JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

30 January 2007 *

In Case T-340/03,

France Télécom SA, formerly Wanadoo Interactive SA, established in Paris (France), represented by O. Brouwer, H. Calvet, M. Pittie, J. Philippe and T. Janssens, lawyers,

applicant,

v

Commission of the European Communities, represented initially by S. Rating and É. Gippini Fournier, acting as Agents, and subsequently by É. Gippini Fournier,

defendant,

APPLICATION for annulment of the Commission's decision of 16 July 2003 relating to a proceeding under Article [82 EC] (Case COMP/38.233 — Wanadoo Interactive) or, in the alternative, for annulment or reduction of the fine imposed on the applicant,

* Language of the case: French.

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of M. Vilaras, President, M.E. Martins Ribeiro, F. Dehousse, D. Šváby and K. Jürimäe, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 April 2005,

gives the following

Judgment

Facts and procedure

1 In the context of the development of high-speed internet access, the Commission decided, in July 1999, to launch a sectoral inquiry within the European Union pursuant to the powers conferred on it by Article 12(1) of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), which focused in particular on the provision of local loop access services and use of the residential local loop.

Against this background, in the light of the information gathered the Commission decided to take a close look at the prices which Wanadoo Interactive SA ('WIN') charged its residential customers in France for high-speed internet access. To this end, it launched proceedings of its own initiative in September 2001.

2 At the material time, WIN was part of the France Télécom group, 99.9% of its capital being held by Wanadoo SA. France Télécom's shareholding in Wanadoo fluctuated between 70 and 72.2% during the period at issue. The group formed by Wanadoo and its subsidiaries ('the Wanadoo group') encompassed all France Télécom's internet activities and its telephone directory business. Within the Wanadoo group, WIN covered the operational and technical aspects of internet access services in France, including ADSL (asymmetric digital subscriber line) services.

3 The Commission sent WIN a first statement of objections on 19 December 2001 ('the first statement of objections') and a supplementary statement of objections on 9 August 2002 ('the supplementary statement of objections'), to which WIN replied on 4 March and 23 October 2002 respectively.

4 On 16 January 2003, the Commission sent WIN a letter setting out facts ('the letter on the facts') giving it access to the file which served as the basis for drafting that letter. WIN in fact had access to the file on 23 and 27 January 2003. By letter of 26 February 2003, WIN asked the Commission to clarify a number of aspects of the letter on the facts. The Commission replied by letter of 28 February 2003 and WIN then submitted a document in reply to the letter on the facts on 4 March 2003.

5 By decision of 16 July 2003 relating to a proceeding under Article [82 EC] (Case COMP/38.233 — Wanadoo Interactive) ('the decision'), the Commission found that '[WIN] infringed Article 82 [EC] by charging for its eXtense and Wanadoo ADSL services predatory prices that did not enable it to cover its variable costs until August 2001 or to cover its full costs from August 2001 onwards, as part of a plan to pre-empt the market in high-speed internet access during a key phase in its development' (Article 1). The Commission ordered it to bring the infringement to an end (Article 2) and imposed a fine on it of EUR 10.35 million (Article 4).

6 The decision defines the relevant market as the French market for high-speed internet access for residential customers. The products with which the infringement is concerned are internet access services based on ADSL technology (Wanadoo ADSL and eXtense).

7 According to the decision, in the case of Wanadoo ADSL, at the material time, the customer had to pay a monthly subscription to France Télécom for supplying the service, renting the ADSL modem from France Télécom, together with a subscription to WIN as its internet service provider ('ISP'). In the case of the eXtense service, the modem was bought by the user who paid only a monthly subscription to WIN corresponding to the service supplied by France Télécom and the flat-rate unlimited internet access.

8 Having looked into various elements, including the market shares (recitals 211 to 222 in the preamble to the decision) and the effects of the 'link-up' with France Télécom (recitals 223 to 228), the Commission concludes that WIN occupied a dominant position on the relevant market. It then concentrates on showing that the below-cost pricing applied by WIN formed part of a deliberate strategy of predation aimed at 'pre-empting' the market and thereby constitutes an abuse of a dominant position within the meaning of Article 82 EC (recital 254).

9 The decision fixes the starting date of the infringement as 1 March 2001 and the end as 15 October 2002, the date on which the remedy put forward by France Télécom in March 2002 entered into force. The variable costs were not covered by the prices charged from March to August 2001 and the full costs were not covered from August 2001 (Article 1 of the decision, see paragraph 5 above).

10 That decision was notified to WIN on 23 July 2003 and, by document lodged at the Registry of the Court of First Instance on 2 October 2003, WIN sought annulment of the decision.

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

Forms of order sought

12 The applicant claims that the Court should:

— annul the decision;

— in the alternative, cancel or reduce the fine;

— order the defendant to pay the costs.

13 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

I — *The claim for annulment of the decision*

14 In support of its claim for annulment, the applicant puts forward a number of procedural pleas, breach of the principle that penalties must be specific to the offender and breach of Article 82 EC.

A — *The plea alleging breach of the rights of the defence and of essential procedural requirements*

1. Arguments of the parties

15 According to WIN, in a case involving predatory pricing the calculation of costs should be regarded as a key part of the objection in question. In its view, not only did it encounter difficulties in relation to access to the file, but also significant elements of the calculation of variable and full costs contained in the decision were never

raised in a statement of objections and were only made known in the letter on the facts. This amounts to a breach of WIN's rights of defence and a breach of essential procedural requirements. WIN submits that it was unable to ascertain the significance of those elements or their position in the scheme of the Commission's reasoning and objections and therefore could not properly exercise its rights of defence in this regard.

16 In addition, in its decision the Commission applied calculations which, in terms of both the method used and the results achieved, are different from those used in the supplementary statement of objections. By modifying its cost recovery test, the Commission thus modified its objection. Moreover, the duration of the infringement established in the decision is greater than that referred to in the statement of objections, without the parties having had the opportunity to comment in this regard.

17 The Commission considers that WIN's arguments are factually wrong and legally unfounded. It contends that, in the letter on the facts, it merely corrected errors in the calculation pointed out by WIN in its reply to the supplementary statement of objections, and did not change either the test or the complaints. It points out, moreover, that WIN was heard on the content of the letter on the facts. The purpose of this was precisely to afford the undertaking the opportunity to effectively make known its views as to whether the facts asserted by the Commission were true and relevant; WIN took this opportunity. By letter of 26 February 2003, WIN thus asked the Commission to provide clarification on a number of aspects of the letter on the facts. The Commission contends that it replied by letter of 28 February 2003, thus allowing WIN the opportunity to reply in turn to the letter on the facts on 4 March 2003. At the time of sending out the letter on the facts, the Commission claims to have given WIN access to the entire file which provided the basis for drafting the letter. WIN in fact had access to the file on 23 and 27 January 2003. As regards the duration of the infringement, the fact that the infringement was still ongoing at the time of sending the statement of objections prevented the Commission from doing more than establish the starting point of the infringement.

2. Findings of the Court

18 It should be noted at the outset that, according to settled case-law, the statement of objections must be couched in terms that, even if succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission. It is only on that basis that the statement of objections can fulfil its function under the Community regulations of giving undertakings and associations of undertakings all the information necessary to enable them properly to defend themselves before the Commission adopts a final decision. Furthermore, it is settled case-law that that obligation is satisfied if the decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and only takes into consideration facts on which the persons concerned have had the opportunity of making known their views. The Commission's final decision need not necessarily replicate the statement of objections (Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011, paragraph 442 and the case-law cited). Thus, it is permissible to supplement the statement of objections in the light of the parties' response, whose arguments show that they have actually been able to exercise their rights of defence. The Commission may also, in the light of the administrative procedure, revise or supplement its arguments of fact or law in support of its objections (Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071, paragraph 438).

19 It is in the light of the foregoing that the present plea must be assessed.

20 It must be stated that, at the inception of the investigation phase, the Commission sent the first letter of objections to WIN on 19 December 2001. WIN submitted observations in its reply of 4 March 2002 and at the hearing held on 18 March 2002 (recital 153 of the decision). On 9 August 2002, the Commission sent WIN the supplementary statement of objections. WIN lodged its observations on that

document on 23 October 2002 and made no request for a hearing to be held (recital 157 of the decision). WIN therefore was able to exercise its rights of defence in relation to the objections raised by the Commission in the statements of objections, both in the context of its replies to the latter and of its hearing.

21 However, the objections upheld by the Commission in its decision are not different from those set out in the statements of objections.

22 In the Commission's statement of objections of 19 December 2001, the introduction is worded as follows:

'This statement of objections is aimed at the pricing practices of [WIN], part of the France Télécom group, for its high-speed internet access services, Wanadoo ADSL and Pack [eXtense], in the course of 2001.

...

In the course of the investigation, it has become apparent that [WIN] has, since the beginning of 2001, undertaken pricing practices in relation to the services in question which are below cost and capable of being classified as predatory and a breach of Article 82 [EC].'

23 In that statement of objections, the Commission concludes, at the end of its analysis, as follows:

'[At this stage,] the policy of predatory pricing pursued by [WIN] since the beginning of 2001 constitutes an abuse of a dominant position [within the meaning of] Article 82(a) and (b) [EC]. The practice in question took place at a critical stage in the development of the market for high-speed internet access for residential users, at the same time as the roll-out of ADSL in France. It gave [WIN] a significant lead over its competitors or prevented them from entering, or maintaining their position on, that market.'

24 Article 1 of the decision, on the other hand, is worded as follows:

'From March 2001 to October 2002, [WIN] infringed Article 82 [EC] by charging for its eXtense and Wanadoo ADSL services predatory prices that did not enable it to cover its variable costs until August 2001 or to cover its full costs from August 2001 onwards, as part of a plan to pre-empt the market in high-speed internet access during a key phase in its development.'

25 A comparison between the first statement of objections and the decision indicates that the company, the market and the products concerned are identical, as is the infringement alleged, that is, the charging of predatory prices contrary to Article 82 EC.

26 However, the decision is considerably more precise in relation to recovery of costs. Unlike the first statement of objections, the decision refers to variable costs and full costs and distinguishes between the periods examined in relation to those costs.

27 However, that information was introduced in the supplementary statement of objections in paragraph 5.4, headed 'Details of the abuse: non-coverage of variable and full costs as part of a strategy to pre-empt the market'. In the two footnotes to which that heading refers, the Commission states that, '[in] that respect, this statement of objections supplements [paragraph] 3.4 of the first statement of objections' and that '[the] assessment as to whether the full costs are covered is a new element in relation to the first statement of objections'. At that stage, WIN was therefore already aware of the method used; it could thus have made known its point of view.

28 The objective of the letter on the facts, according to its very wording, is to 'set out certain facts not explicitly referred to in the statement of objections, to which the Commission might refer in the wording of such decision[; t]hose facts consisting in part of those drawn from the documents on the Commission's file to which [the] lawyers have already had access, and in part of facts gathered in the course of the investigation undertaken after 9 August 2002'.

29 According to WIN, the letter modifies the cost recovery test and thus the corresponding objection in such a way that it should have been the subject of a statement of objections.

30 It should be pointed out at the outset that, apart from merely referring to the different division of the periods analysed, WIN has not made clear in its application what the differences in the methodology or in the results were, or what new facts were introduced by the letter on the facts. It has merely referred to the first statement of objections, the supplementary statement of objections and the letter on the facts, which it annexed to the application. However, it is not for the Court to search through, and identify from, those annexes the information on which the application could be based. Although specific points in the text of the application can be supported and completed by references to specific passages in the documents attached, a general reference to other documents cannot compensate for the lack of

essential information in the application itself, even if those documents are attached to the application (Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 113). It is therefore not appropriate to make a detailed comparison between the statements of objections and the letter on the facts, annexed to the application, with a view to looking for any differences in the methodology or new information in the letter on the facts. For the sake of completeness, it should none the less be pointed out that the letter on the facts does not set out any objection and does not refer to or introduce any change in the method of calculating the rates of recovery of costs. Often in reply to WIN's observations, the letter updates, refines or corrects information already contained in the statements of objections. It therefore does not modify the objections set out in those documents.

31 As regards the different division of the periods analysed, the only information referred to in the application in support of the claim that the cost recovery test was modified was that the decision in fact shortened the period in which variable costs were not recovered and lengthened that in which full costs were not recovered. However, the complaint that costs were not recovered, as is the case with the statement of objections, covers the whole period of the infringement. In addition, the fact that the starting date of the infringement in the statements of objections, January 2001, was changed to March 2001 in the decision is in WIN's favour. Furthermore, the Commission cannot be criticised for taking account of WIN's observations in its reply to the supplementary statement of objections. According to those observations, the Commission's conclusion that the variable costs were not recovered between August and October 2001 was simply based on an error in the calculation. In the decision, the Commission therefore recorded the period in which variable costs were not recovered as ending in August 2001.

32 Even assuming that, by that argument, the applicant pleads that the periods in the analysis of variable costs were modified, it should be pointed out that, in the decision, the third period no longer ceases on 31 December 2001, but continues until 15 February 2002. According to the Commission, that modification was made in order to ensure that the time periods chosen better reflected the evolution of the costs incurred by WIN. It contends that that change merely entails a simplification of the calculations, without any change to the Commission's general findings in the supplementary statement of objections.

33 It should be observed that WIN has not disputed that justification and fails to explain why the extension of the third period is detrimental to its interests.

34 In addition, the letter on the facts invites WIN to submit observations on that letter and offers it the possibility of having access to all the documents on file.

35 It should be pointed out that WIN merely refers, in the introduction to its application, to difficulties in obtaining access to the file, but does not make such difficulties the subject of a plea for annulment. It also does not claim that it did not obtain the documents requested, but rather that it had to make repeated requests and that due 'only to the fact that it was particularly vigilant and that it persevered ... was it able, to the best of its ability, to assert its right of access to the file'. It must be inferred from this that, despite the difficulties it might have encountered, WIN did have access to the file.

36 Thus, in accordance with the case-law referred to in paragraph 18 above, the applicant was informed of essential factual information and had the opportunity of properly making known its views. A hearing had already taken place on 18 March 2002 and a further hearing was not necessary. Furthermore, WIN did not request a further hearing either after the supplementary statement of objections or the letter on the facts was sent.

37 It is clear from the foregoing that the argument that a third statement of objections was necessary cannot be upheld. In addition, WIN was able to exercise its rights of defence in this respect and did not fail to do so. In fact, by letter of 26 February 2003, it asked the Commission to provide clarification on a number of aspects of the letter on the facts, to which the Commission replied by letter of 28 February 2003. The applicant then sent the Commission a document in response to the letter on the facts. Furthermore, WIN in fact had access to the file on 23 and 27 January 2003. WIN has therefore not established that, by sending the letter on the facts, the Commission infringed essential procedural requirements and its rights of defence.

38 For the sake of completeness, if it were held that it is for the Court itself to carry out a detailed comparison of the letter on the facts and the statements of objections by looking for information capable of substantiating the action, it should be pointed out that the facts detailed in the letter on the facts supplemented or developed information already contained in the statements of objections. The assessment, in the letter on the facts, of the actual average revenue and the theoretical revenue at the start of 2002 extends the calculations made in the supplementary statement of objections by taking into account WIN's letter of 13 December 2002. In addition, the price of band width charged by France Télécom in the context of the routing service was already discussed in the first statement of objections and in the supplementary statement of objections. The letter on the facts takes into account in this regard the information provided by France Télécom on 3 May and 21 November 2002. Similarly, the cost of international 'connectivity' was addressed in the first statement of objections. The letter on the facts seeks to take into account the explanations provided on this point by France Télécom in its letter of 13 November 2002. Finally, a preliminary estimate of the foreseeable costs for new subscribers and an estimate of the full costs had already been set out in the supplementary statement of objections.

39 In addition, certain matters in the letter on the facts are clearly provided for information purposes in reply to WIN's comments. Therefore, following WIN's letter of 27 September 2002, the Commission refers, in the letter on the facts, to the costs arising from subscribers' moving house and points out that it does not intend to incorporate those costs into its calculations. As regards the effects of sales dynamics, the Commission points out in the letter on the facts that this does not lead to a finding of predation, but may be used in the context of the discussion on the proposal, put forward by WIN in its document in reply of 23 October 2002, to study each new generation of subscribers separately, independently of the previous or subsequent generations. The arguments, set out in the letter on the facts, with regard to WIN's expenditure on advertising or promotional material are intended to confirm the fact that it is included in the variable costs in the supplementary statement of objections, a matter which WIN disputed in its reply to that document.

40 The only information which may be regarded as indicating a change in the application of the methodology used by the Commission is, first, the different division of the periods analysed, and, secondly, the calculation of the weighted average of cost recovery according to the revenue generated by the total subscriber base for the two services in question.

41 In relation to the division of periods, reference should be made to paragraphs 31 to 33 above.

42 As regards the calculation of the weighted average of cost recovery according to the revenue generated by the subscriber base, the Commission states that 'that change is necessary from a mere arithmetical point of view, in the light of the considerable difference between the costs and revenues of the eXtense service on the one hand, [and] the costs and revenues of the Wanadoo ADSL service on the other, which are twice as low as those of eXtense'. In footnote 77 of the decision, the Commission adds that 'it takes the view that it cannot be bound by an error of calculation made at an earlier stage in the procedure, provided that in order to enable the undertaking to defend itself it has given it the opportunity to submit its observations on the rectification of the mistake, as it did in this case in [the letter on the facts]'.

43 As regards the rectification of errors, it should be noted that WIN does not object to such rectification when it goes in its favour. In its reply to the supplementary statement of objections, WIN draws the Commission's attention to errors which the Commission made in its calculations. In the letter on the facts, the Commission rectifies those errors without demur on WIN's part, or, where the Commission refuses to do so, it explains why. On the other hand, according to WIN, the Commission cannot rectify an error in a letter setting out facts in a way which is not favourable to it, when to do so would effectively alter the objection made against it.

44 It is therefore appropriate to assess whether such rectification amounts to a change in the methodology leading to a new complaint.

45 It should be stated that the method remains that of calculating the rate of recovery of variable and adjusted full costs and that the rectification or modification made in the calculation of the weighted average does not in any way alter the complaint as to predatory pricing carried out since the beginning of 2001, as set out in the two statements of objections. The absence of a calculation of the average in the first statement of objections does not prevent the Commission from concluding that the costs were not recovered, since the calculation as to the rate of recovery was first made on a product-by-product basis (eXtense and Wanadoo ADSL).

46 In addition, according to WIN's reply to the letter on the facts, since the new information taken into account by the Commission in the letter on the facts led to a rate of recovery of adjusted variable costs of over 100% from 1 August 2001 onwards, the Commission modified its method of calculation in order to reduce that rate and maintain its objection that the variable costs were not recovered for the period from 1 August to 15 October 2001. Such an objective, however, cannot be reconciled with the fact that, in the decision, the Commission established the end of the period in which the adjusted variable costs were not recovered to be 31 July 2001. That argument cannot therefore be upheld. WIN has thus not established that there was any change in methodology in the letter on the facts.

47 WIN also submitted that the duration of the infringement established by the decision is longer than that referred to in the statement of objections, without the parties having had an opportunity to comment on this.

48 It should be pointed out that WIN did not dispute the starting date of the infringement and the fact that, between the statement of objections and the decision, the Commission changed the date from January to March 2001.

49 As regards the extension of the duration of the infringement from July to 15 October 2002, clearly, although both statements of objections set the starting date of the infringement as January 2001, neither document stated that the infringement had come to an end. On the contrary, both documents stated that the Commission proposed to take a decision inviting WIN to 'bring the infringement to an end'. Such wording implies unequivocally that, according to the Commission, the infringement in question had not yet been terminated. Admittedly, the first statement of objections referred to facts covering a duration of 12 months and the supplementary statement of objections a duration of 18 months. That temporal limitation of the evidence, and not of the duration of the infringement, to a period that has elapsed does not call into question the express finding in those two documents. By way of illustration, the supplementary statement of objections states:

'Following its analysis, the Commission takes the view at this stage that the policy of predatory pricing pursued by [WIN] since the beginning of 2001 constitutes an abuse of a dominant position ... For the reasons set out above, the Commission proposes to take a decision requiring [WIN] to bring the infringement to an end ...'

50 It is clear that each statement of objections set out the duration established by the Commission on the basis of information which was available to it at the time of drawing up those documents (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 15), since the infringement was not at an end. Moreover, WIN did not claim that it had taken specific measures which brought the alleged infringement to an end. It is only in the decision that the Commission states that 'the abuse came to an end on 15 October 2002, when the remedy presented by France Télécom in March 2002 came into effect'.

51 The statement in the letter on the facts that 'those facts in no way lead to an extension of the period referred to in the statements of objections' must be understood in the light of the considerations which precede it. The fact that the letter on the facts refers to 'the adjusted full costs in 2002' (see p. 6) and that a

number of data cover the first nine months of 2002, and even the full year (see, in particular, Annexes 15.1 and 15.2, 20, 21 and 22), is part of the scope of the investigation of the infringement. It is clear, moreover, from WIN's reply to the letter on the facts that it should have understood that the infringement was continuing. A number of points in its reply refer in fact to the first nine months of 2002, and even the full year. It produced a table headed 'Advertising/Growth of the ADSL base' relating to a period until December 2002 and, under the same heading, a chart covering the period from January 2001 to September 2002. In addition, also in its reply, WIN commented on the rates of recovery of variable costs until 30 September 2002. Finally, in the same reply, WIN disputed the revenue of EUR 37.03 per subscription taken into account by the Commission for the period from 15 February to September 2002. WIN cannot therefore claim that the rights of the defence were infringed (see, to that effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 576).

52 The applicant's argument relating to the extension of the duration of the infringement must therefore be rejected.

53 Since no breach of the rights of the defence has been established, the present plea must be rejected.

B — *The plea in law alleging failure to state reasons*

1. Arguments of the parties

54 In the context of its claim that essential procedural requirements have been breached, WIN also claims that the Commission calls into question, without stating

reasons, the right of every undertaking to align its prices, in good faith, on those of its competitors. That right is enshrined in the case-law of the Court of Justice and in the Commission's previous decisions. WIN adds that, where the decision goes appreciably further than earlier decisions, it is for the Commission to provide explicit reasoning.

55 The Commission, on the other hand, takes the view that it suffices to refer to recitals 314 to 331 of the decision to establish that the plea alleging defective reasoning in this regard is manifestly unfounded.

2. Findings of the Court

56 It should be stated that the decision devotes 18 recitals (314 to 331) to discussing the alignment of prices on competitors' prices. The Commission assesses first the alignment argument from a point of view of principle, then the market position actually occupied by the competitors concerned, and, finally, matters of fact which in its view refute WIN's contention.

57 The Commission therefore fulfilled its obligation to state reasons in this regard. In accordance with the case-law cited by WIN, the Commission stated the reasons on which its decision is based, enumerating the facts forming the legal basis of that measure and the considerations which led it to adopt it (Case 73/74 *Fabricants de papiers peints* v *Commission* [1975] ECR 1491, paragraph 30).

58 In any event, even if it were to be accepted that in the present case the Commission was under an obligation to provide more explicit reasoning, it did not fail to do so.

59 Contrary to what WIN has claimed, the Commission does not provide merely a brief statement of reasons by stating only that a dominant operator cannot align its prices on those of its competitors if its prices are below cost. It sets out its position in detail in recital 315 of the decision and accompanies it with a footnote which makes several references to case-law. That recital is worded as follows:

'First of all, from a point of view of principle, it is true that new entrants or undertakings which are not in a dominant position are entitled to charge promotional prices for limited periods. Their sole aim is to draw the consumer's attention to the very existence of the product, more persuasively than by a mere advertisement, and such offers do not have any negative impact on the market. On the other hand, alignment by the dominant operator on the promotional prices of a non-dominant operator is not justified. Whilst it is true that the dominant operator is not strictly speaking prohibited from aligning its prices on those of competitors, this option is not open to it where it would result in its not recovering the costs of the service in question. Whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, such behaviour cannot be countenanced if its actual purpose is to strengthen that dominant position and abuse it. The dominant undertaking thus has a special responsibility not to allow its behaviour to impair genuine undistorted competition on the common market.'

60 The plea alleging failure to state reasons on this matter cannot be upheld either, so that all the procedural pleas must be rejected.

C — *The plea alleging breach of the principle that penalties must be specific to the offender*

1. Arguments of the parties

61 According to WIN, the Commission manifestly infringed the principle that penalties must be specific to the offender by holding against it matters which the Commission imputes to the France Télécom group and on which neither WIN nor France Télécom were able to submit their observations. The Commission confuses practices alleged against WIN with those of France Télécom. It describes them as the implementation of a concerted action or a single strategy defined by the France Télécom group. However, the procedure is only directed at WIN. This therefore amounts to a 'serious procedural anomaly'.

62 In support of its argument, WIN refers in its application to a number of passages from the decision and the supplementary statement of objections.

63 WIN thereby refers to the Commission's criticisms, in recital 145 of the decision, of the methods used by it and its main shareholder to hold back the development of competitors and to divert the growth in the high-speed market to its own advantage. WIN also cites recital 285 of the decision which refers to 'an overall plan' and states that the 'strategy pursued by the subsidiary cannot be completely dissociated from the objectives of the parent company' and recital 286 in which the Commission considers that 'reference may be made to the behaviour of France Télécom on the wholesale market'.

64 Similarly, according to WIN, in the supplementary statement of objections, the Commission had claimed that part of the facts which it established were 'attributable

to France Télécom', though stating that the 'intense nature of the relationship between [WIN] and France Télécom [was] such ... that it [could] not be denied that the strategies of the two entities [were] closely linked'. The Commission thus asserted that WIN's pricing policy was the result of a 'concerted action' between it and France Télécom.

65 The Commission's response is that reference need only be made to the operative part of the decision to establish that the only undertaking to which the decision applies is WIN. The decision was not addressed to France Télécom because it was not accused of any abuse of a dominant position. The Commission accepts, on the other hand, that the decision frequently refers to France Télécom on account of its key position as operator of the telephony network and of its capacity as the major shareholder in WIN. Those facts are relevant to understanding the context of the market during the infringement period.

2. Findings of the Court

66 It should be recalled that, according to the principle that penalties must be specific to the individual concerned, an undertaking may be penalised only for acts imputed to it individually, a principle applying in any administrative procedure that may lead to the imposition of sanctions under Community competition law (see, to that effect, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 63).

67 It must be stated that it is not apparent from the decision that the Commission is accusing WIN of infringements which were committed by France Télécom and were imputed to WIN. The passages in the decision in which, according to WIN, France Télécom's conduct is criticised are all to be found in two subdivisions of the decision

(Part I, G.4, and Part II, D.3(c)) which relate to the context of the infringement and which are clearly intended to describe the background against which WIN's infringement takes place.

68 The references to France Télécom are therefore justified by the description of the context of the market in question. France Télécom occupies a special position on the market in question since the majority of internet service providers have no choice but to use its services. France Télécom is the incumbent telecommunications operator in France. It operates long-distance networks in France which are used to carry internet traffic. It is the owner of the local telecommunications access network linking all telephone subscribers to its network. At that time, the use of France Télécom's local access network was essential in order to provide an ADSL service (recital 231 of the decision). France Télécom charges its customers for its services, including WIN (recitals 42 to 59 of the decision). The lowering of France Télécom's prices therefore has an impact on WIN's costs. Moreover, its key position and its capacity as WIN's majority shareholder led France Télécom to participate in the administrative procedure.

69 Furthermore, the Commission takes care to explain that although the contextual matters 'can be imputed to [WIN] only in part and although they are not the subject of objections made against [WIN]' they are very important for an understanding of the case (recital 145 of the decision) and that '[i]n order better to assess the scope of [WIN]'s policy and how it fits into an overall plan, the subsidiary's behaviour may usefully be viewed against the background of that of the France Télécom group as a whole' (recital 285 of the decision), while adding that the matters described in recitals 286 to 290 are 'not a list of objections directed against [WIN]' but that 'the strategy pursued by the subsidiary cannot be completely dissociated from the objectives of the parent company'.

70 It is therefore clear from the decision, in which the Commission always took care to state clearly that the background matters were not a list of objections directed against the applicant, that the Commission did not impute to WIN conduct pursued by France Télécom.

71 The plea alleging breach of the principle that penalties must be specific to the offender must therefore be rejected.

D — *Breach of Article 82 EC*

72 According to WIN, the Commission infringed Article 82 EC in several respects. In relation to dominance, the Commission used the wrong market definition and was incorrect in considering WIN to be dominant. As regards abuse of a dominant position, the Commission applied a cost recovery test which was contrary to Article 82 EC in respect of both the costs taken into account and the method used; furthermore, it made gross errors of calculation. In connection with the test of predation, the Commission denied WIN its fundamental right to align its conduct on that of its competitors. It also made an error of law, combined with a manifest error of assessment, by finding that there was a plan of predation and maintaining that it was not necessary to prove recovery of losses.

1. Dominant position

(a) Incorrect market definition

Arguments of the parties

73 According to WIN, the Commission's distinction between low-speed and high-speed internet access for residential customers is based on a seriously flawed and

contradictory analysis. In its view, there is only one market for internet access, which takes the form of a continuum from low-speed to high-speed. This is borne out by the emergence of medium-speed ADSL offers.

74 The Commission recognises the existence of common usage and a certain degree of substitutability between high-speed and low-speed internet access, but refuses to draw the necessary conclusions.

75 In addition, there is real competition between high-speed and low-speed, owing to the unlimited nature of the offers of the two types of internet access, the users being relatively indifferent to their characteristics.

76 Finally, according to the Commission's established previous decisions, a mere difference in the degree of comfort or quality is not sufficient to distinguish between separate relevant markets when the nature of the use is similar. It is apparent from a survey carried out by WIN that, in 80% of cases, subscribers use the same type of applications and functionalities.

77 The Commission refers in turn to its explanations in the decision (recitals 169 to 204) as to the distinction between high-speed and low-speed access. It claims to have shown the differences in usage, technical specificities and performance as well as differences in the price of the services and income per subscriber requiring the two markets to be distinguished. As regards the degree of substitutability, the Commission contends that the only substitution found is entirely asymmetrical, since it works only in one direction, namely from low-speed to high-speed. The Commission further considers that the distinction between high-speed and low-speed is universally recognised today.

Findings of the Court

78 According to settled case-law (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 37; Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 62; and Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraph 91), for the purposes of investigating the possibly dominant position of an undertaking on a given product market, the possibilities of competition must be judged in the context of the market comprising the totality of the products or services which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products or services. Moreover, since the determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and to behave to an appreciable extent independently of its competitors and, in this case, of its service providers, an examination to that end cannot be limited solely to the objective characteristics of the relevant services, but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration.

79 If a product could be used for different purposes and if these different uses are in accordance with economic needs, which are themselves also different, there are good grounds for accepting that this product may, according to the circumstances, belong to separate markets which may present specific features which differ from the standpoint both of the structure and of the conditions of competition. However, this finding does not justify the conclusion that such a product, together with all the other products which can replace it as far as concerns the various uses to which it may be put and with which it may compete, forms one single market.

80 The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that

there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 28).

81 It is also apparent from the Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5, paragraph 7) that '[a] relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.

82 It must be stated that there is not a mere difference in comfort or quality between high- and low-speed access. It is clear from the evidence provided by the Commission (recital 175 of the decision), which was not contradicted by WIN, that some applications available with high-speed access are simply not feasible with low-speed access, including, for example, the downloading of very voluminous video files or interactive network games. WIN also confirmed, in its reply of 4 March 2002 to the first statement of objections, that there are 'audiovisual/multimedia activities ... more specific to ADSL'. In addition, the study undertaken by the Centre de recherche pour l'étude et l'observation des conditions de vie (Research Centre for the Study and Monitoring of Living Standards) (Crédoc) on behalf of WIN which it presented in an annex to its application also describes new uses developed on the internet by the eXtense service and which are specific to high-speed access, that is, playing network games, listening to radio online, watching a video online and shopping online. According to that study, moreover, the subscriber with high-speed access goes online far more often and, on average, for considerably longer than the low-speed access user.

83 As regards the differences in technical features and performances, it is clear from the Commission's contentions (recitals 181 to 187 of the decision), which have not been denied by the applicant, that an important technical feature of high-speed internet access is the specific nature of the modems used. A high-speed internet access

modem cannot be used for low-speed internet access and vice versa (recital 181 of the decision). In addition, in the case of high-speed access, the connection is always on and the telephone line always available for making calls.

84 In addition, in the case of the French market, it should be pointed out that, for the period investigated, the offers of high-speed access involved download speeds in the region of 512 kbits/s (recital 185 of the decision). The offers of traditional low-speed access (limited to 56 kbits/s) and of ISDN (integrated services digital network) (64 or 128 kbits/s) only allowed speeds of 4 to 10 times less. The ADSL offers with download speeds of 128 kbits/s, which, according to the applicant, bear witness to the continuity between low-speed and high-speed, only became available at the end of the period covered by the decision. In addition, even in the case of an offer of 128 kbits/s, the difference between low-speed and high-speed access is considerable. The difference in performance was therefore considerable during the period investigated.

85 In addition to the differences in use, features and performances, there is a significant price differential between low-speed and high-speed access (recitals 188 to 192 of the decision).

86 As regards the degree of substitutability, it is appropriate to recall, in addition to the case-law cited in paragraph 78 above, the criteria laid down by the Commission in its Notice on the definition of the relevant market for the purposes of Community competition law (see paragraph 81 above).

87 According to that notice, the assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small but lasting change in relative prices and

evaluating the likely reactions of customers to that increase. In paragraph 17 of the notice, the Commission states '[t]he question to be answered is whether the parties' customers would switch to readily available substitutes ... in response to a hypothetical small (in the range 5 to 10%) but permanent relative price increase in the products and areas being considered'.

88 In recital 193 of the decision, the Commission admits that low-speed and high-speed access indeed present some degree of substitutability. It adds in recital 194, however, that the operation of such substitutability is extremely asymmetrical, the migrations of customers from offers of high-speed to low-speed access being negligible compared with the migrations in the other direction. However, according to the Commission, if the products were perfectly substitutable from the point of view of demand, the rates of migration should be identical or at least comparable.

89 It should be pointed out, in this respect, that, first of all, it is clear from the information gathered by WIN and reproduced in Table 7 of the decision that the migration rates of high-speed subscribers to integral low-speed offers were very low during the period covered, in spite of the difference in price between those services, which should have prompted numerous internet users to turn to low-speed access. This large discrepancy in the rates of migration between low-speed and high-speed access and between high-speed and low-speed access does not lend credence to the argument that those services are interchangeable in the eyes of consumers. In the application, WIN also failed to adduce any evidence to cast doubt on that analysis.

90 Secondly, it transpires that, according to a survey carried out on behalf of the Commission and presented by WIN in an annex to its application, 80% of subscribers would maintain their subscription in response to a price increase in the range 5 to 10%. According to paragraph 17 of the Notice on the definition of the relevant market for the purposes of Community competition law (see paragraph 87

above), this high percentage of subscribers who would not abandon high-speed access in response to a price increase of 5 to 10% provides a strong indication of the absence of demand-side substitution.

91 Consequently, on the basis of all the foregoing, it should be held 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.

(b) Flawed assessment of dominance

Arguments of the parties

92 According to WIN, the Commission was wrong to consider its position to be dominant. Indeed, the Commission's analysis contains serious deficiencies.

93 Market power cannot be assessed on the basis of market shares on an emerging market. Such a market should be looked at from a dynamic perspective, in order to assess not only actual but also potential competition. According to WIN, the number of potential subscribers is very important given the underequipment of French households. WIN considers that it has shown that new players have emerged on the market and that offers, accompanied by lower prices, have proliferated.

94 These facts show the strength of competition on a market free from barriers, on which WIN cannot therefore hold a dominant position.

95 WIN accuses the Commission of failing to take this into account and of only analysing its market share on the high-speed segment of the market between 31 December 2000 and 31 August 2002. However, the fall of more than 10 percentage points in its market share between August 2002 and March 2003 attests to the competitive and evolving nature of the market.

96 In addition, WIN also submits that the fact of belonging to a group with significant financial resources and an extensive distribution network cannot be assessed without looking to the situation of the competitors. However, the Commission did not undertake an in-depth assessment of the situation of AOL, T-Online/Club-Internet and Tiscali, which are 'linked up' with large groups enjoying exceptional financial power as well as having a wide distribution network.

97 Finally, WIN submits that the regrouping of its telephone directory and internet activities cannot be regarded as endowing it with such financial power as to establish its dominance on the French market for high-speed internet access. First, other competitors, such as T-Online, also have that possibility, and, secondly, the Wanadoo group is perfectly able to meet the needs of its ISP activities without turning to the cash generated by publication of the yellow pages directory.

98 The Commission disputes the emerging nature of the market in question during the period investigated. It contends that WIN's market share increased in a sustained

manner during the period at issue. It takes the view that WIN has not challenged any aspect of the analysis contained in the decision of the synergies and advantages accruing to WIN from its technical, logistical and commercial 'link-up' with the France Télécom group.

Findings of the Court

99 As a preliminary point, it is appropriate to observe that, by virtue of settled case-law, a dominant position exists where the undertaking concerned is in a position of economic strength which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers (*Michelin* v *Commission*, cited in paragraph 78 above, paragraph 30, and Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraph 154). It should be noted at the outset that, in order to establish that a dominant position exists, the Commission does not need to demonstrate that an undertaking's competitors will be foreclosed from the market, even in the longer term.

100 Furthermore, although the importance of market shares may vary from one market to another, very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (*Hoffmann-La Roche* v *Commission*, cited in paragraph 80 above, paragraph 41, and Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 134). The Court of Justice held in Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 60, that this was so in the case of a 50% market share.

101 Even the existence of lively competition on a particular market does not rule out the possibility that there is a dominant position on that market, since the predominant

feature of such a position is the ability of the undertaking concerned to act without having to take account of this competition in its market strategy and without for that reason suffering detrimental effects from such behaviour (*Hoffmann-La Roche* v *Commission*, cited in paragraph 80 above, paragraph 70; see also, to that effect, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 108 to 129). Thus, the fact that there may be competition on the market is a relevant factor for the purposes of ascertaining whether a dominant position exists, but it is not in itself a decisive factor in that regard.

102 It should be examined whether, according to those criteria, as the Commission contends, WIN has a dominant position on the market in question.

103 As regards the market shares, it must be stated that, according to Table 8 in the decision, WIN's share of the market for high-speed access reached 50% on 31 March 2001, increased to 72% on 31 March 2002 and remained stable at this level until August 2002. It is clear from the parties' replies to the questions put by the Court that that share subsequently dropped to 63.6% in October 2002 according to WIN and to a figure which the Commission puts at between 63.4 and 71% according to its sources. During the period at issue, WIN therefore had a very high market share which, save in exceptional circumstances, proves that it had a dominant position with the meaning of the case-law cited above.

104 With regard to the fall in market shares between August and October 2002, a decline in market shares which are still very large cannot in itself constitute proof of the absence of a dominant position (see, to that effect, Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission* [1996] ECR II-1201, paragraph 77). Even by proceeding on the basis of the figure put forward by WIN, WIN's market share was still in fact very high at the end of the infringement period.

105 WIN submits, however, that market shares are not a reliable indicator in the context of an emerging market which still has few customers.

106 The Court considers that, according to the information on the market situation set out in recital 218 of the decision and which is not contested by WIN, by March 2001, the starting date of the infringement according to the Commission, the market concerned had certainly gone beyond the launch or experimental phase. In fact, the high-speed access market began its development in France from 1997. WIN's ADSL services and the first offers of its competitors were launched on a commercial basis at the end of 1999. At the end of June 2000, the market for high-speed internet access for residential customers in France already numbered around 100 000 subscribers, and, by the end of 2000, this figure exceeded 180 000. In the first four months of 2001, the market gained more than 5 000 new subscribers per week. By dating the infringement back only to March 2001, as indicated in recital 71 of the decision, because it took the view that the market had until then 'not ... developed sufficiently for a test of predation to be significant', the Commission duly excluded the start-up phase from its analysis.

107 This was admittedly a fast-growing market, but this fact cannot preclude application of the competition rules, in particular Article 82 EC.

108 This fast-growing market did not show signs of marked instability during the period at issue. On the contrary, a rather stable hierarchy was established with WIN at its head.

109 It should be observed in this regard that, in recitals 213 to 215 of the decision, the Commission completes its analysis of WIN's dominant position by comparing the market shares of WIN with those of its competitors during the period at issue.

According to that analysis, which the applicant does not dispute, it transpires that WIN always had more than eight times the number of ADSL subscribers than its number one competitor. According to case-law, the market shares of the undertaking concerned and of its competitors are valid indicia of a dominant position (*Hoffmann-La Roche* v *Commission*, cited in paragraph 80 above, paragraph 48).

110 WIN submits, however, that such a market should be looked at from a dynamic perspective by assessing not only actual but also potential competition.

111 In that regard, it suffices to point out that, according to its own prospective analyses dating from March 2001, WIN would have a share of 55% of the overall market at the end of 2004. In June 2001, WIN itself re-evaluated those forecasts as to the penetration of the market. It then considered that it would hold over three quarters of the ADSL segment at the end of 2004 and at least 60% of the residential high-speed market (recital 220 and footnote 255 of the decision). Such evidence shows that WIN itself considered potential competition to be limited. As a result, the situation of the relevant market does not support the view that the market shares are an unreliable indication.

112 In addition, in the course of its assessment of WIN's position on the market, the Commission also took into account, in recitals 223 to 246 of the decision, the fact that WIN had enjoyed considerable advantages, through its 'link-up' with the France Télécom group, which contributed to its dominant position.

113 In that regard, it must be pointed out that, contrary to what WIN claims, the Commission examined, in recitals 226 to 228 of the decision, the situation of the competitors referred to by WIN, that is, AOL, T-Online and Tiscali. It found in recital 228 that, whatever the ability of the groups in question to support the

investments and commercial initiatives of their French subsidiaries, none of them could claim to provide those subsidiaries with a technical and logistical 'link-up', and a 'link-up' in terms of a commercial network in France, capable of impacting on the market as much as those provided by France Télécom to WIN.

114 First of all, as regards WIN's claim that the competing groups have a wide distribution network, it should be pointed out that, on French territory, the only territory covered by the decision, it was in any event far from being the size of France Télécom's, the incumbent telecommunications operator in France.

115 Of the commercial advantages enjoyed by WIN, which it does not moreover dispute, it is appropriate to mention, above all, the network of France Télécom's shops which distributed WIN's products all over France.

116 Secondly, WIN also does not dispute the technical advantages which, according to the Commission, stemmed from its 'link-up' with France Télécom. The Commission argued, without demur on the part of WIN, that the latter enjoyed preferential treatment for the whole of 2000 and the first seven months of 2001, in the form of a bespoke offer considerably less restrictive than that offered to its competitors and real-time access to files on convertible lines.

117 Those advantages were, moreover, pointed out by the French Conseil de la concurrence (Competition Council) in Decision 02-MC-03 of 27 February 2002 on the referral and application for interim measures lodged by T-Online, which was annexed to the defence. The Conseil de la concurrence ordered France Télécom to make available to all ISPs an extranet server allowing them to access the same information available to WIN and to order from France Télécom's specialised

services the actual ADSL connection and thus benefit from the same degree of efficiency as WIN itself enjoyed. The Conseil de la concurrence ordered France Télécom to suspend the marketing of WIN's ADSL services in its shops until that scheme had been established. As noted in recital 146 of the decision, the decision was upheld by the Cour d'appel de Paris (France) (Paris Court of Appeal) on 9 April 2002.

118 It must be held that the Commission was right to consider that WIN's 'link-up' with France Télécom conferred on it such advantages over its competitors as to contribute to its dominant position.

119 The last piece of evidence presented by the Commission in its assessment of WIN's position on the market in question is that of the benefits accruing to the Wanadoo group from its presence on the market for directories. It contends that the very lucrative activities on that market are such as to lessen considerably the impact on the group of WIN's loss-making sales on the market for high-speed internet access.

120 It should be pointed out in that regard that the Commission's assessment relates to a different market from that of supply of high-speed internet access. On that basis, as WIN argues, the presence of the Wanadoo group on the market for directories does not conclusively confirm WIN's dominant position on the market in question.

121 Accordingly, in the light of all the above considerations, it must be held that the Commission was right to consider WIN to have a dominant position on the market in question during the period covered by the investigation.

2. The abuse of a dominant position

(a) The complaints in relation to the recovery of costs test

122 This part of the dispute concerns the method of calculating the rate of cost recovery and the errors of calculation which the Commission allegedly made in applying it.

Error as to the method of calculating the rate of cost recovery

— Arguments of the parties

123 According to WIN, the Commission erred in law by applying a test for recovery of fixed costs which does not in any way reflect the economic reality of the profitability of WIN's subscribers. In fact, in the case of subscriptions, a part of the costs and all the revenue are spread over a long period of time during which the costs fluctuate. The Commission's methodology, however, in effect adds the acquisition costs to 48 times the amount of the recurrent monthly costs, as they existed at the date of subscription, and compares that total with 48 times the recurring monthly revenues, as they existed at that date, without taking into account the adaptation of recurrent monthly costs over time.

124 As regards the costs to be taken into account, WIN submits that, in order to determine whether the costs are in fact covered, the Commission is under an obligation to look at all the information at its disposal on the date of the decision, provided it recognises the validity of that information. However, all the accepted cost reductions, between entering into a subscription and October 2002, were ignored by the Commission, or, more precisely, the Commission took into account the cost

reduction in respect of subscribers after that date, but not in order to update the recurrent costs of those who subscribed before then. Taking the example of a customer subscribing to its services on 1 June 2001, WIN submits that the Commission attributed to it an initial recurrent cost of EUR 54.39 per month until the end of May 2005 (that is, over 48 months), while that cost no longer corresponds to the actual cost from August 2001 onwards, since, according to Annex 3 to the decision, from that date onwards the cost does not go above EUR 34.72 per month.

125 WIN submitted to the Commission results based on the method of discounted cash flows in order to calculate the discounted net value ('the DNV') of subscribers. That method consists of listing in respect of each subscriber all the costs and revenues generated by that subscriber, of discounting them by applying a discount rate given by the financial markets and adding the discounted cash flows thus obtained. The cost of the product is made up of the acquisition cost initially paid to which is added the recurrent monthly costs. WIN submits that that method, the only reliable one in economic terms, is universally accepted and accords with the economic calculations of investments made by economists and financial operators. That method was applied by the French Conseil de la concurrence and its validity was recognised in the report produced by Oxera for the Office of Fair Trading (United Kingdom). It shows that WIN's full costs — save those relating to March 2001 where the level of recovery is only at 98 or 99% depending on the product — and, a fortiori, its variable costs are covered for the whole of the period.

126 The Commission agrees with WIN on the need to spread out certain costs but not on the method to be applied. For the purposes of assessing the economic equilibrium of WIN's services, it contends that it opted for a dynamic method which takes account of the fact that certain items of variable costs, and in particular those linked to the acquisition of a subscriber, are offset by revenues that the undertaking reckons that it will obtain from that subscriber over the course of the commercial relationship. By spreading the variable non-recurrent costs over 48 months, the

Commission also took into account the duration of the typical lifetime of a subscription which could serve as a point of reference for an undertaking seeking a return on its investment within a reasonable period.

127 In applying its methodology, the Commission claims that it derived all the figures used from information provided by WIN. The figures were therefore established on an ex post basis. No cost heading is fictitious. The Commission states that, in respect of all subscribers, it took full account of the cost reductions at the precise moment when they occurred.

128 The Commission also disputed the correctness of the recourse in the present case to the discounted cash-flows method advocated by WIN. In its view, that method does not allow any conclusion as to predation. WIN also did not in practice use the DNV calculations at the material time in respect of the products in question. The use of the discounted cash-flows method in the present case is also not supported by Community case-law or by the Commission's previous decisions. In any event, the method proposed by the applicant is not the traditional method, since WIN proposes dividing up the various influxes of new customers into 'cohorts' and, in respect of each of them, analysing whether the discounted cash flow is positive over a period of five years. WIN also integrates into its analysis the increase in profitability as a result of the termination of the infringement.

— Findings of the Court

129 As a preliminary point, it should be recalled that, as the choice of method of calculation as to the rate of recovery of costs entails a complex economic assessment on the part of the Commission, the Commission must be afforded a broad discretion

(see, to that effect, Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 34, and the case-law cited). The Court's review must therefore be 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 a misuse of powers.

130 It is clear from the case-law on predatory pricing that, first, prices below average variable costs give grounds for assuming that a pricing practice is eliminatory and that, if the prices are below average total costs but above average variable costs, those prices must be regarded as abusive if they are determined as part of a plan for eliminating a competitor (*AKZO* v *Commission*, cited in paragraph 100 above, paragraphs 71 and 72; Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraphs 148 and 149, upheld by the Court of Justice in Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 41 (together, 'the *Tetra Pak* cases')).

131 In the decision, the Commission presented three different analyses in order to clarify its approach. The first, set out in recitals 73 to 75 of the decision, is an analysis made on a simple accounting basis, integrating instantaneous costs and revenues. According to WIN itself, this analysis is a crude measure of receipts and expenses recorded in its accounts. Both parties agree that this method is inappropriate. Although WIN denies that this first analysis is in any way significant, it does not dispute the figures which were used. Generally, it recognises that 'almost all the data relating to costs comes from [WIN], a limited amount of data comes from France Télécom'.

132 The second analysis, described in recitals 76 to 86 of the decision, concerns the actual recovery of adjusted costs. According to the principle of depreciation of assets, the Commission spread the costs of acquiring customers over 48 months. On that basis, it made a separate assessment of adjusted variable costs and adjusted full costs, stating that the Court of Justice lays down two tests for cost recovery,

depending on whether or not the actions of the dominant firm form part of a plan to eliminate competitors. It is on this analysis that the Commission decision is based.

133 The Commission also made a third supplementary analysis, in recitals 97 to 106 of the decision, as to the recovery of the adjusted costs foreseeable ex ante. Admittedly, as WIN submits in its reply to the questions put by the Court, the third analysis reflects a very different approach, since the Commission does not seek to retrace the costs and actual revenues. However, according to the decision, that analysis only seeks to 'throw further light on the matter and no more'. In fact, the Commission expressly states in recital 72 of the decision that 'only the adjusted costs approach allows any valid conclusions to be drawn'. The Commission therefore used the second method, that of adjusted costs, in finding that the costs were not covered. It is therefore appropriate to verify the lawfulness of this method, but not necessary to rule on the lawfulness of the supplementary analysis as to the recovery of the adjusted costs foreseeable ex ante.

134 It is clear from recitals 73 to 75 of the decision that the application of the accounting method used in *AKZO* v *Commission*, cited in paragraph 100 above, and the *Tetra Pak* cases, cited in paragraph 130 above, which takes into account the costs simply as they appear in the undertaking's accounts, in the present case leads to very low rates of recovery, that is, 30% for the period from January to July 2001 inclusive and 60% for that from August to December 2001 and 83% for January to June 2002 (Table 2 of the decision).

135 However, the Commission considered, in recital 75 of the decision, that in an expanding market, since the cost of acquiring customers forms a substantial portion of expenditure 'the rates of recovery shown in Table 2 [did] not by themselves prove that prices were predatory'.

136 As the Commission states in recital 76 of the decision, it considered that, in the present context, 'the firm's objective was not to produce an instantaneous profit' but 'to achieve a level of recovery of recurrent costs (network costs and production costs) which is sufficient to ensure that the margin between revenue and recurrent costs will, within a reasonable time, also cover the non-recurrent variable costs invested in the commercial development of the particular product'. The Commission therefore decided to adjust the non-recurrent variable costs by spreading them over a certain period in line with the principle of the depreciation of assets.

137 The Commission thus chose to spread the costs of acquiring customers over 48 months, an approach to which WIN subscribed, while stating that the average duration of subscriptions is now rather in the region of five years, four years being the estimated minimum. It should be observed, however, that WIN does not apply such depreciations, the expenditure in question being entered into the accounts as it arises, as ordinary running costs. In addition, in their business plans, some of its competitors spread non-recurrent variable costs over time, but over periods which are shorter than those used by the Commission in this case (recital 79 and footnotes 70 and 71 of the decision). It is thus not apparent that the period chosen over which the costs were spread is incorrect.

138 In applying this method, the Commission took the view that the prices applied by WIN did not enable it to recover its variable costs until August 2001 or its full costs from January 2001 to October 2002 (Tables 3 and 4 of the decision), there being no doubt that, considering the level of recovery of variable costs, the full costs were not recovered by August 2001.

139 It is thus appropriate to assess the method adopted by the Commission in the light of the objective pursued, that is, the test of recovery of costs under Article 82 EC, and in relation to the criticisms levelled by WIN.

140 First of all, it should be stated that, contrary to what WIN has alleged, the Commission did not apply a test of static recovery, which would have been considerably more unfavourable to WIN (see paragraph 134 above).

141 It is clear from the decision (recitals 76 and 77) that, for the purposes of taking into account the fact that, in the case of subscriptions, the costs and revenues generated by subscribers are spread over a long period of time, the Commission decided to spread the costs of acquiring clients over 48 months.

142 In addition, contrary to what WIN asserts, the method does not in effect add the acquisition costs to 48 times the amount of recurrent monthly costs, as they existed at the date of subscription, and compare that total with 48 times the monthly revenues, as they existed on that same date.

143 On the contrary, it is clear from reading the decision and its annexes that the Commission integrated, in respect of each period of infringement investigated and of all subscribers, the successive reductions in tariffs occurring during the period at issue. It even structured its analysis according to those reductions.

144 In fact, the end, namely 31 July 2001, of the first period taken into account by the Commission for the purposes of analysing the adjusted variable costs (Table 3 of the decision) coincides with the reduction in tariffs for national and regional routing of traffic. The second period takes into account that reduction in costs by applying the new tariffs. The end of the second period, namely 15 October 2001, coincides with the start of a period in which activation services, for which France Télécom normally charges suppliers, were offered free of charge. In that case as well, the resulting

reduction in costs was taken into account. Finally, the date dividing the third and fourth periods, 15 February 2002, is marked by the change in pricing for the international 'connectivity' service and the restoration of charges for activation services by France Télécom.

145 Accordingly, contrary to WIN's allegations, it is clear that the various periods used are aimed precisely at taking into account the reduction in costs relied on.

146 In addition, it is clear inter alia from a comparison of Annexes 1, 3, 5 and 7 of the decision, in respect of the eXtense service, and Annexes 2, 4, 6 and 8 of the decision, in respect of Wanadoo ADSL, that for each period the new tariffs and other cost components are not only applied to the subscriptions running from the beginning of the infringement, but are also reflected across the entire accumulated subscriber base.

147 If a comparison is made, for example, between the recurrent variable costs contained in the table concerning the eXtense service attached in Annex 1 to the decision and relating to the period from 8 January to 31 July 2001 with those of the same type contained in Annex 3 covering the period from 1 August to 15 October 2001, it is apparent that from one period to the other the price of national or regional routing of traffic dropped from FRF 151 to 52.43 and the price of the ADSL access service from FRF 185 to 140. Those reductions in prices were indeed taken into account, not only for the subscriptions entered into from the beginning of the infringement period (Table 3.2 of Annex 3 to the decision), but also for the entire accumulated subscriber base (Table 3.1 of that annex).

148 Similarly, it is clear from a comparison of Annexes 2 and 4 to the decision in respect of Wanadoo ADSL's adjusted variable costs that the price of national or regional routing of traffic, in relation to the entire accumulated subscriber base, fell between the first and second period from FRF 151 to 52.

149 In addition, the free activation service for new subscribers to the eXtense service (Table 5.2 of Annex 5 to the decision), from 15 October 2001 onwards, resulted in a reduction in activation charges for the entire accumulated customer base (Table 5.1 of that annex) from EUR 53.40 to 27.16. Conversely, those costs increased to EUR 32.37 (Table 7.1 of Annex 7 to the decision) when the activation charges for new subscribers to the eXtense service were reinstated as from 15 February 2002 (Table 7.2 of that annex).

150 As regards the cost of international 'connectivity', a comparison between Annexes 5 and 7 to the decision in respect of the eXtense service and Annexes 6 and 8 to the decision in respect of Wanadoo ADSL shows that the reduction from EUR 3.19 to 1.62, between the third and fourth periods, impacted not only on the new subscribers but also on the whole accumulated customer base (Table 7.1 of Annex 7 or Table 8.1 of Annex 8 to the decision, depending on the product).

151 The Commission therefore took account of the various changes in pricing in its assessment of the costs.

152 In this regard, it should be pointed out that the Commission was entitled to consider that the revenue and costs applicable after the infringement cannot be relevant for the purposes of assessing the rate of recovery of costs during the period investigated. According to the case-law, Article 82 EC refers to the position occupied by the undertaking concerned on the common market at the time when it acted in a way which is alleged to amount to an abuse (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 450). WIN cannot therefore include in its calculations the prices and costs applicable after October 2002. Therefore, the applicant's claims based on the prices and costs applicable after October 2002 cannot cast doubt on the Commission's assessment.

153 Finally, as regards WIN's argument that only the method of discounted cash flows is relevant to calculating the rates of recovery in the present case, it should be observed that, even though WIN were to prove that the method which it advocates is appropriate in some respects, this would be insufficient to prove that the method used by the Commission in the present case is unlawful. It is for the applicant to prove that unlawfulness. However, the foregoing assessment has shown that the Commission did not commit a manifest error of assessment in choosing that method.

154 To conclude, WIN has not proved that, in using the data recorded in WIN's accounts and correcting it in favour of WIN to take account of the particular context of the market in question, while complying with the requirements for an assessment under Article 82 EC, the Commission applied an unlawful test of recovery of costs in the present case.

155 For the sake of completeness, it must be held, first, that it is not apparent from the case-law that use of the method of discounted cash flows was necessary in the present case, and, secondly, that WIN has not advanced any argument establishing that the Commission committed a manifest error of assessment in this regard.

156 Consequently, the arguments relating to the method of calculating the rate of recovery of costs must be rejected.

Errors of calculation when applying the method used

— Arguments of the parties

157 According to WIN, the Commission erred in its application of its own method of calculation, particularly in its calculations of the fixed and variable costs. The

Commission selected different values to represent the same costs in a way that was systematically detrimental to WIN. It also made arbitrary inferences as to the existence of price differences which were meant to reflect free months of subscription offered to clients. Those errors explain to a great extent the Commission's finding that costs were not recovered. For further arguments relating to the Commission's errors in calculation, WIN refers to one of the annexes to its application.

158 The Commission takes the view that the application itself does not identify the errors in calculation that were allegedly made in the decision, since the references to the annex are of a general nature. That subsidiary plea must therefore be declared inadmissible.

159 In addition, according to the Commission, WIN does not go so far as to claim that correction of those errors would have led to a different result, as the rate of recovery was still below 100%. That plea is therefore, in any event, ineffective.

160 In its reply, WIN stated that as only the detail of the errors of calculation appeared in the annex, the plea, set out in a precise manner in the application, was admissible. In its view, it is not ineffective either. In fact, that plea shows that the rates of recovery of full costs moved from a margin of 90 to 91% to a margin of 98 to 99%. However, the Commission took the view that a rate of recovery of 99.7% did not amount to an infringement.

161 In its reply, WIN disputed the inclusion of advertising in the variable costs and the calculation of the average rates of cost recovery in respect of the two services in question.

— Findings of the Court

162 As a preliminary point, a distinction should be made between the application of the method of determining the rates of recovery of costs and the calculations proper, which are no more than mathematical operations. It is clear from WIN's written submissions that it does not challenge the substance of the arithmetical calculations, but the inclusion of certain erroneous elements.

163 The application of the method of determining the rates of recovery of costs, unlike the calculations themselves, entails a complex economic assessment on the part of the Commission in which it must be afforded a broad discretion (see, to that effect, *Deere* v *Commission*, cited in paragraph 129 above, paragraph 34). The Court's review must therefore be 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 a misuse of powers.

164 Irrespective of the admissibility of this plea, it should be pointed out that, as the Commission contends, even if all the alleged errors are taken into account and proved, the recovery of full costs by WIN remains, according to WIN itself, below 99% or even 98% in respect of the eXtense service. As a result, the objection that the full costs are not recovered over the whole period investigated stands.

165 In that respect, the fact that the Commission, in exercising its discretion, accepted that a rate of recovery of variable costs of 99.7% did not amount to an infringement cannot require it to take the same approach to a rate of recovery of full costs of 98 or 99%, as the case may be. That plea must therefore be rejected as being ineffective.

166 For the sake of completeness, as regards the alleged inadmissibility of that plea, under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance an application must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court of First Instance to decide the case, if appropriate without other information (see the order in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, paragraph 21).

167 It should also be recalled that, even though the body of the application may be supported and supplemented, in regard to specific points, by references to extracts of documents appended thereto, the annexes have a purely evidential and instrumental function (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 34). The annexes cannot therefore serve as a basis for developing a plea set out in summary form in the application by putting forward complaints or arguments which are not contained in that application. The applicant must indicate in its application the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based (Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17, and the order in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20).

168 Therefore, that plea is admissible in so far as the errors are clearly explained in the application, that is, the selection of different values to represent the same costs and the inference of price differences which are supposed to reflect free months of subscription offered to customers. On the other hand, the inclusion of advertising in the variable costs and the calculation of the average of the rates of recovery of costs in respect of the two services assessed, matters which are only referred to and developed in one of the annexes to the application, is not admissible.

169 That plea must therefore be rejected as being inadmissible in part, and, in any event, ineffective, as indicated in paragraph 165.

(b) The complaints relating to the test of predation

170 According to WIN, the Commission's error of law and manifest errors of assessment in applying the test of predation should result in the annulment of the decision finding a breach of Article 82 EC. WIN argues that it had a right to align its prices on those of its competitors, that there was no plan of predation and reduction of competition, and it was necessary to show that its costs were recovered.

WIN's right to align its prices on its competitors' prices

— Arguments of the parties

171 According to WIN, the right of any operator to align its prices in good faith on those previously charged by a competitor is at the very heart of the competitive process. That right is recognised by the Commission itself in its previous decisions, in the case-law of the Court and in the unanimous teachings of academic literature and economic analysis. The fact that the prices charged by competitors correspond to prices which are below cost for the undertaking concerned is of no relevance in this respect.

172 For that reason, in Decision 83/462/EEC of 29 July 1983 relating to a proceeding under Article [82 EC] (IV/30.698 — ECS/AKZO: interim measures (OJ 1983 L 252, p. 13), the Commission itself expressly permitted the dominant undertaking concerned to charge prices below cost for the purpose of aligning those prices, in good faith, on those previously charged by its competitors. The Court of Justice, in

turn, in the appeal against that decision, held precisely that the Commission cannot, as a matter of principle, call into question the right of a dominant undertaking to align its conduct on that of its competitors and thereby clearly laid down this principle.

173 In addition, in its additional findings, the Commission distorted the facts by wrongly disputing WIN's alignment of prices on those of its competitors.

174 The Commission takes the view that, although an undertaking is not strictly speaking prohibited from aligning its prices on those of its competitors, that possibility is not open to it if it involves charging prices below cost in respect of the services in question. In the present case, according to the Commission, since the pricing policy of the dominant undertaking does not enable it to cover its costs, aligning its prices on the promotional prices of another non-dominant operator is not justified. Furthermore, the Commission took the view that WIN's competitors were not in a dominant position and disputed, for the sake of completeness, the accuracy of WIN's claims that its pricing behaviour was no more than an alignment of prices on those of its competitors.

175 According to the Commission, the discussion on alignment is, in any event, futile. The decision in fact does no more than accuse WIN of maintaining its prices after March 2001, at a time when Noos and Mangoosta had increased their prices by more than 20% and thus when this could no longer be a question of alignment. It refers in this regard to recital 331 of the decision.

— Findings of the Court

176 It must be pointed out first of all that the Commission is in no way disputing the right of an operator to align its prices on those previously charged by a competitor.

It states in recital 315 of the decision that '[w]hilst it is true that the dominant operator is not strictly speaking prohibited from aligning its prices on those of competitors, this option is not open to it where it would result in its not recovering the costs of the service in question'.

177 WIN takes the view, however, that the Commission thereby disregards its previous decisions and the case-law of the Court of Justice.

178 In that regard, it should be observed that, in the previous cases relied on by WIN, the conferral on a dominant undertaking of a right to align its conduct was limited. That observation applies both to Decision 83/462 making an order for interim measures and the subsequent judgment of the Court of Justice (*AKZO* v *Commission*, cited in paragraph 100 above, paragraph 134).

179 Indeed, in Decision 83/462, the Commission did not permit AKZO to align its prices generally on those of its competitors but only, in respect of a particular customer, to align its prices on those of another supplier ready and able to supply to that customer. In addition, that authorisation to align prices in very precise circumstances was not contained in the final decision adopted in that case (Commission Decision 85/609/EEC of 14 December 1985 relating to a proceeding under Article [82 EC] (IV/30.698 — ECS/AKZO Chemie); OJ 1985 L 374, p. 1).

180 WIN therefore cannot claim on that basis alone that, in its previous decisions, the Commission recognised the right of a dominant undertaking to align its prices on those of its competitors, even where that leads it to charge prices below cost.

181 In *AKZO* v *Commission*, cited in paragraph 100 above, which is the only example by way of case-law referred to by WIN in support of its argument, the Court of Justice admittedly did not call into question, as a matter of principle, the right of a dominant undertaking to align its conduct. However, having held that the Commission was right to find that there was no competing offer in the particular case, the Court did not have to rule on the lawfulness of an alignment of prices by a dominant undertaking on those of its competitors where such alignment involved pricing below cost.

182 It is therefore not possible to assert that the right of a dominant undertaking to align its prices on those of its competitors is absolute and that it has been recognised as such by the Commission in its previous decisions and in the relevant case-law, in particular where this right would in effect justify the use of predatory pricing otherwise prohibited under the Treaty.

183 In the present case, the Commission takes the view that a dominant undertaking should not be permitted to align its prices where the costs of the service in question would not be recovered by the dominant undertaking.

184 It is therefore appropriate to examine whether that restriction is compatible with Community law.

185 It should be recalled that, according to established case-law, although the fact that an undertaking is in a dominant position cannot deprive it of the right to protect its own commercial interests if they are attacked and such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it (*United Brands* v *Commission*, cited

in paragraph 101 above, paragraph 189; Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 117; and *Compagnie maritime belge transports and Others* v *Commission*, cited in paragraph 104 above, paragraph 146).

186 The specific obligations imposed on undertakings in a dominant position have been confirmed by the case-law on a number of occasions. The Court stated in Case T-111/96 *ITT Promedia* v *Commission* [1998] ECR II-2937, paragraph 139, that it follows from the nature of the obligations imposed by Article 82 EC that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings.

187 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.

Absence of a plan of predation and reduction in competition

— Arguments of the parties

188 According to WIN, predation presupposes a significant reduction in competition. In its view, if there is no possibility of ousting competitors, or, at the very least, of hindering or restraining their conduct, a strategy of predation can in no way be considered to be rational. Therefore, by sanctioning WIN even though it recognised

that its market share fell significantly during the period of the alleged infringement and that competition at the end of the period covered was healthy, the Commission committed a serious infringement of Article 82 EC. WIN could not possibly drive its competitors out of the market by maintaining prices that were too low. In addition, since the barriers to entry in this sector are low, it is particularly irrational to seek to oust competitors in a market segment of this type, as this would mean, even if there was foreclosure, having to face possible entry at every moment, which would remove any possible interest in ousting competitors.

189 The Commission committed a serious error of assessment in accusing WIN of driving Mangoosta out of the market. That undertaking in fact went bankrupt not because of WIN's pricing but only as a result of a particularly risky strategic policy on its part.

190 Furthermore, WIN disputes the fact that the Commission attributes the slow progress of certain competitors to the fact that they were unable to align their prices on those of WIN. The Commission did not take account of the desire of WIN's competitors to concentrate on the development of low-speed access, to the detriment of ADSL, which was not considered to be viable.

191 The Commission also committed a manifest error of assessment by considering to be predatory prices which were perfectly rational in the context of robust competition, which contributed to the development of the market and are the reason for the robust competition which exists today. Consumers, in any event, never suffered because they had the benefit of low prices.

192 Finally, according to WIN, the strategy which it adopted can in no way be regarded as indicating any predatory intention. The Commission simply pointed to various

aspects designed to prove WIN's supposed intention to eliminate its competitors, but failed to produce any actual plan of predation. The essence of the Commission's argument relating to the alleged predatory intention is based on an arbitrary and biased selection of internal documents found at WIN's premises.

193 The Commission considers in turn that demonstrating the specific effects of WIN's predatory pricing is not decisive for the purposes of finding the infringement in question. It contends that Article 82 EC must be applied where there is a risk of eliminating competition, without having to wait for the object of driving out competition to be achieved.

194 As regards the plan of predation, the Commission argues that it is clear from the case-law that intent can be presumed where prices are lower than average variable costs and must be proved on the basis of sound and coherent evidence where prices are below average total costs but above average variable costs. The Commission considers that it set out in its decision sound evidence proving that the undertaking had deliberately engaged in a strategy of 'pre-empting' the market and restraining competition.

— Findings of the Court

195 As regards the conditions for the application of Article 82 EC and the distinction between the object and effect of the abuse, it should be pointed out that, for the purposes of applying that article, showing an anti-competitive object and an anti-competitive effect may, in some cases, be one and the same thing. If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect. Thus,

with regard to the practices concerning prices, the Court of Justice held in *AKZO* v *Commission*, cited in paragraph 100 above, that prices below average variable costs applied by an undertaking in a dominant position are regarded as abusive in themselves because the only interest which the undertaking may have in applying such prices is that of eliminating competitors, and that prices below average total costs but above average variable costs are abusive if they are determined as part of a plan for eliminating a competitor. In that case, the Court did not require any demonstration of the actual effects of the practices in question (see, to that effect, Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraphs 241 and 242).

196 Furthermore, it should be added that, where an undertaking in a dominant position actually implements a practice whose object is to oust a competitor, the fact that the result hoped for is not achieved is not sufficient to prevent that being an abuse of a dominant position within the meaning of Article 82 EC (*Compagnie maritime belge transports and Others* v *Commission*, cited in paragraph 104 above, paragraph 149, and Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 191).

197 It is clear therefore that, in the case of predatory pricing, the first element of the abuse applied by the dominant undertaking comprises non-recovery of costs. In the case of non-recovery of variable costs, the second element, that is, predatory intent, is presumed, whereas, in relation to prices below average full costs, the existence of a plan to eliminate competition must be proved. According to Case T-83/91 *Tetra Pak* v *Commission*, cited in paragraph 130 above, paragraph 151, that intention to eliminate competition must be established on the basis of sound and consistent evidence.

198 In the present case, the Commission established that WIN had a dominant position, and, in Article 1 of the decision, found that it was unable to cover its variable costs until August 2001 or to recover its full costs from that date until October 2002. In

respect of the period in which WIN did not recover its full costs, the Commission was therefore required, in order to establish the infringement, to provide sound evidence of the existence of a strategy of 'pre-emption' of the market.

199 In recital 110, the decision refers to a number of documents, relating to the whole period at issue, which attest to the existence of WIN's strategy of 'pre-emption' for the high-speed market, in particular:

— a document dating from July 2000 expressing the following objective for the second quarter of 2000 and for 2001: 'pre-empting the ADSL market with an all-inclusive offer [plus] package and accelerating investments for 2001, but with a negative impact on the balance sheet';

— an electronic mail of July 2000 relating to a discussion on the appropriate level of prices stating: 'we will have difficulty in pre-empting this market if our prices are too high';

— the framework letter for 2001 containing the following wording: 'our pre-emption of the ADSL market is imperative';

— a presentation dated 28 February 2001 on the subject of a 'pre-emption campaign in the high-speed domain by [WIN]';

— the strategic plan for 2002 to 2004 reiterating the robust development of high-speed access for the period from 2001 to 2003 and the objective of 'pre-empting a market considered to generate value'.

200 In addition, WIN's documents prove that it was seeking to acquire and then hold onto very significant market shares. The framework letter for 2001 states, for example, that '70% ... 80% of the ADSL market should accrue to [WIN]'. A presentation by the CEO of WIN to the board of France Télécom dated June 2001 refers to a market share of 80% over the entire period 2001 to 2004 in the segment of '"dissociated" offers, like Wanadoo ADSL' and a market share increasing by an average of 50% in 2001 to 72% in 2004 in the segment of '"packaged" offers, like eXtense'.

201 It is true that WIN disputed the scope of those documents and, in particular, the significance of the term 'pre-emption' which they contain. According to WIN, such informal and spontaneous, even unconsidered words, are merely a reflection of the dialectics of the decision-making process. They bind only their authors and not the undertaking.

202 It should be pointed out, however, that those words come from management-level staff within the undertaking and that some of them were expressed in the context of formal presentations for the purpose of taking a decision or of a very detailed framework letter. Their spontaneous and unconsidered nature thus appears to be questionable.

203 In addition, in its application and above all in certain annexes to its application, WIN submitted that the majority of allegedly incriminating documents and statements were taken out of context and that the Commission knowingly failed to take into account a number of exculpatory statements.

204 It must be stated that, in its application, WIN merely argued that the Commission uses a number of extracts of internal documents that it fails to put in their proper context. Such a vague assertion does not enable the defendant to prepare his defence

and the Court to give a ruling, if appropriate, without other information in support (*Koelman* v *Commission*, cited in paragraph 166 above, paragraph 21). To allow the annexes to provide the detail of an argument which is not presented in a sufficiently clear and precise manner in the application would be contrary to their purely evidential and instrumental function.

205 It is therefore appropriate to reject WIN's complaint that supposedly inculpatory documents were taken into account out of context and that a number of exculpatory statements were not taken into account.

206 For the sake of completeness, it should be pointed out that, even by placing the phrase 'we will have difficulty in pre-empting this market if our prices are too high' in context, that is, by preceding it with the words 'we have gone in too high on the price' and following it with the words 'our competitors will price below us', the notion of an intention to eliminate competition is still present.

207 Similarly, it is not possible to read the phrase 'our pre-emption of the ADSL market is imperative' as meaning anything other than an intention to 'pre-empt', even if it is put in the context suggested by WIN of widespread competition. The fact that the statement referred to by the Commission is followed by the statement that 'the introduction of competition on the ADSL market will trigger a wave of price reductions by Netissimo (at retail and wholesale level) from the beginning of 2001' and 'the fixing of pricing conditions for unbundling of the local loop [will] also doubtlessly contribute to the lowering of ADSL prices' does not weaken WIN's declared imperative to 'pre-empt' the market.

208 The phrase '70% ... 80% of the ADSL market should accrue to [WIN]' is not in fact disputed. WIN merely asserts that no mention is made of a possible recourse to low

prices and that there is therefore no link between the prices set and WIN's objectives as regards market share. However, the fact that nothing is mentioned as to the way in which the 70 to 80% share of the ADSL market will be obtained does not detract from the objective pursued.

209 In any event, those statements, which are contained in internal company documents, are an indication of the existence of a plan of predation and reinforced by other evidence.

210 According to recital 279 et seq. of the decision, the intention of restraining competition is also apparent from the fact that WIN knew that its non-profitable pricing strategy combined with high sales volumes was not economically sustainable for its competitors.

211 In an electronic mail to the CEO of WIN, dated end of April 2001 (recital 279 of the decision and footnote 319), the person in charge of ADSL services refers to the competitors which either do not sign up to the offer of service support from France Télécom or are 'on their way out'.

212 WIN also knew that the impossibility of matching its retail prices without suffering losses prevented AOL's entry on the high-speed market. Indeed, an electronic mail from France Télécom to WIN's director of strategic marketing dated 29 June 2001 attaches a statement from the CEO of AOL France, worded as follows (footnote 321 of the decision):

'[I]n the days when we were owned by Cégétel, we launched an offer with Monaco Telecom and had 500 subscribers. We did not launch in France as France Télécom's

ADSL retail offer is not a money-maker for us. Technically, we are ready, but we are not in the business of losing money.'

213 It is also clear from a document entitled 'Note of analysis — Telecoms — Particular issues of internet regulation in France' of 20 July 2001 that WIN had analysed in detail the advantages which it enjoyed as market leader (recital 280 and footnote 322 of the decision). It is apparent from that document that a competitor with less traffic than WIN would enjoy margins on the network costs several points lower than those envisaged for WIN.

214 It is clear from the foregoing that the announcement by WIN in 2001, and at the beginning of 2002, of its rather ambitious commercial objectives, which a non-dominant undertaking could have difficulty in achieving in the unfavourable profit-margin conditions at that time, had the effect of discouraging rival undertakings. This stemmed from WIN's objective of eliminating competition.

215 On the basis of all the foregoing considerations, it must be held that the Commission furnished solid and consistent evidence as to the existence of a plan of predation for the entire infringement period. The logic which that strategy follows is clear from a note of WIN's strategic management of December 2001 stating:

'The high-speed and ADSL market will, for the next few years, continue to be conquest-driven, the strategic objective being to gain a dominant position in terms of market share, the period of profitability only coming later.'

216 In accordance with *AKZO* v *Commission*, cited in paragraph 100 above, and the *Tetra Pak* cases, cited in paragraph 130 above, the Commission therefore established the two elements required in order to prove predatory pricing below average full costs by a dominant undertaking.

217 The arguments advanced by WIN as to the economies of scale and learning effects in order to justify its pricing below cost are not such as to call into question the finding made by the Court. An undertaking which charges predatory prices may enjoy economies of scale and learning effects on account of increased production precisely because of such pricing. The economies of scale and learning effects cannot therefore exempt that undertaking from liability under Article 82 EC.

218 It follows that the complaint based on the absence of a predation plan cannot be upheld.

Recoupment of losses

— Arguments of the parties

219 WIN submits that the recoupment of losses is entirely separate from the test of predation and the Commission must provide evidence of it. It takes the view that, if an undertaking in a dominant position cannot reasonably expect to reduce long-term competition with a view to recouping its losses, in particular because it is easy to enter the market in question, it is not rational for that undertaking to engage in a

policy of predatory pricing. In that situation, the policy of low prices applied by the undertaking must be explained otherwise than by a strategy of predation.

220 According to WIN, that view is supported by all the economic and legal literature as well as by a number of courts and competition authorities, including those of the United States and several Member States of the European Union. The need to prove this has never been ruled out under Community case-law.

221 However, the conditions of competition on the market for high-speed internet access are completely different from those on which the Court of First Instance and the Court of Justice have had to rule in previous cases on predation. The barriers to entry on this market are low, growth is robust, the competitive situation is not frozen and there are numerous actual and potential new entrants. The Commission thus seriously errs in law in maintaining that it is not necessary to prove recoupment of losses.

222 Furthermore, according to WIN, the Commission committed a further manifest error of assessment, coupled with an error of law, by considering that it had furnished evidence of a possibility to recoup losses.

223 The Commission contends that proof of recoupment of losses is not a precondition to making a finding of predatory pricing contrary to Article 82 EC. It considers that the case-law is clear on this point. In the alternative, the Commission points out that the recoupment of losses in the present case is made plausible by the structure of the market and the related revenues which thus can be expected in the future.

— Findings of the Court

224 In *AKZO* v *Commission*, cited in paragraph 100 above, paragraphs 71 and 72, the Court of Justice sanctioned the existence of two different methods of analysis for determining whether an undertaking has applied predatory pricing. First, prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking. Secondly, prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate can be shown (Case C-333/94 P *Tetra Pak* v *Commission*, cited in paragraph 130 above, paragraph 41).

225 In Case C-333/94 P *Tetra Pak* v *Commission*, cited in paragraph 130 above, paragraphs 42 and 43, the Court of Justice held that in the judgment under appeal the Court of First Instance had applied the same reasoning, reasoning which the Court of Justice endorsed. The Court of Justice explained that:

'42 For sales of non-aseptic cartons in Italy between 1976 and 1981, [the Court of First Instance] found that prices were considerably lower than average variable costs. Proof of intention to eliminate competitors was therefore not necessary. In 1982, prices for those cartons lay between average variable costs and average total costs. For that reason, in paragraph 151 of its judgment, the Court of First Instance was at pains to establish — and the appellant has not criticised it in that regard — that Tetra Pak intended to eliminate a competitor.

43 The Court of First Instance was also right, at paragraphs 189 to 191 of the judgment under appeal, to apply exactly the same reasoning to sales of non-aseptic machines in the United Kingdom between 1981 and 1984.'

226 In relation to the recoupment of losses, the Court of Justice added, in paragraph 44 of that judgment:

'[I]t would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalise predatory pricing whenever there is a risk that competitors will be eliminated. The Court of First Instance found, at paragraphs 151 and 191 of its judgment, that there was such a risk in this case. The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors.'

227 In line with Community case-law, the Commission was therefore able to regard as abusive prices below average variable costs. In that case, the eliminatory nature of such pricing is presumed (see, to that effect, Case T-83/91 *Tetra Pak* v *Commission*, cited in paragraph 130 above, paragraph 148). In relation to full costs, the Commission had also to provide evidence that WIN's predatory pricing formed part of a plan to 'pre-empt' the market. In the two situations, it was not necessary to establish in addition proof that WIN had a realistic chance of recouping its losses.

228 The Commission was therefore right to take the view that proof of recoupment of losses was not a precondition to making a finding of predatory pricing.

229 On the other hand, according to the *Tetra Pak* cases, cited in paragraph 130 above, and *AKZO* v *Commission*, cited in paragraph 100 above, it must be examined whether, where prices are lower than full costs but higher than variable costs, they

form part of a plan to eliminate competition. However, in paragraph 215 above, the Court of First Instance came to the conclusion that the Commission furnished solid and consistent evidence as to the existence of a plan of predation for the entire infringement period.

230 It is therefore appropriate to reject all the pleas in law advanced in support of the application for annulment of the decision.

II — *The alternative claims for the cancellation or reduction of the fine*

231 In the alternative, WIN disputes the amount of the fine which was imposed on it and requests that that penalty be cancelled or reduced very substantially. In support of its claims, it alleges breach of the principles that penalties must be specific to the offender and that they must have a proper legal basis, that the practices in question had no effect, that the determination of the duration of the infringement was wrong and that there was a breach of the principle of proportionality.

A — *Breach of the principles that penalties must be specific to the offender and have a proper legal basis*

1. Breach of the principle that penalties must be specific to the offender

(a) Arguments of the parties

232 According to WIN, by basing its findings on the conduct of France Télécom in order to penalise WIN, the Commission infringed the principle that penalties must be

specific to the offender. First, the Commission admitted that it was action on the part of France Télécom that brought the infringement to an end. Secondly, the Commission took into account the conduct of France Télécom in assessing whether the infringement allegedly committed by WIN was intentional.

233 The Commission rejects that plea in essence by referring to its reply to the same plea advanced by WIN in its main claim for annulment. The Commission adds that WIN's intention to foreclose the market is fully substantiated by the undertaking's internal documents, the occasional references to France Télécom being in no way decisive.

(b) Findings of the Court

234 This plea in law is to a large extent very similar to that relied on by WIN in its main claim for annulment. It is therefore appropriate to refer to paragraphs 66 to 71 above.

235 In addition, determining the end of WIN's infringement as the date on which the prices charged by France Télécom were reduced does not mean that the Commission penalised WIN on the basis of France Télécom's conduct. The infringement in question is very clearly attributed to WIN and not France Télécom. WIN could have ceased the infringement itself before France Télécom took action and in the absence of such action. The fact that the end to the infringement was not the result of WIN's conduct does not in any way detract from the infringement. The infringement is directly linked to the level of costs. As certain costs are derived directly from the prices fixed by the suppliers, the end of the infringement can in certain cases be the logical result of the conduct of those suppliers.

236 The Court must therefore reject the argument alleging breach of the principle that penalties must be specific to the offender.

2. Breach of the principle that penalties must have a proper legal basis

(a) Arguments of the parties

237 According to WIN, the decision penalised it on the basis of two new legal rules. First, the question of alignment entailed a complete reversal by the Commission of its previous practice. Secondly, the Commission applied a test of predation that was unprecedented and unpredictable.

238 There is no precedent for predatory pricing on an emerging market. The Commission applied for the first time the method of calculation used in this case by defining it in the course of the procedure. According to the method adopted by a number of national competition authorities, WIN takes the view that it could legitimately consider its prices not to be predatory.

239 The Commission in turn argues that Article 82 EC and Article 15(2) of Regulation No 17 constitute the only legal bases for the imposition of the fine in the present case and that there is nothing novel about those provisions. It relies on established case-law that its previous practice does not by itself serve as a legal framework for imposing fines in the field of competition.

240 The Commission adds, for the sake of completeness, that predatory pricing has already been classed as an infringement of Article 82 EC in the case-law.

(b) Findings of the Court

241 WIN cannot claim that the conduct penalised did not constitute an infringement at the time when it was committed. Any abuse by an undertaking of its dominant position within the common market or on a substantial part of it falls within Article 82 EC.

242 It is settled case-law that the list of abusive practices contained in Article 82 EC is not an exhaustive enumeration of the abuses of a dominant position prohibited by the Treaty (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 26, and Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraph 112).

243 Furthermore, predatory pricing has already been classed as an infringement of Article 82 EC. It was sanctioned by the Commission and gave rise to *AKZO* v *Commission*, cited in paragraph 100 above, and the *Tetra Pak* cases, cited in paragraph 130 above, in which a test of predation was applied based on the distinction between variable costs and full costs, as was applied in the present case.

244 However, in the present case, the Commission adapted that test by spreading the costs of acquiring customers, in a way that was favourable to WIN, so as to take account of the features of the market in question.

245 In that regard, it must be pointed out that the application of the method used in those cases could, in any event, have enabled WIN to foresee that it might incur liability under Article 82 EC. WIN cannot rely on the fact that an adjustment to the method, which was favourable to it, was unforeseeable.

246 It also does not follow from the Commission's previous practice or from the case-law that WIN could legitimately expect that its right to align its prices on its competitors would be accepted in the circumstances of the present case (see paragraphs 176 to 187 above) or that the method of discounted cash flows would be applied (see paragraphs 153 and 156 above) or that the margins after the end of the infringement would be taken into account (see paragraph 152 above). The market was also no longer in a start-up phase during the period investigated (see paragraph 106 above).

247 WIN, however, relies on Commission Decision 2001/354/EC of 20 March 2001 relating to a proceeding under Article 82 [EC] (Case COMP/35.141 — Deutsche Post AG) (OJ 2001 L 125, p. 27, recital 47), in which the Commission did not seek to impose a fine in respect of non-recovery of incremental costs, because the relevant measure of cost recovery that a 'multi-product' or 'multi-service' operator benefiting from a reserved area had to meet in competitive activities had not been clarified previously.

248 In that case, the complainant alleged that Deutsche Post AG was using revenue from the profitable letter-post monopoly in its reserved area to finance below-cost sales in the commercial parcel services sector with a view to driving out competitors in that sector. In its decision, the Commission penalised Deutsche Post's granting of fidelity rebates and imposed on it a fine of EUR 24 million. However, the fine was not imposed in respect of the parcel services provided at below incremental costs.

249 It should be pointed out that the Deutsche Post case exhibited very particular characteristics. The undertaking was engaged in activities which, depending on the circumstances, related to its monopoly based on its public interest tasks or were open to competition. That case thereby raised the problem of defining the relevant measure of cost recovery for an operator benefiting from a reserved area and likely to cover its losses in another sector open to competition with the aid of the profits made in that area. In such a context, the undertaking in question could be uncertain as to the rules to be applied. However, the situation of WIN, which only operated on a competitive market, cannot be compared to that of Deutsche Post and in that regard is more akin to that of AKZO and Tetra Pak.

250 In addition, it should be noted that, although a fine was not imposed on that ground, Decision 2001/354 finds, in Article 2, that Deutsche Post infringed Article 82 EC by supplying mail-order parcel services at prices below the incremental costs of providing those services. Since that decision was delivered on 20 March 2001 and published in the Official Journal on 5 May 2001, WIN should have known at the time of the infringement at issue — March 2000 to October 2002 — that such action constituted an infringement. It will also be noted that, in the present case, it was WIN itself that disputed the use of incremental costs and, in its reply to the supplementary statement of objections, welcomed the fact that the Commission had abandoned that method. WIN is therefore not now in a position to criticise the Commission for making this change.

251 Finally, even if — despite the fact that predatory pricing is not a novel infringement — the particular features of the market for high-speed internet access are to be taken into account, the Commission's decision not to impose a fine in a previous decision because of the relatively novel nature of the infringements found does not grant immunity to undertakings committing infringements which have not previously been penalised by the Commission. The Commission exercises its discretion in the

specific context of each case when assessing whether it is appropriate to impose a fine in order to sanction the infringement found and to protect the effectiveness of competition law (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 239).

252 Consequently, the Commission did not infringe the principle that penalties must have a proper legal basis.

B — *Absence of effects of the conduct in question*

1. Arguments of the parties

253 According to WIN, the Commission was not able to provide evidence that WIN's alleged conduct in any way affected the market. The amount of the fine which was imposed on it should therefore be reduced for this reason as well.

254 WIN submits that the Commission itself contends in its decision that WIN's market share will remain at around 50%, while it reached 72% in October 2002, the date on which the infringement ended, being a reduction of one third in only nine months. This suffices to show that the market structures were not affected on a sustained basis by WIN's alleged anti-competitive conduct.

255 In addition, even during the period at issue, competition on the market for internet access was very healthy. In September 2002, there were over 70 retail offers. New

ISPs entered the market, while the prices of offers fell under the influence of competitors. The development of competition was not hindered and the disappearance of Mangoosta is not attributable to WIN.

256 WIN takes the view in this regard that the Commission's contention that WIN's alleged conduct profoundly affected the structure of the market is no more than a presumption unsupported by any specific fact illustrating the actual difficulties experienced by WIN's competitors.

257 The Commission disputes the data provided by WIN, contending that they relate either to the entire supply of internet access, both high-speed and low-speed, or the particular segment of the supply of high-speed ADSL internet access, depending on what suits WIN's arguments best.

258 The Commission contends that a comparison of the increase in sales of the various players on the market in the course of 2001 until autumn 2002 clearly shows that WIN's strategy enabled it to contain competition and strengthen its position. For example, there were no new significant entries on the market during the period at issue.

2. Findings of the Court

259 In accordance with 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), in assessing the gravity of the infringement, account must be taken of its

nature, its actual impact on the market and the size of the relevant geographic market.

260 WIN has denied that the infringement in question impacted on the market. However, various elements indicate the contrary.

261 First of all, WIN's market share on the high-speed market first increased from 50 to 72% (recital 400 and Table 8 of the decision) between the start of the infringement and August 2002, even though, according to the data provided by WIN in its response to the written questions from the Court, it subsequently fell to 63.6% in October 2002. Furthermore, the closest competitor to WIN had a market share of 8%, the other competitors all having below 2.5% (recital 376 of the decision). It is clear from Table 9 of the decision, not disputed by WIN, that over the entire period WIN increased the gap between it and its nearest competitor very significantly.

262 Secondly, one competitor, Mangoosta, disappeared from the market (recital 400 of the decision). WIN takes the view that Mangoosta's bankruptcy is in no way due to WIN's pricing but due only to Mangoosta's very risky strategic policy. However, it should be pointed out that having launched its products at a price slightly higher than WIN's, Mangoosta made such losses that it finally raised its prices by 20% in March 2001, which did not prevent it being placed in administration on 2 August 2001 (recital 384 of the decision). The disappearance of a very marginal competitor charging prices below cost but slightly above WIN's at the very least constitutes evidence in this case of the difficulty of penetrating the market.

263 Thirdly, during the period covered, a significant decline in the market shares of the competing cable operators was recorded (Table 14 of the decision), while the competitors in the ADSL segment maintained very low levels of penetration. WIN

does not dispute the decline in the cable operators' market shares, arguing that this is not due to its pricing policy but to the development of ADSL to the detriment of cable. It should be pointed out, however, that in September 2001 WIN regarded the cable operators as the only genuine competitors on the market for high-speed internet access (footnote 444 of the decision) and that the ADSL segment was a 'market at the end of 2001 dominated by [it] but not very active overall'.

264 Fourthly, WIN's conduct had a deterrent effect on the ability of competitors to enter the market and to develop. Several of them in fact confirmed that they were unable to align their prices on those of WIN, given the costs involved, without incurring losses (see recital 379 and footnote 451 of the decision). The number of new entries on the market was also marginal. WIN referred to the cases of Dixinet and Net pratique. However, at the end of August 2002, Dixinet only had 10 subscribers to its ADSL and telephony services, while Net pratique, which did not launch its service until the summer of 2002, that is, at the end of the infringement, had no more than 1 400 subscribers six months later.

265 In that regard, WIN's argument attributing the slow progress of certain competitors to a strategic choice and the desire to concentrate on the low-speed segment to the detriment of ADSL, which was regarded as not being viable, is not convincing. Even if certain competitors may have doubted, at the outset, the development of high-speed access, it cannot be presumed that they persisted in this belief in the face of the significant growth of this market. The action brought by T-Online, which supplied internet access under the name Club-Internet, before the French competition authority would seem rather to indicate the contrary. Similarly, the statement of the CEO of AOL France, referred to in paragraph 212 above, leads to the assumption that the reason for that undertaking's absence from the high-speed market was at that time linked to the losses which it suffered because of WIN's large-scale supply rather than its desire to confine its activities to the low-speed segment.

266 As regards WIN's argument that consumers were not harmed by its pricing but, on the contrary, benefited from it, it should be recalled that the Court of Justice has

held that Article 82 EC is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure (*Europemballage and Continental Can* v *Commission*, cited in paragraph 242 above, paragraph 26).

267 The Court must therefore reject this plea alleging that the conduct in question had no impact.

C — *Duration of the infringement wrongly determined*

1. Arguments of the parties

268 WIN argues, first, that the end of the infringement of which it is accused is, according to the Commission, due to the reduction in prices applied by France Télécom on 15 October 2002. However, France Télécom announced the reduction with effect from April 2002, the application of that measure having been delayed by the tariff rebalancing by the Autorité de régulation des télécommunications ('ART') (the French telecommunications regulator). WIN could thus not in any event be held liable for the infringement after March 2002, so that the duration of the infringement can be no more than 13 months.

269 Secondly, the duration of the infringement found in the decision was longer than that referred to in the statements of objections. The Court should therefore hold that the duration of the infringement for which WIN can be held liable is a maximum of 17 months and reduce the fine accordingly.

270 The Commission's answer to the latter argument is that the statements of objections cannot be read as restricting the duration of the infringement when the infringement was still ongoing.

271 As regards the argument based on France Télécom's delay in reducing its prices owing to the process of tariff rebalancing ordered by ART, the Commission takes the view that this argument cannot be relied on.

2. Findings of the Court

272 In relation to the alleged extension of the duration of the infringement as compared to the statements of objections, reference should be made to paragraphs 49 to 52 above, from which it is clear that that argument should be rejected.

273 In relation to France Télécom's announcement that it would reduce its wholesale tariffs with effect from April 2002, it should be pointed out that the infringement did not come to an end on that date but when the reduction in tariffs actually took effect. France Télécom's reduction in tariffs led, mechanically, to a reduction in costs. WIN's prices ceased to be below its full costs and the infringement came to an end. WIN could have brought the infringement to an end at any time without waiting for France Télécom to lower its tariffs, for example by raising its own prices or reducing other cost items. It did not, however, take any measure to this effect.

274 It follows from this that the Court should not reduce the amount of the fine imposed in the light of the duration of the alleged infringement.

D — *Breach of the principle of proportionality*

1. Arguments of the parties

275 In the first place, WIN submits that when setting the amount of the fine, no account was taken of its cooperation and openness. Secondly, it criticises the fact that the Commission ignored the gradual end to the infringement both when setting the basic amount of the fine and in relation to the mitigating circumstances. The scale of the infringement was reduced as from August 2001 on account of France Télécom's reduction in wholesale tariffs, even before the latter was informed of the Commission's investigation. France Télécom's willingness to resolve as quickly as possible the problem identified by the Commission was unstinting.

276 The Commission considers that there are no mitigating or aggravating circumstances in the present case.

2. Findings of the Court

277 First, in relation to the supposed cooperation, according to established case-law, cooperation in the investigation which does not go beyond that which undertakings are already obliged to provide under Article 11(4) and (5) of Regulation No 17 does not warrant a reduction in the fine (see, to that effect, Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342, and Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, paragraph 283).

278 In recital 412 of the decision, the Commission refers to the fact that WIN sought to rely on its openness and full cooperation in the course of that proceeding as mitigating circumstances. The Commission notes however 'that the undertaking merely complied in a normal manner with its obligations under Regulation No 17 with regard to the provision of information to the Commission'.

279 In its application, WIN submits that the Commission failed to take account of the fact that it cooperated fully in the proceeding and that it conducted itself entirely openly. WIN goes on to state that it was on its invitation that the Commission visited its premises and took copies of documents relating to costs and the development of its commercial offers. Neither its application nor its reply contains any further details on that cooperation.

280 It must be stated that WIN has not presented any evidence such as to invalidate the argument that it was merely complying with its obligations under Regulation No 17. WIN fails to establish, in particular, that it invited the Commission to its premises before the investigation was opened. In fact, the Commission contends, in its defence, that the applicant cannot infer a mitigating circumstance from the fact that the Commission merely carried out its onsite investigation on the basis of Article 14(2) of Regulation No 17 'by making an appointment with the undertaking to visit its premises'.

281 In the alternative, even if it were the case, the fact that it invited the Commission itself to visit its premises without waiting for the Commission to order investigations by way of a decision does not suffice to establish such close cooperation as to be able to warrant taking this into account for the purposes of mitigating circumstances. Article 14 of Regulation No 17 provides that, in carrying out the duties assigned to it by Article 81 EC, the Commission may undertake all necessary investigations into undertakings. Its authorised officials may enter any premises and take copies of business records. The Commission's investigations may be conducted on the basis of a simple authorisation (Article 14(2)) or ordered by decision (Article 14(3)). The fact

that the Commission did not order a decision in this case does not in itself mean that 'effective cooperation by the undertaking in the proceedings' existed within the meaning of 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.

282 Secondly, in relation to WIN's argument that the infringement was gradually being brought to an end, it should be pointed out, first of all, that WIN did not itself take any measure to that effect. It cannot excuse itself by relying on efforts made by France Télécom. Secondly, even if steps taken by France Télécom might have had a positive impact on the market before the end of the infringement, those steps cannot change the classification of the infringement committed by WIN, by making it less serious. WIN's predatory pricing on the market in question constitutes a serious infringement of the competition rules. The fact that the intensity of certain abusive components may have varied over the period in question cannot change that classification (see, to that effect *Michelin* v *Commission*, cited in paragraph 195 above, paragraph 278).

283 It follows from the foregoing that WIN's plea based on breach of the principle of proportionality must be rejected, so that the claims for the cancellation or reduction of the fine must be rejected.

284 On the basis of all the preceding considerations, the Court must dismiss the action.

Costs

285 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Vilaras Martins Ribeiro Dehousse

Šváby Jürimäe

Delivered in open court in Luxembourg on 30 January 2007.

E. Coulon M. Vilaras

Registrar President

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