

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

8 March 2007\*

In Case T-339/04,

**France Télécom SA**, formerly Wanadoo SA, established in Paris (France),  
represented by H. Calvet and M.-C. Rameau, lawyers,

applicant,

v

**Commission of the European Communities**, represented by É. Gippini Fournier  
and O. Beynet, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision C(2004) 1929 of 18 May 2004, in Case COMP/C-1/38.916, ordering France Télécom SA and all undertakings directly or indirectly controlled by it, including Wanadoo SA, and all undertakings directly or indirectly controlled by Wanadoo SA, to submit to an inspection under

\* Language of the case: French.

Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81[EC] and 82 [EC] (OJ 2003 L 1, p. 1),

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of H. Legal, President, I. Wiszniewska-Białecka and E. Moavero Milanesi,  
Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 8 June 2006,

gives the following

## **Judgment**

### **Legal background**

- <sup>1</sup> Article 11(1) and (6) (entitled ‘Cooperation between the Commission and the competition authorities of the Member States’) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) provides as follows:

‘The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

...

The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 [EC] and 82 [EC]. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.’

- 2 Article 20 of Regulation No 1/2003 (entitled ‘The Commission’s powers of inspection’) provides as follows:

‘1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

- (a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

- (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
  
- (c) to take or obtain in any form copies of or extracts from such books or records;
  
- (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
  
- (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject-matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject-matter and purpose of the inspection, appoint the date on which it is to

begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject-matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 [EC] and 82 [EC], as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned.

However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.'

- 3 Article 22(2) of Regulation No 1/2003 (entitled 'Investigations by competition authorities of Member States') provides as follows:

'At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.'

### **Facts of the dispute**

- 4 In a decision of 16 July 2003 relating to a proceeding under Article 82 [EC] (Case COMP/38.233 — Wanadoo Interactive) ('the decision of 16 July 2003'), the Commission found that between March 2001 and October 2002 Wanadoo Interactive, at that time a 99.9% subsidiary of Wanadoo SA, itself a subsidiary of

France Télécom SA, which held between 70 and 72.2% of its capital during the period covered by that decision, had abused its dominant position on the market for high-speed internet access services provided to residential customers by employing predatory pricing practices for its eXtense and Wanadoo ADSL services, and imposed a fine of EUR 10.35 million on Wanadoo Interactive.

- 5 In Articles 2 and 3 of that decision, the Commission also ordered Wanadoo Interactive:
- in the context of its eXtense and Wanadoo ADSL services, to refrain from any behaviour having an object or effect identical or similar to that of the infringement;
  - to forward to the Commission, at the end of each year up to and including 2006, the revenue account for its different ADSL (Asymmetric Digital Subscriber Line) services, showing its accrued income, operating costs and customer acquisition costs.
- 6 On 11 December 2003, following a favourable opinion by the French telecommunications regulatory authority, the French Minister for the Economy, Finances and Industry approved a reduction in the wholesale rates charged by France Télécom for access to and reception of IP/ADSL, also referred to as 'Option 5'. Several internet service providers, including Wanadoo, decided to pass on that reduction in their wholesale rates in their retail offers.

- 7 On 12 December 2003, Wanadoo announced an initial reduction in its retail prices, available to both existing and new subscribers, for its high-speed services ('eXtense 512k' unlimited, 'eXtense 512k Fidélité' unlimited, 'eXtense 1024k' unlimited and 'eXtense 1024k Fidélité' unlimited), taking effect on 6 January 2004. The price of its 'eXtense 128k' unlimited offer remained unchanged.
- 8 On 9 January 2004, the Commission sent a letter to Wanadoo, reminding it of the terms of Article 2 of the decision of 16 July 2003 and requesting it to state whether, since the adoption of that decision, it had reduced its retail prices for the services covered by that decision or whether it was envisaging doing so. The Commission indicated that, in the event of a positive reply, it would send Wanadoo a formal request for information on the particulars of such price reductions. The Commission also asked to be informed of the date of the end of Wanadoo's financial year and of when the information required under Article 3 of the decision of 16 July 2003 would be communicated to it. The Commission reiterated its request in an e-mail of 26 January 2004.
- 9 On 12 January 2004, AOL France SNC and AOL Europe Services SARL (hereinafter together referred to as 'AOL') lodged a complaint with the French Competition Council ('the Competition Council') concerning predatory pricing practices by Wanadoo in regard to the four new offers announced by Wanadoo on 12 December 2003, under Article 82 EC and Article L 420-2 of the French commercial code. That complaint was accompanied by an application for interim measures seeking, in particular, suspension of the marketing of those offers under Article L 464-1 of the French commercial code.
- 10 On 29 January 2004, Wanadoo announced the introduction, with effect from 3 February 2004, of an 'eXtense 128k Fidélité' unlimited offer and four flat-rate (or optional) offers, namely 'eXtense 128k/20h', 'eXtense 128k/20h Fidélité', 'eXtense 512k/5Go' and 'eXtense 512k/5Go Fidélité'.



- 11 By letter of 30 January 2004, Wanadoo stated, in reply to the Commission's letter of 9 January 2004, that, following the reduction in France Télécom's wholesale prices, it had announced new offers applicable with effect from 1 January or 1 February 2004. In addition, by letter of 15 March 2004, Wanadoo communicated to the Commission the accounts for the 2003 financial year (ending on 31 December 2003), which had not yet been approved by the general meeting of shareholders.
- 12 On 24 February 2004, AOL supplemented its complaint to the Competition Council with the offers launched by Wanadoo on 3 February 2004 and in that connection likewise applied for interim measures suspending their marketing.
- 13 On 11 May 2004, the Competition Council issued its Decision No 04-D-17 concerning the complaint and the application for interim measures submitted by AOL. In that decision, it rejected the application and referred the complaint for investigation ('the decision of the Competition Council').
- 14 On 18 May 2004, the Commission adopted Decision C(2004) 1929, in Case COMP/C-1/38.916, ordering France Télécom and all undertakings directly or indirectly controlled by it, including Wanadoo, and all undertakings directly or indirectly controlled by Wanadoo, to submit to an inspection under Article 20(4) of Regulation No 1/2003 ('the contested decision').
- 15 That decision states, in the 1st and 5th to 13th recitals in its preamble:

'The Commission ... has received information indicating that Wanadoo is charging rates for ADSL internet access aimed at the French public of which some do not

cover variable costs and others are below total costs. According to the information available, those rates form part of a plan indicating an intention to eliminate competitors. Moreover, the information received indicates that the reduced financial margin between the retail tariffs concerned and France Télécom's wholesale prices ... (Option 5) gives rise to a margin squeeze vis-à-vis competing operators wishing to offer high-speed internet access to residential users on the basis of France Télécom's Option 5.

...

According to the information available to the Commission, an analysis based on provisional data shows that at least three [of the 10 offers referred to in the contested decision mentioned in paragraphs 7 and 10 above] (the two 128 kbit/s optional offers and the 512 kbit/s 24-month optional offer) do not cover variable costs. At least two other offers at 512 kbit/s (the optional 12-month offer and the 24-month unlimited offer) do not cover total costs.

The Commission has also received information indicating that the offers concerned form part of a strategy of containing and driving off competitors.

In addition, according to the information available to the Commission, in spite of the January 2004 decrease in the Option 5 tariffs, the financial margin between Wanadoo's new retail tariffs and Option 5 is insufficient and prevents competitors who base their offer on Option 5 from competing with Wanadoo under equitable conditions.

In its decision ... of 16 July 2003, the Commission found that Wanadoo occupied a dominant position on the French market for high-speed internet access for residential customers. The information available to the Commission indicates that that finding remains valid today.

The below-cost offers applied by Wanadoo and the reduced margin between those offers and the Option 5 tariffs very probably constrained the entry of competitors — whether French or established in the other Member States — onto the market and threatened those already present. According to the information available, most of Wanadoo's competitors had to align themselves with the new offer and the entire ADSL market in France is currently loss making.

The kinds of practice described above amount to the imposition of unfair sales prices. If proved, such practices would constitute an abuse of a dominant position and therefore an infringement of Article 82 [EC].

In order to be able to assess all the relevant facts relating to the alleged practices and the context of the alleged abuse, the Commission has to undertake inspections under Article 20(4) of Regulation No 1/2003.

According to the information available to the Commission, it is very probable that all the information relating to the abovementioned practices, in particular the information establishing the extent of cover of costs and that relating to the strategy of containing and driving off competitors, was communicated only to some members of France Télécom and/or Wanadoo staff. The documentation that exists with regard to the alleged practices is very probably limited to the absolute minimum and held in places and in a form enabling it to be concealed, retained or destroyed in the event of an investigation.

In order to guarantee the effectiveness of this inspection it is therefore essential that it be conducted without the addressees of this [d]ecision gaining prior knowledge hereof. A [d]ecision must therefore be adopted under Article 20(4) of Regulation No 1/2003 ordering the undertakings to submit to an inspection.'

16 Article 1 of the contested decision provides as follows:

'France Télécom ... and Wanadoo ...:

are required to submit to an inspection relating to the alleged imposition of unfair sales prices in the field of high-speed internet access for residential customers contrary to Article 82 [EC], with intent to contain and drive off competitors. The inspection may be carried out in any of the undertakings' premises ...

France Télécom ... and Wanadoo ... shall permit the officials and other persons accompanying them authorised by the Commission to conduct the inspection, and the officials of the competent authority of the relevant Member State, and such officials as are authorised or appointed by it, to have access to all their premises, land and means of transport during normal office hours. The undertakings shall produce the books and other records related to the business requested by such officials and other persons irrespective of the medium on which they are stored, and shall permit them to examine such books and other records related to the business on the spot and to take or obtain copies or extracts therefrom in any form. They shall immediately, on the spot, provide any oral explanation requested by the officials and other persons on facts or documentation relating to the subject-matter or purpose of the inspection and shall permit any representative or member of staff to provide such explanations. They shall permit [such] officials and other persons to record such explanations in any form.'

- 17 Finally, the contested decision states in Article 2 the date on which the inspection is to begin. At the end, it lists the circumstances in which the Commission may impose fines and penalties on any addressee thereof pursuant to Articles 23 and 24 of Regulation No 1/2003, and states that, where an addressee opposes an inspection which has been ordered, the Member State concerned is to afford the officials and other persons accompanying them authorised by the Commission the necessary assistance to enable them to conduct the inspection pursuant to Article 20(6) of Regulation No 1/2003. The decision also mentions the possibility of bringing an action against the decision before the Court of First Instance and contains certain excerpts from Regulation No 1/2003 in an annex.
- 18 On the basis of that decision, the Commission applied to the French authorities for assistance under Article 20(5) of Regulation No 1/2003. By an application for an investigation of 25 May 2004, the French Minister for the Economy, Finances and Industry instructed the director of the National Directorate for Competition, Consumer and Fraud Prevention Investigations to take all steps necessary for conducting the investigation described by the Commission in the contested decision. To that end, the director applied to the *juge des libertés et de la détention* of the Tribunal de grande instance (Regional Court), Nanterre ('the *juge des libertés*') for authorisation to conduct or arrange to be conducted an inspection of France Télécom and Wanadoo and to assist the Commission. That application was accompanied by the contested decision.
- 19 By order of 27 May 2004, the *juge des libertés* gave the authorisation sought, inter alia allowing the French investigators appointed to exercise their powers under Articles L 450-4 and L 470-6 of the French commercial code.
- 20 The contested decision was served on Wanadoo on 2 June 2004, immediately before the inspection, which was completed during the day on 4 June 2004.

## **Procedure and forms of order sought**

- 21 By a document lodged at the Registry of the Court of First Instance on 10 August 2004, Wanadoo brought this action.
- 22 On 1 September 2004, Wanadoo merged with its parent company, France Télécom, to which the applicant's rights were transferred.
- 23 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure.
- 24 The parties presented oral argument and answered the questions put to them orally by the Court at the hearing on 8 June 2006.
- 25 The applicant claims that the Court should:
- annul the contested decision;
  - order the Commission to pay the costs.
- 26 The Commission contends that the Court should:
- dismiss the application;

— order the applicant to pay the costs.

## Law

<sup>27</sup> In support of its application, the applicant submits five pleas in law: infringement of Article 10 EC and of Regulation No 1/2003; infringement of the Commission's duty to examine carefully and impartially all the relevant aspects of the case; inadequate statement of reasons; infringement of the principle of proportionality; and manifest error of assessment.

*First plea: infringement of Article 10 EC and of Regulation No 1/2003*

First part: infringement of the obligation to cooperate in good faith with the national courts

— Arguments of the parties

<sup>28</sup> The applicant contends that, according to the case-law, Article 10 EC imposes on the Community institutions reciprocal duties of cooperation in good faith with the Member States, in particular the national judicial authorities. Regulation No 1/2003 must be read in the light of that article.

- 29 By virtue of that duty to cooperate in good faith, the Commission must make sure that the national authority responsible for ensuring that the coercive measures sought are not arbitrary or disproportionate in relation to the subject-matter of the investigation ordered has everything it needs to exercise its supervisory powers. According to Case C-94/00 *Roquette Frères* [2002] ECR I-9011, the Commission must thus notify the competent national court of the essential features of the suspected infringement.
- 30 In this case, the Commission infringed the duty to cooperate in good faith in various ways, which must render the contested decision void.
- 31 Firstly, the Commission concealed from the *juge des libertés* the decision of the Competition Council of 11 May 2004, the proceedings pending before that Council and the orders made in the decision of 16 July 2003. In doing so, the Commission did not properly inform the national judicial authority of the nature and gravity of the suspected infringement.
- 32 Secondly, the contested decision conceals the analysis made by the Competition Council, which, by stating that the suspected infringement was unlikely, is unfavourable to the Commission's position. In particular, the dismissal of the application for interim measures is based not on lack of urgency but on the fact that the pricing practices in question did not jeopardise the applicant's competitors.
- 33 Thirdly, the Commission referred to an intention on the part of the applicant to conceal documents, even though there was nothing to suggest this, and also failed to inform the *juge des libertés* that it did not need to carry out an inspection or to enlist the assistance of the national authorities to gather the information that enabled it to adopt the decision of 16 July 2003.



34 If the *juge des libertés* had had that information, his assessment of whether the coercive measures sought were arbitrary or disproportionate would have been different. Nor, moreover, would he have asked the Commission for supplementary information, because he would have been confident that it was acting in good faith.

35 Finally, the applicant claims that it only submitted to the inspection because the order of the *juge des libertés* had been served on it. In any event, the legality of the contested decision must be assessed only by reference to the factual and legal information in existence at the time of its adoption.

36 In the first place, the Commission replies that the applicant's arguments are inoperative.

37 The Commission submits that the fact that no mention was made of the decision of the Competition Council is not relevant, since the applicant agreed to submit to the inspection decision, which was mandatory in itself, there being no requirement under Article 20(6) of Regulation No 1/2003 for the Commission to request the help of the national authorities. The order of the *juge des libertés* therefore made no difference. Moreover, it was the latter order that the applicant should have challenged if it considered that the *juge des libertés* did not have enough information to take his decision.

38 Furthermore, even on the assumption that the *juge des libertés* did not have sufficient information to be able to review the proportionality of the planned coercive measures, the legality of the contested decision would not be affected. All that he could have done then would have been to refuse the coercive measures sought.

- 39 In the second place, the duty to cooperate in good faith under Article 10 EC cannot be relied on autonomously by an individual to secure the annulment of an act, unless the alleged infringement of that article involves an infringement of another rule of Community law. In that regard, a general reference to Regulation No 1/2003 is insufficient.
- 40 In the third place, the Commission claims that it in any event provided the *juge des libertés* with all the information necessary for him to ensure that the coercive measures sought were not arbitrary or disproportionate in relation to the object of the inspection. The Commission points out that the national court does not have jurisdiction to control the necessity or the merits of an inspection, the division of work within the European competition network or the potential effects of the pricing practices of the undertaking concerned on the market in question.
- 41 Therefore, neither the proceedings before the Competition Council nor that Council's decision were necessary or helpful to the *juge des libertés* to enable him to exercise his supervisory powers. Accordingly, the applicant's arguments run counter to Article 20(8) of Regulation No 1/2003. The Commission says that the decision of 16 July 2003 was mentioned in the contested decision and that it was for the national court, if it deemed it necessary, to request further information from the Commission.
- 42 In the alternative, the Commission adds that the decision of the Competition Council supports the conclusion that there were sufficient grounds for undertaking an inspection and that the dismissal of the application for interim measures is irrelevant because it does not relate to the substance but to the lack of urgency.
- 43 The contested decision thus contains such particulars as are necessary and helpful to enable the national court to exercise its supervisory authority: the decision shows, in a properly substantiated manner, that the Commission had in its file indicia

providing reasonable grounds for suspecting infringements of the competition rules and describes the essential characteristics of the alleged infringement, what was being sought and the information to be verified, in accordance with the case-law.

44 In the fourth place, the argument that there was no intention to conceal is not relevant.

45 The Commission concludes that, by this first part, the applicant is attempting to obtain a result that amounts to annulment of the order of the *juge des libertés*, and that it ought therefore to be dismissed.

#### — Findings of the Court

46 It must first of all be noted that, contrary to the Commission's contention, it is clear from the applicant's arguments that the applicant is not relying on an autonomous infringement of Article 10 EC, and therefore the principle of cooperation in good faith, but that it is relying on the infringement of Article 10 EC in conjunction with an infringement of Regulation No 1/2003.

47 In that regard, the Court points out that the methods for implementing the obligation of cooperation in good faith which flows from Article 10 EC and is binding on the Commission in its relations with the Member States (Case 230/81 *Luxembourg v Parliament* [1983] ECR 255, paragraph 37, and order in Case C-2/88 *Imm Zwartveld and Others* [1990] ECR I-3365, paragraph 17) have, with regard to the relations established in the context of inspections carried out by the Commission to uncover infringements of Articles 81 EC and 82 EC, been defined in

Article 20 of Regulation No 1/2003, which sets out the procedures by which the Commission, the national competition authorities and the national judicial authorities are to cooperate where the Commission has decided to carry out an inspection in the context of that regulation.

48 So, Article 20 of Regulation No 1/2003 authorises the Commission to conduct inspections either on production of a written authorisation, in accordance with Article 20(3), or on the basis of a decision requiring the undertakings to submit to an inspection, in accordance with Article 20(4). Where the Commission carries out an inspection under Article 20(3), it is required by that provision, in good time before the inspection, to give notice of the inspection to the competition authority of the Member State in whose territory the inspection is to be conducted. Where the Commission carries out an inspection under Article 20(4), that provision requires it to consult the competition authority of the Member State in whose territory the inspection is to be conducted before adopting the decision ordering the inspection.

49 According to Article 20(6) of Regulation No 1/2003, the assistance of the national authorities is necessary to conduct the inspection where the undertaking to be inspected opposes it, and where that assistance requires authorisation from a judicial authority, such authorisation is to be applied for, in accordance with Article 20(7). By virtue of Article 20(8), the national judicial authority is then required to control that the Commission decision ordering the inspection is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject-matter of the inspection; the lawfulness of the Commission's decision is, however, subject to review only by the Community Courts.

50 It follows that Article 20 of Regulation No 1/2003 establishes a clear distinction between, in particular, decisions adopted by the Commission under Article 20(4) on the one hand, and a request to the national judicial authority for assistance under Article 20(7) on the other.

- 51 Although the Community Courts alone have jurisdiction to review the legality of a decision adopted by the Commission under Article 20(4) of Regulation No 1/2003, as is clear, in particular, from Article 20(8) in fine, it is, conversely, solely for the national court whose authorisation to employ coercive measures is sought under Article 20(7) of Regulation No 1/2003, possibly assisted by the Court of Justice in the context of a reference for preliminary ruling, and subject to any national remedies, to determine whether the information sent by the Commission in the context of that application enables it to carry out its supervisory function under Article 20(8) of Regulation No 1/2003, and so properly to determine the application presented to it (see, in this respect, with regard to Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ), English Special Edition 1959-1962, p. 87), *Roquette Frères*, cited in paragraph 29 above, paragraphs 39, 67 and 68).
- 52 A national judicial authority to which application is made under Article 20(7) of Regulation No 1/2003 has, under Article 20(8) and the case-law (see, in regard to Regulation No 17, *Roquette Frères*, cited in paragraph 29 above), a right to require further details from the Commission, inter alia, of the grounds on which the Commission suspects an infringement of Articles 81 EC and 82 EC, the gravity of the suspected infringement and the nature of the involvement of the undertaking concerned. A review by the Court of First Instance, which could theoretically give rise to a finding that the information provided by the Commission to the authority was insufficient, would require the Court of First Instance to re-evaluate the assessment already made by that authority of the adequacy of the information. Such a review cannot be accepted because the assessment made by the national judicial authority is subject to review only under such internal remedies as may be available in respect of the decisions of that authority.
- 53 The arguments raised by the applicant in support of its first plea must therefore be rejected in their entirety, since, by challenging the content of the contested decision, they require the Court of First Instance to review the assessment made by the *juge des libertés*, in the context of Article 20(8) of Regulation No 1/2003, as to whether

the information presented to him by the Commission to obtain the authorisation sought under Article 20(7) of the regulation was sufficient. The Court of First Instance does not have jurisdiction to review the way in which a national court to which application is made in the context of Article 20(7) discharges the task conferred on it by Article 20(8).

54 Furthermore, it must be borne in mind that the legality of an act must be assessed by reference to the law and facts at the time when the act was adopted (Joined Cases 15/76 and 16/76 *France v Commission* [1979] ECR 321, paragraph 7, and Case T-384/02 *Valenzuela Marzo v Commission* [2004] ECR-SC I-A-235 and II-1035, paragraph 98). Accordingly, the use to which a decision ordering an inspection is put, or the assessment by the national judicial authority of the information in the decision in the context of an application by the Commission under Article 20(7) of Regulation No 1/2003, has no bearing on the legality of the decision ordering the inspection.

55 In the context of this plea, therefore, it is purely in the light of the information required by Article 20(4) of Regulation No 1/2003, as interpreted by the case-law, that the Court must determine whether the applicant's arguments alleging a failure by the Commission to fulfil its obligation to cooperate in good faith are well founded.

56 In that regard, Article 20(4) of Regulation No 1/2003 defines the essential material that must be included in a decision ordering an inspection, requiring the Commission to specify the subject-matter and purpose of the inspection, the date on which it is to begin, the penalties provided for in Articles 23 and 24 of that regulation and the right to have the decision reviewed by the Community Courts.

57 The purpose of the statement of reasons for decisions ordering an inspection is thus to show that the operation carried out on the premises of the undertakings concerned is justified, but also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding their rights of defence (see, in relation to Regulation No 17, Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, paragraph 29, and *Roquette Frères*, cited in paragraph 29 above, paragraph 47).

58 The requirement for the Commission to specify the subject-matter and purpose of the inspection therefore constitutes a basic guarantee of the rights of defence of the undertakings concerned and consequently the scope of the duty to give reasons for decisions ordering inspections cannot be limited by reference to considerations relating to the effectiveness of the investigation. In that connection, whilst it is true that the Commission is not required to communicate to the addressee of such a decision all the information at its disposal concerning the presumed infringements, or to delimit precisely the relevant market, or to set out the exact legal nature of the presumed infringements, or to indicate the period during which those infringements were committed, it must none the less state as precisely as possible the presumed facts which it intends to investigate, namely what it is looking for and the matters to which the investigation must relate (see, in relation to Regulation No 17, Case 85/87 *Dow Benelux v Commission* [1989] ECR 3137, paragraph 10; *Hoechst v Commission*, cited in paragraph 57 above, paragraph 41, and *Roquette Frères*, cited in paragraph 29 above, paragraph 48).

59 To that end, the Commission is also required to state in a decision ordering an inspection the essential features of the suspected infringement by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement of the undertaking concerned, the evidence sought and the matters to which the investigation must relate as well as the powers conferred on the Community investigators (see, in regard to Regulation No 17, Case 136/79 *National Panasonic v Commission* [1980] ECR 2033, paragraph 26, and *Roquette Frères*, cited in paragraph 29 above, paragraphs 81, 83 and 99).

- 60 In order to establish that the inspection is justified, the Commission is required to show, in a properly substantiated manner, in the decision ordering the inspection that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement of which the undertaking subject to inspection is suspected (see, in relation to Regulation No 17, *Roquette Frères*, cited in paragraph 29 above, paragraphs 55, 61 and 99).
- 61 It cannot but be noted that in this case, although the contested decision, which is reproduced in paragraphs 15 to 17 above, is couched in general terms, it none the less contains the essential elements required by Article 20(4) of Regulation No 1/2003 and the case-law. It states the subject-matter and the purpose of the inspection, showing the essential features of the suspected infringement, identifying the market thought to be affected (high-speed internet access for residential customers in France), the nature of the restrictions on competition suspected of the applicant (pricing practices alleged to be contrary to Article 82 EC), the supposed degree of involvement of the applicant (the applicant is the originator of the infringement), what was being sought and the matters to which the investigation was to relate (information relating to these practices, in particular information on the extent to which the applicant's costs were covered and on a strategy of containing and driving off competitors, which may only have been communicated to some members of staff of France Télécom and/or the applicant, to be sought at any of the undertaking's premises, in its books and other documents related to the business and possibly orally), the powers conferred on the Community investigators, the date on which the inspection was to start (2 June 2004), the penalties provided for in Articles 23 and 24 of Regulation No 1/2003, and the possibility of bringing an action opposing the inspection before the Court of First Instance.
- 62 As to whether the inspection was justified, the contested decision states in a properly substantiated manner that the Commission had in its file information and evidence providing reasonable grounds for suspecting infringements of the competition rules by the applicant. Thus, the Commission mentions, inter alia, that it has received information stating that the applicant is charging the general public in France ADSL internet access prices, of which some do not cover variable



costs and others are below total costs, as part of a plan indicating an intention to eliminate competitors and which might constitute an infringement of Article 82 EC. In addition, it states that an analysis based on provisional data effectively demonstrated that certain of the applicant's offerings identified in the contested decision did not cover either variable costs or total costs.

63 Contrary to the applicant's contention, neither the proceedings pending before the Competition Council, nor the decision of the Competition Council, nor yet the orders in the decision of 16 July 2003 support the view that the inspection ordered in this case was not justified.

64 Although the Competition Council states in its decision of 11 May 2004 that 'neither the sector nor the undertakings that comprise it appear to have suffered serious and immediate damage as a result of Wanadoo's pricing practices', as the applicant pointed out, that council none the less considers that 'the possibility that certain pricing practices employed by Wanadoo fall within the scope ... of Article 82 [EC] if they affect a substantial part of national territory cannot be ruled out'. The Competition Council also noted in its decision that the applicant was in a dominant position on the market in question; that certain theories as to revenue advanced by the applicant seemed 'not very likely'; that for the 'eXtense 128k/20h Fidélité' and 'eXtense 512k/5Go Fidélité' offers, it seemed that the applicant had sold at below its variable costs, which, according to the decision, creates a strong presumption of predatory behaviour under the Community case-law; and that, in certain circumstances, the 'eXtense 128k/20h', 'eXtense 512k/5Go Fidélité' and 'eXtense 512k Fidélité' offers could not cover total costs.

65 The fact that the decision refused to grant the interim measures sought is irrelevant because the Competition Council justified its refusal on the basis that there was no serious or immediate damage to the sector or undertakings in the sector or any immediate damage to the consumer, in other words, on the basis that there was no urgency, and not on the ground that the application brought before it was manifestly unfounded.

- 66 In addition, it appears from the contested decision that, despite the orders contained in the decision of 16 July 2003, the Commission had received information indicating that the applicant was probably not complying with them. Furthermore, the applicant does not show that the genuine information and evidence set out by the Commission in the contested decision could not justify the inspection. It has therefore not been established that the inspection was unjustified.
- 67 Finally, it is common ground that the applicant was aware of the proceedings pending before the Competition Council, of the decision of the Competition Council and of the orders contained in the decision of 16 July 2003. Therefore, the fact that that information was not mentioned in the contested decision could not have adversely affected the rights of the defence or prevented the applicant from assessing the scope of its duty to cooperate with the Commission during the inspection.
- 68 In the light of all of the foregoing, the Court finds that the Commission's obligations under Article 20(4) of Regulation No 1/2003 were complied with and that the first part of the first plea cannot therefore be upheld.

Second part: infringement of the division of powers and the duty to cooperate in good faith with the national competition authorities under Regulation No 1/2003

— Arguments of the parties

- 69 The applicant argues that the Commission infringed the division of powers established by Regulation No 1/2003 and its implementing provisions and failed to fulfil its duty of cooperation in good faith with the national competition authorities under Article 11(1) of Regulation No 1/2003 and Article 10 EC.

70 Regulation No 1/2003 decentralised Community competition law, on the basis of the principle of subsidiarity referred to in Regulation No 1/2003 on the one hand, and of the principle of cooperation between the authorities responsible for the application of Community competition law on the other. To that end, Regulation No 1/2003 established a European competition network and a system of competences and cooperation between the members of that network. The principle of cooperation is mentioned, *inter alia*, in Article 11(1) of Regulation No 1/2003, in the Commission's notice on cooperation within the network of competition authorities (OJ 2004 C 101, p. 43; 'the Notice') and in the joint statement of the Council and the Commission of 10 December 2002 on the functioning of the network of competition authorities (declaration recorded in the minutes of the meeting of the Council concerning the adoption of Regulation No 1/2003, document No 15435/02 ADD 1; 'the Joint Statement').

71 On the basis of those two principles, the Commission set out in the Notice the rules for allocating cases between members of the network. Those rules were infringed by the contested decision. First of all, under the Notice, the Competition Council is the authority which is well placed to act in the case and the Commission is not better placed. Therefore, the inspection cannot lead to the Competition Council being relieved of the case and it being reallocated to the Commission, and the inspection ordered is therefore not lawful. Secondly, direct intervention by the Commission is unjustified because the Competition Council possesses inspection powers and the Commission could have requested it to use them. Thirdly, even if the contested decision were to be regarded as lawful, the Commission should have applied Article 22(2) of Regulation No 1/2003 and thus associated the Competition Council with the measures of inspection and delegated to it all the tasks that could be delegated.

72 The Commission replies, principally, that, in so far as this part of the plea alleges infringement of the division of powers under Regulation No 1/2003, it is inadmissible because it does not describe the plea for annulment precisely. It does not invoke any specific provision of the regulation. In truth, the EC Treaty and Regulation No 1/2003 establish parallel competences for the application of Articles

81 EC and 82 EC. The Joint Statement and the Notice, on the other hand, only indicate how the authorities in the network can coordinate their actions and preserve the Commission's power to act at any time against any infringement of Articles 81 EC and 82 EC.

73 As to the principle of subsidiarity, first of all, Regulation No 1/2003 simply states that the adoption of the regulation does not go beyond what is necessary for the effective application of the rules in the Treaty, but it does not affect the Commission's powers to conduct investigations. Next, where the Commission has competence to apply the EC Treaty directly in individual cases, the principle of subsidiarity cannot be interpreted in a manner that deprives it of such competence. Finally, reliance on that principle is unfounded, since the Commission's involvement is limited to a preliminary stage of investigation before it decides whether it is appropriate to initiate proceedings.

74 Furthermore, the Notice has no binding legal effect and, in addition, the applicant's reading of the criteria for the allocation of cases is incorrect. The Commission is still free to take over a case at any time. The Commission further submits, firstly, that certain aspects of the case militate in favour of the substance of the matter being dealt with by the Commission and, secondly, that its decision to conduct an inspection and to deal with the substance of the case itself was the subject of a dialogue with the French authorities. In any event, the legality of the contested decision does not depend on whether it was the subject-matter of preliminary discussions or close dialogue with the national competition authorities, since the Commission's only obligation in this regard is that laid down in the last sentence of Article 20(4) of Regulation No 1/2003, of which the applicant is not pleading infringement.

75 Finally, Article 22(2) of Regulation No 1/2003 has no effect on the legality of the contested decision. The regulation does not require the Commission to delegate certain tasks to the national authorities.

76 The Commission concludes from the foregoing that it has not infringed any duty to cooperate with the French competition authorities.

— Findings of the Court

77 As a preliminary matter, the Commission's argument that this part is inadmissible in so far as it is based on infringement of the division of powers under Regulation No 1/2003 must be rejected. The fact that no specific provision of the regulation is identified in this regard is not such as to render this part of the applicant's arguments inadmissible, inasmuch as the applicant essentially contends that it is a system for allocating competences arising under Regulation No 1/2003 that has been infringed, and the actual existence of that system is one of the foundations of its argument.

78 The Court must therefore examine whether, by the contested decision, the Commission infringed the division of powers or the duty to cooperate in good faith with the national competition authorities arising under the principle of subsidiarity, Article 11(1) of Regulation No 1/2003, the Notice, the Joint Statement and Article 22(2) of Regulation No 1/2003.

79 With regard, first of all, to the division of powers between the Commission and the national competition authorities, it must be observed that Regulation No 1/2003 puts an end to the previous centralised regime and, in accordance with the principle of subsidiarity, establishes a wider association of national competition authorities, authorising them to implement Community competition law for this purpose. However, the scheme of the regulation relies on the close cooperation to be built up between the Commission and the competition authorities of the Member States organised as a network, the Commission being given responsibility for determining the detailed rules for such cooperation. Furthermore, the regulation does not call

into question the general power that the Commission is acknowledged to enjoy by the case-law (Case C-344/98 *Masterfoods* [2000] ECR I-11369, paragraphs 46 and 48). The Commission in effect has very wide powers of investigation under Regulation No 1/2003 and is in any event entitled to decide to initiate proceedings relating to an infringement, which entails removing the case from the Member States' competition authorities. The Commission thus retains a leading role in the investigation of infringements.

80 The applicant thus misinterprets the cooperation instituted by Regulation No 1/2003 between the Commission and the competition authorities of the Member States. There is no provision in the regulation establishing a rule allocating powers, such as that alleged by the applicant, whereby the Commission is not authorised to carry out an inspection if a national competition authority is already dealing with the same matter. On the contrary, Article 11(6) of Regulation No 1/2003 provides, subject only to consultation of the national authority concerned, that the Commission retains the option of initiating proceedings for the adoption of a decision, even where a national authority is already acting in the matter.

81 Therefore, the Commission must, a fortiori, be able to carry out an inspection such as that ordered in this case. A decision ordering an inspection is a step that is merely preparatory to dealing with the substance of the case, and does not have the effect of formally initiating proceedings within the meaning of Article 11(6) of Regulation No 1/2003; an inspection decision does not in itself demonstrate the Commission's intention to adopt a decision on the substance of the case (see, to that effect, in relation to Regulation No 17, Case 48/72 *Brasserie de Haecht* [1973] ECR 77, paragraph 16). Recital 24 in the preamble to Regulation No 1/2003 also states that the Commission should be empowered to undertake such inspections as are necessary to detect any infringement of Article 82 EC, and Article 20(1) of that regulation expressly provides that, in order to carry out the duties assigned to it by that regulation, the Commission may conduct all necessary inspections.

82 It follows that Regulation No 1/2003 does not establish a system for allocating competences as claimed by the applicant. The argument that it was infringed cannot therefore be upheld.

83 With regard, secondly, to the Notice, which in the applicant's submission also allocates competences as between the Commission and the national competition authorities and was infringed in this case, it must first be noted that paragraph 4 states that consultations and exchanges within the network are matters between public enforcers and that, according to paragraph 31, the Notice does not create individual rights for the companies involved to have the case dealt with by a particular authority. The applicant's contention that under the Notice only the Competition Council could deal with the case is therefore unfounded.

84 Next, it must be held that the applicant's argument runs counter to the actual wording of the Notice. Paragraph 8, to which the applicant refers, effectively sets out the conditions in which an authority can be regarded as well placed to deal with a case. However, the use of the word 'can' shows that this merely entails the possibility of sharing tasks, which cannot be regarded as imposing an obligation on the Commission not to deal with a case or not to investigate a case where the conditions set out in paragraph 8 are met. In addition, under paragraph 5 of the Notice, each member of the network retains full discretion in deciding whether or not to investigate a case, and paragraph 55 provides, in accordance with Article 11(6) of Regulation No 1/2003, that the Commission may in any event take over a case being dealt with by a national authority. Therefore, the applicant's argument based on the Notice is unfounded.

85 Thirdly, paragraph 3 of the Joint Statement states that that statement is political in nature and that it does not create legal rights or obligations. The applicant cannot therefore rely on such a document with a view to procuring the annulment of an act of Community law that adversely affects it. In any event, paragraph 22 provides that

the Commission may take over a case even if a national competition authority is already acting, provided that the Commission explains to that national authority and to the other members of the network the reasons for the application of Article 11(6) of Regulation No 1/2003. It has already been shown that the contested decision does not entail the application of Article 11(6) of Regulation No 1/2003, and that the Commission must therefore be regarded as authorised to carry out an inspection in this case.

<sup>86</sup> With regard, fourthly, to the obligation to cooperate in good faith with the national competition authorities under Article 11(1) of Regulation No 1/2003 and Article 10 EC, it is sufficient to note that Article 11(1) of Regulation No 1/2003 lays down a general rule that the Commission and the national competition authorities are required to cooperate closely, but does not require the Commission to refrain from carrying out an inspection in a case with which a national competition authority is dealing in parallel. On the contrary, it is apparent from the provisions examined above, and in particular Article 11(6) of Regulation No 1/2003, that the principle of cooperation means that the Commission and the national competition authorities may, at least in the preliminary stages of the cases with which they deal, work in parallel. In addition, the applicant does not deny that the Commission was in fact in contact with the relevant national authority before adopting the contested decision. As to Article 10 EC, the applicant merely states that the provision has been infringed but does not expand on its allegation other than by a reference to Article 11(1) of Regulation No 1/2003. It follows that the alleged infringement of those articles has not been established.

<sup>87</sup> Fifthly, the argument relating to Article 22(2) of Regulation No 1/2003 is inoperative. That provision in fact merely provides for the possibility for the Commission to delegate part of its tasks to the national competition authorities but does not impose on it any obligation to do so.

<sup>88</sup> Finally, and sixthly, as regards the argument relating to the principle of subsidiarity laid down in the second paragraph of Article 5 EC, it must be borne in mind that, under that provision, in areas which do not fall within its exclusive competence the



Community is to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore by reason of the scale or effects of the proposed action be better achieved by the Community.

<sup>89</sup> In this case, the reference to the principle of subsidiarity in Regulation No 1/2003 merely indicates that the adoption of Regulation No 1/2003 complies with the principle. In addition, the protocol on the application of the principles of subsidiarity and proportionality annexed to the EC Treaty states in paragraph 3 that the principle of subsidiarity does not call into question the powers conferred on the Community by the Treaty, as interpreted by the Court of Justice (Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 102). Therefore, that principle does not call into question the powers conferred on the Commission by the EC Treaty, which include the power to apply the competition rules, and in particular the right to carry out inspections to assess any suspected infringements. In addition, and in any event, as has already been seen, the Commission's action is a preliminary step that does not involve the formal initiation of proceedings for the purposes of Article 11(6) of Regulation No 1/2003. The adoption of the contested decision did not therefore have the effect of relieving the Competition Council of its competence. Accordingly it has not been established that the principle of subsidiarity was infringed.

<sup>90</sup> It follows from the foregoing that the applicant has not established that the Commission infringed a rule on the allocation of competences which prohibited it from conducting the inspection in question, or that it failed to fulfil its duty to cooperate in good faith with the national competition authorities as instigated, inter alia, by Regulation No 1/2003, or that it infringed the principle of proportionality. The second part of the first plea is therefore unfounded.

<sup>91</sup> The first plea must therefore be rejected in its entirety.

*Second plea: infringement of the Commission's obligation to examine carefully and impartially all the relevant aspects of the individual case*

Arguments of the parties

92 The applicant claims that, according to the case-law, in cases where the Commission has a discretion, it is required to observe the guarantees conferred by the Community legal order, which include, in particular, the obligation to examine carefully and impartially all the relevant facts of the individual case. In this case, the Commission infringed that obligation by paying no regard, before deciding to undertake the inspection, to the fact that the Competition Council had already received a complaint concerning the offers made by the applicant in January and February 2004, and had determined that a finding of predatory conduct was highly unlikely. The applicant maintains that, even though it may be accepted that the Commission might arrive at a different assessment from that reached by the Competition Council on the structure and development of the French market for high-speed internet access services, the Commission should none the less have weighed in the balance the information it had with the information in the Competition Council's decision. Yet it does not even mention the existence of the Competition Council's decision. That infringement was accompanied by a manifest error of assessment, and aggravated by contacts between the Commission and the Competition Council's Rapporteur and with AOL. A careful and impartial examination would have entailed an explanation of why the inspection was still necessary notwithstanding the decision of the Competition Council.

93 The Commission replies that this plea ought to be rejected. It carefully and impartially examined all the relevant information in the case, and in particular the decision of the Competition Council and its own decision of 16 July 2003. It did not reach a firm view on whether there had been an infringement but merely entertained suspicions based on information received, inter alia, from various competitors of the applicant. Moreover, the Competition Council's decision contained sufficient evidence in itself that there probably had been an infringement. Finally, in addition

to that decision and to the meetings with the Competition Council's Rapporteur, the Commission also had several meetings with the official from the Competition Council responsible for contacts with the Commission.

## Findings of the Court

- 94 The guarantees afforded by the Community legal order in administrative proceedings include, in particular, the principle of sound administration, which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* [2003] ECR II-3275, paragraph 404).
- 95 In this case, the applicant claims essentially that the Commission infringed that obligation by failing to take account of the Competition Council's decision and to weigh in the balance the content of that decision with the information it had. The Commission exacerbated the infringement by making contact with the Competition Council's Rapporteur responsible for the case and with AOL, one of the applicant's competitors.
- 96 Those arguments cannot be accepted.
- 97 First of all, the fact that the Competition Council's decision is not mentioned in the contested decision does not suffice to found the conclusion that it was not taken into consideration by the Commission. On the contrary, the contacts between the Commission and the Competition Council's Rapporteur, in respect of the role which he played in the process of drawing up or adopting of the Competition Council's

decision, show rather that the Commission was aware of that decision, or at least that it was about to be adopted, and also of the proceedings pending before the Competition Council when it adopted the contested decision.

98 Next, a number of matters indicated by the Competition Council in its decision and referred to in paragraphs 64 and 65 above, no matter how they may be assessed when the Court examines the substance of the case, militate in favour of a decision ordering an inspection. It can therefore neither be concluded that the Commission was effectively unaware of the decision nor be considered that the Commission was required to explain why the inspection ordered remained necessary notwithstanding that decision of the Competition Council.

99 It follows that the Commission cannot be regarded as having failed to carry out a careful and impartial examination of all the relevant information in this case, or as having made a manifest error of assessment when analysing that information. The Commission's contacts with the Competition Council's Rapporteur and with AOL cannot call that assessment into question, since the Commission has not been found to have failed in its obligation to examine carefully and impartially all the relevant information in the individual case.

100 In the light of the foregoing, the second plea must be rejected.

*Third plea: infringement of the obligation to state reasons*

Arguments of the parties

101 The applicant claims that, under Article 253 EC, the Commission is required to state the reasons on which its decisions are based. It is settled case-law that the

Commission is required to disclose in a clear and unequivocal fashion the reasoning followed, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review.

102 However, the contested decision does not contain an adequate statement of reasons. It does not state the grounds on which the Commission was able to disregard the fact that national proceedings were pending in respect of the same facts, to depart from the findings of the Competition Council or to determine that an inspection was necessary and proportionate. Furthermore, it fails to justify the conclusion that the Competition Council's decision did not render the inspection unnecessary and disproportionate, fails to mention the existence of that decision and contradicts it in regard to essential factual matters. The applicant is therefore unable to comprehend the justification for a step as onerous as the inspection in question. The Commission therefore infringed its obligation to state its reasons, and the contested decision must be annulled.

103 The Commission replies that Article 20(4) of Regulation No 1/2003 defines which aspects of the reasoning are to appear in a decision ordering an investigation by providing that the decision must state the subject-matter and purpose of the investigation. The reasons given also satisfy the requirements as to reasoning laid down by the case-law on Article 14(3) of Regulation No 17, which is in the same terms as Article 20(4) of Regulation No 1/2003. The Commission was not, in particular, required to classify the infringement or to justify its decision by reference to all the facts which might emerge from a decision of a national authority on interim measures. Similarly, factual assessments of information available to it do not form part of the reasons which the Commission is required to communicate to the addressee of a decision ordering an inspection. As to the failure to mention the Competition Council's decision, this is irrelevant as it is not such as to impede either the applicant's understanding of the contested decision, or its means of defence, or the review carried out by the Court of First Instance.

104 Finally, the Commission cannot be required specifically to justify its assessment of whether it is appropriate to carry out an investigation or the manner in which it shares responsibilities with the national authorities in a specific case.

## Findings of the Court

- 105 The purpose of the requirement to give reasons for a particular decision, which arises generally under Article 253 EC, is to enable the Community judicature to exercise its power to review the legality of the decision and to provide the person concerned with sufficient information to ascertain whether or not the decision is well founded or whether it is vitiated by an error giving rise to a right to contest its validity, while the scope of the duty depends on the nature of the measure in question and on the context in which it was adopted (Case 185/83 *Instituut Electronenmicroscopie* [1984] ECR 3623, paragraph 38, and Case T-349/03 *Corsica Ferries France v Commission* [2005] ECR II-2197, paragraphs 62 and 63).
- 106 In regard to decisions of the Commission ordering an inspection, it must be borne in mind that Article 20(4) of Regulation No 1/2003 defines the essential information that must appear in the reasons for the decision. It has already been found in paragraph 68 above that infringement of that provision was not established, since, inter alia, the Commission was not required to justify its decision to conduct the inspection ordered by reference to evidence provided by the applicant.
- 107 It follows that the plea that the statement of reasons was inadequate must be rejected.

*Fourth plea: infringement of the principle of proportionality*

## Arguments of the parties

- 108 The applicant submits that, according to the case-law, the inspection measures decided on by the Commission must be proportionate and necessary to the aim in

view. Even on the assumption that the Commission's aim was to ascertain whether the 10 offers launched in January and February 2004 by Wanadoo amounted to predatory pricing prohibited by Article 82 EC, use of the powers of inspection conferred on the Commission by Article 20(4) of Regulation No 1/2003 was not proportionate. A large amount of information on revenue and costs concerning the offers in question had already been obtained by the Competition Council and there was no risk of any information being destroyed or concealed. Moreover, that information could have been obtained by means less onerous than an inspection.

109 Furthermore, it had already been shown in *inter partes* proceedings that it was very unlikely that Wanadoo would recover its losses and therefore that the suspected predatory pricing practices and their exclusionary effects existed. In those circumstances, it was not certain that the impugned acts fell within the scope of Article 82 EC, and the inspection was not necessary or proportionate to its objective of establishing the existence of an infringement, even if it had proved fruitful.

110 The applicant further contends that the Commission did not state the reasons why the figures put forward by Wanadoo could not be checked by measures less onerous than an inspection, such as technical findings by an expert. As regards the search for information on whether there was any intention to oust competitors, the Commission produced no evidence showing that it had received information indicating that the offers in question formed part of a strategy of containing or driving off competitors. The applicant concludes that the contested decision must be annulled for infringement of the principle of proportionality.

111 The Commission replies that the principle of proportionality requires that acts of the Community institutions should not exceed the limits of what is appropriate and necessary to attain the end in view. The proportionality of an inspection decision depends on the gravity of the alleged infringement; the possibility that the inspection might enable reliable information as to the existence of the infringement to be

obtained; and an evaluation of the expected effectiveness of such an inspection by comparison with other measures of investigation. Given the circumstances of the case, and in particular the fact that the information gathered by the Competition Council was, at least in part, deemed unrealistic, that principle was observed.

- 112 Furthermore, it is clear from the case-law that, where the Commission has to choose between an inspection ordered by decision and another less onerous measure of investigation, the choice is dictated solely by the need for a satisfactory investigation, in the light of the particular circumstances of the case, and does not require the existence of exceptional circumstances.
- 113 The Commission further submits that there is no foundation to the applicant's assertion that the Commission cannot conduct an inspection when an earlier decision in respect of the same undertaking has been adopted without recourse to inspection, and that it confined itself to ordering an inspection at the undertaking's premises.
- 114 Finally, the Commission claims that it is only after a thorough investigation that it will be able to form a view as to whether there has been an infringement and also, and in any event, that the arguments advanced by the applicant as to the substance of the alleged infringement are contrary to the case-law of the Court of Justice and the Court of First Instance.
- 115 The contested decision is therefore intended purely to enable the Commission to gather the information needed to assess whether there has been an infringement of the Treaty. Accordingly, it is not disproportionate by reference to the aim in view, in particular because the nature of the presumed infringement, which contains an element of intent, suggests that the information likely to prove a serious infringement is usually held in secret locations and the likelihood of destruction or concealment is considerable.



- 116 The Commission concludes from the foregoing that the plea alleging infringement of the principle of proportionality is unfounded.

### Findings of the Court

- 117 The principle of proportionality, which is one of the general principles of Community law, requires that the acts of Community institutions do not exceed the limits of what is appropriate and necessary to attain the end in view; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, and Case C-180/00 *Netherlands v Commission* [2005] ECR I-6603, paragraph 103).
- 118 In the area to which this case relates, observance of the principle of proportionality involves establishing that the inspection envisaged does not constitute, in relation to the aims thereby pursued, a disproportionate and intolerable interference (see, in relation to Regulation No 17, *Roquette Frères*, cited in paragraph 29 above, paragraph 76). However, the choice to be made by the Commission between an investigation by straightforward authorisation and an investigation ordered by a decision does not depend on matters such as the particular seriousness of the situation, extreme urgency or the need for absolute discretion, but rather on the need for an appropriate inquiry, having regard to the special features of the case. Therefore where an investigation decision is solely intended to enable the Commission to gather the information needed to assess whether the Treaty has been infringed, such a decision is not contrary to the principle of proportionality (see, in relation to Regulation No 17, *National Panasonic v Commission*, cited in paragraph 59 above, paragraphs 28 to 30, and *Roquette Frères*, cited in paragraph 29 above, paragraph 77).

119 It is in principle for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules and even if it already has evidence, or indeed proof, of the existence of an infringement, the Commission may legitimately take the view that it is necessary to order further investigations enabling it to better define the scope of the infringement or to determine its duration (see, in relation to Regulation No 17, Case 374/87 *Orkem v Commission* [1989] ECR 3283, paragraph 15, and *Roquette Frères*, cited in paragraph 29 above, paragraph 78).

120 In this case, firstly, the purpose of the contested decision is to gather information on the pricing practices employed by the applicant, in order to assess whether there has been an infringement of the Treaty. The contested decision does, admittedly, state that the Commission has some information on those practices. However, according to the case-law, the Commission was entitled to seek to gather more information, in particular information relating to a strategy of containing and driving off competitors, and it is difficult to see how the Commission might have obtained such information, should that be necessary, other than by means of an inspection. Secondly, given that the information sought included evidence of a possible intention to eliminate competitors, it was acceptable, for the purpose of an adequate investigation of the case, to order the inspection by a decision, so as to ensure that the inspection would be effective. Thirdly, the inspection ordered by the contested decision was confined to the undertaking's premises, even though in some circumstances Regulation No 1/2003 now allows for the inspection of other premises, including the homes of certain members of staff of the undertaking concerned. In the light of these factors, it does not appear that in this case the Commission acted disproportionately by reference to the aim in view and thus failed to observe the principle of proportionality, as the inspection ordered by a decision was appropriate in the light of the particular circumstances of the case.

121 The applicant's arguments cannot invalidate that conclusion. Firstly, it has already been held above that the Competition Council's decision does not support the applicant's position that it was uncertain whether the alleged practices were being employed and cannot therefore preclude the hypothesis advanced by the Commission in the contested decision that the applicant might be charging prices

contrary to Article 82 EC. The fact that the Commission might subsequently be unable to establish, on the substance, predatory pricing on the basis of the evidence collected during the inspection is irrelevant, since it does not justify the conclusion that the inspection ordered was inappropriate. The contested decision also states more generally that the Commission suspects the applicant of pricing practices that contravene Article 82 EC, which is in itself a sufficient ground for the inspection.

<sup>122</sup> Secondly, as is clear from the case-law cited above, the fact that the Commission was already in possession of certain evidence indicating that the applicant is engaging in pricing contrary to Article 82 EC, or that such evidence has already been collected by the Competition Council and could therefore be transmitted to the Commission, is not sufficient to justify the conclusion that the contested decision is disproportionate. The case-law in fact recognises that the Commission has a right to seek further information, even if it already has indicia of an infringement.

<sup>123</sup> Thirdly, the applicant's assertion that the Commission produced no evidence establishing that it had received information indicating that the offers in question were part of a strategy to eliminate competitors is without foundation. The contested decision expressly states that this theory is based on information received by the Commission and the Commission is not required, in a decision such as the contested decision, to state the evidence and indicia on which the decision is based (see, in this regard, in relation to Regulation No 17, *Roquette Frères*, cited in paragraph 29 above, paragraph 62).

<sup>124</sup> It follows from the foregoing that the fourth plea in law must be rejected.

*Fifth plea: manifest error of assessment*

## Arguments of the parties

125 The applicant claims that the Commission made a manifest error of assessment by stating in the contested decision that the entire ADSL market in France was then operating at a loss, whereas the Competition Council's decision of 11 May 2004, of which the Commission could not have failed to be unaware, gave the impression that a good number of internet access providers were operating at a profit and that one operator had said that it was making a profit. The Commission therefore stated incorrect facts concerning a fundamental point and thus ignored the reason why predatory pricing is prohibited, namely that it eliminates competitors. The contested decision is therefore based on a manifest error of assessment and, consequently, must be annulled.

126 The Commission replies that it was in possession of information which supported the assertion that the entire ADSL market in France was operating at a loss and that in any event it was sufficient for the Commission to have reached the conclusion that the material at its disposal constituted serious indicia of a possible infringement permitting it to take the view in this case that certain of the new offers were being marketed at below cost.

127 That being so, this plea is inoperative, because even if that statement was incorrect, it could not render the contested decision unlawful. Whether the sector as a whole is operating at a profit or at a loss is not one of the relevant criteria for establishing whether prices charged by an undertaking in a dominant position are predatory. First of all, the case-law has established that prices that are below average variable costs give rise to a presumption that a pricing practice is eliminatory. Next, according to the argument advanced by the applicant, there can be no predatory behaviour unless all competitors are operating at a loss and are collectively threatened by elimination. In effect, it cannot be precluded that Article 82 EC will apply to a pricing practice aimed at some competitors only, which is borne out by

the decision of the Competition Council. Finally, the sentence in the Competition Council's decision to which the applicant refers applies in fact to only part of the offers and prices in question, and in any event, since the Commission was in possession of contradictory information, it was entitled to make an assessment of the credibility of the various items of evidence available to it. In any event, these are questions that go to the substance of the infringement and can be resolved only in the light of a thorough investigation.

### Findings of the Court

<sup>128</sup> The applicant alleges that the Commission made a manifest error of assessment, but in support of that assertion merely refers to an assessment contained in the decision of the Competition Council. However, that decision relates only to an application for interim measures and it cannot therefore be precluded that the Competition Council might reach a different conclusion following a substantive examination of the evidence in the file. Nor, further, can the Commission be considered to be bound by a factual assessment made by a national competition authority on the basis of certain evidence, since it cannot be precluded that the Commission may be in possession of other evidence that will properly lead it to a different conclusion from that reached by that authority. It is apparent from the contested decision, moreover, that the Commission was in possession of evidence that formed the basis for the assertion which the applicant is challenging here.

<sup>129</sup> Having regard to the presumption of lawfulness attaching to acts of the Community institutions (Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, paragraph 48), which means that it is for the person claiming that such an act is unlawful to provide evidence that it is, and having regard to the fact that the applicant has not adduced concrete evidence in support of its assertion other than the reference to a decision which has been found above not to be conclusive, the alleged manifest error of assessment has not been established.

130 The fifth plea in law must therefore be rejected.

131 In the light of the foregoing, the application must be dismissed in its entirety.

### **Costs**

132 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 Commission has applied for costs and the applicant has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

**1. Dismisses the application;**

**2. Orders the applicant to pay the costs.**

Legal                      Wiszniewska-Białecka    Moavero Milanese

Delivered in open court in Luxembourg on 8 March 2007.

E. Coulon

Registrar

H. Legal

President