JUDGMENT OF THE COURT (Second Chamber)

14 October 2010 *

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* Language of the case: German.

In Case C-280/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 23 June 2008,

Deutsche Telekom AG, established in Bonn (Germany), represented by U. Quack, S. Ohlhoff and M. Hutschneider, Rechtsanwälte,

appellant,

the other parties to the proceedings being:

European Commission, represented by K. Mojzesowicz, W. Mölls and O. Weber, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Vodafone D2 GmbH, formerly Vodafone AG & Co. KG, formerly Arcor AG & Co. KG, established in Eschborn (Germany), represented by M. Klusmann, Rechtsanwalt,

Versatel NRW GmbH, formerly Tropolys NRW GmbH, formerly CityKom Münster GmbH Telekommunikationsservice and TeleBeL Gesellschaft für Telekommunikation Bergisches Land mbH, established in Essen (Germany),

EWE TEL GmbH, established in Oldenburg (Germany),

HanseNet Telekommunikation GmbH, established in Hamburg (Germany),

Versatel Nord GmbH, formerly Versatel Nord-Deutschland GmbH, formerly KomTel Gesellschaft für Kommunikations- und Informationsdienste mbH, established in Flensburg (Germany),

NetCologne Gesellschaft für Telekommunikation mbH, established in Cologne (Germany),

Versatel Süd GmbH, formerly Versatel Süd-Deutschland GmbH, formerly tesion Telekommunikation GmbH, established in Stuttgart (Germany),

Versatel West GmbH, formerly Versatel West-Deutschland GmbH, formerly Versatel Deutschland GmbH & Co. KG, established in Dortmund (Germany),

represented by N. Nolte, Rechtsanwalt,

interveners at first instance,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, U. Lõhmus, A. Ó Caoimh (Rapporteur) and P. Lindh, Judges,

Advocate General: J. Mazák,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 25 November 2009,

after hearing the Opinion of the Advocate General at the sitting on 22 April 2010,

gives the following

Judgment

1 By its appeal, Deutsche Telekom AG seeks to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 10 April 2008 in Case T-271/03 *Deutsche Telekom* v *Commission* [2008] ECR II-477 ('the judgment under appeal') dismissing its action for annulment of Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG) (OJ 2003 L 263, p. 9; 'the decision at issue').

I — Background to the dispute

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

'1 The applicant, Deutsche Telekom AG, is the incumbent telecommunications operator in Germany. …

2 The applicant operates the German fixed telephone network. Before the full liberalisation of telecommunications markets, it enjoyed a legal monopoly in the retail provision of fixed-line telecommunications services. The German markets in the provision of infrastructure and in the provision of telephone services have been liberalised since 1 August 1996, when the Telekommunikationsgesetz (German Law on telecommunications; "TKG") of 25 July 1996 (BGBl. 1996 I, p. 1120) came into force. Since then, the applicant has faced varying degrees of competition from alternative operators on the two markets.

3 The applicant's local networks each consist of a number of local loops for subscribers. The term "local loop" signifies the physical circuit connecting the network termination point at a subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network.

4 The applicant offers access to its local networks to other telecommunications operators and to subscribers. As regards the applicant's access services and charges, it is therefore necessary to distinguish between the local network access services which the applicant offers its competitors ("wholesale [local loop] access [services]") and the local network access services which the applicant offers its subscribers ("[end-user access services]").

I — Wholesale [local loop] access [services]

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

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

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

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

…

II — [End-user access services]

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

existing [narrowband] networks so as to be able to offer broadband services such as faster Internet access.

…

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

A — Charges for retail analogue lines … and digital narrowband … lines …

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

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

…

17 Under the terms of the decision of the [Federal Ministry of Post and Telecommunications] of 17 December 1997, the applicant was to reduce the aggregate price for each of the two baskets by 4.3% in the period from 1 January 1998 to 31 December 1999 (first price cap period). When that first period ended on 31 December 1999, RegTP – by decision of 23 December 1999 – essentially maintained the composition of the baskets and lowered the prices by a further 5.6% in the period from 1 January 2000 to 31 December 2001 (second price cap period).

18 Within this framework of binding price reductions, the applicant could modify the charges for individual components of each basket after obtaining prior authorisation from RegTP. … The system thus enabled the charges for one or more components of a basket to be increased, provided that the price ceiling for the basket was not exceeded. …

19 In the first two price cap periods [from 1 January 1998 to 31 December 2001], the applicant reduced the retail prices in both baskets substantially, going far beyond the mandatory reductions. Those price reductions essentially applied to call charges. Retail prices for analogue lines …, on the other hand, remained unchanged throughout both price cap periods, … As regards retail prices for [digital narrowband] lines, the applicant lowered basic monthly charges during the same period …

20 A new price cap system … has been in effect since 1 January 2002 … In place of the two baskets for residential and business customers, the new system uses

four baskets, for end-user lines (basket A), local calls (basket B), domestic long-distance calls (basket C), and international calls (basket D).

21 On 15 January 2002, the applicant informed RegTP that it proposed to increase its monthly charges for analogue and [digital narrowband] lines … That increase was authorised by RegTP …

22 On 31 October 2002, the applicant made a further application to increase its retail charges. RegTP partly refused that application …

B — Charges for ADSL lines …

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

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

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

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

'102 A margin squeeze exists if the charges to be paid to [the applicant] for wholesale [local loop] access [services], taking monthly charges and one-off charges together, are so expensive that competitors are forced to charge their end-users prices higher than the prices [the applicant] charges its own end-users for similar services. If wholesale charges [for local loop access services] are higher than retail charges [for end-user access services], [the applicant's] competitors, even if they are at least as efficient as [the applicant], can never make a profit, because on top of the wholesale charges [for local loop access services] they pay to [the applicant] they also have other costs such as marketing, billing, debt collection …

103 If [the applicant] charges its competitors [wholesale] prices for [local loop] access [services] that are higher than its own prices for retail local network access, [the applicant] prevents its competitors from offering access via the local loop in addition to call services. …

104 [The applicant] takes the view that there cannot be abusive pricing in the form of a margin squeeze in the present case, because wholesale charges [for local loop access services] are imposed by [RegTP]. …

105 Contrary to [the applicant's] view, however, the margin squeeze is a form of abuse that is relevant to this case. On related markets on which competitors buy wholesale [local loop access] services from the established operator, and depend on the established operator in order to compete on a [retail] product or service market, there can very well be a margin squeeze between regulated wholesale [prices for local loop access services] and retail prices [for end-user access services]. To show that there is a margin squeeze it is sufficient that there should be a disproportion between the two charges such that competition is restricted. …'

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

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

II — The proceedings before the General Court and the judgment under appeal

7 By application lodged at the Registry of the General Court on 30 July 2003, the appellant brought an action, principally, for annulment of the decision at issue and, in the alternative, for a reduction of the fine imposed by that decision.

8 In support of its application for annulment of the decision at issue, the appellant put forward, inter alia, a plea in law alleging infringement of Article 82 EC and a plea in law alleging misuse of powers and infringement of the principles of proportionality, legal certainty and protection of legitimate expectations.

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

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

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

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

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

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

principles of proportionality and legal certainty, the General Court stated, in particular, in paragraph 265 of the judgment under appeal:

'While it is not inconceivable that the German authorities also infringed Community law – particularly the provisions of [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10)], as amended by [Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13)] – by opting for a gradual rebalancing of connection and call charges, such a failure to act, if it were to be established, would not remove the scope which the applicant had to reduce the margin squeeze.'

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

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

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

States. The Commission did not therefore misuse its powers by making that finding on the basis of Article 82 EC.'

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

18 Consequently, the General Court dismissed the whole action and ordered the appellant to bear its own costs and to pay those incurred by the Commission.

III — Forms of order sought

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

— set aside the judgment under appeal;

— annul the decision at issue;

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

— order the Commission to pay the costs.

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

21 Vodafone D2 GmbH, formerly Vodafone AG & Co. KG, formerly Arcor AG & Co. KG ('Vodafone'), contends that the Court should dismiss the appeal as inadmissible or, at the very least, unfounded, and order the appellant to pay the costs.

22 Versatel NRW GmbH, formerly Tropolys NRW GmbH, formerly CityKom Münster GmbH Telekommunikationsservice and TeleBeL Gesellschaft für Telekommunikation Bergisches Land mbH, EWE TEL GmbH, HanseNet Telekommunikation GmbH, Versatel Nord GmbH, formerly Versatel Nord-Deutschland GmbH, formerly KomTel Gesellschaft für Kommunikations- und Informationsdienste mbH, NetCologne Gesellschaft für Telekommunikation mbH, Versatel Süd GmbH, formerly Versatel Süd-Deutschland GmbH, formerly tesion Telekommunikation GmbH, and Versatel West GmbH, formerly Versatel West-Deutschland GmbH, formerly Versatel Deutschland GmbH & Co. KG (together 'Versatel') also contended at the hearing that the Court

should dismiss the appeal, endorsing the forms of order sought by the Commission and by Vodafone.

IV — Appeal

A — *Admissibility*

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

24 In that regard, it should be borne in mind that it is apparent from Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. That requirement is not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the contested judgment, merely reproduces the pleas in law and arguments previously submitted to the General Court. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake (see, in particular, Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 34 and 35, and

Case C-76/01 P *Eurocoton and Others* v *Council* [2003] ECR I-10091, paragraphs 46 and 47).

25 However, provided that the appellant challenges the interpretation or application of European Union law ('EU law') by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (see, in particular, Case C-321/99 P *ARAP and Others* v *Commission* [2002] ECR I-4287, paragraph 49).

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

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

B — *Substance*

28 In support of its appeal, the appellant puts forward three pleas in law alleging, respectively, (i) errors of law concerning the manner in which the regulation of its activities by RegTP as the competent national regulatory authority was dealt with, (ii) errors of law in the application of Article 82 EC, and (iii) errors of law in the calculation of fines owing to a failure to take such regulation into account.

29 It must be borne in mind in that regard that, by the judgment under appeal, the General Court dismissed in its entirety the action brought by the appellant against the decision at issue, holding, in essence, as can be seen from paragraphs 3 to 6 of the present judgment, that the Commission was entitled to impose a fine on the appellant for infringement of Article 82 EC on account of the implementation of an unfair pricing practice, resulting for competitors who are at least as efficient as the appellant in a margin squeeze generated by an inappropriate spread between wholesale charges for local loop access services and retail charges for end-user access services, preventing them from competing effectively with the appellant for the provision of the latter services.

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

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

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

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

31 By contrast, the appellant does not challenge in principle the proposition that a pricing practice adopted by a dominant undertaking which results in a margin squeeze of its competitors who are at least as efficient is to be regarded as unfair in the light of Article 82 EC.

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

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

1. Preliminary observations

34 In order to consider the substance of the appellant's grounds of appeal against that judgment, it should, in the first place, be pointed out that, according to Article 113(2) of the Rules of Procedure of the Court of Justice, the subject-matter of the proceedings before the General Court may not be changed in the appeal. The Court's jurisdiction in an appeal is confined to a review of the findings of law on the pleas argued before the General Court. A party may not, therefore, put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court, since to do so would be to allow it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court (see, to that effect, in particular Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59; Case C-68/05 P *Koninklijke Coöperatie Cosun* v *Commission* [2006] ECR I-10367, paragraph 96; and Case C-564/08 P *SGL Carbon* v *Commission* [2009], paragraph 22).

35 Both in its appeal and at the hearing, the appellant argued that it did not have any scope to determine wholesale prices for local loop access services, since those were set by the national regulatory authority, namely RegTP. The margin squeeze at issue was said to be caused, in reality, by the excessive wholesale prices set by RegTP. In order to end that margin squeeze, the Commission should, therefore, have brought an action for failure to fulfil obligations under Article 226 EC against the Federal

Republic of Germany for breach of EU law, instead of adopting a decision against the appellant under Article 82 EC. Furthermore, it is wrong, according to the appellant, to take the view that wholesale prices for local loop access services are set on the basis of the appellant's costs. Those prices are determined by RegTP on the basis of the cost of efficient service provision in accordance with a model laid down by the national regulatory authority.

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

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

38 With regard to those points at issue between the parties, it must nevertheless be observed, first of all, that the question of the appellant's scope to adjust its wholesale prices for local loop access services was not argued before the General Court, which

handed down the judgment under appeal having accepted the premiss, undisputed before it, that the appellant did not have the necessary scope.

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

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

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

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

43 In order to assess the substance of the complaints put forward by the appellant to call into question the lawfulness of the judgment under appeal, in particular those by which it denies responsibility for the infringement and the abusive nature of the margin squeeze identified in the decision at issue – complaints put forward by the first and second grounds of appeal – it is accordingly necessary to rely solely on the premiss accepted in that judgment: that the appellant had scope only to adjust its retail prices for end-user access services, scope whose existence is undisputed in the context of the present appeal.

44 Second, it should be stressed that, if the subject-matter of the proceedings before the General Court is not to be changed, it is not possible in the context of the present appeal to accuse the General Court of failure to censure the Commission for not calling into question the conduct of the national regulatory authorities on the premiss that those authorities, having set an excessive wholesale price for local loop access services, may be said to be solely responsible for the margin squeeze identified in the decision at issue.

45 Admittedly, according to the case-law of the Court, it is for each Member State to take all appropriate measures, whether general or particular, to ensure the fulfilment by the national regulatory authorities of the obligations which are binding under EU law (see, to that effect, Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 85). Furthermore,

Articles 81 EC and 82 EC, in conjunction with Article 10 EC, require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings (see, in particular, Case 13/77 *GB-Inno-BM* [1977] ECR 2115, paragraph 31, and Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, paragraph 20).

46 However, as regards the possibility of the Commission bringing an action for failure to fulfil obligations against the Member State concerned, since the judgment under appeal in the present case relates solely to the lawfulness of a decision adopted against the appellant by the Commission pursuant to Article 82 EC, the Court must, in the context of that appeal, confine itself to ascertaining whether the complaints put forward in support of that appeal show that the General Court's examination of the lawfulness of such a decision is vitiated by errors of law, irrespective of whether the Commission could, simultaneously or alternatively, have adopted a decision finding that the Member State in question had infringed EU law.

47 Consequently, as the General Court itself found in substance, inter alia, in paragraphs 265 and 271 of the judgment under appeal, even if it is not inconceivable that the national regulatory authorities infringed EU law in this instance, and the Commission could indeed therefore have chosen to bring an action for failure to fulfil obligations against the Federal Republic of Germany under Article 226 EC, such possibilities are irrelevant at the stage of the present appeal, not least because, according to the case-law of the Court, under the system laid down by Article 226 EC, the Commission has a discretion to bring an action for failure to fulfil obligations, and it is not for the Courts of the European Union ('Courts of the Union') to assess whether it was appropriate to do so (see, in particular, Case C-233/00 *Commission* v *France* [2003] ECR I-6625, paragraph 31).

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

49 Consequently, the Court cannot, in the present appeal, review complaints which challenge the lawfulness of wholesale prices for local loop access services, particularly on the basis of their allegedly excessive nature as compared with the costs incurred by the appellant in supplying them (see, on that point, Case C-55/06 *Arcor* [2008] ECR I-2931, paragraph 69). Such complaints go beyond the pleas argued at first instance and are, therefore, in accordance with the case-law cited in paragraph 34 of the present judgment, inadmissible in this appeal.

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

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

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

53 In the second place, it should be recalled, concerning specifically the assessment of market data and the competitive situation, that it is not for the Court of Justice, on an appeal, to substitute its own assessment for that of the General Court. In accordance with Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice, the appeal must be limited to questions of law. Assessment of the facts does not, save where there may have been distortion of the facts or evidence, which has not been pleaded here, constitute a question of law which is subject, as such, to review by the Court of Justice (see Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 78 and the case-law cited).

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

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

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

(a) The first part of the first ground of appeal, concerning the attributability of the infringement

(i) Judgment under appeal

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

57 As regards, first of all, the period from 1 January 1998 to 31 December 2001, having noted in paragraph 100 of its judgment that, within the applicable legislative

framework, the appellant was able to adjust its prices after obtaining the prior authorisation of RegTP, the General Court concluded in paragraph 105 of its judgment that the Commission was correct to find that, having regard to the six applications for reductions in call charges in that period, the appellant had scope during that period to apply for increases in the retail prices of its narrowband access services to end-users, while respecting the overall ceilings for baskets of residential and business services.

58 Next, the General Court considered in paragraphs 106 to 124 of the judgment under appeal whether, notwithstanding that scope, RegTP's intervention in the setting of the appellant's retail prices for end-user access services had the effect that the appellant was no longer governed by Article 82 EC. In that respect, it held in paragraph 107 of its judgment that the fact that those retail prices have to be approved by RegTP does not absolve the appellant from responsibility under Article 82 EC, since the appellant influences the level of its retail prices for end-user access services through applications to RegTP for authorisation.

59 In that regard, the General Court, in paragraphs 108 to 124 of the judgment under appeal, rejected the appellant's argument that it does not have any responsibility under Article 82 EC because RegTP checks the compatibility with Article 82 EC of its retail prices for end-user access services in advance.

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

narrowband services are compatible with Article 82 EC, that the national regulatory authorities operate under national law, that national law may, as regards telecommunications policy, have objectives which differ from those of European Union competition policy and that the various decisions of RegTP to which the appellant refers do not include any reference to Article 82 EC.

61 As to the fact that RegTP has considered, in a number of decisions, the question of the existence of a margin squeeze, the General Court stated in paragraphs 116 to 119 of the judgment under appeal that the fact that, having found a negative spread between wholesale prices for local loop access services and the appellant's retail prices for end-user access services, RegTP took the view in each case that other operators should be able to offer their end-users competitive prices by resorting to cross-subsidised charges for access services and call charges shows that RegTP did not consider the compatibility of the charges in question with Article 82 EC or, at any rate, that it applied Article 82 EC incorrectly.

62 The General Court pointed out in paragraph 120 of the judgment under appeal that, in any event, even on the assumption that RegTP is obliged to consider whether the retail prices for end-user access services proposed by the appellant are compatible with Article 82 EC, the Commission cannot be bound by a decision taken by a national body pursuant to that article.

63 Furthermore, the General Court noted in paragraphs 121 to 123 of the judgment under appeal that the attribution of any infringement to the appellant depends on whether the latter had sufficient scope at the material time to fix its retail prices for

narrowband access services to end-users at a level that would have enabled it to end or reduce the margin squeeze at issue. The General Court reiterated in that regard that the appellant was able to influence the level of those retail prices through applications to RegTP for authorisation. It also observed that, in its judgment of 10 February 2004, the Bundesgerichtshof had expressly confirmed the appellant's responsibility to make such applications and that the German legal framework did not preclude RegTP from having authorised prices which are contrary to Article 82 EC.

64 Consequently, the General Court found in paragraph 124 of the judgment under appeal that, notwithstanding RegTP's intervention in the setting of the appellant's retail prices for narrowband access services to end-users, the appellant had sufficient discretion during the period from 1 January 1998 to 31 December 2001 for its pricing policy to fall within the scope of Article 82 EC.

65 As regards, in the second place, the period from 1 January 2002, having noted in paragraphs 144 and 145 of the judgment under appeal that the appellant does not deny that it could have increased its retail prices for broadband access services (ADSL) from that date and that, since it fixes those prices at its own discretion, within the limits imposed under German law, its pricing practices in that area are capable of being caught by Article 82 EC, the General Court considered in paragraphs 147 to 151 of its judgment whether the appellant could have reduced the margin squeeze by increasing its retail prices for broadband access services. Paragraphs 148 and 149 of the judgment under appeal are worded as follows:

'148 It must be noted in that regard that since wholesale [local loop] access services can provide end-users with the whole range of … access services, the applicant's scope to increase its [retail prices for broadband access services] is capable of reducing the margin squeeze between wholesale prices [for local loop access

services], on the one hand, and retail prices for the whole range of [end-user] access services, on the other. A combined analysis, at end-user level, of … access services is required not only because they amount to a single supply of services at wholesale level, but also because, as the Commission explained in the [decision at issue] without having been challenged by the applicant on that point, ADSL cannot be offered to end-users on its own because, for technical reasons, it always involves an upgrading of … narrowband connections.

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

(ii) Arguments of the parties

66 As regards, in the first place, the period from 1 January 1998 to 31 December 2001, the appellant submits by its first complaint that the General Court erred in relying on

the premiss that the existence of scope to adjust its retail prices for end-user access services is a necessary and sufficient requirement in order for an infringement to be attributable. The existence of such leeway does not resolve the issue whether the failure on the appellant's part to apply to RegTP for authorisation to increase those retail prices amounted to wrongful conduct.

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

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

subject to regulation at national level should be able to rely on the correctness of that regulation.

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

70 By its third complaint, the appellant submits that, contrary to what the General Court held in paragraphs 109 and 110 of the judgment under appeal, the fact that its retail prices for analogue lines were based on authorisation by the Federal Ministry of Post and Telecommunications is irrelevant to the consideration of attributability. RegTP's rejection of the complaint of a margin squeeze restricting competition is, by contrast, decisive.

71 As regards, in the second place, the period from 1 January 2002 to 21 May 2003, the appellant submits by its first complaint that the judgment under appeal is erroneous in so far as, just as in the case of the previous period, the margin squeeze cannot be attributed to the appellant.

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

73 By its third complaint, the appellant claims that the General Court erred in law in making unfounded assumptions as to the possibility of a reduction of the margin squeeze. The finding in paragraph 149 of the judgment under appeal that cross-price elasticity does not remove the appellant's scope to increase its ADSL prices is accurate but irrelevant. However, the General Court did not consider whether, and to what extent, an end-user of a narrowband line would decline to switch to a broadband line as a result of an increase in its price.

74 The Commission points to the erroneous nature of the appellant's key argument that the infringement cannot be attributed to the appellant because the matter is within the remit of the national regulatory authority and that the Commission cannot issue proceedings directly against a regulated undertaking in a case in respect of which RegTP has already taken a decision. It contends that the appellant's complaints should, therefore, be rejected in their entirety.

75 Vodafone contends that the first part of the first ground of appeal is inadmissible because the appellant merely reproduces the arguments on which it relied during the proceedings before the General Court, solely for the purpose of securing a re-examination of that argument by the Court of Justice. In the alternative, the appellant's complaints should be rejected as unfounded.

76 Versatel also contended at the hearing that the General Court had correctly held that the appellant had sufficient scope to increase its retail prices for end-user access services.

(iii) Findings of the Court

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

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

79 However, that premiss is incorrect.

80 According to the case-law of the Court of Justice, it is only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that Articles 81 EC and 82 EC do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings. Articles 81 EC and 82 EC may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings (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).

81 The possibility of excluding anti-competitive conduct from the scope of Articles 81 EC and 82 EC on the ground that it has been required of the undertakings in question by existing national legislation or that the legislation has precluded all scope for any competitive conduct on their part has thus been accepted only to a limited extent by the Court of Justice (see Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraph 19; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraphs 27 to 29; and Case C-198/01 *CIF* [2003] ECR I-8055, paragraph 67).

82 Thus, the Court has held that if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles 81 EC and 82 EC (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 *CIF*, paragraph 56).

83 According to the case-law of the Court, dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market (Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 57).

84 It follows from this that the mere fact that the appellant was encouraged by the intervention of a national regulatory authority such as RegTP to maintain the pricing practices which led to the margin squeeze of competitors who are at least as efficient as the appellant cannot, as such, in any way absolve the appellant from responsibility under Article 82 EC (see, to that effect, Case 123/83 *Clair* [1985] ECR 391, paragraphs 21 to 23).

85 Since, notwithstanding such interventions, the appellant had scope to adjust its retail prices for end-user access services, the General Court was entitled to find, on that ground alone, that the margin squeeze at issue was attributable to the appellant.

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

87 Instead, in its various complaints and arguments the appellant merely underlines the encouragement provided by RegTP's intervention, and states, in particular, that RegTP itself considered and approved the margin squeeze at issue in the light both of national and European Union telecommunications law and of Article 82 EC and, moreover, that the Bundesgerichtshof held in a judgment of 10 February 2004 that the appellant cannot take the place of RegTP in assessing whether a pricing practice is contrary to Article 82 EC.

88 For the reasons set out in paragraphs 80 to 85 of the present judgment, such arguments cannot, however, in any way alter the fact that that pricing practice is attributable to the appellant, since it is common ground that the appellant had scope to adjust its retail prices for end-user access services, and, therefore, such arguments are ineffective as a means of challenging the General Court's findings on that point.

89 In particular, the appellant cannot complain that the General Court did not consider whether there was 'fault' on its part by failing to use the scope which it had to apply to RegTP for authorisation to adjust its retail prices for end-user access services. The existence or otherwise of any 'fault' in such conduct cannot alter the finding that the appellant had scope to adopt that conduct, and can be taken into account only in determining whether that conduct was an infringement and at the stage of setting the level of the fines.

90 Moreover, as the General Court held in paragraph 120 of the judgment under appeal, the Commission cannot, in any event, be bound by a decision taken by a national body pursuant to Article 82 EC (see, to that effect, Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, paragraph 48). In the present case, the appellant does not, indeed, deny that RegTP's decisions are not binding on the Commission.

91 Admittedly it is not inconceivable, as the appellant observes, that the national regulatory authorities may themselves have infringed Article 82 EC in conjunction with Article 10 EC, and therefore that the Commission could have brought an action for failure to fulfil obligations against the Member State concerned. However, that circumstance also does not affect the scope which the appellant had to adjust its retail

prices for end-user access services and, accordingly, it is, as paragraphs 44 to 49 of the present judgment have already shown, ineffective in the present appeal for the purpose of challenging the General Court's findings as to whether the infringement can be attributed to the appellant.

92 The same applies to the appellant's claim that the purpose of RegTP's regulation is to open the relevant markets up to competition. It is common ground that that regulation did not in any way deny the appellant the possibility of adjusting its retail prices for end-user access services or, therefore, of engaging in autonomous conduct that is subject to Article 82 EC, since the competition rules laid down by the EC Treaty supplement in that regard, by an *ex post* review, the legislative framework adopted by the Union legislature for *ex ante* regulation of the telecommunications markets.

93 Similarly, the Court must reject the complaint that, by reason of the cross-price elasticity of retail prices for broadband access services and retail prices for narrowband access services, the General Court erred in law in paragraph 149 of the judgment under appeal with regard to the possibility of the appellant reducing the margin squeeze from 1 January 2002 by increasing its retail prices for broadband access services. As the General Court stated in the same paragraph, that complaint does not in any way preclude the existence of scope for the appellant to adjust its retail prices for broadband access services. Furthermore, in so far as the appellant also seeks to deny that that increase led to a higher average retail price for narrowband and broadband access services taken together, the present complaint must, in accordance with the case-law cited in paragraph 53 of the present judgment, be rejected as inadmissible, since it

seeks to call into question the General Court's definitive assessment of the facts in the judgment under appeal, while making no claim as to distortion of those facts.

94 Finally, the complaint as to contradictory grounds, mentioned in paragraph 72 of the present judgment, cannot be upheld because it is founded on an incorrect premiss. While it is true that, particularly in paragraphs 119 and 199 to 201 of the judgment under appeal, the General Court rejected the possibility of cross-subsidisation between two separate markets – namely the market in end-user access services and that in call services for subscribers – at the stage of calculating the margin squeeze, it is wrong to take the view that the General Court required such cross-subsidisation when it was examining the attributability of the infringement.

95 In paragraphs 148 to 150 of the judgment under appeal, the General Court merely found in that regard that the appellant's scope to increase its retail prices for broadband access services was capable of reducing the margin squeeze generated by the spread between wholesale prices for local loop access services and retail prices for all end-user access services. In doing so, the General Court did not in any way require there to be a practice of cross-subsidisation between narrowband and broadband access services, particularly since – as stated in paragraph 148 of the judgment under appeal, which the appellant has not challenged in the present appeal – there is a single, separate services market at the level of wholesale local loop access services, the access services provided at that level allowing the appellant's competitors to supply both narrowband and broadband access services to their end-users, whereas for technical reasons the latter services cannot be offered on their own to end-users.

96 Consequently, the first part of the first ground of appeal must be rejected in its entirety as, in part, inadmissible and, in part, ineffective or unfounded.

(b) The second part of the first ground of appeal, concerning the principle of the protection of legitimate expectations

(i) Judgment under appeal

97 After recalling in paragraph 267 of the judgment under appeal that RegTP had taken the view in a number of decisions adopted in the period at issue that, even though there was a negative spread between the appellant's wholesale prices for local loop access services and its retail prices for end-user access services, other operators should be able to offer their end-users competitive prices by resorting to cross-subsidisation of access services and call services, the General Court found, in paragraph 268 of its judgment, that RegTP's decisions do not include any reference to Article 82 EC, and that it follows implicitly but necessarily from RegTP's decisions that the appellant's pricing practices have an anti-competitive effect, since the appellant's competitors have to resort to cross-subsidisation in order to be able to remain competitive on the market in access services.

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

'In those circumstances, RegTP's decisions could not have created for the applicant a legitimate expectation that its pricing practices were compatible with Article 82 EC. It must be observed furthermore that, in its judgment of 10 February 2004 setting aside the judgment of the Oberlandesgericht Düsseldorf of 16 January 2002, the Bundesgerichtshof confirmed that "the administrative examination procedure [undertaken by RegTP] does not preclude the possibility in practice of an undertaking

submitting a charge by which it abuses its dominant position and obtains authorisation for it because the abuse is not revealed during the examination procedure'".

(ii) Arguments of the parties

99 The appellant takes the view that the General Court applied the principle of the protection of legitimate expectations incorrectly. RegTP's decisions repeatedly denied the existence of a margin squeeze that restricted competition, and this created a legitimate expectation on the part of the appellant that its charges were lawful.

100 In that regard, the appellant claims, by its first complaint, that whether or not RegTP's decisions expressly refer to Article 82 EC is irrelevant, since RegTP had in any event found that there was no margin squeeze that restricted competition.

101 By its second complaint, the appellant submits that, contrary to the view taken by the General Court in paragraphs 267 and 268 of the judgment under appeal, it follows neither from RegTP's statement concerning the possibility of 'cross-subsidisation' with the prices of call services, nor from the use of the term 'cross-subsidisation', that its pricing practices have an anti-competitive effect.

102 By its third complaint, the appellant submits that the reference in paragraph 269 of the judgment under appeal to a judgment of the Bundesgerichtshof of 10 February

2004 is of no relevance. That judgment was delivered after the reference period and cannot, therefore, determine whether the appellant was entitled to rely on the accuracy of RegTP's decisions during that period. On the contrary, the appellant could have inferred from a judgment of the Oberlandesgericht Düsseldorf of 16 January 2002 that it was entitled to rely on the decisions of RegTP, since that court held that RegTP's decisions precluded any infringement of Article 82 EC.

103 The Commission contends that, while RegTP's pronouncements do not anticipate its assessment with regard to Article 82 EC, neither can they form the basis of a legitimate expectation that the Commission will share the opinion of RegTP. The appellant's complaints should, therefore, be rejected as ineffective or unfounded.

104 Vodafone takes the view that the second part of the first ground of appeal is inadmissible, since the appellant, in essence, merely repeats the complaints already raised before the General Court concerning the significance of RegTP's earlier decisions, its statements concerning the possibility of cross-subsidisation and the meaning of a judgment of the Oberlandesgericht Düsseldorf. In any event, that part of the ground of appeal is unfounded since a legitimate expectation can be created only by the authority responsible for the legal situation at issue.

(iii) Findings of the Court

105 By the present complaints, the appellant merely claims that decisions adopted by RegTP or handed down by certain national courts were capable of creating for the

appellant a legitimate expectation that its pricing practices were compatible with Article 82 EC, reiterating or developing the arguments relied on at first instance before the General Court in order to show that the Commission infringed the principle of the protection of legitimate expectations, but it fails to expound any legal arguments to demonstrate why paragraphs 267 to 269 of the judgment under appeal are vitiated by an error of law.

106 The appellant thereby seeks, by calling into question the decision at issue in this way, to secure a re-examination of the application that was made before the General Court. Consequently, in accordance with the case-law cited in paragraph 24 of the present judgment, its complaints are inadmissible on that point.

107 As to the remainder, in so far as the appellant denies, in its second complaint, that it could have inferred from the decisions of RegTP that its pricing practices had had a restrictive effect on competition, it must be held that the appellant seeks to call into question the General Court's assessment of the facts without alleging any distortion of those facts, and that, therefore, in accordance with the case-law cited in paragraph 53 of the present judgment, such a complaint must also be considered inadmissible.

108 Finally, in so far as the third complaint seeks to call into question the relevance of the judgment delivered by the Bundesgerichtshof on 10 February 2004, it must be rejected as ineffective since it concerns a ground that was included in the judgment purely for the sake of completeness in support of other findings made by the General Court (see, to that effect, Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraph 148 and the case-law cited).

109 As the use of the word 'furthermore' near the beginning of the second sentence of paragraph 269 of the judgment under appeal shows, the General Court referred to

findings in that Bundesgerichtshof judgment solely in order to confirm the conclusion drawn from the grounds in paragraphs 267 and 268 of the judgment under appeal and which is set out in the first sentence of paragraph 269: that RegTP's decisions could not have created for the appellant a legitimate expectation that its pricing practices were compatible with Article 82 EC.

110 Consequently, the second part of the first ground of appeal must be dismissed as, in part, inadmissible and, in part, ineffective.

(c) The third part of the first ground of appeal, concerning the intentional or negligent nature of the infringement of Article 82 EC

(i) Judgment under appeal

111 The General Court rejected the appellant's plea alleging a failure to state reasons in relation to the intentional or negligent nature of the infringement, noting, in paragraph 286 of the judgment under appeal, that the decision at issue contains a reference to Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), the first subparagraph of which lays down the conditions which must be fulfilled to enable the Commission to impose fines, including the condition that the infringement was committed intentionally or negligently.

112 Furthermore, the General Court stated in paragraph 287 of its judgment that, in the decision at issue, the Commission set out in detail the grounds on which it considers the appellant's pricing practices to be abuses within the meaning of Article 82 EC and the grounds on which the appellant must be deemed responsible for the infringement found, even though the German authorities have to approve the appellant's charges.

113 The General Court also rejected the appellant's plea regarding the absence of any negligence or intentional misconduct. In that regard, the General Court stated in paragraph 296 of the judgment under appeal that the appellant could not be unaware that, notwithstanding the authorisation decisions of RegTP, it had genuine scope to reduce the margin squeeze, nor that that margin squeeze entailed serious restrictions on competition, particularly in view of its monopoly on the market in wholesale local loop access services and its virtual monopoly on the market in end-user access services.

114 In addition, the General Court held, in paragraph 298 of the judgment under appeal, that the initiation of a pre-litigation procedure against the Federal Republic of Germany did not affect the conditions in the first subparagraph of Article 15(2) of Regulation No 17, since the appellant could not have been unaware that it had genuine scope to increase its retail prices for end-user access services and that its pricing practices were hindering the growth of competition in the market in local loop access services, a market in which the degree of competition was already weakened as a result, in particular, of its presence.

115 Lastly, in paragraph 299 of the judgment under appeal, the General Court rejected the complaint based on RegTP's examination of the margin squeeze for the reasons set out in paragraphs 267 to 269 of its judgment, which are referred to in paragraphs 97 and 98 of the present judgment.

(ii) Arguments of the parties

116 The appellant submits by its first complaint that, in paragraphs 284 to 289 of the judgment under appeal, the General Court misconstrues the requirements of Article 253 EC by proceeding, erroneously, on the principle that the allegation of negligence or intentional misconduct was sufficiently reasoned in the decision at issue. In fact that decision does not include any finding of law or of fact in relation to the question of negligence or fault.

117 In the first place, the appellant submits that it is not sufficient, from a legal perspective, for the Commission to refer to Article 15(2) of Regulation No 17 in the second citation of the decision at issue. The citation does not form part of the statement of reasons for the decision; it merely indicates the legal basis. In any event, such a citation does not disclose why the Commission takes the view that the infringement was committed intentionally or negligently.

118 In the second place, the appellant takes the view that the Commission's substantive findings, to which the General Court refers in paragraph 287 of the judgment under appeal, do not support the complaint of an intentional or negligent infringement of Article 82 EC, since they are unrelated to the issue of the individual attributability of the conduct, that is to say to the question whether the appellant could or could not have been unaware of the anti-competitive nature of its conduct.

119 By its second complaint, the appellant submits that the General Court's assessment of fault is vitiated by a failure to state reasons, and, moreover, the grounds of the judgment under appeal are based on a misapplication of the first subparagraph of Article 15(2) of Regulation No 17. The imputability to the appellant of any infringement

of Article 82 EC is lacking. In the light of RegTP's decisions, and in the absence of any precedent in the European Union, the appellant was unaware of the purportedly anti-competitive nature of its conduct.

120 According to the appellant, the considerations relating to the decisions of RegTP which appear in paragraphs 267 to 269 of the judgment under appeal and to which the General Court refers in paragraph 299 of its judgment do not support the conclusion that the appellant acted wrongfully. The fact that RegTP does not expressly refer to Article 82 EC is not conclusive, since the assessment of fault does not depend on whether the undertaking concerned is aware that its conduct infringes Article 82 EC. Furthermore, it cannot be inferred either from the concept of cross-subsidisation used by RegTP or from the judgment of the Bundesgerichtshof of 10 February 2004 that the appellant acted wrongfully. Lastly, the General Court failed to consider the conclusions which the appellant was entitled to draw from the Commission's overall conduct as a result not only of the initiation of proceedings for failure to fulfil obligations against the Federal Republic of Germany, but also from the fact that the Commission informed the appellant of its intention not to pursue the procedure initiated against it.

121 The Commission contends that the regulation of the industry is relevant only to the issue whether the appellant knew that its actions were unlawful and not to the determination of the intentional nature of the infringement. The third part of the first ground of appeal is, therefore, ineffective or, in any event, unfounded.

122 Vodafone takes the view that the appellant is again reproducing the arguments relied on before the General Court in order to argue that there was no fault. In any event, the appellant's arguments are inadmissible in so far as they require the Court of Justice, on the grounds of fairness, to substitute its own assessment for that of the

General Court in the context of its review of the grounds of the General Court's judgment. As to the remainder, the third part of the first ground of appeal is unfounded.

(iii) Findings of the Court

123 As a preliminary point, it must be noted that the present complaints, while repeating in part the arguments put before the General Court, are admissible in accordance with the case-law cited in paragraph 25 of the present judgment, because they criticise the General Court for having adopted an incorrect legal test in relation to the application of the condition that an infringement be negligent or intentional, and in relation to the review of the Commission's observance of that condition in the light of its obligation to state reasons. Furthermore, it must be borne in mind that the question whether the grounds of a judgment of the General Court are adequate is a question of law which is amenable, as such, to judicial review on appeal (see, in particular, Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies* v *Council and Commission* [2008] ECR I-6513, paragraph 90).

124 As regards, in the first place, the complaints as to whether the General Court's findings are well founded, it must be borne in mind, in relation to the question whether the infringements were committed intentionally or negligently and are, therefore, liable to be punished by a fine in accordance with the first subparagraph of Article 15(2) of Regulation No 17, that it follows from the case-law of the Court that that condition is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty (see Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission*

[1983] ECR 3369, paragraph 45, and *Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 107).

125 In the present case, the General Court took the view in paragraphs 296 and 297 of the judgment under appeal that that condition was satisfied, since the appellant could not have been unaware that, notwithstanding the authorisation decisions of RegTP, it had genuine scope to set its retail prices for end-user access services and, moreover, the margin squeeze entailed serious restrictions on competition, particularly in view of its monopoly on the wholesale market in local loop access services and its virtual monopoly on the retail market in end-user access services.

126 It must be held that such reasoning, which is based on findings of fact which, in the absence of any allegation of distortion, are for the General Court alone to assess, is not vitiated by any error of law.

127 In so far as the appellant complains that the General Court did not take RegTP's decisions or the lack of any precedent in the European Union into account, it is sufficient to note that such arguments are merely intended to show that the appellant was unaware that the conduct complained of in the decision at issue was unlawful in the light of Article 82 EC. Such arguments must, therefore, in accordance with the case-law cited in paragraph 124 of the present judgment, be rejected as unfounded.

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

under Article 82 EC in respect of the appellant, does not in any way alter the finding that the appellant could not have been unaware of the anti-competitive nature of its conduct. The General Court did not, therefore, commit an error of law when it held, in paragraph 298 of the judgment under appeal, that the initiation of the procedure in question had no bearing on the intentional or negligent nature of an infringement for the purposes of Article 15(2) of Regulation No 17.

129 As to the complaint put forward by the appellant in respect of paragraph 299 of the judgment under appeal, it must, in accordance with the case-law cited in paragraph 108 of the present judgment, be rejected as ineffective, since it concerns a ground that was included in the judgment purely for the sake of completeness to support the findings made in paragraphs 296 and 297 of the judgment under appeal, which suffice to demonstrate the intentional or negligent nature of the infringement.

130 As regards, in the second place, the complaints concerning the General Court's review of the statement of reasons for the decision at issue in relation to the intentional or negligent nature of the infringement, it must be noted that the obligation to provide a statement of reasons laid down in Article 253 EC is an essential procedural requirement which must be distinguished from the question whether the reasoning is well founded, which is concerned with the substantive legality of the measure at issue. To that end, the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent European Union judicature to exercise its power of review (Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35).

131 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other

parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 166).

132 In the present case, as regards the statement of reasons for the decision at issue, the General Court held in paragraph 286 of the judgment under appeal that that decision contained a reference to Article 15(2) of Regulation No 17 which refers to the conditions required to be fulfilled to enable the Commission to impose fines, including the condition that the infringement was committed intentionally or negligently, and, moreover, in paragraph 287 of its judgment, that the Commission set out in detail in its decision the grounds on which it considers the appellant's pricing practices to be abuses and those on which the appellant must be deemed responsible for the infringement found, in spite of the approval of its charges by the national regulatory authorities.

133 Those findings disclose the grounds on which the decision at issue was taken and enabled the appellant to ascertain the Commission's reasoning for the application to the appellant of the conditions laid down by Article 15(2) of Regulation No 17 for the imposition of fines. The General Court was able, therefore, without infringing Article 253 EC, to infer from them that the decision at issue contained sufficient reasoning on that point in the light of the requirements laid down by that provision. The appellant's complaint in that respect is, therefore, unfounded.

134 In so far as the appellant further submits in that regard that the Commission's findings, which are restated in paragraph 287 of the judgment under appeal, are irrelevant to the determination of the intentional or negligent nature of an infringement, it is sufficient to note that that complaint, which seeks to call into question the substance of the statement of reasons adopted in the decision at issue, is inadmissible in the present appeal, in accordance with the case-law cited in paragraph 24 of the present judgment.

135 As regards, in the third place, the grounds of the judgment under appeal, it must be observed that the obligation to state the reasons on which a judgment is based arises under Article 36 of the Statute of the Court of Justice, which applies to the General Court by virtue of the first paragraph of Article 53 of the Statute, and Article 81 of the Rules of Procedure of the General Court (see judgment of 4 October 2007 in Case C-311/05 P *Naipes Heraclio Fournier* v *OHIM*, paragraph 51 and the case-law cited).

136 It has consistently been held that the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the General Court's reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review (see, in particular, Case C-259/96 P *Council* v *de Nil and Impens* [1998] ECR I-2915, paragraphs 32 and 33, and Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 70).

137 In that regard, suffice it to note that, as is already apparent from paragraph 125 of the present judgment, paragraphs 296 and 297 of the judgment under appeal clearly and unequivocally disclose the General Court's reasoning in regard to the negligent or intentional nature of the alleged infringement. Consequently, the complaint alleging a failure to state reasons for the judgment under appeal in that respect is without substance.

138 Therefore, the third part of the first ground of appeal must be rejected as, in part, inadmissible and, in part, ineffective or unfounded.

(d) Conclusion as to the first ground of appeal

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

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

140 The second ground of appeal put forward by the appellant is divided into three parts relating, respectively, to the relevance of the margin squeeze test for the purpose of establishing abuse within the meaning of Article 82 EC, the adequacy of the method of calculating the margin squeeze and the effects of the margin squeeze.

(a) Judgment under appeal

141 In paragraphs 153 to 207 of the judgment under appeal, the General Court rejected the appellant's complaints concerning the unlawfulness of the method used by the Commission to find that a margin squeeze existed.

142 First, in paragraphs 166 to 168 of the judgment under appeal, the General Court rejected the appellant's complaint that the abusive nature of a margin squeeze can arise only from the abusive nature of its retail prices for end-user access services. Having found in paragraph 166 of its judgment that, according to the decision at issue, the abuse committed by the appellant consists in the imposition of unfair prices in the form of a margin squeeze to the detriment of the appellant's competitors, with the Commission taking the view that such a margin squeeze exists if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services to end-users, the General Court held in paragraph 167:

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

143 Second, in paragraphs 183 to 194 of the judgment under appeal, the General Court rejected the appellant's complaint that the Commission had calculated the margin squeeze on the basis of the charges and costs of a vertically integrated dominant undertaking, disregarding the particular situation of competitors on the market. The General Court pointed out in paragraph 185 of its judgment that its review of complex economic appraisals made by the Commission is limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with,

whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers, and went on to hold, inter alia, as follows:

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

187 According to the Commission, "there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the [retail] market" … In the present case, the margin squeeze is said to be abusive because the applicant itself "would have been unable to offer its own retail services without incurring a loss if … it had had to pay the wholesale access price as an internal transfer price for its own retail operations" … In those circumstances, "competitors [who] are just as efficient" as the applicant cannot "offer retail access services at a competitive price unless they find additional efficiency gains" …

188 [I]t must be noted that, although the Community judicature has not yet explicitly ruled on the method to be applied in determining the existence of a margin squeeze, it nevertheless follows clearly from the case-law that the abusive nature

of a dominant undertaking's pricing practices is determined in principle on the basis of its own situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors.

…

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

193 The Commission was therefore correct to analyse the abusive nature of the applicant's pricing practices solely on the basis of the applicant's particular situation and therefore on the basis of the applicant's charges and costs.

194 Since it is necessary to consider whether the applicant itself, or an undertaking just as efficient as the applicant, would have been in a position to offer retail services otherwise than at a loss if it had first been obliged to pay wholesale access [services] charges as an internal transfer price, the applicant's argument that its competitors are not seeking to replicate its own customer pattern and can acquire additional revenue from innovative products which they alone supply on

the market (as to which the applicant provides no details however) is ineffective. For the same reasons, the argument that competitors can exclude the possibility of (pre)selection cannot succeed.'

144 Third, in paragraphs 195 to 206 of the judgment under appeal, the General Court rejected the complaint that the Commission had taken into account only revenues from all access services and excluded revenues from other services, particularly those from call services.

145 In that regard, the General Court stated, first of all, in paragraph 196 of the judgment under appeal, that Directive 96/19 which, as regards the tariff structure of incumbent operators, makes a distinction between the initial connection, the monthly rental, local calls, regional calls and long-distance calls, aimed to effect tariff rebalancing between those different elements on the basis of actual costs in order to ensure full competition in telecommunications markets, and that, specifically, that operation had to take the form of a reduction in the charges for regional and international calls and an increase in connection charges, the monthly rental and local call rates. In paragraph 197 of its judgment, the General Court concluded from this that the Commission had therefore correctly observed that separate consideration of access charges and call charges is in fact therefore required by the EU law principle of tariff rebalancing.

146 Next, the General Court noted in paragraph 198 of the judgment under appeal that a system of undistorted competition between the appellant and its competitors can be guaranteed only if equality of opportunity is secured as between the various economic operators. In that regard, it held:

'199 While it is true that, from the point of view of the end-user, access services and call services constitute a whole, the fact remains that, as far as the applicant's

competitors are concerned, the provision of call services to end-users via the applicant's fixed network requires access to the local loop. Equality of opportunity as between the incumbent operator and owner of the fixed network, such as the applicant, on the one hand, and its competitors, on the other, therefore means that prices for access services must be set at a level which places competitors on an equal footing with the incumbent operator as regards the provision of call services. Equality of opportunity is secured only if the incumbent operator sets its retail prices [for end-user access services] at a level which enables competitors – presumed to be just as efficient as the incumbent operator – to reflect all the wholesale costs [in respect of local loop access services] in their retail prices. However, if the incumbent operator does not adhere to that principle, new entrants can only offer access services to their end-users at a loss. They would then be obliged to offset losses incurred in relation to local network access by higher call charges, which would also distort competition in telecommunications markets.

200 Therefore it follows that, even if, as the applicant claims, it were true that access services and telephone calls constitute a "cluster" as far as the end-user is concerned, the Commission was entitled to conclude in recital 119 [of] the [decision at issue] that, in order to assess whether the applicant's pricing practices distort competition, it was necessary to consider the existence of a margin squeeze in relation to access services alone, and thus without including telephone call charges in its calculation.

201 Furthermore, the calculation offsetting access charges and call charges to which the applicant itself refers confirms that the applicant and its competitors are not

on an equal footing as regards local network access, which is, however, a prerequisite for undistorted competition in the telephone calls market.

202 In any event, since the applicant significantly lowered its telephone call charges in the period covered by the [decision at issue] …, it is conceivable that competitors did not even have the economic opportunity to offset charges suggested by the applicant. In fact, the competitors, already at a competitive disadvantage by comparison with the applicant in relation to local network access, had to apply even lower call charges than the applicant in order to encourage potential customers to discontinue their subscription to the applicant and to subscribe to them instead.'

147 The General Court concluded from this in paragraph 203 of the judgment under appeal that, for the purposes of calculating the margin squeeze, the Commission was entitled to take account only of revenues from access services and to exclude revenues from other services, such as call services.

148 In addition, after stating in paragraph 223 of the judgment under appeal that the Commission's calculation error in relation to the calculation of the appellant's product-specific costs did not affect the lawfulness of the decision at issue owing to the fact that the unfair – within the meaning of Article 82 EC – nature of the appellant's pricing practices is linked to the very existence of the margin squeeze rather than to its precise spread, the General Court rejected, in paragraphs 234 to 244 of that judgment, the appellant's complaints concerning the lack of any effect on the market, stating, in particular:

'234 According to the Commission, the applicant's pricing practices restricted competition in the market for [end-user] access services. It reaches that conclusion in the [decision at issue] … on the basis of the very existence of the margin

squeeze. It maintains that it is not necessary to demonstrate an anti-competitive effect, although, in the alternative, it examines that effect in recitals 181 to 183 [of] the [decision at issue].

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

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

237 Having regard to the fact that the applicant's wholesale [local loop access] services are … indispensable to enabling a competitor to enter into competition with the applicant on the [retail] market in [end-user] access services, a margin squeeze between the applicant's wholesale [charges for local loop access services] and retail charges [for end-user access services] will in principle hinder the growth of competition in the [retail] markets. If the applicant's retail prices [for end-user access services] are lower than [the] wholesale charges [for its local loop access services], or if the spread between the applicant's wholesale

[charges for those wholesale services] and [those] retail charges is insufficient to enable an equally efficient operator to cover its product-specific costs of supplying [end-user] access services, a potential competitor who is just as efficient as the applicant would not be able to enter the [end-user] access services market without suffering losses.

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

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

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

…

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

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

(i) Arguments of the parties

149 By its first complaint, the appellant submits that the judgment under appeal is vitiated by a failure to state reasons, owing to a failure to consider the appellant's argument that the Commission should not have applied the margin squeeze test because

charges for wholesale local loop access services are set by RegTP. The judgment under appeal is, in that respect, based on a vicious circle. The General Court applied the test chosen by the Commission itself to determine matters which should be covered by an examination of the appellant's charges. However, the appellant's objection relates to an earlier stage of reasoning, namely the issue of whether the margin squeeze test chosen by the Commission is appropriate in any event.

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

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

152 According to the appellant, in a situation such as that in the present case, the dominant undertaking commits an abuse only if the retail price for end-user access services is, in itself, so low as to constitute an abuse.

153 The Commission takes the view that the judgment under appeal is sufficiently reasoned and that the appellant's other arguments are unfounded.

154 According to Vodafone, whether or not the complaints in the first part of the second ground of appeal are inadmissible because they are a repetition of the arguments put forward at first instance and concern a factual assessment that is incorrect, they are both factually and legally irrelevant.

(ii) Findings of the Court

155 As a preliminary point it must be noted that, contrary to Vodafone's contention, the first part of the second ground of appeal is admissible, for the same reasons as those held in paragraph 123 of the present judgment, since the appellant, while essentially repeating the arguments which it advanced before the General Court, complains that the latter committed an error of law by adopting an incorrect legal test for the application of Article 82 EC and by failing to provide sufficient reasoning for the judgment under appeal in that respect.

156 As to whether the first part of the second ground of appeal is well founded, it should be noted as regards, in the first place, the complaint concerning a failure to state reasons for the judgment under appeal, that the appellant is wrong to complain that the General Court failed to respond in a reasoned manner in its judgment to the appellant's argument that the margin squeeze test is irrelevant where, as in the present case, wholesale prices for local loop access services are set by a national regulatory authority and, therefore, that the General Court failed to give proper reasons for the appropriateness of the Commission's choice of the margin squeeze test in finding an abuse under Article 82 EC.

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

158 It must be observed that, in so doing, the General Court implicitly but necessarily indicated why the national regulatory authorities' purported regulation of wholesale prices for local loop access services did not, in the present case, preclude the appellant's pricing practices from being categorised as abusive for the purposes of Article 82 EC.

159 It is clear from the various considerations in paragraphs 166 to 168 and 183 to 213 of the judgment under appeal that, according to the General Court, it is not the level of the wholesale prices for local loop access services – which, as has already been stated in paragraphs 48 and 49 of the present judgment, cannot be challenged in the present appeal – or the level of retail prices for end-user access services which is contrary to Article 82 EC, but the spread between them.

160 In accordance with the case-law cited in paragraphs 135 and 136 of the present judgment, the appellant was therefore in a position, on reading those passages of the judgment under appeal, to ascertain why the national regulatory authorities' purported regulation of wholesale prices for local loop access services was, according to the General Court, irrelevant to the application in the present case of Article 82 EC to the appellant's pricing practices.

161 It follows from this that paragraphs 166 to 168 of the judgment under appeal, read in conjunction with paragraphs 183 to 213 thereof, contain sufficient reasoning for the grounds on which the General Court held that, notwithstanding the setting by the national regulatory authorities of wholesale prices for local loop access services, the Commission's choice of the margin squeeze test was appropriate for the purpose of determining whether the appellant's pricing practices were abusive within the meaning of Article 82 EC.

162 The complaint concerning a failure to state the grounds for the judgment under appeal must, therefore, be rejected as unfounded.

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

164 Admittedly, as is apparent from paragraphs 38 to 43 of the present judgment, it is necessary in the present appeal to adopt the premiss that was accepted by the General Court in the judgment under appeal and by the Commission in the decision at issue that the appellant does not have any scope to adjust those wholesale prices.

165 That being the case, the appellant cannot, in connection with the present complaint, rely on the premiss that the wholesale prices for local loop access services set by the national regulatory authorities are excessive in order to demonstrate the inappropriateness of the margin squeeze test. Even if it were to be accepted that, as the appellant claimed at the hearing, the complaints of competitors which led to the adoption of the decision at issue were based on that circumstance, such a premiss, as has already been stated in paragraphs 48 and 49 of the present judgment, must be regarded as being outside the scope of the present appeal.

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

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

168 It follows from this that the level of wholesale prices for local loop access services is, in itself, irrelevant to any challenge of the substance of the General Court's finding with regard to the application of Article 82 EC to the pricing practices at issue.

169 By contrast, in order to consider whether the present complaint is well founded, the Court must consider whether the General Court was right, in particular in

paragraphs 166 and 168 of the judgment under appeal, to find that, even if the appellant does not have scope to adjust its wholesale prices for local loop access services, its pricing practices can nevertheless be categorised as an abuse within the meaning of Article 82 EC where, irrespective of whether those wholesale prices and the retail prices for end-user access services are, in themselves, abusive, the spread between them is unfair, namely, according to that judgment, where that spread is either negative or insufficient to cover the appellant's product-specific costs of providing its own services, so that a competitor who is as efficient as the appellant is prevented from entering into competition with the appellant for the provision of end-user access services.

170 In that regard, it has consistently been held that Article 82 EC is an application of the general objective of European Community action, namely the institution of a system ensuring that competition in the common market is not distorted. Thus, the dominant position referred to in Article 82 EC relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers (see Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38, and Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-2369, paragraph 103).

171 In the present case, it must be borne in mind that, as is apparent from paragraphs 50 to 52 of the present judgment, the appellant does not deny that it enjoys a dominant position on all the relevant service markets, namely both on the wholesale market in local loop access services and on the retail market in end-user access services.

172 As regards the abusive nature of the appellant's pricing practices, it must be noted that subparagraph (a) of the second paragraph of Article 82 EC expressly prohibits a dominant undertaking from directly or indirectly imposing unfair prices.

173 Furthermore, the list of abusive practices contained in Article 82 EC is not exhaustive, so that the practices there mentioned are merely examples of abuses of a dominant position. The list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position prohibited by the Treaty (see *British Airways* v *Commission*, paragraph 57 and the case-law cited).

174 In that regard, it must be borne in mind that, in prohibiting the abuse of a dominant position in so far as trade between Member States is capable of being affected, Article 82 EC refers to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (see, to that effect, *Hoffman-La Roche* v *Commission*, paragraph 91; *Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 70; Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 69; *British Airways* v *Commission*, paragraph 66; and *France Télécom* v *Commission*, paragraph 104).

175 It is apparent from the case-law of the Court that, in order to determine whether the undertaking in a dominant position has abused such a position by its pricing practices, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions

to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or to strengthen the dominant position by distorting competition (see, to that effect, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 73, and *British Airways* v *Commission*, paragraph 67).

176 Since Article 82 EC thus refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition, a dominant undertaking, as has already been observed in paragraph 83 of the present judgment, has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (see, to that effect, *France Télécom* v *Commission*, paragraph 105 and the case-law cited).

177 It follows from this that Article 82 EC prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors, that is to say practices which are capable of making market entry very difficult or impossible for such competitors, and of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners, thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits. From that point of view, therefore, not all competition by means of price can be regarded as legitimate (see, to that effect, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 73; *AKZO* v *Commission*, paragraph 70; and *British Airways* v *Commission*, paragraph 68).

178 In the present case, it must be noted that the appellant does not deny that, even on the assumption that it does not have the scope to adjust its wholesale prices for local loop access services, the spread between those prices and its retail prices for end-user

access services is capable of having an exclusionary effect on its equally efficient actual or potential competitors, since their access to the relevant service markets is, at the very least, made more difficult as a result of the margin squeeze which such a spread can entail for them.

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

180 It is true, as paragraphs 175 to 177 of the present judgment have already shown, that Article 82 EC aims, in particular, to protect consumers by means of undistorted competition (see Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others* [2008] ECR I-7139, paragraph 68).

181 However, the mere fact that the appellant would have to increase its retail prices for end-user access services in order to avoid the margin squeeze of its competitors who are as efficient as the appellant cannot in any way, in itself, render irrelevant the test which the General Court applied in the present case for the purpose of establishing an abuse under Article 82 EC.

182 By further reducing the degree of competition existing on a market – the end-user access services market – already weakened precisely because of the presence of the

appellant, thereby strengthening its dominant position on that market, the margin squeeze also has the effect that consumers suffer detriment as a result of the limitation of the choices available to them and, therefore, of the prospect of a longer-term reduction of retail prices as a result of competition exerted by competitors who are at least as efficient in that market (see, to that effect, *France Télécom* v *Commission*, paragraph 112).

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

184 It follows from this that the appellant's complaint that the test applied by the General Court in order to establish an abuse within the meaning of Article 82 EC was erroneous must be rejected as, in part, inadmissible and, in part, unfounded.

185 Consequently, the first part of the second ground of appeal must be rejected.

(c) The second part of the second ground of appeal, concerning the adequacy of the method of calculating the margin squeeze

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

(i) The complaint concerning the misapplication of the as-efficient-competitor test

— Arguments of the parties

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

188 According to the appellant, contrary to the General Court's finding in paragraph 188 of the judgment under appeal, it is not the situation of the dominant undertaking that is decisive for the assessment of conduct from the point of view of Article 82 EC, but that of competitors and their opportunities to compete with that undertaking on services in the light of the particular conditions of competition in the relevant market.

189 In that regard, the appellant explains that the situation of the dominant undertaking can be a reliable indicator if historical, material and legal market conditions of competition in the market are the same for the dominant undertaking and its competitors, and that the as-efficient-competitor test can be a useful tool in such cases in so far as it lessens the advancement of inefficient competitors and increases legal certainty for the dominant undertaking. Nevertheless, such is not the case where competitors are subject to different legal or material conditions. If such a situation arises, the as-efficient-competitor test should be adjusted.

190 In the present case, the appellant states that it was obliged to accept all end-users, regardless of their economic attractiveness. In addition, from a legal perspective, it was obliged to offer its customers operator (pre)selection, or 'call-by-call' selection. Its competitors are not subject to those obligations and, in general, exclude operator (pre)selection and accordingly market connections and calls as a single product.

191 The appellant takes the view that the as-efficient-competitor test should have been modified on account of those specific features of the case. Although the actual wholesale charges for local loop access services and retail charges for end-user access services as well as the appellant's product-specific costs could be relied upon in order

to determine the average costs and revenue of the appellant's competitors, there is no justification for relying on the appellant's customer structure. In addition, calls and other telecommunications services should have been incorporated in the margin squeeze analysis.

192 According to the appellant, the principle of legal certainty does not mean that obvious anomalies in the appellant's customer structure or differences between the regulatory conditions under which the dominant undertaking and its competitors do business should be disregarded.

193 The Commission points out that the appellant cannot defend itself by asserting that it was not as efficient as its competitors, since competition law does not protect inefficient undertakings. The appellant's arguments are, therefore, unfounded.

194 Vodafone contends that the present complaint is inadmissible. The appellant is reproducing the complaints on which it relied before the General Court and during the Commission procedure. In addition, it is, in essence, raising complaints which are not subject to review by the Court. In any event, the as-efficient-competitor test is the appropriate test for ascertaining whether certain conduct can have an exclusionary effect on the market. The appellant's arguments are, therefore, unfounded.

— Findings of the Court

195 As a preliminary point, it must be noted that, contrary to Vodafone's contention, the present complaint is admissible even though it partly reiterates the arguments put forward at first instance, since, in accordance with the case-law cited in paragraph 25 of the present judgment, the complaint is that, by resorting to the as-efficient-competitor test notwithstanding the fact that the appellant is not subject to the same legal and material conditions as its competitors, the General Court applied an incorrect legal test to the application of Article 82 EC to the pricing practices at issue and, therefore, committed an error of law on that point.

196 As to whether that complaint is well founded, as is apparent from paragraph 186 of the judgment under appeal and from paragraphs 4 and 12 of the present judgment, the as-efficient-competitor test used by the General Court in the judgment under appeal consists in considering whether the pricing practices of a dominant undertaking could drive an equally efficient economic operator from the market, relying solely on the dominant undertaking's charges and costs, instead of on the particular situation of its actual or potential competitors.

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

198 In that regard, it must be borne in mind that the Court has already held that, in order to assess whether the pricing practices of a dominant undertaking are likely to eliminate a competitor contrary to Article 82 EC, it is necessary to adopt a test based on the costs and the strategy of the dominant undertaking itself (see *AKZO* v *Commission*, paragraph 74, and *France Télécom* v *Commission*, paragraph 108).

199 The Court pointed out, inter alia, in that regard that a dominant undertaking cannot drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them (see *AKZO* v *Commission*, paragraph 72).

200 In the present case, since, as is apparent from paragraphs 178 and 183 of the present judgment, the abusive nature of the pricing practices at issue in the judgment under appeal stems in the same way from their exclusionary effect on the appellant's competitors, the General Court did not err in law when it held, in paragraph 193 of the judgment under appeal, that the Commission had been correct to analyse the abusive nature of the appellant's pricing practices solely on the basis of the appellant's charges and costs.

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

202 Such an approach is particularly justified because, as the General Court indicated, in essence, in paragraph 192 of the judgment under appeal, it is also consistent with the general principle of legal certainty in so far as the account taken of the costs of the

dominant undertaking allows that undertaking, in the light of its special responsibility under Article 82 EC, to assess the lawfulness of its own conduct. While a dominant undertaking knows what its own costs and charges are, it does not, as a general rule, know what its competitors' costs and charges are.

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

204 The appellant's complaint concerning the misapplication of the as-efficient-competitor test must, therefore, be rejected.

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

— Arguments of the parties

205 By this complaint, the appellant claims that the General Court erred in law in failing to take into account in its analysis of the pricing practice at issue, in addition to

end-user access services, call services and other telecommunications services provided to end-users. That approach is said not to be compatible with current economic thinking or with the decision-making practice of comparable authorities in Europe and in the United States. It is also said to be at odds with the realities of the market, given that end-users do not consider connections in isolation when choosing their operator, and nor do operators when structuring the range of their services.

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

207 In the second place, the appellant submits that paragraphs 196 to 202 of the judgment under appeal are based on several errors of law. The issue whether, in determining the existence of a margin squeeze, the Commission was entitled not to take call charges into account depends on the legal question of principle concerning the method to be used to determine the existence of a margin squeeze where undertakings provide a range of products. The General Court cannot avoid that assessment by emphasising the restricted nature of its review.

208 First, the appellant submits that paragraphs 196 and 197 of the judgment under appeal, concerning the principle of EU law in relation to tariff rebalancing, are wrong in law.

209 In that regard, the appellant takes the view that the judgment under appeal contradicts its own paragraph 113 in which the General Court stated, in order to justify attributing the infringement to the appellant, that the objectives of the legislation relating to the telecommunications sector may differ from those of European Union competition policy. In paragraphs 196 and 197 of its judgment, the General Court infers from a regulatory principle that access services and call services must be analysed separately in order to calculate the margin squeeze in the light of Article 82 EC.

210 Also, the appellant submits that paragraphs 196 and 197 of the judgment under appeal are insufficiently reasoned in so far as the General Court does not explain why its understanding is correct or consider the objections raised by the appellant, in particular the fact that the principle of tariff rebalancing applies only to the appellant and that its competitors provide bundled access and call services.

211 The appellant claims further in that regard that paragraphs 196 and 197 of the judgment under appeal are wrong in substance and infringe Article 82 EC. The principle of tariff rebalancing is not a means of testing the application of Article 82 EC but is intended only to ensure that the Member States ease the financial burden on undertakings responsible for universal service provision. Moreover, since the appellant is not subject to the same regulatory conditions as its competitors, the principle of tariff rebalancing applies only to the appellant. That principle does not, however, reveal anything about its competitors' competitive opportunities. Therefore, the principle of tariff rebalancing does not support the conclusion that the bundling of access

services and local loop telecommunications services must be ruled out, on normative grounds, for the purposes of a margin squeeze analysis.

212 Second, the appellant submits that paragraphs 199 to 202 of the judgment under appeal, concerning equality of opportunity, are wrong in law.

213 In that regard, the appellant takes the view that paragraph 199 of the judgment under appeal is not sufficiently reasoned in so far as the General Court should have considered which services are based on the local loop as wholesale services, as it is only on the basis of the result of that examination that the General Court could have drawn any conclusions as to the equality of opportunity of the appellant and one or other competitor. Equality of opportunity is assured where an overall analysis of all charges and costs of all telecommunications services based on the local loop shows that wholesale prices for local loop access services together with product-specific costs do not exceed retail prices for end-user access services.

214 Next, the appellant claims that the General Court acted contrary to the laws of logic. In paragraph 238 of the judgment under appeal, the General Court assumes that the appellant suffers no loss as a result of the provision of telephone connections to end-users, and that it is not, therefore, obliged to offset any losses by means of call revenues. Yet the General Court considers that the prices of the appellant's access services to its end-users are lower than wholesale prices for local loop access services and recognises that those are set on the basis of the appellant's costs. The General Court's assumption that the appellant does not incur any costs for access services is, therefore, manifestly incorrect and incompatible with the premisses accepted by the General Court.

215 Furthermore, the appellant claims that the General Court's statement in paragraph 202 of the judgment under appeal is contradictory. The view that its competitors had to apply even lower call charges than the appellant's own in order to encourage potential customers to discontinue their subscription to the appellant is directly at odds with the as-efficient-competitor test, according to which only the appellant's cost and tariff structure is decisive.

216 Lastly, the appellant submits that the General Court applies an incorrect legal test with regard to the allocation of the burden of proof in so far as, in paragraphs 201 and 202 of the judgment under appeal, it merely allows that 'it is conceivable' that competitors did not have an opportunity to offset any losses generated by telephone connections by means of call revenues, whereas the appellant sought to demonstrate in its application at first instance that cross-subsidisation was possible.

217 The Commission takes the view that the General Court did not err in law in confirming the Commission's approach in paragraphs 195 to 207 of the judgment under appeal. It contends, therefore, that the appellant's arguments should be rejected.

218 Vodafone claims that the present complaint is inadmissible. The appellant is reproducing the submissions it made before the General Court and during the procedure before the Commission. Moreover, it is essentially raising complaints which are not subject to review by the Court. In any event, the General Court has given sufficient consideration to the appellant's complaints.

— Findings of the Court

219 As a preliminary point it must be noted that, contrary to Vodafone's contention and for the same reasons as those held in paragraph 155 of the present judgment, the present complaint is admissible – notwithstanding the fact that it partly repeats the arguments put forward at first instance – in so far as it criticises the General Court for having adopted an incorrect legal test for the application of Article 82 EC to the pricing practices at issue by resorting to the criteria of tariff rebalancing and equality of opportunity.

220 As to whether that complaint is well founded, it must be observed that, since it relates, in the first place, to the alleged incompleteness of the General Court's analysis of the margin squeeze, on the ground that it failed to recognise that access to wholesale local loop access services enables competitors to provide their end-users with bundled services including calls, that complaint is based on a misreading of the judgment under appeal.

221 As is clear from paragraphs 199 and 200 of its judgment, the General Court did not in any way, contrary to the appellant's submission, rule out the notion that, from the point of view of the end-user, access services and call services can indeed constitute a whole, but considered that, even if that were the case, the Commission was entitled to consider the existence of a margin squeeze in relation to access services alone, without call services being included. As is apparent from paragraphs 196 to 201 of the judgment under appeal, the General Court came to that conclusion, inter alia, as a result of the Commission's consideration of the principles of tariff rebalancing and equality of opportunity.

222 It follows from this that the present complaint must, to that extent, be rejected as unfounded.

223 In the second place, in so far as the present complaint concerns the General Court's findings in respect of the principle of tariff rebalancing, it must be held, first of all, that the General Court did not commit any error of law in taking account in paragraphs 196 and 197 of the judgment under appeal of such a principle, which arises from the legislation relating to the telecommunications sector, in order to consider the merits of the Commission's application of Article 82 EC to the appellant's pricing practices.

224 Since the legislation relating to the telecommunications sector defines the legal framework applicable to it and, in so doing, contributes to the determination of the competitive conditions under which an undertaking such as the appellant carries on its business in the relevant markets, it is, as has already been shown in paragraphs 80 to 82 of the present judgment, a relevant factor in the application of Article 82 EC to the conduct of that undertaking, whether for the purposes of defining the relevant markets, assessing the abusive nature of such conduct or setting the amount of the fines.

225 That finding is not affected by the fact, as alleged by the appellant, that the tariff rebalancing principle applies only to the appellant itself and not to its competitors. For the reasons set out in paragraphs 196 to 203 of the present judgment, the General Court was fully entitled to rely, in accordance with the as-efficient-competitor test, on the situation and the costs of the dominant undertaking for the purpose of determining whether the pricing practices at issue constituted an abuse in the light of Article 82 EC.

226 Consequently, since the General Court held in paragraph 196 of the judgment under appeal – unchallenged by the appellant in the present appeal – that the tariff rebalancing referred to in European Union legislation in relation to the telecommunications sector had to take the form, in particular, of a reduction in the charges for regional and international calls and an increase in the monthly rental and local call rates, it could lawfully infer from this, in paragraph 197 of its judgment, that the principle of tariff rebalancing does require that retail prices for access services and retail prices for call services be considered separately for the purpose of determining whether the relevant pricing practices of the appellant are abusive.

227 Contrary to the appellant's submission, there is no contradiction in the grounds for the latter findings and the finding which appears in paragraph 113 of the judgment under appeal, according to which national legislation relating to the telecommunications sector may have different objectives from those envisaged by European Union competition policy. That point has no bearing on the issue whether legislation relating to the telecommunications sector may be taken into account for the purpose of the application of Article 82 EC to the conduct of a dominant undertaking. In particular, contrary to what is claimed by the appellant, it does not in any way suggest that that legislation could be disregarded altogether in the application of Article 82 EC.

228 The appellant is also incorrect in claiming that the General Court gave insufficient grounds for the judgment under appeal on that point. As is apparent from the foregoing review, the General Court clearly stated in paragraphs 196 and 197 of its judgment how the principle of tariff rebalancing enables the Commission to disregard call services in its calculation of the margin squeeze. Furthermore, as is apparent from paragraph 221 of the present judgment, the General Court addressed the appellant's argument that its competitors provide bundled access and call services in paragraphs 199 and 200 of the judgment under appeal. Likewise, it set out in paragraphs 186 to 194 of its judgment why the Commission was entitled to base its analysis of the abusive nature of the pricing practices at issue solely on the appellant's particular situation. In so doing, the General Court observed the requirements of

Article 36 of the Statute of the Court of Justice, which apply to the General Court by virtue of the first paragraph of Article 53 of the Statute, and Article 81 of the Rules of Procedure of the General Court, as noted in paragraphs 135 and 136 of the present judgment.

229 It follows from this that, on those various points, the present complaint must be rejected as unfounded.

230 In the third place, in so far as the present complaint relates to the General Court's findings as to equality of opportunity, it should be noted that the Court of Justice has consistently held that a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators (see, in particular, Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 25; Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 83; Joined Cases C-327/03 and C-328/03 *ISIS Multimedia Net and Firma O2* [2005] ECR I-8877, paragraph 39; and Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 51).

231 In the present case, the appellant does not deny that, as the General Court in essence held, in particular in paragraphs 199, 236 and 237 of the judgment under appeal, in the absence of an alternative infrastructure, its competitors' wholesale access to the local loop on the fixed network held by the appellant is indispensable to enabling them to make a viable entry onto the retail markets in services to end-users and to compete effectively with the appellant in those markets (see, to that effect, *Arcor*, paragraph 103).

232 Furthermore, as noted in paragraph 50 of the present judgment, the appellant does not deny that the wholesale market in local loop access services and the retail market in end-user access services are separate markets, particularly as against retail markets for the provision of other telecommunications services. Nor, moreover, as observed in paragraph 51 of the present judgment, does the appellant deny having a dominant position on the wholesale market in local loop access services and on the retail market in end-user access services.

233 In those circumstances, the General Court did not err in law in ruling, in paragraphs 199 and 237 of the judgment under appeal, that equality of opportunity means that the appellant and its equally efficient competitors are placed on an equal footing in the retail market in end-user access services, and that such is not the case where wholesale prices paid to the appellant for local loop access services cannot be reflected in their retail prices for end-user access services other than by providing those services at a loss.

234 Since the retail market for end-user access services constitutes a separate market, and wholesale local loop access services are indispensable to enabling competitors who are at least as efficient as the appellant to enter into effective competition on that market with an undertaking which, as in the appellant's case, has a dominant position largely as a result of the legal monopoly it enjoyed before the liberalisation of the telecommunications sector, the establishment of a system of undistorted competition requires that the dominant undertaking should not be able – by means of its pricing practices on that retail market – to impose on all its equally efficient competitors a competitive disadvantage such as to prevent or restrict their access to that market or the growth of their activities on it.

235 That is particularly the case given that, since any provision by those competitors of other telecommunications services to end-users across the appellant's fixed network also requires them to acquire wholesale local loop access services from the appellant, that competitive disadvantage on the retail market for end-user access services is necessarily reflected in the markets for those other telecommunications services, as the General Court noted in essence in paragraph 199 of the judgment under appeal.

236 Contrary to the appellant's submission, that last point does not, however, mean that revenues from those other telecommunications services have to be taken into account in order to ascertain whether competitors who are at least as efficient as the appellant are subject to inequality in competitive conditions on the retail market for end-user access services. Those other telecommunications services fall within markets that are distinct from the latter market. The General Court was therefore entitled, in paragraph 199 of the judgment under appeal, not to include them in its analysis for the purpose of ascertaining whether there was equality of opportunity in the relevant market.

237 Neither can the appellant properly plead a failure to state reasons in that regard. The arguments set out by the General Court in paragraphs 199 and 237 of the judgment under appeal are not vitiated by any failure to state reasons, since they allow the appellant, in accordance with the case-law cited in paragraphs 135 and 136 of the present judgment, to ascertain the reasons for the General Court's finding that equality of opportunity had to be secured on the retail market for end-user access services.

238 The Court must also reject the allegation of a failure to observe the laws of logic in so far as paragraph 238 of the judgment under appeal is said to show that the General Court relied on the false and contradictory premiss that the appellant suffers no loss on the market for end-user access services that it would have to offset on other

markets, while finding that the appellant's retail prices for those services are lower than the wholesale prices for local loop access services set on the basis of its costs.

239 First, it must be borne in mind that it follows from paragraphs 48 and 49 of the present judgment that the factual premiss of that line of argument cannot be regarded as having been established in the present appeal, since the question whether wholesale prices for local loop access services are consistent with the appellant's costs is not among the pleas that were discussed before the General Court.

240 Second, it must be held that, in establishing in paragraphs 199 and 237 of the judgment under appeal that the appellant's pricing practices on the retail market for end-user access services places all of its equally efficient competitors on an unequal footing on that market by comparison with the appellant, resulting, as is apparent in particular from paragraphs 166 to 168 and 194 of that judgment, in a margin squeeze of those competitors in relation to access services, the General Court demonstrated sufficiently that equality of opportunity was not observed on the relevant market and, therefore, that a system of undistorted competition was not assured on that market. The General Court was not, therefore, in any way required, additionally, to consider whether that equality was observed on other, separate, markets, such as the call services market, or, therefore, whether an infringement of Article 82 EC could also be identified on those markets. It follows from this that the General Court's findings in paragraph 238 of its judgment are included for the sake of completeness.

241 Consequently, in accordance with the case-law cited in paragraph 108 of the present judgment, the appellant's present line of argument must be rejected as ineffective.

242 Similarly, since they are directed against grounds which were included for the sake of completeness, the appellant's criticisms in respect of paragraphs 201 and 202 of the judgment under appeal must also be rejected. In common with paragraph 238 of that judgment, those grounds, introduced by the expressions 'furthermore' and 'in any event', respectively, also relate to the question included for the sake of completeness of the extent to which the pricing practices at issue were able to affect competitive conditions on the retail markets other than the retail market in end-user access services.

243 It follows from this that the present complaint must, on those various points, therefore, be rejected as ineffective or unfounded, as the case may be.

244 Finally, as to the remainder, in so far as the appellant complains in the second part of the second ground of appeal that the General Court's review of the decision at issue was much too limited and that it adopted a method incompatible with current economic thinking, the decision-making practices of comparable authorities and the realities of the market, the present complaint is inadmissible in accordance with the case-law cited in paragraph 24 of the present judgment, since it does not identify the error of law which the General Court is said to have committed.

245 The Court must, therefore, reject the second part of the second ground of appeal as, in part, inadmissible and, in part, ineffective or unfounded.

(d) The third part of the second ground of appeal, concerning the effects of the margin squeeze

(i) Arguments of the parties

246 By its first complaint, the appellant submits that the General Court correctly rejects the Commission's view that it is not necessary for any anti-competitive effect to be demonstrated. However, in its analysis of the effects, the General Court relied in paragraph 237 of the judgment under appeal on a margin squeeze that took into account only charges relating to access services. In addition, in paragraph 238 of its judgment, the General Court relied on the mistaken premiss that the appellant's competitors are disadvantaged by comparison with the appellant with regard to the practice of cross-subsidisation between access services and call services to end-users.

247 By its second complaint, the appellant claims that the General Court's findings regarding the anti-competitive effects of the practice at issue are vitiated by errors of law. In paragraph 239 of the judgment under appeal, the General Court merely indicated that the market share of the appellant's competitors in the broadband access services and narrowband access services markets remained small, but made no finding as regards the causal connection between those market shares and the purported margin squeeze. It is not surprising that network operators' market penetration is slow in the field of telecommunications, given the investment required for the network infrastructure of the local loop.

248 Furthermore, the appellant takes the view that, in paragraph 240 of the judgment under appeal, the General Court misread recital 182 of the decision at issue, since

that recital refers to the decline in the share of analogue lines in all access services to end-users provided by those competitors, not to the decline in the competitors' market share in the field of analogue lines.

249 The Commission challenges the appellant's assertion that the General Court rejected its view that there was no need for proof of an anti-competitive effect in the case of a margin squeeze. In any event, the appellant's complaints are unfounded.

(ii) Findings of the Court

250 With regard to the third part of the second ground of appeal, it must be held at the outset that, in paragraphs 234 to 244 of the judgment under appeal, the General Court correctly rejected the Commission's arguments to the effect that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors constitutes an abuse within the meaning of Article 82 EC, and that it is not necessary for an anti-competitive effect to be demonstrated.

251 It should be borne in mind that, in accordance with the case-law cited in paragraph 174 of the present judgment, by prohibiting the abuse of a dominant position in so far as trade between Member States is capable of being affected, Article 82 EC refers to the conduct of a dominant undertaking which, through recourse to methods different from those governing normal competition in products or services

on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

252 The General Court therefore held in paragraph 235 of the judgment under appeal, without any error of law, that the anti-competitive effect which the Commission is required to demonstrate, as regards pricing practices of a dominant undertaking resulting in a margin squeeze of its equally efficient competitors, relates to the possible barriers which the appellant's pricing practices could have created for the growth of products on the retail market in end-user access services and, therefore, on the degree of competition in that market.

253 As is already apparent from paragraphs 177 and 178 of the present judgment, a pricing practice such as that at issue in the judgment under appeal that is adopted by a dominant undertaking such as the appellant constitutes an abuse within the meaning of Article 82 EC if it has an exclusionary effect on competitors who are at least as efficient as the dominant undertaking itself by squeezing their margins and is capable of making market entry more difficult or impossible for those competitors, and thus of strengthening its dominant position on that market to the detriment of consumers' interests.

254 Admittedly, where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze of its equally efficient competitors, with the purpose of driving them from the relevant market, the fact that the desired result is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 82 EC. However, in the absence of any effect on the competitive situation of

competitors, a pricing practice such as that at issue cannot be classified as exclusionary if it does not make their market penetration any more difficult.

255 In the present case, since, as has already been noted in paragraph 231 of the present judgment, the wholesale local loop access services provided by the appellant are indispensable to its competitors' effective penetration of the retail markets for the provision of services to end-users, the General Court was entitled to hold in paragraph 237 of the judgment under appeal, as paragraphs 233 to 236 of the present judgment have already shown, that a margin squeeze resulting from the spread between wholesale prices for local loop access services and retail prices for end-user access services, in principle, hinders the growth of competition in the retail markets in services to end-users, since a competitor who is as efficient as the appellant cannot carry on his business in the retail market for end-user access services without incurring losses.

256 The appellant has not challenged that finding. For the reasons already set out in paragraphs 233 to 236 of the present judgment, the complaint concerning the failure to take into account revenues from any provision of other telecommunications services to end-users must be rejected as unfounded. The argument relating to paragraph 238 of the judgment under appeal concerning the possibility of cross-subsidisation must be rejected as ineffective for the reasons stated in paragraphs 238 to 241 of the present judgment.

257 In addition, in paragraph 239 of the judgment under appeal, the General Court found – as, in the absence of an allegation of distortion, it is for the General Court alone to do – that 'the small market shares acquired by … competitors in the retail … market [in end-user access services] since the market was liberalised by the entry into force of the TKG on 1 August 1996 are evidence of the restrictions which the

applicant's pricing practices have imposed on the growth of competition in those markets'. In that regard, contrary to what is claimed by the appellant, it is clear from the expression 'have imposed' that the General Court did find a causal connection between the appellant's pricing practices and the small market shares acquired by competitors. The appellant's complaint on that point is, therefore, unfounded.

258 Furthermore, the General Court concluded in paragraph 244 of its judgment, which also remained unchallenged in the present appeal, that the appellant had not produced any evidence to rebut the findings in the decision at issue that its pricing practices actually restricted competition in the retail market in end-user access services.

259 In those circumstances, it must be concluded that the General Court was correct to hold that the Commission had established that the particular pricing practices of the appellant gave rise to actual exclusionary effects on competitors who were at least as efficient as the appellant itself.

260 That conclusion is not altered by the appellant's objection in relation to paragraph 240 of the judgment under appeal. Even if the General Court were, in that respect, to have misread the decision at issue, the error would be ineffective in the context of the present appeal because it relates to a ground that was included for completeness' sake to support paragraphs 237 and 239 of that judgment, and it is apparent from the foregoing review that those paragraphs adequately show that the General Court was entitled to hold that the pricing practice at issue had an exclusionary effect in the retail market in end-user access services.

261 Consequently, the third part of the second ground of appeal must be rejected as, in part, ineffective and, in part, unfounded.

(e) Conclusion as to the second ground of appeal

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

4. The third ground of appeal, alleging errors of law in the calculation of the fines owing to the failure to take the regulation of charges into account

(a) Judgment under appeal

263 In paragraphs 306 to 321 of the judgment under appeal, the General Court rejected the appellant's pleas that insufficient account was taken of the regulation of charges in the calculation of the amount of the fine, and that insufficient account was taken of mitigating circumstances.

264 As regards the gravity of the infringement, the General Court held, in paragraphs 310 to 313 of the judgment under appeal:

'310 It must be held that, contrary to the applicant's claim, the Commission was entitled to characterise the infringement as serious for the period from 1 January 1998 to 31 December 2001.... The pricing practices complained of strengthen the barriers to entry to the recently liberalised markets and thus jeopardise the proper functioning of the common market. In that regard, it must be borne in mind that the Guidelines [on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; "the Guidelines")] (second paragraph of Section 1A) describe the exclusionary behaviour of dominant firms as serious infringements, or even very serious infringements if committed by undertakings holding a virtual monopoly.

311 As regards the intervention of RegTP in setting the applicant's tariffs, it must be borne in mind that, when the level of the penalty is set, the conduct of the undertakings concerned may be assessed in the light of the national legal framework, which is a mitigating factor …

312 At the hearing, the Commission explained that the 10 % reduction of the fine to take account of the fact that "the [applicant's] retail [charges for end-user access services] and wholesale charges [for local loop access services] … were subject to sector specific regulation … on national level" (recital 212 [of] the [decision at issue]) relates to RegTP's intervention in setting the applicant's prices and to the fact that that national authority has, on several occasions during the period

covered by the [decision at issue], considered the question of the existence of a margin squeeze resulting from the applicant's tariff practices.

313 Having regard to the Commission's discretion when determining the amount of a fine …, it must be held that the Commission duly took into account the matters referred to in the preceding paragraph when reducing the basic amount of the fine by 10%.'

265 The General Court went on, in paragraphs 315 to 320 of the judgment under appeal, to reject the appellant's arguments that, as in the case of the dominant undertaking in Commission Decision 2001/892/EC of 25 July 2001 relating to a proceeding under Article 82 of the EC Treaty (COMP/C-1/36.915 – Deutsche Post AG – Interception of cross-border mail) (OJ 2001 L 331, p. 40; 'the Deutsche Post decision'), the Commission should have imposed a symbolic fine on the appellant.

266 In that regard, the General Court held, in particular, in paragraphs 317 to 319 of the judgment under appeal:

'317 … it must be held that the applicant's situation is fundamentally different from that of the undertaking referred to in the Deutsche Post decision.

318 It follows from … the Deutsche Post decision … that the Commission deemed it appropriate to impose only a symbolic fine on the undertaking referred to in that decision on three grounds: (1) the undertaking concerned had behaved in accordance with the case-law of German courts; (2) there was no Community case-law relating specifically to the cross-border letter mail services concerned; and (3) the undertaking concerned had undertaken to introduce a procedure

for the processing of incoming cross-border letter mailings which would avoid practical difficulties and facilitate the detection of future interference with free competition, should it occur.

319 In the present case, first, it must be noted that the only judgment of the German courts to which the applicant refers is the judgment of the Oberlandesgericht Düsseldorf, which was delivered on 16 January 2002, thus in the period during which the infringement was characterised in the [decision at issue] as minor … In any event, that judgment was set aside by the judgment of the Bundesgerichtshof of 10 February 2004. Second, it follows from the [decision at issue] … that the Commission applied the same principles as those underlying [Commission Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article [82] of the EEC Treaty (Case No IV/30.178 Napier Brown – British Sugar) (OJ 1988 L 284, p. 41)]. In its Notice of 22 August 1998 on the application of the competition rules to access agreements in the telecommunications sector – framework, relevant markets and principles [OJ 1998 C 265, p. 2] (paragraphs 117 to 119), the Commission had already announced that it proposed to apply the principles of [Decision 88/518] in the telecommunications sector. … Finally, third, the applicant in the present case has not given any undertaking to avoid any other future infringement.'

(b) Arguments of the parties

267 The appellant's third ground of appeal is divided into three parts relating to the serious nature of the infringement, the failure to take the regulation of charges into appropriate consideration as an attenuating circumstance and the imposition of a symbolic fine, respectively.

i) The first part of the third ground of appeal, concerning the serious nature of the infringement

— Arguments of the parties

268 The appellant claims that the General Court infringed Article 15(2) of Regulation No 17 in that neither the Commission's arguments nor the grounds of the judgment under appeal, in paragraphs 306 to 310 thereof, support the assertion that, as regards the period from 1 January 1998 to 31 December 2001, it committed a serious infringement within the meaning of the Guidelines.

269 In addition, the appellant submits that the General Court disregarded the fact that, according to Section 1A of the Guidelines, exclusion may indeed constitute a serious infringement but will not necessarily do so. The General Court failed, therefore, to consider the arguments against categorisation as a serious infringement, in particular the small contribution of the appellant to the infringement that was acknowledged in paragraph 312 of the judgment under appeal by a 10 % reduction of the basic amount.

270 The Commission contends that those arguments should be rejected as ineffective or unfounded.

— Findings of the Court

271 It must be borne in mind that, according to settled case-law, the Commission enjoys a broad discretion as regards the method for calculating fines. That method, set out in the Guidelines, displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 15(2) of Regulation No 17 (see Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191, paragraph 112 and the case-law cited).

272 Within that framework, it is for the Court of Justice to verify whether the General Court has correctly assessed the Commission's exercise of that discretion (Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 48, and Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 134).

273 It is apparent from settled case-law that the gravity of the infringements of EU competition law must be assessed in the light of numerous factors, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (see, in particular, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 241; *Dalmine* v *Commission*, paragraph 129; and Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 54).

274 The factors capable of affecting the assessment of the gravity of infringements include the conduct of the undertaking concerned, the role it played in the establishment of

the practice in question, the profit which it was able to derive from that practice, its size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the European Union (see, by analogy, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 129, and *Dansk Rørindustri and Others* v *Commission*, paragraph 242).

275 In the present case, the General Court did not, therefore, commit any error of law in holding, in paragraph 310 of the judgment under appeal, that the Commission had been entitled to characterise the infringement committed by the appellant as serious for the period from 1 January 1998 to 31 December 2001, since, by strengthening the barriers to entry to the recently liberalised markets, the pricing practices at issue were jeopardising the proper functioning of the internal market. As is apparent from the case-law of the Court, exclusionary practices of dominant undertakings, such as the practice at issue in the present case, are particularly serious infringements of Article 82 EC (see, to that effect, Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 51, and *AKZO* v *Commission*, paragraph 162).

276 Thus, according to the second paragraph of Section 1A of the Guidelines, such exclusion of competitors from the market can, quite rightly, be described as a serious infringement, or even a very serious infringement, if committed by an undertaking holding a virtual monopoly.

277 The appellant's small contribution to the purported infringement in the light of the regulation of its charges by RegTP cannot alter those findings, since the role played by the undertaking concerned in the infringement is, in principle, not a mandatory factor but just one of a number of other factors to be taken into account in assessing the gravity of the infringement (see, to that effect, *Dalmine* v *Commission*, paragraph 132).

278 In addition, it is apparent from the case-law of the Court of Justice that, as the General Court noted in paragraph 311 of the judgment under appeal, when the level of the penalty is set, the conduct of the undertaking concerned may be assessed in the light of the national legal framework, which is a mitigating factor (see, to that effect, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 620, and *CIF*, paragraph 57).

279 Accordingly, the General Court was also correct to consider, in paragraphs 311 to 313 of the judgment under appeal, that, having regard to the Commission's discretion when determining the amount of a fine, the Commission had duly taken into account the appellant's limited role, in view of RegTP's intervention in setting the appellant's charges, when it reduced the basic amount of the fine by 10 %.

280 Furthermore, as is apparent from the foregoing, in drawing such conclusions in paragraphs 310 to 313 of the judgment under appeal, the General Court gave sufficient reasons for its judgment, in so far as it clearly indicated, in accordance with the case-law cited in paragraphs 135 and 136 of the present judgment, why the infringement was serious and did not merit any other description on account of the limited role played by the appellant.

281 Consequently, the first part of the third ground of appeal must be rejected as unfounded.

ii) The second part of the third ground of appeal, concerning the failure to take the regulation of charges into appropriate consideration as a mitigating circumstance

— Arguments of the parties

282 The appellant observes that, in recital 212 of the decision at issue, the Commission took account only of the existence of sector-specific regulation on a national level but not of the content of that regulation, namely, in particular, RegTP's consideration and denial of the existence of any margin squeeze restricting competition.

283 The appellant takes the view that the General Court erred in law by failing to criticise the Commission's disregard of two other attenuating circumstances for the purposes of Section 3 of the Guidelines. It was as a result of the review and denial of the existence of an anti-competitive margin squeeze in a series of decisions that the appellant was convinced that its conduct was lawful. Furthermore, the infringement was committed, at most, negligently.

284 The Commission contends that those complaints of the appellant must be rejected as unfounded.

— Findings of the Court

285 With regard, in the first place, to the complaint concerning a failure to take into account the fact that RegTP ruled out the existence of a margin squeeze, it must be held that that complaint is based on a misreading of the judgment under appeal.

286 In paragraph 312 of the judgment under appeal, the General Court explicitly found – which, in the absence of an allegation of distortion, it is for the General Court alone to do – that the Commission's 10% reduction of the fine in the decision at issue to take account of the fact that the appellant's retail prices for end-user access services and wholesale prices for local loop access services are subject to sector-specific regulation on a national level related both to RegTP's intervention in setting the appellant's prices and to the fact that, on several occasions during the period concerned, RegTP had considered the question of the existence of a margin squeeze resulting from the appellant's pricing practices.

287 In those circumstances, the Court must reject the present complaint of the appellant as unfounded.

288 With regard, in the second place, to the complaint concerning the negligent nature of the infringement, it must be recalled that, in paragraphs 295 to 298 of the judgment under appeal, the General Court set out the grounds on which the complaint that there was no negligence or intention on the part of the appellant had to be rejected. As is apparent from paragraphs 124 to 137 of the present judgment, the review of the complaints raised by the appellant in relation to the third part of the first ground of appeal did not reveal any error of law or failure to state reasons that might vitiate those grounds.

289 By the present complaint, the appellant merely submits that the infringement was committed, at most, negligently. In so doing, it asks the Court to assess the facts itself, although no distortion is alleged. In accordance with the case-law cited in paragraph 53 of the present judgment, that complaint is, therefore, inadmissible in the present appeal.

290 Consequently, the second part of the third ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

(iii) The third part of the third ground of appeal, concerning the imposition of a symbolic fine

— Arguments of the parties

291 The appellant claims that, in paragraph 319 of the judgment under appeal, the General Court failed to have regard to the right to equal treatment by failing to impose on it a symbolic fine, as in the Deutsche Post decision, even though the three conditions which the Commission set to that end in that decision have also been fulfilled in the present case.

292 The appellant states, first of all, that it behaved in a manner that is consistent with the case-law of the German courts, since RegTP has, on a number of occasions during the period in question, ruled that the purported margin squeeze is not anti-competitive. It is irrelevant that the judgment of the Oberlandesgericht Düsseldorf, delivered on

16 January 2002, was set aside by the Bundesgerichtshof in 2004, since that setting aside was the result of the possibility of an objection which is not applicable in the present case and it is only after the delivery of the judgment of the Bundesgerichtshof that the appellant could proceed on the basis that it might be liable under Article 82 EC. Second, there was no relevant case-law from the Courts of the Union during the period in question. The Notice of 22 August 1998 referred to in paragraph 319 of the judgment under appeal cannot be described as 'case-law' and reveals nothing about the crucial issue in the present case of whether a margin squeeze can be established in the case of regulated charges. Furthermore, the General Court contradicts itself in so far as it states in paragraph 188 of the judgment under appeal that the Courts of the Union have not yet explicitly ruled on the method to be applied in order to determine the existence of a margin squeeze. Third, a commitment to end the infringement cannot constitute a binding condition for the imposition of a symbolic fine where, as in the present case, detection of the purported infringement poses no difficulty, since it is only the assessment of the conduct that is being contested.

293 The Commission contends that the appellant's allegation is irrelevant and, in the alternative, that it is unfounded.

— Findings of the Court

294 According to the case-law of the Court, the fact that the Commission, in the past, imposed fines of a certain level for particular types of infringement does not mean that it is stopped from raising that level within the limits indicated in Regulation No 17, if that is necessary to ensure the implementation of European Union competition

policy. The proper application of the European Union's competition rules requires that the Commission be able at any time to adjust the level of fines to the needs of that policy (*Musique Diffusion française and Others* v *Commission*, paragraph 109).

295 In any event, in the present case, the General Court set out in detail in paragraphs 317 to 320 of the judgment under appeal the reasons why the appellant's situation had to be regarded as fundamentally different from that of the undertaking referred to in the Deutsche Post decision.

296 By its present arguments, the appellant confines itself, in essence, to challenging the General Court's assessment in that regard, claiming that it is in the same situation as the undertaking referred to in the Deutsche Post decision in so far as the three grounds on which the Commission imposed a symbolic fine in that decision also obtain in the present case; it does not, however, allege any distortion of the facts or indicate why that assessment is vitiated by one or more errors of law.

297 It follows from this that, by those arguments which essentially reiterate those already advanced before the General Court, the appellant is really seeking to secure a re-examination of the application submitted at first instance, which, in accordance with the case-law cited in paragraph 24 of the present judgment, is outside the jurisdiction of the Court of Justice in the present appeal.

298 Furthermore, in so far as the appellant relies on a contradiction between the grounds and paragraph 188 of the judgment under appeal, its complaint must be rejected as unfounded. The fact, noted by the General Court in that paragraph, that the Courts

of the Union have not yet explicitly ruled on the method to be applied in determining the existence of a margin squeeze in no way contradicts the finding in paragraph 319 of the same judgment that, for its part, the Commission had already applied the principles contained in the decision at issue and announced their application to the telecommunications industry.

299 Consequently, the third part of the third ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

(c) Conclusion as to the third ground of appeal

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

301 It follows from this that the present appeal must be dismissed.

V — Costs

302 In accordance with the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court shall make a decision as to costs. Under Article 69(2) of those Rules, which apply to the procedure on appeal by virtue of Article 118 of those Rules, the unsuccessful party shall be ordered to pay

the costs if they have been applied for in the successful party's pleadings. Since the Commission, Vodafone and Versatel have applied for costs against the appellant, and the latter has been unsuccessful, the appellant must be ordered to pay the costs of the present appeal.

On those grounds, the Court (Second Chamber) hereby

1. Dismisses the appeal;

2. Orders Deutsche Telekom AG to pay the costs.

[Signatures]