

	<p>TRIBUNAL DE PRIMERA INSTANCIA DE LAS COMUNIDADES EUROPEAS Soud prvního stupně Evropských společenství DE EUROPÆISKE FÆLLESSKABERS RET I FØRSTE INSTANS GERICHT ERSTER INSTANZ DER EUROPÄISCHEN GEMEINSCHAFTEN EUROOPA ÜHENDUSTE ESIMESE ASTME KOHUS ΠΡΩΤΟΔΙΚΕΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES TRIBUNAL DE PREMIÈRE INSTANCE DES COMMUNAUTÉS EUROPÉENNES CÚIRT CHÉADCHÉIME NA GCOMHPHOBAL EORPACH TRIBUNALE DI PRIMO GRADO DELLE COMUNITÀ EUROPEE EIROPAS KOPIENU PIRMĀS INSTANCES TIESA</p>	<p>EUROPOS BENDRIJŲ PIRMOSIOS INSTANCIJOS TEISMAS EURÓPAI KÖZÖSSÉGEK ELŐFOKÚ BÍRÓSÁGA IL-QORTI TAL-PRIMI ISTANZA TAL-KOMUNITAJIET EWROPEJ GERECHT VAN EERSTE AANLEG VAN DE EUROPESE GEMEENSCHAPPEN SĄD PIERWSZEJ INSTANCIJ WSPÓLNOT EUROPEJSKICH TRIBUNAL DE PRIMEIRA INSTÂNCIA DAS COMUNIDADES EUROPEIAS SÚD PRVÉHO STUPŇA EURÓPSKÝCH SPOLOČENSTEV SODIŠČE PRVE STOPNJE EVROPSKIH SKUPNOSTI EUROOPAN YHTEISÖJEN ENSIMMÄISEN OIKEUSASTEEN TUOMIOISTUIN EUROPEISKA GEMENSKAPERNAS FÖRSTAINSTANSRÅTT</p>
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Press and Information

PRESS RELEASE No 38/06

2 May 2006

Judgment of the Court of First Instance in Case T-328/03

O2 (Germany) GmbH & Co. OHG v Commission of the European Communities

THE COMMISSION'S DECISION CONCERNING THE AGREEMENT BETWEEN O2 AND T-MOBILE ON NETWORK SHARING FOR THE THIRD GENERATION OF MOBILE TELECOMMUNICATIONS (3G) IN GERMANY IS PARTIALLY ANNULLED

The Court of First Instance considers that the Decision suffers from insufficient analysis in that it contains no objective discussion of what the competition situation would have been in the absence of an agreement and in that it does not demonstrate in concrete terms that the provisions of the agreement on roaming have restrictive effects on competition.

In 2001 O2 and T-Mobile, two operators of digital mobile telecommunications networks and services in Germany, concluded a framework agreement concerning infrastructure sharing and national roaming for the third generation of GSM mobile telecommunications ('3G') on the German market. Following its notification to the Commission on 6 February 2002, the agreement was amended by supplementary agreements of 20 September 2002, 22 January 2003 and 21 May 2003.

T-Mobile and O2 asked the Commission to confirm that the framework agreement that they had concluded did not fall within the scope of the rules on competition or, failing that, to grant them an exemption from those rules.

In its Decision of 16 July 2003 the Commission concluded that it had no grounds for action in respect of the provisions of the agreement relating to site sharing. It also granted an exemption, that is to say that it declared the rules on competition to be inapplicable to the provisions of the agreement relating to roaming in respect of the periods which it specified.

O2 brought an action before the Court of First Instance seeking the annulment of the provisions of that decision relating to the exemption from the application of the rules on competition.

Today, **the Court has annulled the exemption granted by the Commission in respect of the provisions on roaming in so far as that exemption implies that those provisions fall within the scope of the rules on competition.**

The Court finds that **the Commission failed to fulfil its obligation to carry out an objective analysis of the competition situation in the absence of the agreement.** In order to be able to make a proper assessment of the extent to which the agreement was necessary for O2 to penetrate the 3G mobile communications market, the Commission should have considered in more detail whether, in the absence of the agreement, O2 would have been present on that market.

As regards the impact of the agreement on competition, the Court next observes that the Commission's general assessment that national roaming restricts competition is not based on any concrete evidence specific to the agreement and contained in the Decision.

The Court finds that **the Commission's Decision betrays, moreover, a failure to evaluate the amendments made to the agreement as regards roaming in urban areas.** By not specifically evaluating the scheme of the agreement as amended after its initial notification, the Commission vitiated its assessment by a failure to analyse the facts. The amended agreement provides in particular that roaming will last for a shorter period in urban areas than in the two other areas (of secondary commercial importance and lesser commercial importance). The Commission's general assessment of the restrictive nature of roaming fails to take account of that adjustment, both in space and time, of the national roaming provided for in the amended agreement.

The Court adds that no restrictive effect resulting from the mechanism for determining prices has been established.

Lastly, the Court finds that in the assessment of whether the agreement was compatible with the common market, **the Commission failed to take into account the particular context** resulting from the specific characteristics of the **emerging market for the third generation of GSM mobile telecommunications.**

The Court considers that it cannot be ruled out that such a roaming agreement, instead of restricting competition between network operators, is, on the contrary, capable of enabling the smallest operator to compete with the major players in certain circumstances. In the light of the specific characteristics of the relevant emerging market, O2's competitive situation on the 3G market would probably not have been secure without the agreement, and might even have been jeopardised.

Consequently, **the Court of First Instance annuls the Decision in so far as it grants an exemption to the provisions of the agreement on roaming** (Article 81(3) EC) without first establishing that those provisions are anti-competitive in nature (Article 81(1) EC).

REMINDER: An appeal, limited to points of law only, may be brought before the Court of Justice of the European Communities against a decision of the Court of First Instance, within two months of its notification.

Unofficial document for media use, not binding on the Court of First Instance.

Languages available: DE, EN, FR

*The full text of the judgment may be found on the Court's internet site
<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-328/03>
It can usually be consulted after midday (CET) on the day judgment is delivered.*

*For further information, please contact Christopher Fretwell
Tel: (00352) 4303 3355 Fax: (00352) 4303 2731*