

— By its second (alternative) plea in law, the Commission submits that the Court of First Instance was wrong to conclude that the disputed measure is not selective, that is to say, that it does not favour certain undertakings within the meaning of Article 87(1) EC. The Commission goes on to submit that the Court of First Instance erred in concluding that, even if the measure were selective, it would still not constitute State aid in view of its purpose and on the ground that that measure would be justified by the nature and general scheme of the system.

Appeal brought on 26 June 2008 by Deutsche Telekom AG against the judgment delivered by the Court of First Instance on 10 April 2008 in Case T-271/03 Deutsche Telekom v Commission

(Case C-280/08 P)

(2008/C 223/48)

Language of the case: German

Parties

Appellant: Deutsche Telekom AG (represented by: U. Quack, Rechtsanwalt, S. Ohlhoff, Rechtsanwalt, M. Hutschneider, Rechtsanwalt)

Other parties to the proceedings: Commission of the European Communities, Arcor AG & Co. KG, Versatel NRW GmbH, formerly Tropolys NRW GmbH, formerly CityKom Münster GmbH Telekommunikationsservice, EWE TEL GmbH, HanseNet Telekommunikation GmbH, Versatel Nord-Deutschland GmbH, formerly KomTel Gesellschaft für Kommunikations- und Informationsdienste mbH, NetCologne Gesellschaft für Telekommunikation mbH, Versatel Süd-Deutschland GmbH, formerly tesion Telekommunikation GmbH, Versatel West-Deutschland GmbH & Co. KG, formerly VersaTel Deutschland GmbH & Co. KG

Form of order sought

- Set aside the judgment of the Court of First Instance of 10 April 2008 in Case T-271/03;
- annul Commission Decision 2003/707/EC (1) of 21 May 2003, notified under document number C(2003)1536;
- in the alternative, reduce, at the Court's discretion, the fine imposed on Deutsche Telekom AG in Article 3 of the contested Commission decision;
- order the Commission to pay the costs.

Pleas in law and main arguments

The appellant bases its appeal against the above mentioned judgment of the Court of First Instance on the following grounds of appeal.

The judgment infringes Article 82 EC and the principle of the protection of legitimate expectations because in the present case, there has been no objective infringement of Article 82 EC attributable to the appellant and the appellant has also not been at fault. The judgment fails to take into account, in the manner required by law, repeated examinations of the purported margin squeeze by the German regulatory authority for telecommunications and post ('RegTP'), which was responsible at that time for regulating the appellant. RegTP repeatedly examined whether there was an anti-competitive margin squeeze in respect of local loops and found that there was none. In a situation like that, the responsibility of the relevant regulatory authority overrides and restricts the regulated undertaking's special responsibility for maintaining the structure of the market. In the light of the regulatory decisions, the appellant had a right to assume that its conduct was not anti-competitive. The assumption that the appellant could have reduced the purported margin squeeze by increasing its ADSL charges is contrary to the Court's own position that, in the context of examining a margin squeeze, 'cross-subsidisation' between different markets is not to be taken into account. In addition, the Court of First Instance was wrong not to object to the fact that the Commission failed to examine whether an increase in ADSL charges would have actually reduced the purported margin squeeze.

The judgment also infringes Article 82 EC because the Court of First Instance erred in examining whether the conditions for the application of Article 82 EC were met. In the present case, a margin squeeze test is inherently unsuitable to establish abuse. In a situation where charges for wholesale access were imposed by the relevant regulatory authority — as is the case here — the test in itself could produce anti-competitive results.

In this context, the Court of First Instance also infringed its *obligation to state the reasons for its judgment*.

In the context of examining the methodology used by the Commission to establish that there had been a margin squeeze, the contested judgment also contains errors of law on essential points. First of all, the so-called 'as-efficient-competitor-test', which the Court of First Instance used as a generally applicable standard of comparison, can in any event not be used in a situation in which the dominant undertaking and its competitors operate under different regulatory and actual competitive conditions — as is the case here. Second, the margin squeeze test only takes into account charges for access, while charges for additional telecommunication services (especially telephone calls) that require the same wholesale service, were not considered. The judgment's findings on the effects of the purported margin squeeze suffered from several errors in law and the judgment failed to examine whether the purported margin squeeze supported the Court of First Instance's findings on the structure of the market.

Further, the judgment fails to observe the requirements of Article 253 EC as regards the Commission's obligation to state the reasons on which its decisions are based.

Finally, the Court of First Instance also wrongly applied Article 15(2) of Regulation 17 when it failed to object to the Commission's calculation of the fine, even though the Commission wrongly assumed that there had been a serious infringement, failed to take proper account of the sector specific regulation of the appellant's charges and should not have imposed more than a symbolic fine. In doing so, the Court of First Instance failed to take into account, in a legally correct manner, all relevant factors and to deal to the requisite legal standard with the appellant's arguments concerning cancellation or reduction of the fine.

⁽¹⁾ OJ 2003 L 263, p. 9.

Action brought on 27 June 2008 — Commission of the European Communities v Kingdom of the Netherlands

(Case C-283/08)

(2008/C 223/49)

Language of the case: Dutch

Parties

Applicant: Commission of the European Communities (represented by: W. Roels and W. Wils, Agents)

Defendant: Kingdom of the Netherlands

Form of order sought

— declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2005/29/EC ⁽¹⁾ of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), or in any event by failing to notify the Commission thereof, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive;

— order the Kingdom of the Netherlands to pay the costs.

Pleas in law and main arguments

The period within which the directive had to be transposed into national law expired on 12 June 2007.

⁽¹⁾ OJ 2005 L 149, p. 22.

Action brought on 27 June 2008 — Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland

(Case C-284/08)

(2008/C 223/50)

Language of the case: English

Parties

Applicant: Commission of the European Communities (represented by Messrs W. Roels and W. Wils, Agents)

Defendant: United Kingdom of Great Britain and Northern Ireland

The applicant claims that the Court should:

— declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 on unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') ⁽¹⁾, or in any event by failing to communicate them to the Commission, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the Directive in its territory of Gibraltar;

— order United Kingdom of Great Britain and Northern Ireland to pay the costs.

Pleas in law and main arguments

The period within which the directive had to be transposed expired on 12 June 2007.

⁽¹⁾ OJ L 149, p. 22.