Case T-340/03

France Télécom SA

v

Commission of the European Communities

(Competition – Abuse of a dominant position – Market for services in high-speed internet access — Predatory pricing)

Summary of the Judgment

1. *Competition — Administrative procedure — Statement of objections — Necessary content*

2. *Procedure — Application initiating proceedings — Formal requirements*
   (Statute of the Court of Justice, Art. 21, first para.; Rules of Procedure of the Court of First Instance, Art. 44(1))

3. *Competition — Administrative procedure — Decision establishing an infringement — Obligation to state the reasons on which the decision is based — Scope*
   (Art. 82 EC)

4. *Competition — Fines — Principle of the individualisation of sanctions*

5. *Competition — Dominant position — Relevant market — Delimitation*
(Art. 82 EC)

6. *Competition — Dominant position — Holding of a very large market share an indicator*
(Art. 82 EC)

7. *Competition — Dominant position — Abuse — Below cost pricing with the aim of eliminating a competitor*
(Art. 82 EC)

8. *Competition — Dominant position — Abuse — Below cost pricing with the aim of eliminating a competitor*
(Art. 82 EC)

9. *Competition — Dominant position — Obligations on the dominant undertaking*
(Art. 82 EC)

10. *Competition — Fines*
(Council Regulation No 17, Art. 15(2))

11. *Competition — Fines — Amount — Determination — Criteria — Actual market impact*
(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03)

12. *Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine in return for the cooperation of the undertaking concerned*
(Art. 81 EC; Council Regulation No 17, Arts 11(4) and (5) and 14(2) and (3); Commission Notice 98/C 9/03)

1. 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. 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 state-

ment of objections. 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.

Such a requirement is satisfied where 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, and where, if the decision is considerably more precise in relation to recovery of costs, the information was introduced in the supplementary statement of objections.

(see paras 18, 25-27, 36)

2. It is not for the Court to search through, and identify from, the annexes to the application the information on which the application could be based.

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.

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, since the annexes have a purely evidential and instrumental function. 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.

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.

(see paras 30, 166, 167, 204)

3. In adopting a decision on the application of Article 82 EC, the Commission has fulfilled its obligation to state reasons, where the decision sets out the facts forming the legal basis of that measure and the considerations which led it to adopt it.

(see para. 57)

4. 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.

The fact that a decision finding that an undertaking has infringed Article 82 EC and imposing a fine on it refers to the conduct of another undertaking does not contravene that principle where the conduct is not used as an objection as regards the undertaking subject to the penalty but is only taken into account to describe the context of the market in question.

(see paras 66, 68, 70, 71)

5. 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 competi-

tion 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.

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.

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.

It is also apparent from the Commission Notice on the definition of the relevant market for the purposes of Community competition law 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'. 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.

Thus, as regards the internet access sector, since there is not a mere difference in comfort or quality between high- and low-speed access, in addition to the differences in use, features and performances, and since there is a significant price differential between the two, and, while low-speed and high-speed access indeed present some degree of substitutability, 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, the Commission is right to find that a sufficient degree of substitutability between high-speed and

low-speed access does not exist and to define the market to be taken into account in order to assess the existence of a dominant position as that of high-speed internet access for residential customers.

(see paras 78-82, 85-88, 91)

6. 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; 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.

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. This is so, for example, in the case of a 50% market share.

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. 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.

The fall in market shares during the period at issue does not rule out the existence of a dominant position either, since a decline in market shares which are still very large cannot in itself constitute proof of the absence of a dominant position.

The fact that there is a fast-growing market also cannot preclude application of the competition rules, in particular Article 82 EC, especially where the undertaking in question has always held

a market share much greater than that of its number one competitor, which is a valid indicium of a dominant position, and where it itself considers potential competition to be limited.

The fact that the undertaking in question has enjoyed considerable advantages over its competitors, through its 'link-up' with the group to which it belongs, may be such as to contribute to its dominant position.

(see paras 129, 162, 163)

(see paras 99-101, 103, 104, 107, 109, 111, 112, 118)

7. For the purpose of determining whether, through the rates of recovery of costs, there is an abuse of a dominant position resulting from predatory pricing, 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.

Since the choice of method of calculation as to the rate of recovery of costs, unlike the calculations themselves, entails a complex economic assessment on the part of the Commission, the Commission must be afforded a broad discretion. 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.

8. For the purpose of the application of Article 82 EC, 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, there are two methods of analysis for determining whether an undertaking has applied predatory pricing. 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 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. No demonstration of the actual effects of the practices in question is required.

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.

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. That intention to eliminate competition must be established on the basis of sound and consistent evidence.

In that regard, 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. 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.

Moreover, where prices are below average variable costs or where prices are below average total costs but above average variable costs, it is not necessary to establish in addition proof that the undertaking in question had a realistic chance of recouping its losses.

Finally, 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.

(see paras 130, 152, 195-197, 217, 224, 227, 229)

9. It is 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. 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.

(see para. 251)

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.

(see paras 182, 185, 186)

10. The Commission's decision not to impose a fine in a particular case 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.

11. 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, 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.

As regards the latter factor, the undertaking concerned cannot deny that the infringement of which it is accused had an actual impact on the market where its share of the market in question increased from when the infringement began and never went back to its initial level, where that market share stays well

above that of its closest competitor, where one of its very marginal competitors charging prices below cost but slightly above those charged by the undertaking concerned has disappeared from the market, where its competitors maintained very low levels of penetration, and finally, where the undertaking's conduct had a deterrent effect on the ability of competitors to enter the market and to develop.

(see paras 259-264)

12. 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.

The fact that an undertaking accused of an infringement 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 adopt a decision 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.

(see paras 277, 281)