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Press and Information

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Judgment of the Court of First Instance in Case T-340/03

France Télécom SA v Commission of the European Communities

COURT UPHOLDS COMMISSION DECISION FINDING THAT FRANCE TÉLÉCOM ABUSED ITS DOMINANT POSITION ON THE FRENCH MARKET FOR INTERNET ACCESS

Predatory pricing which does not allow either variable or full costs to be recovered, as part of a plan to pre-empt the market for high-speed Internet access, constitutes an abuse of a dominant position

At the material time, Wanadoo Interactive SA ('WIN') was part of the France Télécom group. The group formed by Wanadoo and its subsidiaries encompassed all France Télécom's Internet activities and its telephone directory business. Within that group, WIN covered the operational and technical aspects of Internet access services in France, including ADSL (Asymmetric Digital Subscriber Line) services.

The Commission decided, in July 1999, to launch a sectoral inquiry within the European Union into, in particular, the provision of local loop access services and use of the residential local loop. Against this background, having opened a proceeding on its own initiative in September 2001, it took a close look at the prices which WIN charged its residential customers in France for high-speed Internet access.

Following that proceeding, the Commission found that the predatory prices charged by WIN for its eXtense and Wanadoo ADSL services did not enable it to cover its variable costs until August 2001 or to cover its full costs between then and October 2002, as part of a plan to pre-empt the market in high-speed Internet access during a key phase in its development. Accordingly, its conduct constituted an abuse of its dominant position on the French market for high-speed Internet access for residential customers. By decision of 16 July 2003, the Commission imposed a fine on it of EUR 10.35 million.

WIN lodged an appeal against that decision before the Court of First Instance.

Following a merger on 1 September 2004, France Télécom SA succeeded to the rights of WIN.

In its judgment, the Court considers first of all that the Commission was right to find that a sufficient degree of substitutability between high-speed and low-speed access did not exist and to define the market in question as that of high-speed Internet access for residential customers.

In its action, WIN disputed that it had a dominant position or that there was abuse.

The Court considers that WIN had a dominant position on the French market for Internet access, in the light of its very high market share during the period at issue, the fact of having eight times the number of ADSL subscribers than its number one competitor and its 'link-up' with France Télécom, the incumbent telecommunications operator in France, which conferred on it advantages over its competitors.

In that context, the Court also points out that the fast-growing nature of the market for high-speed Internet access during the period at issue cannot preclude application of the competition rules.

As regards the existence of an abuse, the Court states that, in relation to predatory pricing, first, prices below average variable costs give grounds for assuming that a pricing practice is eliminatory and that, secondly, prices below average total costs but above average variable costs must be regarded as abusive if they are determined as part of a plan for eliminating a competitor.

Moreover, the Court finds that the Commission was correct in its choice and application of the method of calculating the rate of recovery of costs which led it to conclude that there was predatory pricing and that the Commission furnished solid and consistent evidence as to the existence of a plan of predation. It was not necessary to establish in addition proof that WIN had a realistic chance of recouping its losses.

The Court considers that WIN cannot therefore rely on an absolute right to align its prices on those of its competitors in order to justify its conduct. Even if alignment of prices by a dominant undertaking on those of its competitors is not in itself abusive or objectionable, it might become so where it is aimed not only at protecting its interests but also at strengthening and abusing its dominant position.

The Court therefore holds that the Commission was correct in finding that WIN had abused its dominant position.

Finally, the Court upholds the fine imposed on WIN.

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: BG ES CS DE EL EN FR IT HU PL RO SK SL

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-340/03>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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*Pictures of the delivery of the judgment are available on EbS "Europe by Satellite",
a service provided by the European Commission, Directorate-General Press and
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