the appellant did not challenge at first instance the definition of the relevant markets. As follows from paragraph 139 of the judgment under appeal, the appellant had not disputed that before 2002 it had sufficient scope to end the margin squeeze. Had the appellant used that scope, there would have been no margin squeeze in the period from 2002 to 2003 either. Indeed, due to the new regulation applicable as of 2002 allowing a supplementary increase of charges for retail access, and thus a reduction of the margin squeeze (see paragraphs 141 and 142 of the judgment under appeal), a margin squeeze which had already ended in 2001 should in any event not have been re-established by the regulation in 2002. I agree with the Commission that by the abuse in the first period the appellant prepared the ground for the abuse in the following period. This finding was made by the General Court in paragraph 135 of the judgment under appeal in respect of the period

up until 2002 and the same logic underlies the General Court's finding for the second period.

30. By its third complaint, the appellant submits that an error of law was made with regard to the possibility of reducing the margin squeeze. The statement in paragraph 149 of the judgment under appeal, while correct, is irrelevant. However, the assumption according to which 'a limited increase in ADSL charges would have led to a higher average retail price for narrowband and associated broadband access services' is incorrect in law as it is not supported by facts. The question whether and to what extent subscribers to a narrowband connection would forgo changing to a broadband connection due to the increase in the broadband access charges was not examined. An increase in the broadband access charges would have led to a reduction in turnover.

31. In that connection, as I pointed out above, the appellant has not contested the separation of markets. As the appellant admitted in its appeal, the broadband market grew considerably during the period in question (see recital 27 to the contested decision) and on this point the appellant did not allege any distortion of evidence. As the Commission pointed out, owing to the margin squeeze existing in the analogue lines and ISDN sector, the appellant was making sure it also had clients in the ADSL sector. It follows that an increase

in ADSL charges would in any event have led to an improvement in competition and to a reduction of the margin squeeze. I also agree with the Commission that the appellant has not disputed the statement (see recital 77 et seq. to the contested decision) that end users who, for business reasons, depend on a broadband connection do not, for the most part, switch to a simple narrowband connection in the event of a price increase. Therefore, even if there had been a more limited increase in the number of new customers, owing to the higher prices (price elasticity), the margin squeeze would have been reduced. Therefore, I consider that the General Court did not err in law when it confirmed the Commission's statement that the margin squeeze could have been reduced by way of an increase in ADSL charges. It follows from the foregoing that the first part of the appellant's first ground of appeal is unfounded.

2. Second part of the first ground of appeal concerning the principle of protection of legitimate expectations

32. The Commission and Vodafone contend that this part of the first ground of appeal should be dismissed.

33. The appellant submits that the General Court applied the principle of protection of legitimate expectations in an erroneous manner. Indeed, RegTP's decisions created a legitimate expectation on the appellant's part that its charges were lawful. In that connection, the question whether those decisions include a reference to Article 82 EC is irrelevant for the reasons set out in point 24 above. As regards the second complaint, contrary to what the General Court held in paragraphs 267 and 268 of the judgment under appeal, it follows neither from RegTP's statement about the possibility of cross-subsidisation with communications charges nor from the use of the expression 'cross-subsidisation' that the appellant's pricing practices had an anti-competitive effect. At the time there was no decision of the Commission or judgment of the Community Courts on this issue. Hence the appellant had a right to rely on RegTP's decisions.

the appellant's critique of paragraphs 267 and 268 of the judgment under appeal also relies implicitly on the hypothesis that the Commission should be bound by RegTP's assessment, which as we have seen above is not the case. In fact, RegTP's decisions should have raised suspicions that there might have been potential problems with its charge structure – not least in view of the pre-existing case-law (and the Commission's decision-making practice) cited in paragraphs 188 to 191 of the judgment under appeal to the effect that the abusive nature of a dominant undertaking's pricing practices is determined on the basis of its own situation. Moreover, as Vodafone correctly noted, the appellant was aware that in 1998 and 1999 15 of its competitors lodged complaints with the Commission concerning its charge structure and the Commission started examining those facts under Article 82 EC.

34. However, it follows from the considerations set out under the first part of the first ground of appeal that in so far as RegTP's statements do not pre-empt the Commission's assessment, they may not create for the appellant a legitimate expectation that the Commission would follow RegTP's opinion. That in itself is sufficient to exclude a breach of the principle of protection of legitimate expectations, and the appellant's arguments against paragraphs 267 to 269 of the judgment under appeal should not succeed. At any rate, I agree with the Commission that

35. By its third complaint, the appellant contends that the General Court's reference to the Bundesgerichtshof's judgment of 10 February 2004 is irrelevant. That judgment was delivered after the period in question and is not decisive for the question whether the appellant had a right to rely on the correctness of RegTP's decisions taken during the relevant period. Rather, the appellant could infer from the judgment of the Oberlandesgericht Düsseldorf (Higher Regional Court of Düsseldorf) of 16 January 2002 that it was

correct to rely on RegTP's decisions and that any abuse under Article 82 EC was excluded.

part of the first ground of appeal should be rejected.

36. Concerning the judgment of the Bundesgerichtshof, contrary to what the appellant's arguments would suggest, it is clear from a reading of the judgment under appeal that the General Court did not consider it to be a basis for legitimate expectations, but merely sought to indicate that the Bundesgerichtshof came to the same conclusion as the General Court. With regard to the judgment of the Oberlandesgericht Düsseldorf, I agree with Vodafone that that judgment was in any event delivered several years after the beginning of the period in question. Therefore, at most, it could be relevant merely for the period after 16 January 2002. Indeed, as Vodafone pointed out, it is arguable that the appellant did not in fact have any legitimate expectation which would merit protection.¹⁶ It follows from the considerations set out under the first part of the first ground of appeal that as a dominant undertaking it should have verified on its own whether its conduct was compatible with Article 82 EC. It is also relevant that under Regulation No 17, which was still in force at the time, it had in fact the possibility to seek to obtain from the Commission a negative clearance for its charge structure. Therefore it follows from all the foregoing considerations that the second

3. Third part of the first ground of appeal concerning whether the infringement was committed intentionally or negligently

37. The Commission and Vodafone contend that this part of the first ground of appeal should be dismissed.

38. According to the appellant's first complaint, the judgment under appeal, in paragraphs 284 to 289, does not meet the requirements of Article 253 EC in that it erroneously found that the contested decision contained sufficient reasoning on negligence or intention. It is not sufficient from a legal point of view for the Commission to refer in the second citation of the contested decision to Article 15(2) of Regulation No 17 as the legal basis for imposing a fine. A citation does not form part of the grounds of a decision. In any event, it does not bring out the reasons why the Commission considered that the infringement was committed intentionally or negligently. Secondly, the Commission's

¹⁶ — Cf. Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraphs 25 and 31.

findings of fact, to which reference is made in paragraph 287 of the judgment under appeal, are not such as to give grounds for the claim of an infringement of Article 82 EC committed intentionally or negligently. They have no connection with the question of subjective attributability of conduct under the case-law.

39. First of all, according to the case-law, an undertaking is aware of the anti-competitive nature of its conduct when it is 'aware of the factual elements justifying both the finding of the existence of a dominant position on the market and the assessment of [the finding by the Commission of] an abuse of that position'.¹⁷ Therefore, suffice it to point out that since the awareness of infringing competition rules is not decisive, there may be intentional fault even where the undertaking does

not know the interpretation of those rules by the Commission. The appellant's argument concerning sector-specific regulation can, in this respect, only play a role at most with regard to the question whether the appellant knew that its action was unlawful. It does not, however, affect the intentional character of its conduct. As was also correctly pointed out by the Commission, in those circumstances this part of the first ground of appeal becomes ineffective because the appellant manifestly fulfilled the subjective conditions under Article 15(2) of Regulation No 17, which is a fact it has not disputed. The Commission has recognised that the contested decision contains no precise explanations as to whether the infringement was committed deliberately or, at least, negligently. I agree, however, that since the duty to state reasons depends on the specific circumstances of a given case, the General Court was entitled to conclude that the requirements of Article 253 EC were met in the present case. In that respect, it may be pointed out that the relevant criteria associated with the concept of intention and negligence are beyond doubt in so far as they form part of established case-law.¹⁸ As was rightly noted in paragraph 286 of the judgment under appeal, the contested decision contains a reference to Article 15(2) of Regulation No 17 and that should be understood in the sense that the Commission considered the infringement to have been committed intentionally or, at the very least, negligently. Then, as the General Court correctly stated in paragraph 287 of the judgment under appeal, in the contested decision the Commission described in detail the circumstances of the infringement, not least the grounds on which the Commission considered the appellant's pricing practices to be abuses and the grounds on which the appellant should be deemed responsible, in spite of the applicable regulation. Therefore the claim that the General Court incorrectly concluded that the

17 — See Case 322/81 *NBIM v Commission* ('*Michelin T*') [1983] ECR 3461, paragraph 107, and Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others v Commission* [1983] ECR 3369, paragraph 45. See also Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others v Commission* [2006] ECR II-5169, paragraph 206.

18 — See Case 19/77 *Miller* [1978] ECR 131, paragraph 18.

contested decision contained sufficient reasoning should be rejected.

appropriate conclusions from the Commission's general conduct in the present case.

40. According to the appellant's second complaint, the assessment in paragraphs 295 to 300 of the judgment under appeal is vitiated by a failure to state adequate reasons. Furthermore, the reasoning is based on an erroneous application of the first subparagraph of Article 15(2) of Regulation No 17. The subjective attributability of a potential infringement of Article 82 EC is lacking. In view of RegTP's decisions and the absence of a Community precedent, the appellant was not aware of the allegedly anti-competitive character of its conduct. The statements concerning the decisions of RegTP in paragraphs 267 to 269 of the judgment under appeal, to which reference is made in paragraph 299 of that judgment, do not support the conclusion that the appellant committed a(n intentional) fault. The assessment of a fault does not depend on whether the undertaking is aware that its conduct infringes Article 82 EC but rather on the awareness of the anti-competitive character of its conduct. In addition, neither the concept of cross-subsidisation used by RegTP nor the judgment of the Bundesgerichtshof supports the conclusion that the appellant committed a fault. Finally, the General Court omitted to examine the claim that the appellant was entitled to draw the

41. In my view, in paragraph 295 et seq. of the judgment under appeal the General Court fulfilled the requirements to state reasons when it came to the conclusion that the appellant acted intentionally because it was aware of the factual elements relevant for the assessment of its case. The appellant's argument that it was unaware of the conclusion that a certain conduct was not, on the basis of a legal assessment, allowed by the applicable rules – when it refers to the concepts of 'anti-competitive' or 'anti-competitive character' – cannot prosper. Suffice it to point out that that approach does not correspond to the relevant criteria set out in the case-law referred to in point 39 above, according to which what matters are circumstances or factual elements justifying the finding of an abuse under Article 82 EC. Finally, the General Court rightly held in paragraph 298 of the judgment under appeal that the appellant's arguments concerning the initiation of a pre-litigation procedure against the Federal Republic of Germany are irrelevant inasmuch as they do not concern the criteria set out in the case-law on the concept of intentional fault referred to above. As regards the alleged promise by the Commission that it would not pursue the case against the appellant, the latter furnished no proof to substantiate it and therefore the General Court was not required

to deal with it. It follows that the third part of the first ground of appeal should also be rejected. Therefore the first ground of appeal should be rejected as unfounded in its entirety.

to determine the elements of the assessment of the appellant's charges. However, the appellant's objection concerned an earlier stage of the reasoning – the question regarding the appropriateness of the Commission's margin squeeze test.

B — The second ground of appeal, alleging errors of law in the application of Article 82 EC

1. First part of the second ground of appeal concerning the relevance of the margin squeeze test to establish abuse

42. The Commission and Vodafone contend that this part of the second ground of appeal should be dismissed.

43. By its first complaint, the appellant alleges a failure to state reasons, because its arguments were not examined by the General Court. The judgment under appeal is based on a vicious circle – the General Court applied the criterion chosen by the Commission

44. It should be pointed out that this is the first time that this form of abuse has been brought before the Court of Justice.¹⁹ The only previous Community case-law on margin squeeze is the General Court's *Industrie des poudres sphériques v Commission*.²⁰ However, that case concerned a rejection of a complaint by the Commission rather than a decision finding an abuse of a dominant position. In the present case, this Court will have to decide *inter alia* the question of principle – was the General Court correct in holding that margin

19 — Cf. also pending Case C-52/09 *TeliaSonera Sverige*, in which a series of questions was submitted on margin squeeze. However, the issues and the factual and regulatory context are different in several important respects (e.g. there is no interaction between telecommunications regulation and competition law and, in particular, there was no regulatory obligation on TeliaSonera to offer input products for ADSL).

20 — Case T-5/97 [2000] ECR II-3755 (also referred to as the 'IPS' case). Cf. national cases *inter alia*: (Italy) *Telecom Italia*, A 351, provvedimento no 13752, 16 November 2004; (France) *France Télécom/SFR Cegetel/Bouygues*, Decision No 04-D-48, 14 October 2004; (Denmark) *Song Networks A/S/TDC/SDNOFON*, 27 April 2004; (Sweden) *TeliaSonera*, dnr 1135/2004, 22 December 2004; (UK) *BSkyB*, CA98/20/2002, and Case *NCCN 500*, Ofcom Decision, 1 August 2008. See also footnotes 26 and 29.

squeeze constitutes a stand-alone abuse of a dominant position, that is to say even in the absence of abusive wholesale prices and/or predatory retail prices? As will be seen below, I consider that the General Court – by endorsing the definition of margin squeeze provided by the Commission in the contested decision – was able to find, without committing any error of law, that in the present case margin squeeze does indeed constitute a stand-alone form of abuse. Turning specifically to the first complaint, concerning the failure to state reasons, I do not agree with the appellant's contention. Indeed, the reasoning of the General Court on this point is not limited to paragraphs 166 to 168 of the judgment under appeal. It is also paragraphs 169 to 213 that are relevant in this respect in so far as in those paragraphs the General Court dealt with the method used by the Commission to answer the question whether or not there was a margin squeeze and thus an abuse under Article 82 EC. That is sufficient to find that the General Court did not infringe Article 253 EC. I also do not consider that the General Court may be reproached for circular reasoning. Admittedly, in paragraphs 166 to 168 of the judgment under appeal the General Court merely adopted the Commission's point of view. However, as Vodafone rightly pointed out, in paragraph 183 et seq. of the judgment under appeal the General Court proceeded to examine the appellant's arguments and to explain why it considered it was necessary to reject them. In particular, when analysing the Commission's method the General Court also assessed the question whether that method is suitable to show an abuse under Article 82 EC. That is why in paragraph 167 of the judgment under appeal, in agreement with the Commission's approach, the General Court could state that for this type of abuse what matters is the spread between the prices and not the abusive nature of the prices per se. In that connection, in paragraphs 189 to 191 of the judgment under appeal the General Court refers to relevant precedents to this effect. Thus there is clearly

no failure to state reasons in the judgment under appeal on this point.

45. By its second complaint, the appellant claims an erroneous application of Article 82 EC: a margin squeeze test is inherently unsuitable to establish abuse in a situation where charges for wholesale access are imposed by an NRA. Indeed, if the NRA fixed wholesale charges which were exaggerated, the regulated undertaking would be obliged to apply exaggerated retail prices in order to ensure an appropriate margin between wholesale and retail charges. Here the appellant was required to choose between two different forms of abuse: a margin squeeze or excessive prices. Thus it could not avoid committing an abuse. A dominant undertaking only commits an abuse when its retail charges are, as such, abusively low.

46. I consider that since the General Court correctly held that the margin squeeze depends on the spread between two prices and not on the absolute level of the prices per se – and provided of course that the undertaking has discretion to modify at least one of those prices – a margin squeeze test must remain applicable even if one or both of those prices are subject to regulation. Indeed, the example of excessive wholesale prices imposed by the

NRA is, in my view, theoretical in nature and the appellant did not explain why it should be relevant for the purposes of the present case, not least because the wholesale prices were fixed on the basis of its costs, as follows from paragraph 8 of the judgment under appeal, and the appellant had the option to submit an application to take into account a change in the calculation of the cost basis. Therefore the judgment under appeal is in conformity with Article 82 EC and the first part of the second ground of appeal should be rejected as unfounded.

Commission's methodology, the judgment under appeal also contains errors of law as it relies on criteria which are not compatible with Article 82 EC. The As-Efficient-Competitor-Test was wrongly applied to the facts of the case because the appellant, as a dominant undertaking, is not subject to the same regulatory conditions as its competitors. The appellant was required to take over all subscribers, regardless of their economic attractiveness. In addition, it was required to provide 'pre-selection' and 'call-by-call' (together: '(pre-)selection'), whilst its competitors were not subject to such obligations. Thus the As-Efficient-Competitor-Test should have been adapted. The analysis should not have been based on the appellant's customer structure.

2. Second part of the second ground of appeal concerning the erroneous calculation of the margin squeeze

47. The Commission and Vodafone contend that this part of the second ground of appeal should be dismissed.

48. By its first complaint, the appellant submits that, in the context of examining the

49. This part of the second ground of appeal concerns the criteria which are relevant for a

margin squeeze to be considered abusive under Article 82 EC. It is clear by now that the Commission in the contested decision and the General Court in the judgment under appeal did not reprimand the appellant for the level of its wholesale prices, not least because they were imposed by the NRA (even if, as follows from paragraph 93 of the judgment under appeal, that fact was merely presumed for the benefit of the appellant). Indeed, the issue was not that its wholesale prices were set too high, but rather that its retail prices were too low, so that the spread between these and the wholesale prices – and thus competitors' margins – was either negative or insufficient, depending on the relevant period.²¹ Therefore as follows from paragraph 181 of the judgment under appeal, the appellant's present argument concerning product-specific costs concerns only the second period (2002 to May 2003), because in the first period the spread between the appellant's wholesale and retail prices was negative. The criterion that needs to be considered by the Court in this respect is the relevance of the 'As-Efficient-Competitor-Test', which is the subject of the appellant's first complaint. The Court will need to answer the question whether in margin squeeze cases account should, in principle, be taken of the dominant undertaking's own costs (the As-Efficient-Competitor-Test), rather than the costs of its competitors (the

'Reasonably-Efficient-Competitor-Test').²² In 1998, in its Access Notice, the Commission expressly suggested both tests to be relevant. With regard to the former test, the Commission stated: 'A [margin] squeeze could be demonstrated by showing that the dominant company's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company ...' Concerning the latter test, it stated: 'In appropriate circumstances, a [margin] squeeze could also be demonstrated by showing that the margin between the price charged to competitors on the downstream market ... for access and the price which the network operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit ...'²³ However, as the judgment under appeal correctly recalls, this Court considered the As-Efficient-Competitor-Test relevant in the context of predatory pricing in *AKZO v Commission*.²⁴ In my view the General Court was right to hold that the As-Efficient-Competitor-Test is relevant not only where the abuse consists in the difference between the dominant undertaking's prices and costs, but also where it is between its wholesale and retail prices.²⁵ Indeed, I consider that it is difficult to fault the General Court's analysis in paragraphs 186 to 194 of the judgment under appeal, since it clearly follows from relevant precedents and from the principle of legal certainty that the

21 — Cf. the objection at issue in Commission Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article [82 EC] (Case No IV/30.178 *Napier Brown – British Sugar*) (OJ 1988 L 284, p. 41), recitals 65 and 66: 'BS [left] an insufficient margin for a ... seller of retail sugar, as efficient as BS itself ... The maintaining, by a dominant company ... of a margin between the price which it charges for a raw material to the companies which compete with the dominant company in the production of the derived product and the price which it charges for the derived product, which is insufficient to reflect that dominant company's own costs of transformation ... is an abuse of dominant position ...' See also recital 41.

22 — This test may take into account either actual or merely abstract (potential) competitors. It was endorsed by the UK Competition Appeal Tribunal ('CAT') in *Genzyme (remedy)* [2005] CAT 32, paragraph 249, and by the Court of Appeal of Brussels in *TELE2 v Belgacom*, 18 December 2007, R.G. 2006/MR/3.

23 — See also, for instance, European Commission, 'Pricing Issues in Relation to Unbundled Access to the Local Loop', ONP Committee, ONPCOM 01-17, 25 June 2001, pp. 1 to 17.

24 — Case C-62/86 [1991] ECR I-3359.

25 — Cf., in this connection, the Opinion of Advocate General Fennelly in Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others v Commission* [2000] ECR I-1365, points 123 to 139.

As-Efficient-Competitor-Test is the appropriate test in the context of the present case. Moreover, a large body of opinion holds that, in general, the As-Efficient-Competitor-Test constitutes an appropriate criterion.²⁶

50. Turning specifically to the first complaint, the appellant takes issue with paragraph 188 of the judgment under appeal and submits that for the purposes of the present case rather than the situation of the dominant undertaking it should be the situation of its competitors that is relevant. The appellant contends that because as a dominant undertaking it is in the present case subject to different legal and substantive conditions, the As-Efficient-Competitor-Test should have

been adapted. In particular, it argues that the analysis should not have been based on its customer structure. First of all, I would note that the appellant itself recognises that that test is generally useful in so far as it reduces promotion of inefficient competitors and increases legal certainty for dominant undertakings, because under this test they are in a position to assess – ex ante – the lawfulness of their own activities. Next, as the Commission rightly pointed out, the appellant may not defend itself by declaring that it was not as efficient as its competitors. Competition law provides no such ‘inefficiency defence’. Instead, Article 82 EC seeks to prevent conduct of a dominant undertaking which tries to stifle competition, when that undertaking is precisely forced to strive to eliminate inefficiencies. Therefore I am not convinced that the present case should warrant modification of criteria which Article 82 EC establishes in this context.

26 — This was confirmed by the UK CAT in *Genzyme* Case No 1016/1/1/03 [2004] CAT 4, and by the UK Court of Appeal in *Albion* (Dwr Cymru Cyfyngedig and Albion Water Limited and Water Services Regulation Authority [2008] EWCA Civ 536), paragraph 105. Having said that, it is arguable that in the judgment under appeal (in particular in paragraph 188) the General Court did not totally rule out, as a matter of principle, the Reasonably-Efficient-Competitor-Test and I consider that it is, indeed, not inconceivable that there may be other cases in which the Reasonably-Efficient-Competitor-Test may be appropriate as a secondary and additional test. As regards the potential breach of the principle of legal certainty, some commentators suggest that it should be assessed on a case-by-case basis and that long-experienced incumbents are often very well placed to accurately appraise new entrants’ costs or, at least, the costs of a Reasonably-Efficient new entrant, not least because they have unparalleled knowledge of the market. See Amory, B. and Verheyden, A., ‘Comments on the CFI’s recent ruling in *Deutsche Telekom*’, *Global Competition Policy*, May 2008, and Clerckx, S. and De Muyter, L., ‘Price squeeze abuse in the EU telecommunications sector’, *Global Competition Policy*, April 2009. Also: O’Donoghue, R., and Padilla, A.J., *The Law and Economics of Article 82 EC*, Oxford: Hart, 2006, pp. 191 and 331.

51. By its second complaint, the appellant contends that the General Court made an error of law in so far as it failed to take into account charges for additional telecommunications services (telephone calls). Such a method is compatible neither with economics nor with the decision-making practice of other authorities in Europe and the United States. It is in contradiction with market reality: neither subscribers nor operators consider

access services on an isolated basis. From an economic point of view, the margin squeeze analysis must take into account all revenues and costs related to the wholesale service. In cases of multi-product undertakings, if there are costs from wholesale services which serve as the basis for a variety of services to end-users on several markets at the same time, the aggregation should be undertaken at a higher level where the totality of relevant services to subscribers is taken into account.

of equality of opportunity. Moreover, as the General Court rightly held in paragraph 192 of the judgment under appeal, any other approach could be contrary to the general principle of legal certainty. However, the appellant submits that in spite of the margin squeeze its competitors were able to compete with it on the basis of business models other than its own or by offering products thanks to services outside the market in question. As follows from paragraphs 195 to 199 of the judgment under appeal, the As-Efficient-Competitor-Test showed that the appellant's competitors could not economically adopt the model used concretely by the appellant on the market for access. The appellant may not seek an adaptation of the As-Efficient-Competitor-Test in the present case merely because its situation is not the same as that of its competitors. That is not possible simply because the dominant undertaking and its competitors will by definition never be quite in the same situation. As to the arguments concerning the difficulties it faces as a former State undertaking in the process of transformation to a commercial one, having a different customer structure from its competitors, suffice it to point out that as I said above competition law does not take account of such inefficiencies of dominant undertakings. Moreover, the Commission noted that the appellant had rather a competitive advantage thanks to its analogue clients when they wished to upgrade their access subscription. As regards the argument that only the appellant offered 'call-by-call', the Commission pointed out that that is incorrect – some of its competitors also offered the same service to their clients. The appellant's obligation to allow that service followed from its particular position on the market and therefore there was no discrimination vis-à-vis its competitors; different situations were treated differently. As I stated at the beginning of this Opinion, regulation may not affect the application of Article 82 EC as long as the appellant had sufficient commercial discretion.

52. Indeed, the As-Efficient-Competitor-Test is appropriate because it shows whether a competitor is able to compete with the dominant undertaking on the basis

Hence the appellant may not now seek to derive a special status from regulation.

53. The appellant submits that the General Court's analysis of the margin squeeze is incomplete in so far as it fails to take into account communications made possible thanks to the wholesale service. Indeed, competitors are able to exclude (pre-)selection of operators and to offer a bundle of access, communications and so on via the local loop. Here the subscribers' demand and the competition of the operators concern a bundled offering of access and communications services. Secondly, paragraphs 196 to 202 of the judgment under appeal are based on several errors of law. The question whether or not communications charges are relevant depends on the question of principle concerning the correct method to be applied for multi-product undertakings. The General Court may not escape that assessment by referring to its limited review in paragraph 185 of the judgment under appeal.

54. First, the statements in paragraphs 196 and 197 of the judgment under appeal – that the principle of tariff rebalancing requires a separate consideration of access charges

and call charges – are incorrect in law. The judgment under appeal is contradictory. In paragraph 113 the General Court relies, for attributability, on the fact that the objectives of sector-specific regulation may differ from those of Community competition policy, but then infers precisely from a regulatory principle that a separate consideration of access charges and call charges is necessary even if subscribers see those services as a whole. Then, paragraph 161 of the judgment under appeal contains insufficient reasoning in so far as it does not state why the General Court's idea is correct and it does not examine the objections raised by the appellant.

55. Again, I agree with the Commission that in this case only an approach allowing two markets to be considered separately and analysing the margin squeeze between the wholesale market and the retail market is compatible with Article 82 EC. Indeed, in paragraphs 195 to 207 of the judgment under appeal the General Court did not err in law in confirming the Commission's approach. As regards the argument concerning the margin squeeze test in a case of a multi-product undertaking, it has been correctly pointed out by the Commission that the appellant ignores the fact that access services are not indispensable for generating revenue from communications. With call-by-call, the appellant was also able to generate revenue on the

communications market, just like its competitors, independently from the situation of subscription contracts. The Commission correctly explained why the appellant's assertion that all competitors deactivated call-by-call is incorrect; the appellant confuses cause and effect, the margin squeeze created by it prevented competitors from providing merely access services and covering their costs. As regards the examples of decisions of other regulatory authorities which came to different conclusions, these may be interesting at most from the comparative law point of view. They do not, however, modify the objectives and criteria of analysis under Article 82 EC. Then, concerning the statement in paragraph 185 of the judgment under appeal, it would appear that in spite of that statement the General Court proceeded to make a detailed assessment to confirm the Commission's method.

56. In addition, according to the appellant the conclusion that the principle of tariff rebalancing excludes telecommunications services is substantively incorrect and infringes Article 82 EC. That principle does not provide criteria for the application of Article 82 EC. Furthermore, the principle of tariff rebalancing applies only to the appellant and its charge regulation but not to its competitors. It does not say anything about their possibilities to compete. While telecommunications regulation may be used for the

implementation of Article 82 EC, that article is not a tool intended for implementation of sector-specific regulation.

57. As regards the principle of tariff rebalancing, there does not appear to be any contradiction in the judgment under appeal. It is indisputable that Article 82 EC needs to take into account the situation and legal framework of the market concerned. The allegation of lack of reasoning in the judgment under appeal on this point cannot succeed in so far as it is insufficiently detailed. In particular, the appellant does not explain what are its objections to recourse to the principle of tariff rebalancing. Furthermore, while paragraph 196 of the judgment under appeal sets out the relationship between the regulatory framework and the assessment under Article 82 EC, paragraph 197 makes a reference to the reasoning of the Commission. I agree with the Commission that, contrary to the appellant's assertions, tariff rebalancing covered by Commission Directive 96/19/EC²⁷ is aimed at clearly separating provision of universal service and services subject to competition and at distinguishing on the basis of costs. Cross-subsidisation should therefore be prevented. However, that leads to the conclusion, correctly adopted in paragraph 196 of the judgment under appeal, that there has

²⁷ — Directive of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13).

to be a distinction between charges for connections and those for communications even in the framework of an analysis under Article 82 EC. It is irrelevant whether the regulation applies to competitors in this respect because Directive 96/19 precisely seeks to protect the appellant's competitors.

the appellant's cost structure and charges are decisive.

58. First, the appellant submits that paragraph 199 of the judgment under appeal contains insufficient reasoning. The General Court should have examined which services are based on the local loop as a wholesale service. Only then could the General Court have come to a conclusion on equality of opportunity. Such equality is assured only under a global analysis of all charges and costs of all services based on the local loop. The appellant contends that the General Court defied the laws of logic and refers to paragraph 238 of the judgment under appeal. The premiss of the General Court according to which the appellant does not bear any costs for connections is manifestly erroneous. In reality, since retail charges for connections applied by the appellant are lower than its own costs, the appellant should, like its competitors, resort to cross-subsidisation between access charges and communications charges. Furthermore, the statement in paragraph 202 of the judgment under appeal is contradictory as it is in direct contradiction with the As-Efficient-Competitor-Test according to which only

59. I consider that the statements in paragraphs 199 to 201 of the judgment under appeal, according to which equality of opportunity imposes a separation, are correct because a global assessment of connections and communications would force the appellant's competitors to compete with it merely on the basis of a specific model of cross-subsidisation which would consolidate the strong position of the appellant in the area of connection services, as was correctly submitted by the Commission. However, as the General Court held in paragraph 202 of the judgment under appeal, the model proposed by the appellant would force its competitors to compensate the losses generated in the area of connection services with higher charges in the area of communications. In that regard, it is important to emphasise that the appellant does not challenge the market definition according to which retail connection services and charges for communications each constitute a separate market. In addition, communications services may also be provided without recourse to the connection service. The Commission rightly contends that the claim that principles of logic were infringed is not helpful to the appellant. The contested decision denounced the margin squeeze merely because of its effect on the retail market and therefore the Commission was not required to carry out an investigation as to whether

competitors were worse placed than the appellant on the market for communications. In my view suffice it to point out that paragraph 237 of the judgment under appeal already contains a full answer to the arguments raised at first instance which is sufficient to confirm the contested decision. Therefore, the criticism of paragraph 238 of the judgment under appeal is irrelevant. In any event, the appellant has not proven that that criticism is well founded. In addition, the General Court correctly held – without contradicting itself – on the basis of the *As-Efficient-Competitor-Test* that competitors have a chance on the market if they offer, with connection charges higher so as to cover the costs, communications charges lower than those of the appellant, so that bundles of services were comparable.

61. I agree with the Commission that the General Court decided on the question of fact raised by the appellant and did not resolve the dispute on the basis of the burden of proof. In paragraph 202 of the judgment under appeal, the General Court stated that during the period in question the appellant significantly lowered its telephone call charges. This statement may not be attacked by the appellant, as it did not claim any distortion of facts. Therefore the second part of the second ground of appeal should be rejected.

3. Third part of the second ground of appeal concerning the effects of the margin squeeze

60. Finally, the appellant considers that the General Court applied an erroneous legal criterion with regard to the apportionment of the burden of proof in so far as in paragraphs 201 and 202 of the judgment under appeal it merely stated that ‘it is conceivable’ that competitors did not have the economic opportunity to offset potential losses generated by telephone connections with revenues from communications, while the appellant wanted to show, in its application at first instance, that it was possible to carry out cross-subsidisation.

62. The Commission and Vodafone contend that this part of the second ground of appeal should be dismissed.

63. By its first complaint, the appellant submits that since the calculation of the margin squeeze was erroneous, the assessment of the effects of the alleged margin squeeze is also vitiated by errors of law. Paragraphs 234 and 235 of the judgment under appeal rightly reject the Commission’s idea that there was no need to show anti-competitive effects. However, the analysis in paragraph 237 of the judgment under appeal is based on a margin

squeeze which only takes into account connection charges. In paragraph 238 of the judgment under appeal reference is made to an erroneous premiss according to which, regarding cross-subsidisation of connection services and communications services, the competitors are discriminated against vis-à-vis the appellant who suffers no losses at the level of connections. By its second complaint, the appellant contends that the reasoning demonstrating that there were anti-competitive effects is also vitiated by errors of law. Paragraph 239 of the judgment under appeal merely states that the competitors' market share on the broadband and narrowband connections markets remained weak, without providing any causal link between these market shares and the alleged margin squeeze. In addition, paragraph 240 of the judgment is based on a misunderstanding of recital 182 to the contested decision.

appellant's pricing practices could have created for the growth of competition in the market in question. Thus while the General Court did not require that the Commission demonstrate actual anti-competitive effects, it did require proof of the creation of barriers to entry to the market and thus a demonstration of potential anti-competitive effects. In that regard, the General Court at paragraph 237 of the judgment under appeal found that, given that the appellant's wholesale services are indispensable to enabling a competitor to enter into competition with the appellant on the downstream market in retail access services, a margin squeeze between the appellant's wholesale and retail charges will, in principle, hinder the growth of competition in the downstream markets. Thus the General Court correctly emphasised in my view the fact that in this case the wholesale services were indispensable and that without access to those services, the appellant's competitors would not even be able to enter the downstream market in retail services. This is in line with the approach developed by the General Court in its case-law, which has been confirmed by the Court of Justice, that the effect required does not necessarily relate to the actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect.²⁸ In my view, it clearly follows that the Commission must demonstrate that in the specific market context in question there are potential

64. I would point out that at paragraph 235 of the judgment under appeal the General Court rightly stated that the Commission is required to demonstrate that the appellant's pricing practices have an anti-competitive effect. It is clear from that paragraph that the General Court considered that the anti-competitive effect which the Commission is required to demonstrate in the present case relates to the possible barriers which the

28 — Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, paragraph 30, relating to the judgments of the General Court in Case T-203/01 *Michelin v Commission* ('*Michelin II*') [2003] ECR II-4071, paragraphs 238 and 239, and Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 293. See also Opinion of Advocate General Ruiz-Jarabo Colomer in *Sot. Lélou kai Sia and Others*, cited in footnote 7, point 50. See, on the subject, Advocate General Kokott, *Economic thinking in EU competition law*, Madrid, 29 October 2009.

anti-competitive effects.²⁹ Thus a mere claim that there may be remote, abstract anti-competitive effects will not suffice. It follows from all the foregoing that the General Court made no error of law.

squeeze and take into account call services. Finally, on the argument concerning recital 182 to the contested decision, it should be pointed out that it is not directed against the judgment under appeal. Moreover, as was argued by the Commission, it is inadmissible as it was not raised at first instance and is, in any event, unfounded because the margin squeeze in the present case, regardless of its extent, made it economically impossible for competitors to propose access services at the same price as the appellant. Therefore, the third part of the second ground of appeal should be rejected as partly inadmissible and, in any event, unfounded. Consequently, the second ground of appeal should be rejected in its entirety.

65. As regards the appellant's first complaint that the analysis of effects is in any event incorrect because it only takes account of connection charges, that complaint is ineffective. I have already explained in my Opinion above why those arguments should be rejected. As regards the appellant's second complaint concerning the causal link and, in particular, its argument that in telecommunications it is not surprising that operators penetrate the market only slowly, it was not presented as such at first instance and is, in any event, not relevant. On the inclusion of call services, the appellant has not explained for what reason it was necessary to modify, at this stage of the assessment, the approach which was used as the basis for the calculation of the margin

C — The third ground of appeal, alleging errors of law in the calculation of fines

1. First part of the third ground of appeal concerning the serious character of the infringement

²⁹ — This approach is in line with the judgment in *Sot. Lélos kai Sia and Others*, *ibid.*, where the Court would appear to have implicitly rejected the notion of a *per se* abuse and proceeded to examine objective justifications taking account of the specific market context. Cf. Case C^W/00615/05/03, *Vodafone/O2/Orange/T-Mobile*, Ofcom Decision, May 2004, and *BT Openworld's consumer broadband products*, Ofcom Decision, November 2003.

66. The appellant submits that Article 15(2) of Regulation No 17 was infringed in so far

as neither the arguments of the Commission nor the reasoning of the General Court in paragraphs 306 to 310 of the judgment under appeal support the assertion that, for the first period, the appellant committed a serious infringement. The General Court disregarded the fact that, according to Section 1A of the Fining Guidelines,³⁰ exclusionary conduct only ‘may’ constitute serious infringements. Thus it failed to examine the arguments against the qualification of the infringement as serious.

is ineffective because the infringement was not qualified as serious but only as minor. Concerning the period from 1998 to 2001, the Commission rightly submitted that in accordance with Section 1A(1) of the Guidelines it is not obliged at the stage of determination of the seriousness of the infringement to take into account a slight contribution to the infringement (see paragraph 311 of the judgment under appeal). The possibility to recognise an attenuating circumstance in this respect has been used by the Commission, as follows from paragraph 312 of the judgment under appeal. Furthermore, the appellant does not explain which specific act of participation of RegTP in the fixing of prices should have led to an additional reduction of the fine. Therefore this part of the third ground of appeal should be rejected.

67. The Commission contends that this part of the third ground of appeal should be dismissed.

2. Second part of the third ground of appeal, that insufficient account was taken of attenuating circumstances

68. Suffice it to point out that for the period from 1 January 2002 the appellant’s argument

69. The appellant contends that in recital 212 to the contested decision, the Commission only took account of the existence of sector-specific regulation on the national level but not of the content of the regulation, that is RegTP’s examination and denial of an

30 — Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; ‘the Guidelines’).

anti-competitive margin squeeze. The General Court made an error of law in so far as it did not criticise the Commission for having disregarded two other attenuating circumstances within the meaning of Section 3 of the Guidelines. In view of RegTP's decisions, the appellant was convinced of the lawfulness of its conduct. In any event, the infringement was committed negligently.

3. Third part of the third ground of appeal concerning the imposition of a symbolic fine

70. The Commission contends that this part of the third ground of appeal should be dismissed.

71. As the Commission argued, the appellant disregards in any event the fact that recital 212 to the contested decision was drafted in broad terms and that it fully supports the interpretation given to it in paragraph 312 of the judgment under appeal. As regards the argument to the effect that the appellant acted merely negligently, it was not raised at first instance. At any rate, the General Court rightly decided in paragraphs 295 to 297 of the judgment under appeal that the appellant's conduct corresponded to the definition of an intentional infringement. This part of the third ground of appeal is therefore partly inadmissible and, in any event, unfounded.

72. In paragraph 319 of the judgment under appeal there is a breach of the right to equal treatment. The appellant should have been subject to a symbolic fine, as in the *Deutsche Post* decision.³¹ The appellant acted in a manner which complied with the case-law of German courts and with decisions of RegTP. It is irrelevant that the judgment of the Oberlandesgericht was later set aside, because it resulted from the possibility of an exception which is not applicable in this case and it was only after the judgment was set aside that the appellant could proceed on the basis that it might be liable under Article 82 EC. The appellant's situation is comparable to that which served as the basis for the case in *Deutsche Post*. The Access Notice is hardly 'case-law'. Finally, an undertaking to put an end to an infringement may not constitute a necessary condition for the imposition of a symbolic fine.

31 — Commission Decision 2001/892/EC of 25 July 2001 relating to a proceeding under Article 82 of the EC Treaty (COMP/C-1/36.915 – Deutsche Post AG – Interception of cross-border mail) (OJ 2001 L 331, p. 40; 'the Deutsche Post decision').

73. The Commission contends that this part of the third ground of appeal should be dismissed.

74. The Commission is correct when it argues that the appellant's claim is irrelevant. This argument would help the appellant's cause only if the factual and legal frameworks of the two cases were directly comparable.³² Paragraphs 317 to 320 of the judgment under appeal show that that was not the case and, indeed, the appellant did not argue that the statements in those paragraphs are erroneous in facts and that the differences stated therein

did not exist. The Commission is also right that symbolic fines are the exception and it should not be required to justify a decision to fix a fine according to the normal rules. In any event, the Commission took into account RegTP's decisions under attenuating circumstances. The General Court confirmed in paragraphs 312 and 313 that there was no error of assessment in this respect. As regards the judgment of the Oberlandesgericht suffice it to point out that the General Court correctly stated in paragraph 319 of the judgment under appeal that it was delivered during the period for which the Commission did not impose a fine otherwise appropriate in normal circumstances. At any rate, it is also correct that the Oberlandesgericht in no way dealt with the question of which factors should be taken into account when defining a margin squeeze. Hence that judgment is irrelevant for the purposes of the symbolic fine. Finally that judgment is incompatible with the Court's case-law. The fact that it was set aside by the Bundesgerichtshof merely confirmed what the appellant should have known. Secondly, the Commission made known its position vis-à-vis certain practices in its communications with the appellant. RegTP's declarations did not concern Article 82 EC and, at any rate, in 1998 the Commission made known in its Access Notice that Community competition law was applicable alongside telecommunications law and that even practices authorised by NRAs were subject to the Treaty provisions on competition. Finally, I consider that it is sufficient to point out that, unlike in *Deutsche Post*, in the present case the appellant has not given any undertaking to avoid any other future infringement. In addition, the Commission added that in the present case the appellant did not facilitate its task as competition authority. This part of the third ground of appeal should also be rejected as unfounded and, consequently, the third ground of appeal should be rejected in its entirety. It results from all the above considerations that the appeal must be dismissed.

³² — See, to that effect, Case C-196/99 P *Aristrain v Commission* [2003] ECR I-11005, paragraph 76 et seq.

IV — Conclusion

75. In the light of all of the foregoing, I propose that the Court should:

- dismiss the appeal;
- order Deutsche Telekom to bear its own costs and to pay those incurred by the Commission;
- order Vodafone and Versatel to bear their own costs.