

## Press and Information

## Court of Justice of the European Union PRESS RELEASE No 117/13

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Advocate General's Opinion in Case C-295/12 P Telefónica SA and Telefónica España SAU v Commission

## Advocate General Wathelet proposes that the Court should refer the case concerning the fine of more than €151 million which the Commission imposed on Telefónica back to the General Court for it to give judgment once more

He takes the view that the General Court did not, in terms of its unlimited jurisdiction, carry out the in-depth examination of the calculation of the fine which it is required to make

EU law prohibits undertakings from abusing a dominant position on the internal market or a substantial part of that market since trade between Member States may be affected as a result.

On 11 July 2003, Wanadoo España SL submitted a complaint to the Commission, complaining that the margin between the wholesale prices which the subsidiaries of Telefónica charged their competitors for the wholesale supply of broadband access in Spain and the retail prices which they charged end-users was not enough to allow competitors of Telefónica to compete with it.

By decision of 4 July 2007, the Commission declared that Telefónica had abused its dominant position by imposing unfair prices on its competitors throughout the period from September 2001 until December 2006. There was a margin squeeze between the prices for retail broadband access on the Spanish mass market and the prices on the regional and national wholesale broadband access markets. A fine of €151 875 000, the basic amount for the calculation of which was set at €90 million, was therefore imposed on Telefónica.

Telefónica brought an action before the General Court against that decision on the part of the Commission. By judgment<sup>1</sup> of 29 March 2012, the General Court dismissed the action.

Telefónica then lodged the present appeal before the Court of Justice against that judgment of the General Court.

In his Opinion delivered today, Advocate General Melchior Wathelet states first of all that with regard to penalties the Court of Justice has special competence: that of unlimited jurisdiction. That enables it, particularly in the field of competition law, not only to cancel or confirm a fine and its amount but also to increase or reduce it. Accordingly, that jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's. In that regard, the Advocate General takes the view that, when conducting its review of legality, the General Court may not use the Commission's margin of discretion as a basis for dispensing with the conduct of an in-depth review of the law and of the facts in respect of the fine imposed or for failing to require the Commission to explain a change in its policy regarding fines in a specific case.

In the present case, Telefónica maintained before the General Court that the Commission had infringed the principles of individualisation of penalties, proportionality and equal treatment in addition to its obligation to state reasons by setting the basic amount of the fine at €90 million. That amount was, after the Microsoft case², the second highest basic amount ever imposed for abuse of a dominant position. Furthermore, that amount was nine and ten times higher, respectively, than

<sup>2</sup> Case T-167/08 Microsoft Corp v Commission, see also Press Release No 89/12.

<sup>&</sup>lt;sup>1</sup> Case <u>T-336/07</u> Telefónica and Telefónica de España v Commission, see also Press Release No 40/12.

the basic amount imposed in 2003 on Deutsche Telekom and on Wanadoo Interactive in respect of an almost identical abuse of a dominant position in the same sector, although the three decisions were adopted on the basis of the same Guidelines on the method of setting fines. Furthermore, the conduct at issue partially overlapped in temporal terms. In addition, the three cases concerned the internet access markets in France, Germany and Spain, which were very similar in terms of size, economic importance and stage of growth. That manifest disproportion between the basic amount imposed on Telefónica and the amounts imposed on Wanadoo Interactive and Deutsche Telekom is further aggravated by the fact that, in the case of Telefónica, the basic amount was increased by 25% by way of deterrence, an increase which was not applied to Wanadoo Interactive or Deutsche Telekom, despite the size of those undertakings.

According to Advocate General Melchior Wathelet, the paragraphs of the General Court's judgment concerning those issues contain practically no genuine analysis on its part. Consequently, he considers that, with regard to the principles of non-discrimination, proportionality and individualisation of penalties and to the obligation of the Commission to state reasons concerning the amount of the fine, the General Court has manifestly failed to conduct a full review, as it was required to do. He therefore proposes that the case should be referred back to the General Court for a new ruling on the fine imposed by the Commission. In that regard, the Advocate General states that he is not saying that there was an infringement of those principles, but that the General Court failed correctly to verify, in the context of its unlimited jurisdiction, whether or not the Commission's decision concerning the fine complied with those principles.

**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The full text of the Opinion is published on the CURIA website on the day of delivery.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355