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

10 April 2008 *

In Case T-271/03,

Deutsche Telekom AG, established in Bonn (Germany), represented initially by K. Quack, U. Quack and S. Ohlhoff, and subsequently by U. Quack and S. Ohlhoff, lawyers,

applicant,

v

Commission of the European Communities, represented initially by K. Mojzesowicz and S. Rating, then by K. Mojzesowicz and A. Whelan, and subsequently by K. Mojzesowicz, W. Mölls and O. Weber, acting as Agents,

defendant,

* Language of the case: German.

supported by

Arcor AG & Co. KG, established in Eschborn (Germany), represented initially by M. Klusmann, F. Wiemer and M. Rosenthal, then by M. Klusmann and F. Wiemer, and subsequently by M. Klusmann, lawyers,

and by

Versatel NRW GmbH, formerly Tropolys NRW GmbH, formerly CityKom Münster GmbH Telekommunikationsservice and TeleBeL Gesellschaft für Telekommunikation Bergisches Land mbH, established in Essen (Germany),

EWE TEL GmbH, established in Oldenburg (Germany),

HanseNet Telekommunikation GmbH, established in Hamburg (Germany),

Versatel Nord-Deutschland GmbH, formerly KomTel Gesellschaft für Kommunikations- und Informationsdienste mbH, established in Flensburg (Germany),

NetCologne Gesellschaft für Telekommunikation mbH, established in Cologne (Germany),

Versatel Süd-Deutschland GmbH, formerly tesion Telekommunikation GmbH, established in Stuttgart (Germany),

Versatel West-Deutschland GmbH, formerly Versatel Deutschland GmbH & Co. KG, established in Dortmund (Germany),

represented by N. Nolte, T. Wessely and J. Tiedemann, lawyers,

interveners,

APPLICATION for annulment of Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 EC (Case COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG) (OJ 2003 L 263, p. 9), and, in the alternative, reduction of the fine imposed on the applicant in Article 3 of that decision,

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

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

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 3 May 2007,

gives the following

Judgment

Facts

1 The applicant, Deutsche Telekom AG, is the incumbent telecommunications operator in Germany. The German State holds 30.92% of shares directly in the capital of the applicant and (through the Kreditanstalt für Wiederaufbau) 12.13% indirectly; the remaining 56.95% of the shares are held by institutional and private investors.

2 The applicant operates the German fixed telephone network. Before the full liberalisation of telecommunications markets, it enjoyed a legal monopoly in the retail provision of fixed-line telecommunications services. The German markets in the provision of infrastructure and in the provision of telephone services have been liberalised since 1 August 1996, when the Telekommunikationsgesetz (German Law on telecommunications; 'TKG') of 25 July 1996 (BGBl. 1996 I, p. 1120) came into force. Since then, the applicant has faced varying degrees of competition from alternative operators on the two markets.

3 The applicant's local networks each consist of a number of local loops for subscribers. The term 'local loop' signifies the physical circuit connecting the network termination point at a subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network.

4 The applicant offers access to its local networks to other telecommunications operators and to subscribers. As regards the applicant's access services and charges, it is therefore necessary to distinguish between the local network access services which the applicant offers its competitors ('wholesale access') and the local network access services which the applicant offers its subscribers ('retail access').

I — *Wholesale access*

5 By Decision No 223a of the Federal Ministry of Post and Telecommunications ('BMPT') of 28 May 1997, the applicant was required to offer its competitors fully unbundled access to the local loop with effect from June 1997.

6 The applicant's charges for wholesale access are made up of two components: a monthly subscription charge, and a one-off charge. When a competitor discontinues access to a local loop, the applicant charges him the cost of discontinuance.

7 Under Paragraph 25(1) of the TKG, the applicant's wholesale access charges must be approved in advance by the Regulierungsbehörde für Telekommunikation und Post (German regulatory authority for telecommunications and post; 'RegTP').

8 In that context, RegTP checks whether the wholesale access charges proposed by the applicant satisfy the requirements laid down by Paragraph 24 of the TKG. Thus, under Paragraph 24(1) of the TKG, '[r]ates shall be based on the costs of efficient service provision'. Furthermore, under Paragraph 24(2) of the TKG, rates shall not:

'1. contain surcharges which prevail solely as a result of the provider's dominant position … in the relevant telecommunications market;

2. contain discounts which prejudice the competitive opportunities of other companies in a telecommunications market; or

3. create any advantages for individual users in relation to other users of identical or similar telecommunications services in the relevant telecommunications market;

unless there is evidence of an objectively justifiable reason therefor'.

9 Under Paragraph 29(1) of the TKG, the applicant is required to apply the charges authorised by RegTP throughout the period of validity of RegTP's authorisation.

II — *Retail access*

10 As regards retail access, the applicant offers two basic variants: the traditional analogue connection (brand name: 'T-Net') and the digital narrowband connection (integrated services digital network, or ISDN; brand name: 'T-ISDN'). Both these variants of end-user access can be provided over the applicant's existing copper pair network (narrowband connections). The applicant also offers end-users a broadband connection (asymmetrical digital subscriber line, or ADSL; brand name: 'T-DSL'), for which it had to upgrade the existing T-Net and T-ISDN networks so as to be able to offer broadband services such as faster Internet access.

11 The applicant's charges for retail access (also referred to as 'retail charges' or 'retail prices') for analogue and ISDN lines are regulated by a price cap system. By contrast, the applicant sets its retail prices for ADSL at its own discretion, but these may be reviewed subsequently.

12 The applicant's retail prices are made up of two components: a basic monthly charge, which depends on the quality of the line and services supplied, and a one-off charge for a new connection or takeover of a line, depending on the work needed at the two ends of the line. The applicant does not charge its end-users the cost of discontinuance.

A — *Charges for retail analogue lines (T-Net) and digital narrowband or ISDN lines (T-ISDN)*

13 Retail prices for analogue and ISDN lines are regulated under a price cap system. Under point 2 of Paragraph 27(1) and Paragraph 25(1) of the TKG, and Paragraphs 4 and 5 of the Telecommunications Charges Order of 1 October 1996 (BGBl. 1996 I, p. 1492; 'the Charges Order'), retail prices for connection to the applicant's network and for telephone calls are not regulated separately for each service, according to the individual cost of that service; they are regulated for a block of services at a time, with different services being grouped together in 'baskets'.

14 The price cap system for access to the applicant's network was introduced by decision of the BMPT of 17 December 1997 (Communication 202/1997, *Amtsblatt* (BMPT) 34/97, p. 1891). The system was taken over by RegTP on 1 January 1998, whereupon RegTP established two baskets, one for services to residential customers and the other for services to business customers. Each basket contained both retail access (standard analogue and ISDN connections) and the full range of telephone products offered by the applicant, such as local, regional, long-distance and international calls.

15 In accordance with Paragraph 4(1) and (2) of the Charges Order, RegTP determines a starting charge level for all the services grouped in a basket, and targets for the movement of basket prices over a specified period.

16 The tariff system in question thus establishes a price ceiling for each basket but makes no provision for mandatory minimum basket prices.

17 Under the terms of the decision of the BMPT of 17 December 1997, the applicant was to reduce the aggregate price for each of the two baskets by 4.3% in the period from 1 January 1998 to 31 December 1999 (first price cap period). When that first period ended on 31 December 1999, RegTP — by decision of 23 December 1999 — essentially maintained the composition of the baskets and lowered the prices by a further 5.6% in the period from 1 January 2000 to 31 December 2001 (second price cap period).

18 Within this framework of binding price reductions, the applicant could modify the charges for individual components of each basket after obtaining prior authorisation from RegTP. Under Paragraph 27(2) of the TKG and Paragraph 5(3) of the Charges Order, adjustments to charges would be authorised if the average price of a basket did not exceed the price cap index imposed. The system thus enabled the charges for one or more components of a basket to be increased, provided that the price ceiling for the basket was not exceeded. However, under Paragraph 27(3) of the TKG, approval could be refused if 'it [was] obvious that [the charges did] not meet the requirements of points 2 or 3 of Paragraph 24(2) [of the TKG] or where they [were] not in conformity with [the TKG] or other legal provisions'.

19 In the first two price cap periods, the applicant reduced the retail prices in both baskets substantially, going far beyond the mandatory reductions. Those price reductions essentially applied to call charges. Retail prices for analogue lines (monthly and one-off access charges), on the other hand, remained unchanged throughout both price cap periods, that is, from 1998 until the end of 2001. As regards retail prices for ISDN lines, the applicant lowered basic monthly charges during the same period, but did not adjust its one-off charges to end-users.

20 A new price cap system was adopted by decision of RegTP of 21 December 2001 and has been in effect since 1 January 2002 (*Amtsblatt* (*RegTP*) 2/2002, of 6 February

2002, p. 75). In place of the two baskets for residential and business customers, the new system uses four baskets, for end-user lines (basket A), local calls (basket B), domestic long-distance calls (basket C), and international calls (basket D).

21 On 15 January 2002, the applicant informed RegTP that it proposed to increase its monthly charges for analogue and ISDN lines by EUR 0.56. That increase was authorised by RegTP by decision of 13 March 2002.

22 On 31 October 2002, the applicant made a further application to increase its retail charges. RegTP partly refused that application by decision of 19 December 2002 and authorised an increase of EUR 0.33 in the monthly charge for a T-Net analogue line instead of the increase of EUR 0.99 sought by the applicant, and refused the increase of EUR 13.40 in the one-off takeover charge for T-Net and T-ISDN lines.

B — *Charges for ADSL lines (T-DSL)*

23 ADSL (T-DSL) charges are not subject to advance regulation under the price cap system. Under Paragraph 30 of the TKG, those charges may be reviewed subsequently.

24 On 2 February 2001, following a number of complaints from competitors of the applicant, RegTP initiated a retrospective investigation of the applicant's ADSL prices in order to determine whether there was any practice of below-cost selling, contrary to the German rules on competition. RegTP closed the proceeding on 25 January 2002, having found that the price increase which the applicant had announced on 15 January 2002 did not give rise to a suspicion of price dumping.

Administrative procedure

25 Between 18 March and 20 July 1999, the Commission received complaints from 15 companies which were competitors of the applicant, challenging the applicant's pricing.

26 On 15 July 1999, the Commission sent the applicant a request for information pursuant to Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87). The applicant responded to that request by letters of 13 and 25 August 1999.

27 On 19 January 2000, the Commission sent a request for information to the applicant's competitors.

28 On 22 June 2001, the Commission sent a further request for information to the applicant.

29 On 2 May 2002, the Commission sent the applicant a statement of objections pursuant to Article 19(1) of Regulation No 17.

30 On 29 July 2002, the applicant filed observations on the statement of objections.

31 On 25 October 2002, the applicant filed observations on the complainants' responses to the statement of objections.

32 On 21 February 2003, the Commission sent the applicant a further statement of objections.

33 On 14 March 2003, the applicant filed observations on the further statement of objections.

The contested decision

34 On 21 May 2003, the Commission adopted Decision 2003/707/EC relating to a proceeding under Article 82 EC (Case COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG) (OJ 2003 L 263, p. 9; 'the contested decision'). The decision was notified to the applicant on 30 May 2003.

35 According to the Commission, the relevant product or service markets are the upstream market in local network access for the applicant's competitors at the wholesale level and the downstream market in access to narrowband connections (analogue and ISDN lines) and broadband connections (ADSL lines) at the retail level (recital 91 to the contested decision). Geographically, those markets cover the territory of Germany (recital 92 to the contested decision).

36 The Commission finds that the applicant holds a dominant position on all the relevant product and service markets (recital 96 to the contested decision).

37 According to the Commission, the applicant has infringed Article 82 EC by operating abusive pricing in the form of a 'margin squeeze' by charging its competitors prices for wholesale access that are higher than its prices for retail access to the local network (recitals 1, 57, 102 and 103 to the contested decision).

38 As regards the margin squeeze, recitals 102 to 105 to the contested decision state:

'102 A margin squeeze exists if the charges to be paid to [the applicant] for wholesale access, taking monthly charges and one-off charges together, are so expensive that competitors are forced to charge their end-users prices higher than the prices [the applicant] charges its own end-users for similar services. If wholesale charges are higher than retail charges, [the applicant's] competitors,

even if they are at least as efficient as [the applicant], can never make a profit, because on top of the wholesale charges they pay to [the applicant] they also have other costs such as marketing, billing, debt collection, etc.

103 If [the applicant] charges its competitors prices for wholesale access to the local loop that are higher than its own prices for retail local network access, it prevents its competitors from offering access via the local loop in addition to call services. If a competitor might be interested in ordering unbundled local loops in order to offer access services to its customers, [the applicant] forces it to offset its losses on access services out of higher revenue on telephone calls, as [the applicant] itself does. But in recent years call charges have fallen substantially in Germany, so that competitors often have no realistic possibility of offsetting one price against another.

104 [The applicant] takes the view that there cannot be abusive pricing in the form of a margin squeeze in the present case, because wholesale charges are imposed by the regulatory authority. A margin squeeze, [the applicant] contends, must be the result of excessive wholesale prices or insufficient retail prices, or a combination of the two, and it must be legally possible to end the situation by varying either of them. But the wholesale price is fixed by the regulatory authority, so that [the applicant] controls only the retail charges, and those are subject to review only for compatibility with the principles of abusive below-cost selling or predation.

105 Contrary to [the applicant's] view, however, the margin squeeze is a form of abuse that is relevant to this case. On related markets on which competitors

buy wholesale services from the established operator, and depend on the established operator in order to compete on a downstream product or service market, there can very well be a margin squeeze between regulated wholesale and retail prices. To show that there is a margin squeeze it is sufficient that there should be a disproportion between the two charges such that competition is restricted. Of course it has also to be shown that the undertaking subject to price regulation has the commercial discretion to avoid or end the margin squeeze on its own initiative. If it has that discretion, as it has in the present case …, the question which prices the undertaking can change without the intervention of the State is relevant only for purposes of the choice of remedies to bring the margin squeeze to an end.'

39 As regards the methodology of the margin squeeze test, the Commission finds that, through access to the applicant's local network, its competitors can offer their end-users a range of retail access services, namely analogue narrowband access, digital narrowband access (ISDN) and broadband access in the form of ADSL services. Since RegTP applies single charges for the applicant's wholesale services, irrespective of the nature of the downstream service provided over the line, the applicant's monthly and one-off charges (pro rata according to the average length of subscription) for wholesale access must therefore be compared with its monthly and one-off charges (pro rata according to the average length of subscription) for retail access. In order to calculate the applicant's average retail access prices, the Commission carries out a quantitative weighting exercise in respect of the applicant's various retail charges for analogue, ISDN and ADSL lines, and for the ISDN and ADSL line variants (recitals 113, 115, 116, 142 to 151 to the contested decision).

40 For the purpose of calculating the margin squeeze, the Commission takes account only of charges for local network access. Telephone call charges are not included in that calculation (recital 119 to the contested decision).

41 According to the Commission, 'there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (recital 107 to the contested decision).

42 The Commission reaches the conclusion in its margin squeeze calculations that there was a negative spread between the applicant's wholesale and retail prices between 1998 and 2001 (recital 153 to the contested decision). That spread was positive in 2002 (recital 154 to the contested decision). However, as the positive spread was insufficient to cover the applicant's product-specific costs linked to the provision of retail services, there was a margin squeeze in 2002 (recitals 154 and 160 to the contested decision). That margin squeeze still existed at the time of the adoption of the contested decision (recital 161 to the contested decision).

43 The Commission goes on to find that the applicant's wholesale and retail charges are subject to sector-specific regulation. Nevertheless, the applicant has sufficient discretion to restructure its charges so as to reduce or indeed put an end to the margin squeeze (recitals 57, 105, and 163 to 175 to the contested decision). The Commission concedes that, from 1 January 2002, the applicant no longer had discretion to increase retail prices for analogue or ISDN lines. However, it could have reduced the margin squeeze by increasing its charges for ADSL lines (recitals 171 to 175 and 206 to the contested decision).

44 The Commission concludes in recital 199 to the contested decision:

'[The applicant] is abusing its dominant position on the relevant markets for direct access to its fixed telephone network. Such abuse consists in charging unfair prices

for wholesale access services to competitors and retail access services in the local network, and is thus caught by Article 82(a) of the EC Treaty. In the period from the beginning of 1998 to the end of 2001, [the applicant] was in a position to end the margin squeeze entirely by adjusting its retail charges. Since the beginning of 2002, [the applicant] could in any event have reduced the margin squeeze, by increasing the ADSL retail access charges not subject to the price cap system.'

45 Having assessed the infringement as a serious infringement for the period from the beginning of 1998 to the end of 2001, and a minor infringement for the period since the beginning of 2002, the Commission imposed a fine of EUR 12.6 million (recitals 207 and 212 to the contested decision).

46 The operative part of the contested decision reads as follows:

'Article 1

[The applicant] has since 1998 infringed Article 82(a) of the EC Treaty by charging its competitors and end-users unfair monthly and one-off charges for access to the local network, thus significantly impeding competition on the market for access to the local network.

Article 2

[The applicant] shall immediately bring to an end the infringement referred to in Article 1 and shall refrain from repeating any act or conduct described in Article 1.

Article 3

For the infringement referred to in Article 1, a fine of EUR 12.6 million is hereby imposed on [the applicant].

…'

Procedure

47 By application lodged at the Registry of the Court of First Instance on 30 July 2003, the applicant brought the present action.

48 By documents lodged at the Registry of the Court of First Instance on 12 December 2003, Arcor AG & Co. KG ('the first intervener'), and CityKom Münster GmbH Telekommunikationsservice, subsequently known as Tropolys NRW GmbH, then

Versatel NRW GmbH; EWE TEL GmbH; HanseNet Telekommunikation GmbH; ISIS Multimedia Net GmbH & Co. KG, subsequently known as Arcor AG & Co. KG; KomTel Gesellschaft für Kommunikations- und Informationsdienste mbH, subsequently known as Versatel Nord-Deutschland GmbH; NetCologne Gesellschaft für Telekommunikation mbH; TeleBeL Gesellschaft für Telekommunikation Bergisches Land mbH, subsequently known as Tropolys NRW GmbH, then Versatel NRW GmbH; tesion Telekommunikation GmbH, subsequently known as Versatel Süd-Deutschland GmbH; Versatel Deutschland GmbH & Co. KG, subsequently known as Versatel West-Deutschland GmbH (together: 'the second intervener'), applied for leave to intervene in support of the form of order sought by the Commission.

49 By letter of 30 January 2004, the applicant sent the Court a request for confidential treatment of certain passages in the application, the defence, the reply and certain annexes relating thereto.

50 By letter of 22 March 2004, the applicant sent the Court a request for confidential treatment of a passage in the rejoinder.

51 By order of the President of the First Chamber of the Court of First Instance of 6 May 2004, the companies mentioned in paragraph 48 above were granted leave to intervene in support of the form of order sought by the Commission. The decision on the validity of the request for confidential treatment was reserved.

52 Non-confidential versions of various procedural documents, prepared by the applicant, were sent to the first and second interveners.

53 By letters of 24 June 2004, the first and second interveners contested the confidentiality of various passages which were obscured in the non-confidential versions of the procedural documents.

54 On 14 July 2004, the second intervener lodged its statement in intervention; the first intervener did likewise on 2 August 2004. The main parties submitted their observations on the statements in intervention.

55 By letter of 20 December 2004, the applicant lodged observations on the objections of the first and second interveners concerning the request for confidentiality.

56 By order of 15 June 2006, the President of the Fifth Chamber partly granted the applicant's request for confidentiality.

57 By letter of 14 September 2006, the second intervener informed the Court that the first intervener had become the legal successor to ISIS Multimedia Net GmbH & Co. KG. By the same letter, it informed the Court, in accordance with Article 99 of the Rules of Procedure of the Court of First Instance, that, to avoid duplication of interveners, it was withdrawing the intervention of ISIS Multimedia Net GmbH & Co. KG, which had become Arcor AG & Co. KG.

58 By order of the President of the Fifth Chamber of the Court of First Instance of 30 November 2006, Arcor AG & Co. KG, formerly ISIS Multimedia Net GmbH & Co. KG, was removed from the case as second intervener.

59 On 11 December 2006, after hearing the parties, the Court decided to refer the present case to the Fifth Chamber, Extended Composition, of the Court of First Instance.

60 Upon hearing the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure, put written questions to the applicant and to the Commission and requested them to produce certain documents. The main parties complied with those requests within the prescribed period.

61 By letter of 21 March 2007, the applicant sent the Court a request for confidential treatment of various matters in the Commission's statement of 5 March 2007 containing the replies to the Court's written questions. The first and second interveners did not raise any objections to that request for confidentiality, and a non-confidential version of the Commission's statement, which was prepared by the applicant, was sent to the first and second interveners.

62 As Judge Dehousse was unable to sit in the present case, the President of the Court of First Instance designated Judge Wahl to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure on 29 March 2007.

63 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 3 May 2007.

Forms of order sought by the parties

64 The applicant claims that the Court of First Instance should:

— annul the contested decision or, in the alternative, reduce the fine imposed by the Commission in Article 3 of the contested decision at the Court's discretion;

— order the Commission to pay the costs, including extra-judicial costs.

65 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

66 The first intervener contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs, including those of the first intervener.

67 The second intervener contends that the Court should:

— dismiss the applicant's application;

— order the applicant to pay the costs, and to pay the extra-judicial costs of the second intervener.

Law

I — *Principal form of order sought: annulment of the contested decision*

68 The applicant raises three pleas in law alleging, first, an infringement of Article 82 EC; second, that the operative part of the contested decision is defective; and third, misuse of powers and infringement of the principles of proportionality, legal certainty and protection of legitimate expectations.

A — *First plea in law: infringement of Article 82 EC*

69 The first plea in law is in four parts. The first part alleges the absence of an abuse as the applicant did not have sufficient scope to avoid a margin squeeze. The second complains of the unlawfulness of the method used by the Commission to establish

the margin squeeze. The third alleges an error by the Commission in calculating the margin squeeze, and the fourth alleges the lack of any effect on the market of the margin squeeze identified.

1. First part: absence of an abuse as the applicant did not have sufficient scope to avoid a margin squeeze

(a) Arguments of the parties

70 The applicant submits that it did not have sufficient scope to avoid the margin squeeze alleged in the contested decision. First, it notes that the Commission itself found that the applicant did not have scope to fix charges for wholesale access. Charges for wholesale access, which are fixed by RegTP, ought to correspond to the cost of efficient service provision. Therefore, they do not necessarily correspond to the applicant's costs.

71 Second, the applicant did not have scope to fix its charges for retail access either. As regards the period from 1998 to 2001, any abuse by the applicant is precluded by the fact that RegTP alone — and previously the BMPT — is responsible for the applicant's charges for narrowband connections (see paragraphs 73 to 79 below).

72 As to the period after January 2002, it is only the applicant's conduct in fixing charges for broadband connections that could be abusive, since the Commission itself acknowledged in the contested decision that the applicant has not had any scope to fix charges for narrowband connections since 2002. However, as regards the period after January 2002, any scope the applicant may have had to fix charges for broadband connections (assuming that was established), would in any event have no bearing on the margin squeeze alleged (see paragraphs 80 to 83 below).

73 First, as far as narrowband connections are concerned (analogue and ISDN lines), the applicant explains that, under German law, all its retail prices had to be examined and approved in advance by RegTP or, before 1998, by the BMPT. The applicant — who, under Paragraph 29(1) of the TKG, could not depart from the charges thus authorised without incurring a fine — cannot therefore be regarded as having infringed Article 82 EC by applying those charges.

74 As to the setting of charges, the applicant observes that, under the price cap system, RegTP initially defines the basket of services and the targets for the movement of prices which limit basket price adjustments ('price indices' or 'price caps'). Next, RegTP examines the individual price adjustments proposed by the applicant. Accordingly, under Paragraphs 24 and 27 of the TKG, RegTP should ascertain — irrespective of compliance with the ceiling fixed for the basket in question — whether the charges requested have been set (without any justification) below the cost of efficient service provision or whether they contravene other legal provisions, particularly Article 82 EC. RegTP should therefore refuse a retail price adjustment sought by the applicant if the prices contravene Article 82 EC, particularly because of an anti-competitive margin squeeze.

75 The applicant maintains that, before 1 May 2002 — in accordance with Paragraph 97(3) of the TKG, under which authorisations for the applicant's charges granted 'before 1 January 1998 … remain[ed] in force until 31 December 2002 at the latest' — it was bound by the mandatory tariffs for analogue lines which were based on an authorisation that was granted by the BMPT without any time-limit.

76 The applicant also notes that its application of 31 October 2002 for an increase in its retail access charges was only partly accepted by RegTP, within the limit of the price cap, by decision of 19 December 2002. Moreover, since 1 January 2002, charges for end-user lines are in a separate basket for which a specific reference value has been set. Telephone call charges have no bearing on compliance with those values. The Commission itself recognises that the applicant has not had any opportunity to increase its charges for narrowband access since 2002. The fact that the applicant did not make any further applications to increase authorised charges between 1998 and 2001 does not mean that the applicant can be held responsible for the level of charges set by RegTP and, therefore, for an alleged margin squeeze. The mere right to submit applications for price adjustment cannot be regarded as an autonomous price-fixing power. RegTP's procedure for examining and authorising charges on a case by case basis was put in place precisely to ensure through advance regulation that the incumbent operator does not apply abusive pricing, in accordance with the obligation imposed on the Member States by Article 17 of Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24). Where an application is examined and determined in accordance with that procedure and satisfies the procedural requirements of the Community legal framework for telecommunications law, an undertaking which applies charges set after such an examination cannot be accused of any abuse. Charges which are checked and authorised cannot be described as an abuse on the part of the undertaking which applies them.

77 Furthermore, the applicant explains that the advance regulation exercised by RegTP serves to establish the structure of the market through administrative intervention and — in the areas subject to advance regulation — transfers responsibility for maintaining the structure of the market from the regulated undertaking to the regulatory authority. Accordingly, the applicant is obliged to request price adjustments from RegTP only in the event of a change in the underlying circumstances.

78 In any event, even on the assumption that the applicant can be held responsible for a certain tariff level on the basis of its right to request a price adjustment, there was no change of circumstances such as to require the applicant to make further applications to increase its retail prices. On the contrary, since 1998, the costs of providing connections have remained almost unchanged, and wholesale access charges have even been considerably reduced. Furthermore, in the same period, RegTP concluded in its decisions of 8 February 1999, 23 December 1999, 30 March 2001, 21 December 2001, 11 April 2002 and 29 April 2003 that no margin squeeze existed to the detriment of competitors. In addition, by judgment of 16 January 2002, the Oberlandesgericht Düsseldorf (Higher Regional Court of Düsseldorf, Germany) held that the applicant's authorised charges did not contravene Article 82 EC.

79 As regards the judgment of the Bundesgerichtshof (Federal Court of Justice, Germany) of 10 February 2004, setting aside the judgment of the Oberlandesgericht Düsseldorf of 16 January 2002, the applicant submits that that judgment confirms that RegTP checks whether a charge to which a request for authorisation relates is compatible with Article 82 EC and that responsibility for any infringement of Article 82 EC can only exceptionally be ascribed to the undertaking which applied for the charge to be authorised. The applicant observes that RegTP itself has concluded on several occasions since 1998 that there is no margin squeeze to the detriment of the applicant's competitors. Furthermore, the Bundesgerichtshof expressly left open the question of the applicant's responsibility under competition law on account of the regulated charges.

80 Second, the applicant submits that any abuse in the period beginning in 2002 which is based solely on the alleged scope for increases in T-DSL (ADSL) charges cannot be ascribed to the applicant. The Commission cannot consider that discretion in isolation, since the margin squeeze was not calculated on the basis of the T-DSL (ADSL) charges alone, but on the basis of all the retail prices. Moreover, contrary to the Commission's contention, the applicant could not increase its charges indefinitely. Thus, the applicant claims that the basic component of the charge, namely the price of the basic subscription (analogue or ISDN connection), requires the prior authorisation of RegTP. In addition, the surcharge for switching from an analogue or ISDN connection to an ADSL connection is subject to subsequent review by RegTP. The applicant refers in that regard to the decisions of RegTP of 30 March 2001 and 25 January 2002. In those circumstances, the applicant — whose charges had to be fixed, in accordance with Paragraph 24 of the TKG, on the basis of the cost of efficient service provision — certainly did not have unlimited scope to increase its ADSL charges. In its decision of 25 January 2002, RegTP closed the proceeding initiated against the applicant concerning predatory pricing in relation to ADSL. The applicant observes further that the Commission refers only to the figures taken from RegTP's decision of 30 March 2001 in order to show that the applicant has had scope to increase its ADSL charges since 2002.

81 In addition, the applicant submits that, on the basis of the Commission's calculations, with the exception of the start-up phase, its retail prices for ADSL services (analogue lines since 2001 and ISDN lines since 2002) were higher than those of its wholesale access, having been increased by specific costs associated with retail access. There was therefore no margin squeeze on that market. Moreover, the real cause of the alleged margin squeeze was RegTP's setting of low charges for analogue lines. Therefore since, according to the Commission itself, there are separate markets for broadband connections (ADSL) and narrowband connections (analogue and ISDN lines), the applicant maintains that even if it had any scope on the broadband connections market to enable it to increase its charges for ADSL lines, neither an increase in or a reduction of ADSL charges would have any repercussions on the continued existence of an anti-competitive margin squeeze on the narrowband connections market. Correction of ADSL charges could not eliminate the alleged dysfunctioning of the

narrowband connections market, any more than fixing ADSL charges would provoke that dysfunctioning. In its reply, the applicant submits further that, although a single wholesale service provides access to a number of downstream markets, each of those downstream markets must be investigated as to the existence of a margin squeeze.

82 The applicant also challenges the Commission's argument that the wholesale market for local network access is a unified market. Full access to the local network can provide end-users only with either broadband connections or narrowband connections. Moreover, broadband connections can be marketed separately from narrowband connections on the basis of line sharing. Full access to the local network is therefore not necessary for ADSL services. If the Commission had taken account of the charges for line sharing — which are significantly lower than the charges for wholesale access — in assessing the margin squeeze, the result would have been more favourable for the applicant.

83 Lastly, the applicant submits that the Commission failed to show in the contested decision how the applicant could have reduced the alleged margin squeeze by increasing ADSL charges. In view of the cross-price elasticity between ADSL and traditional connections and between the different ADSL variants (over analogue connections and ISDN), which the Commission accepts, a more thorough investigation would have been appropriate to determine whether an increase in ADSL charges would actually have resulted in an increase in weighted retail prices. The applicant notes in that regard that there is cross-price elasticity between ADSL and narrowband connections. If it had demanded higher ADSL charges in the past than those which it applies, the number of ADSL customers would have been lower. There is also considerable cross-price elasticity even within the ADSL sector. The applicant explains in that regard that ADSL connections are offered over both analogue and ISDN lines. An increase in ADSL charges on the basis of ISDN connections would shift demand towards the analogue variant.

84 The Commission and the first and second interveners contend that the first part of the first plea in law should be dismissed.

(b) Findings of the Court

(i) Preliminary observations

85 It follows from the case-law that Articles 81 EC and 82 EC apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 81 EC and 82 EC do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings (see Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraph 33, and the case-law cited).

86 In that regard it must nevertheless be observed that the possibility of excluding particular anti-competitive conduct from the scope of Articles 81 EC and 82 EC, on the ground that it has been required of the undertakings in question by existing national legislation or that the legislation has eliminated any possibility of competitive conduct on their part, has been only partially accepted by the Court of Justice (Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraphs 130 to 134; Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraph 19; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraphs 27 to 29; and Case C-198/01 *CIF* [2003] ECR I-8055, paragraph 67).

87 For the national legal framework to have the effect of making Articles 81 EC and 82 EC inapplicable to the anti-competitive activities of undertakings, the restrictive effects on competition must originate solely in the national law (Case T-513/93 *Consiglio nazionale degli spedizionieri doganali* v *Commission* [2000] ECR II-1807, paragraph 61).

88 Articles 81 EC and 82 EC may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings (*van Landewyck and Others* v *Commission*, cited in paragraph 86 above, paragraphs 126 and 130 to 134; *Stichting Sigarettenindustrie and Others* v *Commission*, cited in paragraph 86 above, paragraphs 12 to 37; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 23 to 25; and *Commission and France* v *Ladbroke Racing*, cited in paragraph 85 above, paragraph 34).

89 Thus, if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles 81 EC and 82 EC (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 36 to 73, and *CIF*, cited in paragraph 86 above, paragraph 56; see, to that effect, Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 60).

90 It is in the light of the principles set out above that the Court must examine the German legal framework — in particular the TKG, the Charges Order and the decisions taken by RegTP during the period covered by the contested decision — in order to establish whether it eliminated any possibility of competitive activity by the applicant or whether it allowed the applicant sufficient scope to fix its charges at a level which would have enabled it to end or reduce the margin squeeze identified in the contested decision.

(ii) The contested decision

91 In the contested decision, the Commission examines the charges for wholesale access and the retail charges and finds an 'abuse by [the applicant] in the form of a margin squeeze generated by a disproportion between [those two charges]' (recital 57).

92 The Commission goes on to indicate in the contested decision that 'there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (recital 107).

93 Although the Commission does not, in the contested decision, exclude the possibility of the applicant reducing its charges for wholesale access (recitals 17, 163 and 206), it confines its analysis in that decision to the question whether the applicant had genuine scope to increase its retail prices (recitals 164 to 175). To that end it distinguishes between two periods.

94 The Commission takes the view first of all that, '[i]n the period from the beginning of 1998 to the end of 2001, [the applicant] was in a position to end the margin squeeze entirely by adjusting its retail charges' (recital 199). The Commission explains that the applicant 'could have avoided the margin squeeze by increasing retail charges for analogue and ISDN connections' (recital 164).

95 Next, for the period from 1 January 2002 to the adoption of the contested decision, the Commission also finds that the applicant had scope to increase its retail charges. However, that scope applies only to retail prices for ADSL access. The Commission observes in the contested decision that, '[s]ince the beginning of 2002, [the applicant] could in any event have reduced the margin squeeze, by increasing the ADSL retail access charges' (recital 199). It explains that, 'since 1 January 2002, [the applicant's] only legal means of reducing the margin squeeze has been limited to increases in the T-DSL charges' (recital 206).

96 In those circumstances, it is necessary to consider whether the Commission was correct to find in the contested decision that the applicant had sufficient scope during the two periods identified in paragraphs 94 and 95 above to increase its retail prices, so as to end or reduce the margin squeeze identified in the contested decision.

(iii) Absence of an abuse because the applicant had insufficient scope to avoid a margin squeeze by increasing its retail prices in the period from 1 January 1998 to 31 December 2001

97 According to the contested decision (recitals 164 and 199), the applicant had sufficient scope to end the margin squeeze in the period from 1 January 1998 to 31 December 2001 by increasing its retail charges for access to analogue and ISDN lines.

98 In order to assess the merits of that finding it is necessary, in the first place, to consider the German legislative framework applicable.

99 In that respect, it must be observed that, under the second sentence of Paragraph 27(1) and Paragraph 25(1) of the TKG, and Paragraphs 4 and 5 of the Charges Order, the applicant's retail prices for access to analogue and ISDN lines had to be approved by RegTP in the context of a price cap system. The price cap applied to two baskets (residential services and business services) which, for the period from 1 January 1998 to 31 December 2001, consisted of both access services and telephone calls, in particular, local, regional, long-distance and international calls. In view of the cap imposed by the decision of the BMPT of 17 December 1997, the applicant had to reduce the aggregate price for each of the two baskets by 4.3% in the period from 1 January 1998 to 31 December 1999 and, following the decision of RegTP of 23 December 1999, by 5.6% in the period from 1 January 2000 to 31 December 2001.

100 However, it must be held that, within that framework, the applicant was able to adjust its prices after obtaining the prior authorisation of RegTP. The applicant does not dispute the statement in recitals 37 and 166 to the contested decision that, in the period from 1 January 1998 to 31 December 2001, it lowered its telephone call charges by much more than the 4.3% and 5.6% reductions required by RegTP for the baskets as a whole. RegTP's reply of 3 April 2002 to the request for information of 23 March 2002 referred to in recital 37 to the contested decision thus confirms that 'the charges for telephone services regulated under the price cap system were reduced by DEM [*confidential*] [1] [or approximately EUR [*confidential*]] over and above the price cap requirements'.

101 That tariff reduction gave the applicant scope to increase its retail prices for access to its analogue and ISDN lines.

1 — Confidential data omitted.

102 As stated in recital 167 to the contested decision, the applicant also admitted in its reply to the statement of objections that there was scope for it to be able to increase the monthly charge per residential line by EUR [*confidential*] during the 1998 and 1999 price cap period.

103 The fact that the applicant did have scope to increase its retail charges is also apparent from remarks made by the German Government in its communication to the Commission of 8 June 2000, in which the German Government stated:

'The … complaint that, by its retail price cap decisions, RegTP limited the [applicant's] discretion to such an extent that an increase in the basic charge would not have been possible is unfounded. … [In fact the applicant] had the scope to raise the basic charge for analogue connections (DEM 21.39) so as better to align the basic charge with the charge of DEM 25.40 authorised on 8 February 1999 for local network access.'

104 Furthermore, RegTP's decision of 8 February 1999 — to which the applicant refers in its application and in its reply to support its argument that it cannot be held responsible for an infringement of Article 82 EC — confirms that 'the applicant retains a discretion as regards the adjustment of the various retail prices, subject to the limits applicable to the basket established in the price cap procedure'.

105 The Commission was correct therefore to find in recitals 166 and 167 to the contested decision that, having regard to the six applications for reductions in call charges between 1 January 1998 and 31 December 2001, the applicant had scope during that period to apply for increases in the prices of its access services for analogue and ISDN

lines, while respecting the overall ceilings for baskets of residential and business services. Moreover, the applicant admitted at the hearing that it had such scope.

106 In the second place, it is necessary to consider whether, notwithstanding the discretion noted in paragraph 105 above, the applicant is no longer subject to Article 82 EC as a result of RegTP's intervention in fixing the applicant's charges.

107 In that respect, it must be borne in mind at the outset that the fact that the applicant's charges had to be approved by RegTP does not absolve it from responsibility under Article 82 EC (see, to that effect, Case 123/83 *BNIC* [1985] ECR 391, paragraphs 21 to 23). Since the applicant (as it also admits in its reply) influences the level of its retail charges through applications to RegTP for authorisation pursuant to Paragraph 28(1) of the TKG, the restrictive effects on competition associated with the margin squeeze found in the contested decision did not originate solely in the applicable national legal framework (*Consiglio nazionale degli spedizionieri doganali* v *Commission*, cited in paragraph 87 above, paragraph 61).

108 The applicant nevertheless maintains that it did not have any responsibility under Article 82 EC, as RegTP had checked the compatibility of its charges with Article 82 EC beforehand.

109 In that respect, first, it must be noted that the retail charges for access to analogue lines which applied throughout the period from 1 January 1998 to 31 December 2001 had not been authorised by RegTP, but were based on decisions taken under the legislation in force before the adoption of the TKG. In response to a written

question of the Court, the applicant thus confirmed that its retail charges for analogue lines in relation to the period from 1 January 1998 to 31 December 2001 were based on an open-ended authorisation granted by the Federal Ministry of Post and Telecommunications in 1990 on the basis of the Telecommunications Code (Telekommunikationsordnung).

110 However, neither in its application nor in its reply did the applicant claim that the charges fixed under the legislation in force in 1990 had been authorised after the competent authority had considered them as to their conformity with Article 82 EC.

111 Second, it must be noted that the provisions of the TKG in force since 1 August 1996 do not indicate that RegTP considers whether applications for the adjustment of retail charges for access to analogue or ISDN lines are compatible with Article 82 EC.

112 In support of its argument, the applicant refers however to Paragraph 27(3) of the TKG, under which RegTP is to examine the conformity of the requested adjustment of charges 'with … other legal provisions' (said by the applicant to include Article 82 EC) and to the various decisions of RegTP mentioned in paragraph 78 above in which the existence of a margin squeeze was investigated.

113 In that respect it must be stated, first, that even though RegTP is obliged, like all organs of the State, to respect the provisions of the EC Treaty (see, to that effect, *CIF*, cited in paragraph 86 above, paragraph 49), it was, at the material time, the German body responsible for regulating the telecommunications sector, rather than the competition authority of the Member State concerned. However, the national regulatory authorities operate under national law which may, as regards telecommunications policy, have objectives which differ from those of Community competition

policy (see the Commission's Notice of 22 August 1998 on the application of the competition rules to access agreements in the telecommunications sector — framework, relevant markets and principles (OJ 1998 C 265, p. 2), paragraph 13).

114 Next, it must be noted that the various decisions of RegTP to which the applicant refers in support of its case do not include any reference to Article 82 EC.

115 It is true that RegTP examined the issue of the margin squeeze in a number of its decisions, particularly those of 8 February 1999, 30 March 2001, 21 December 2001, 11 April 2002 and 29 April 2003.

116 However, in those decisions, having found a negative spread between the applicant's wholesale and retail prices, RegTP took the view in each case that other operators should be able to offer their end-users competitive prices by resorting to cross-subsidised charges for access services and call charges.

117 Thus, RegTP finds in its decision of 29 April 2003 that:

'[C]ompetitors are not so prejudiced with regard to their competitive opportunities in the local network by the slight difference between retail and wholesale prices as to make it economically impossible for them to enter the market successfully or even to remain in the market. … [That difference] was not so significant as to deprive competitors of any opportunity themselves to cross-subsidise their retail prices in

order to be able to offer their end-users connections at a price as attractive as that offered by the applicant, or even at a lower price. That applies particularly to the higher-value and costlier ISDN and ADSL connections, which have increased markedly in number on account of the significant expansion of internet penetration, as well as of the marketing of faster and better access to the internet.'

118 RegTP follows a similar reasoning in its decisions of 8 February 1999, 30 March 2001, 21 December 2001 and 11 April 2002.

119 However, the fact that RegTP does not object to the charges requested by the applicant, after finding that the applicant's competitors must resort to cross-subsidisation in order to be able to offer their end-users competitive prices for access, shows that RegTP did not consider the compatibility of the charges in question with Article 82 EC or, at any rate, that it applied Article 82 EC incorrectly (see paragraphs 198 to 202 and 238 below).

120 In any event, even on the assumption that RegTP is obliged to consider whether retail charges proposed by the applicant are compatible with Article 82 EC, the Commission would not thereby be precluded from finding that the applicant was responsible for an infringement. The Commission cannot be bound by a decision taken by a national body pursuant to Article 82 EC (see, to that effect, Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, paragraph 48).

121 Third, it must be noted that attribution of any infringement to the applicant in the present case depends on whether the applicant had sufficient scope at the material time to fix its charges at a level that would have enabled it to end or reduce the margin squeeze at issue.

122 It has already been held that the applicant was able to influence the level of its retail charges through applications to RegTP for authorisation (see paragraphs 98 to 105 above). In the context of the applicant's special responsibility as an undertaking in a dominant position (Case 322/81 *NBIM* v *Commission* [1983] ECR 3461, paragraph 57; Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 112; and Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 97), the applicant was therefore obliged to submit applications for adjustment of its charges at a time when those charges had the effect of impairing genuine undistorted competition on the common market.

123 Furthermore, in its judgment of 10 February 2004 (paragraph 79 above), the Bundesgerichtshof expressly confirmed the applicant's responsibility to make applications for the adjustment of its charges. In addition, it noted that the German legal framework did not preclude RegTP from authorising proposed charges which are contrary to Article 82 EC. The Bundesgerichtshof held, in fact, that, '[u]nlike those cases in which the conduct of the undertaking in a dominant position is directly determined by national legal provisions, the authorisation of charges that is prescribed by telecommunications law is nevertheless based on the application for authorisation made by the provider', and that, '[e]ven if the administrative examination procedure is intended not to authorise tariffs which prove to constitute an abuse of a dominant position …, that does not preclude the possibility in practice of an undertaking submitting a charge by which it abuses its dominant position and obtains authorisation for it because the abuse is not revealed during the examination procedure'.

124 It follows from all the foregoing that, notwithstanding RegTP's intervention in the setting of the applicant's charges, the applicant had sufficient discretion during the period from 1 January 1998 to 31 December 2001 for its pricing policy to fall within the scope of Article 82 EC.

125 In the third place, it is necessary to consider whether the applicant used the discretion which it had in relation to its retail prices in order to avoid the margin squeeze identified in the contested decision in the period from 1 January 1998 to 31 December 2001.

126 In the present case, first of all, as regards retail prices for analogue lines, the applicant does not deny that it made no application to RegTP for authorisation for an increase in one-off charges and/or monthly charges. Thus, it is common ground that 'the monthly and one-off access charges for standard analogue telephone connections remained unchanged throughout the entire time from 1998 to the end of 2001' (recital 38 to the contested decision).

127 The applicant nevertheless maintains that, before 1 May 2002, it was bound in accordance with Paragraph 97(3) of the TKG by the mandatory charges for analogue lines that had been set in 1990 by the Federal Minister for Post and Telecommunications.

128 However, Paragraph 97(3) of the TKG, containing a transitional provision, provided only that the applicant's charges approved before the entry into force of the TKG would remain in effect until 31 December 2002 at the latest. That provision in no way therefore prevented the applicant from intervening in retail prices by making applications for price changes to RegTP before that date or, in particular, during the entire period from 1 January 1998 to 31 December 2001.

129 Second, as regards retail prices for ISDN lines, it is undisputed that, following the applicant's application, RegTP authorised a reduction in the basic monthly charges by decision of 16 February 2000 (recital 40 to the contested decision).

130 Furthermore, throughout the period from 1 January 1998 to 31 December 2001, the applicant made no application for price adjustment in respect of its one-off charges for the provision of ISDN lines. Those charges, which, according to the applicant, are

based on a 1996 decision of the BMPT and which remained valid in accordance with Paragraph 97(3) of the TKG after the entry into force of the TKG, were not therefore adjusted during the period from 1 January 1998 to 31 December 2001 (recital 41 to the contested decision).

131 It follows that the applicant did not use the discretion available to it in order to secure an increase in its retail prices, which would have helped to reduce the margin squeeze in the period from 1 January 1998 to 31 December 2001. On the contrary, it even used that discretion to lower its retail prices in respect of ISDN lines during that period.

132 Finally, in the fourth place, it is necessary to consider whether the Commission has established to the requisite legal standard in the contested decision that the applicant had sufficient scope in the period from 1 January 1998 to 31 December 2001 to '[avoid] the margin squeeze' (recital 164). In that respect, the Commission states in the contested decision that the applicant 'was in a position [during that period] to end the margin squeeze entirely by adjusting its retail charges' (recital 199).

133 It must be noted in that regard that the margin squeeze identified in the contested decision for that period amounted to EUR [*confidential*] up to 31 December 1998, EUR [*confidential*] up to 31 December 1999, EUR [*confidential*] up to 31 December 2000 and EUR [*confidential*] up to 31 December 2001 (recitals 152 and 153 to the contested decision, and Table 10).

134 However, as the Commission contends in its reply to a written question of the Court, it follows from the findings in recital 167 to the contested decision, which have not been challenged by the applicant, that the applicant actually lowered its call charges

by a total of EUR [*confidential*] during the period 1998 and 1999. However, that amount — distributed over [*confidential*] lines (Table 7 of the contested decision) and 24 months — would have enabled the applicant to raise the average price of its retail charges to EUR [*confidential*] per month.

135 It follows that the reduction in call charges would have created sufficient scope to end entirely the margin squeeze identified in the contested decision. For if, by exercising its discretion, the applicant had ended the margin squeeze as from 1998, it would have sufficed for the applicant to maintain the balance between its charges for wholesale access and its retail charges in order to avoid the margin squeeze identified in the contested decision throughout the period from 1 January 1998 to 31 December 2001. In addition, as the Commission also points out in the contested decision (recital 167), it is common ground that the applicant reduced its call charges further during the 2000 and 2001 period to EUR [*confidential*], and that the effect of that reduction was to increase further the applicant's scope to raise its retail prices.

136 At the hearing the applicant pointed out that, during the period from 1 January 1998 to 31 December 2001, RegTP had to investigate compliance with the price ceilings separately in respect of business and private customers. The applicant maintains that it had little scope to increase retail prices for individuals, and that it could not use its greater discretion to increase retail access prices for its business customers because that would have resulted in discrimination against those customers, contrary to point 3 of Paragraph 24(2) of the TKG.

137 However, in its application, the applicant has not disputed the finding in recital 167 to the contested decision that the amount released by the reductions in call charges could have been redirected to 'connections for residential and business customers' and could have been used entirely to increase retail access charges. Nor, in its application, has the applicant disputed the Commission's statement in recital 132 to the

contested decision that 'no distinction [should be made] between residential and business customers … because no sufficiently precise demarcation between them is possible'.

138 The line of argument referred to in paragraph 136, which was raised for the first time at the hearing, must therefore be declared inadmissible, in accordance with Article 48(2) of the Rules of Procedure.

139 Finally, it must be noted that the applicant does not dispute the finding in recital 168 to the contested decision that, during the period from 1 January 1998 to 31 December 2001, it could have '[undertaken] further reductions in call charges … and thereby … [obtained additional] leeway for price increases in the monthly and one-off charges for analogue and ISDN connections'.

140 It follows from all the foregoing that the Commission was entitled to find in the contested decision (recitals 164 and 199) that the applicant had sufficient scope during the period from 1 January 1998 to 31 December 2001 to end entirely the margin squeeze complained of in that decision.

(iv) Absence of an abuse because the applicant had insufficient scope to reduce the margin squeeze by increasing its ADSL retail access charges from 1 January 2002

141 It must be borne in mind that a new price cap system in Germany, approved by RegTP by decision of 21 December 2001, has been in force since 1 January 2002.

Under the terms of that decision, 'end-user lines' are in a separate basket. Within that basket, the increase in retail prices for analogue and ISDN connections was capped at 4.1% per annum.

142 It is not disputed that, following an application to RegTP on 15 January 2002, the applicant was authorised to increase its monthly charges for analogue and ISDN lines by EUR 0.56, which represented an increase in the average level of charges for all the services in the basket concerned of 4.04% (recital 44 to the contested decision). Nor is it disputed that the applicant's application of 31 October 2002 for an increase in its retail prices — in relation to the monthly rental charge for a T-Net analogue telephone line and the one-off takeover charges for T-Net and T-ISDN lines — was largely rejected by RegTP, because the increase would no longer have been consistent with the current price cap index figures (recital 45 to the contested decision).

143 Accordingly, the Commission finds in the contested decision (recital 206) that 'since 1 January 2002, [the applicant's] only legal means of reducing the margin squeeze has been limited to increases in the T-DSL charges'. According to the Commission, from that date, the applicant's discretion covered only ADSL retail access charges (see also recitals 174 and 199 to the contested decision).

144 In the first place, it must be noted in that regard that the applicant does not deny that it could have increased its ADSL charges from 1 January 2002. It maintains, however, that it did not have unlimited leeway because its charges had to be set on the basis of the cost of efficient service provision and could be reviewed subsequently by RegTP.

145 However, since the applicant fixes its ADSL charges at its own discretion, within the limits imposed under German law, its pricing practices in that area are capable of being caught by Article 82 EC (see paragraphs 87 and 88 above).

146 The fact that the Commission referred in the contested decision only to charges deriving from a decision of RegTP of 30 March 2001 in order to assess the extent of the applicant's discretion from 1 January 2002 alters nothing in that respect. The applicant does not deny that it had a limited discretion to increase its charges for ADSL access services from 1 January 2002.

147 In the second place, it is necessary to consider whether, as the Commission contends in the contested decision (recital 199), the applicant could have 'reduced the margin squeeze' by increasing its charges for ADSL access services from 1 January 2002. The applicant submits in that respect that, for end-users, the markets for narrowband and ADSL access services are separate markets. In those circumstances, an increase by the applicant in ADSL retail charges would have had no effect on the alleged margin squeeze identified in the markets for analogue and ISDN access services.

148 It must be noted in that regard that since wholesale access services can provide end-users with the whole range of analogue, ISDN and ADSL access services, the applicant's scope to increase its ADSL charges is capable of reducing the margin squeeze between wholesale prices, on the one hand, and retail prices for the whole range of analogue, ISDN and ADSL access services, on the other. A combined analysis, at end-user level, of analogue, ISDN and ADSL access services is required not only because they amount to a single supply of services at wholesale level, but also because, as the Commission explained in the contested decision (recital 26) without having been challenged by the applicant on that point, ADSL cannot be offered to end-users on its own because, for technical reasons, it always involves an upgrading of analogue or ISDN narrowband connections.

149 The applicant's observations concerning the purported cross-price elasticity between ADSL and narrowband connections and between the different ADSL variants must be rejected. First, those observations do not preclude the existence of scope for the applicant to increase its ADSL charges. Second, a limited increase in ADSL charges would have led to a higher average retail price for narrowband and associated broadband access services, and would thus have reduced the margin squeeze identified. In view, in particular, of the advantages of broadband as regards data transmission, end-users of broadband access services would not automatically choose to revert to a narrowband connection when ADSL retail access charges are increased.

150 The applicant's argument that broadband connections can be marketed separately from narrowband connections on the basis of line sharing at the wholesale level cannot be accepted either. If, by that argument, the applicant seeks to distinguish two separate wholesale markets relating to narrowband services and broadband services respectively, that argument must be declared inadmissible in accordance with Article 48(2) of the Rules of Procedure because, in its application, the applicant has not challenged the definition of the relevant markets that was applied in the contested decision, which identifies a single wholesale market, namely the market for fully unbundled access to the local network (recitals 64 to 67 to the contested decision). If, by that argument, the applicant claims that the Commission should have taken account of the line sharing charges for the purpose of calculating charges for wholesale access, that argument cannot be accepted either. The applicant has failed to show that, if the Commission had taken the line sharing charges into account, that would have affected its findings as to the existence of a margin squeeze or of the applicant's scope to reduce the margin squeeze by increasing its ADSL retail access charges.

151 It follows from all the foregoing that the Commission was entitled to find in the contested decision that the applicant had sufficient scope from 1 January 2002 to reduce the margin squeeze identified in that decision by increasing its charges for ADSL access services.

152 Accordingly, the first part of the plea in law must be rejected.

2. Second part: unlawfulness of the method used by the Commission to establish a margin squeeze

(a) Arguments of the parties

153 The applicant submits that the abusive nature of a margin squeeze can arise only from the abusive nature of retail prices alone, since the Commission does not deny that the prices of wholesale access are mandatorily set by the official authorities. However, the Commission has not demonstrated that the applicant's retail prices would lead to price dumping and as such are abusive. The applicant refers in that regard to Lexecon's expert opinion. The contested decision is thus erroneous because the Commission applied a test which does not relate to the abusive nature of the retail prices as such, but to the relationship between those prices and the prices of wholesale access.

154 The applicant also claims that the finding of a margin squeeze is based on a number of errors relating to the method used.

155 In the first place, the applicant observes that, as far as retail prices are concerned, the Commission took account only of revenue from the provision of telephone lines to end-users. In order to be able to find a margin squeeze and in view of the narrow definition of the market used in the contested decision, the Commission should have taken account of additional revenue from the applicant's competitors for connection and higher-value services (see, to that effect, Case T-342/99 *Airtours* v *Commission*

[2002] ECR II-2585, paragraph 276). The revenue in question is generated by local or long-distance calls, call termination and call sending, as well as other higher-value services. Although the Commission found that '[t]he fixed-network connections are in reality a prerequisite for the provision of a variety of telecommunications services to end-users', and that those services enable considerable additional revenue to be generated (recital 205 to the contested decision), it nevertheless contradicted itself in refusing to take the charges for those telecommunications services into account in its analysis of the margin squeeze. From an economic standpoint, however, it would be necessary to take those charges into account in order to assess the actual opportunities for a competitor of the applicant to enter the market.

156 Thus, first, the applicant submits that its competitors are not obliged to offer their customers preselection and call-by-call services in respect of local, long-distance or international calls. Its competitors are therefore able to predict their revenue from telephone calls with far greater certainty than the applicant. As far as long-distance calls are concerned, the applicant maintains in its reply that it has been required to provide preselection and call-by-call (together: '(pre)selection') services since 1998.

157 In addition the applicant submits in its reply that carrier (pre)selection is not automatically excluded for its competitors' customers. However, almost all of the applicant's competitors avail themselves of the possibility (which is not open to the applicant) of excluding (pre)selection where it is to their advantage to do so. The applicant's competitors are thus assured of receiving the revenue connected with telephone calls by virtue of the voluntary exclusion of carrier (pre)selection. None of the complainants in the administrative procedure took the view, moreover, that the exclusion of (pre)selection rendered its service provision less attractive or that a lower initial connection charge should have been offered by way of compensation. Furthermore, their call charges are almost all higher than the costs of establishing the call.

158 Second, the applicant submits that its competitors could offer innovative products on the basis of unbundled access to the local network, which are not offered by the applicant itself. In calculating the margin squeeze, the Commission should therefore also have taken into account the additional revenue generated by such products.

159 Third, the applicant maintains that its charges for retail access services (one-off and monthly charges) cannot be isolated from call charges. Competition for telecommunications services is for bundles of services. The applicant refers in that regard to a market study. Accordingly, the telecommunications companies offer a choice of connection variants and call options which are marketed as a combined product: mixed price packages in which rising monthly charges are set against falling call charges. In considering in its decision of 29 April 2003 whether the applicant's charges were leading to a margin squeeze that would distort competition, RegTP also regarded as decisive the fact that the applicant's competitors are in a position to obtain additional revenue from call services. The same or similar explanations are also given in the other decisions taken by RegTP between 1999 and 2003, cited in paragraph 78 above. The applicant refers moreover to the practice of the United States' Federal Communications Commission (FCC) and the British Office of Telecommunications (Oftel), and to the opinion expressed by the German Government in its observations of 8 June 2000 in proceedings for failure to fulfil obligations, which confirm that other revenue available to competitors must be taken into account in the analysis of a margin squeeze.

160 In its reply, the applicant submits further that an analysis of the margin squeeze must be undertaken from the point of view of different levels of aggregation where wholesale access serves as the basis for a variety of services to end-users. Thus, at each level, only those costs of wholesale access which are exclusively linked to the corresponding final product or group of final products concerned should be taken into account. Consequently, if wholesale products WP1 and WP2 are required for

the production of final product FP1, but if, at the same time, final product FP2 is produced on the basis of WP2 and WP3, a margin squeeze occurs either where the price of FP1 or of FP2 is lower than the price of WP1 or of WP3, or where the aggregate price of FP1 and FP2 is lower than the aggregate price of WP1, WP2 and WP3. However, the price of WP2 should not be taken into account for the purpose of determining whether there is a margin squeeze at the first level of aggregation. The analysis should be conducted at a higher level of aggregation where products FP1 and FP2 constitute a whole from the customer's point of view, or where products FP1 and FP2 are bundled for technical or legal reasons (by wholesale product WP2), with the result that the dominant undertaking would necessarily lose the revenues from the two final products FP1 and FP2 when transferring wholesale product WP2. Unbundled access to the local network is a wholesale product in respect of at least two final products, namely calls and connections, which constitute a 'cluster' for customers. The costs of the wholesale product should not be attributed to just one of the two final products but to both of them. It follows that charges for retail line-rental and for calls and higher-value services should be compared with the charges relating to that combined offer of services when analysing the margin squeeze.

161 Furthermore, the applicant challenges the Commission's arguments concerning the principle of tariff rebalancing (recitals 120 to 123 to the contested decision). Thus, according to the applicant, tariff rebalancing — the purpose of which is to reduce the connection deficit which traditionally exists in the majority of the Member States, by means of an increase in connection charges and a parallel decrease in call charges — concerns incumbent operators only. By contrast, the analysis of the margin squeeze concerns the entry to the market of the applicant's competitors. In the context of Article 82 EC, it is important to establish only whether, taking into account the actual situation on the market, it is possible for competitors to provide retail services without impediment on the basis of the applicant's charges for wholesale access. In that respect, the applicant observes that its competitors are not obliged to offer (pre)selection. The legal framework thus allows the applicant's competitors to enjoy legally guaranteed revenues from call services, completely independently of any tariff rebalancing. The applicant submits further that it is subject to regulation by RegTP, which aims to achieve progressive tariff rebalancing.

162 In the second place, the applicant claims that the method used by the Commission to identify a margin squeeze is defective, because it relies on the proposition that it should be possible for the applicant's competitors to replicate its customer pattern entirely (recitals 120 to 127 to the contested decision). However, no competitor would have an interest in replicating a customer pattern which, owing to the obligation to provide universal services, is characterised by a disporportionately high and unprofitable share of low-income end-users with analogue lines, who generate only a small turnover and who are not prepared to switch to higher-value connections. The fall in the applicant's competitors' share of analogue connections from 21% to 10% between 1999 and 2002 (recital 182 to the contested decision) is explained by the fact that customers of the applicant's competitors have increasingly been switching to higher-value connections.

163 The applicant claims that, contrary to the Commission's contention (recital 133 to the contested decision), there is no margin squeeze in the highest-value market sectors which are of interest to the applicant's competitors (ISDN connections and ADSL connections over analogue or ISDN lines). Both the applicant's own charges and those of its competitors in respect of lines in the highest-value segments are sufficient to cover costs.

164 In the third place, the applicant is critical of the fact that the Commission takes the discontinuance charge into account when calculating the prices of wholesale services. The discontinuance of an end-user's connection by a competitor of the applicant involves both connection work to restore to the applicant the local loop rented, and administrative tasks, which are not necessary in the case of an end-user's discontinuance where the applicant uses the local loop itself. These costs are specific inefficiency costs which arise as a result of entry to the market, which the incumbent operator in a dominant position necessarily does not incur. Any such costs which are generated solely as a result of technical or administrative measures associated with entry to a market should be disregarded in the analysis of a margin squeeze. In fact, Article 82 EC does not require a dominant undertaking to remove all barriers to entry, but prohibits the creation of artificial barriers to entry.

165 The Commission and the first and second interveners contend that the second part of the first plea in law should be rejected.

(b) Findings of the Court

(i) Whether the Commission should have demonstrated in the contested decision that the applicant's retail prices were, as such, abusive

166 In the present case, according to the contested decision (recital 201), '[t]he abuse committed by [the applicant] consists in the imposition of unfair prices in the form of a margin squeeze to the detriment of [the applicant's] competitors'. The Commission takes the view that there is 'an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (recital 107 to the contested decision).

167 It is true that, in the contested decision, the Commission establishes only that the applicant has scope to adjust its retail prices. However, the abusive nature of the applicant's conduct is connected with the unfairness of the spread between its prices for wholesale access and its retail prices, which takes the form of a margin squeeze. Therefore, in view of the abuse found in the contested decision, the Commission was not required to demonstrate in that decision that the applicant's retail prices were, as such, abusive.

168 The applicant's argument that the abusive nature of a margin squeeze can arise only from the abusive nature of its retail prices must therefore be rejected.

(ii) The method used by the Commission to calculate the margin squeeze

Contested decision

169 In recitals 106 to 139 to the contested decision, the Commission sets out the method which it used to calculate the margin squeeze.

170 It submits first of all that the basis for establishing an abusive margin squeeze is the comparison between 'the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services' (recital 107 to the contested decision).

171 The Commission adds that '[i]n order to establish the existence of a margin squeeze it is essential that the wholesale and retail access services be comparable' (recital 109 to the contested decision). According to the Commission, '[the] established operator and its competitors as a rule provide retail services of all kinds. It has therefore to be considered whether the established operator's retail and wholesale services are comparable, in the sense that their technical features are the same or at least similar and that they allow the same or at least similar services to be provided' (recital 109 to the contested decision).

172 The Commission finds that the wholesale charges for unbundled access to local loops can indeed be compared with retail access charges, and that wholesale access enables the applicant's competitors to offer their end-users a range of different retail access services, namely analogue narrowband access, digital narrowband access (ISDN) and broadband access in the form of ADSL services (recitals 110 and 112 to the contested decision).

173 According to the Commission, there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services 'is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (recital 107 to the contested decision). The Commission therefore relies on the applicant's charges and costs as a basis for assessing whether the applicant's pricing practices are abusive.

174 In order to determine whether the difference between the applicant's retail prices and the prices of its wholesale access leads to an abusive margin squeeze, the Commission compares the price of a single wholesale service (local loop access) with the price of a plurality of retail services (access to analogue, ISDN and ADSL connections) (recital 113 to the contested decision).

175 The Commission does not take revenues from telephone calls into account at the retail price level. It only examines the charges for access to the network, which it compares to the charges of wholesale access (recital 119 to the contested decision).

176 Since RegTP has applied single wholesale tariffs, irrespective of the downstream services which competitors provide over the line supplied to them by the applicant (recital 113 to the contested decision), it is necessary, according to the Commission,

to compare charges for wholesale access with average prices for all retail access services, taking account of each variant of retail access service actually marketed by the applicant and the respective prices of those lines (recital 116 to the contested decision).

177 It must therefore be borne in mind that the retail prices (for each variant offered by the applicant) and the prices for wholesale access are composed of two items, namely an initial one-off charge and a monthly subscription charge (recitals 142 and 149 to the contested decision).

178 To calculate the 'monthly price' of the one-off charges, these were divided by [*confidential*], representing the average period (in months) for which end-users keep a telephone subscription (recitals 148 and 151 to the contested decision).

179 Thus, the average total monthly retail price is the sum of the price of the average monthly charge (taking into account all retail access services) and the average one-off charges (taking into account all retail access services and the average duration of a subscription) (recital 148 to the contested decision).

180 The average total monthly price of wholesale services is the sum of the price of the monthly charge and the price of the average one-off charges (taking into account the average duration of a subscription) (recital 151 to the contested decision). According to the Commission, the one-off charges for wholesale access also include discontinuance charges. The Commission notes that '[t]he discontinuance charge is payable for re-connecting an unbundled line to [the applicant's] network and is imposed only on

competitors at wholesale level', and adds that '[t]he discontinuance charge and the charge for access provision are the only one-off wholesale charges which competitors must pay to [the applicant]' (recital 151 to the contested decision).

181 On the basis of that calculation of monthly prices, the Commission finds that the spread between the applicant's wholesale and retail prices was negative between 1998 and 2001 (recital 153 to the contested decision). In view of that finding, it is not necessary, according to the Commission, 'to determine whether this spread was sufficient to cover [the applicant's] downstream costs for customer relations' (recital 153 to the contested decision). By contrast, since the spread was positive from 2002 onwards, the Commission calculated '[the applicant's] product-specific costs [for providing retail services], in order to assess whether this positive spread [was] sufficient [for the applicant] to cover [those] product-specific costs' (recital 154 to the contested decision).

182 The Commission concludes that the margin squeeze in access to the local network still existed at the time of the adoption of the contested decision (recital 161 to the contested decision), since the applicant's product-specific costs for providing retail services still exceeded the positive spread between retail and wholesale prices (recital 160 to the contested decision).

Lawfulness of the method used by the Commission

— Preliminary observations

183 It must be noted that the applicant puts forward three complaints concerning the method used to calculate the margin squeeze. First of all, the applicant submits that,

as far as retail prices are concerned, the Commission should not have taken into consideration only revenues from the provision of telephone lines to end-users, but also revenues from other services such as call services. Second, the applicant criticises the method used by the Commission to demonstrate the existence of a margin squeeze based on the proposition that the applicant's competitors would have an interest in entirely replicating its customer pattern. Third, the method used is defective because the Commission inflates the prices of wholesale access by taking discontinuance charges into account in the calculation of those prices.

184 The various arguments put forward in relation to the first two complaints all relate to one or other of the two essential features of the method used by the Commission. The first concerns the margin squeeze calculation based on the charges and costs of a vertically integrated dominant undertaking, disregarding the particular situation of competitors on the market. The second concerns the taking into account of revenues from all access services, excluding revenues from other services which may be supplied via access to a fixed network.

185 Before considering those various complaints and arguments, it must be borne in mind that, although as a general rule the Community judicature undertakes a comprehensive review of the question whether the conditions for applying the competition provisions of the EC Treaty are met, its review of complex economic appraisals made by the Commission is necessarily 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 misuse of powers (Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34; Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62; and Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 78).

— The alleged unlawfulness of the method of calculating the margin squeeze on the basis of the charges and costs of a vertically integrated dominant undertaking, disregarding the particular situation of competitors on the market

186 It must be observed first of all that the Commission considered in the contested decision whether the pricing practices of the dominant undertaking could have the effect of removing from the market an economic operator that was just as efficient as the dominant undertaking. The Commission therefore relied exclusively on the applicant's charges and costs, instead of on the particular situation of the applicant's actual or potential competitors, in order to assess whether the applicant's pricing practices were abusive.

187 According to the Commission, 'there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (recital 107 to the contested decision). In the present case, the margin squeeze is said to be abusive because the applicant itself 'would have been unable to offer its own retail services without incurring a loss if … it had had to pay the wholesale access price as an internal transfer price for its own retail operations' (recital 140 to the contested decision). In those circumstances, 'competitors [who] are just as efficient' as the applicant cannot 'offer retail access services at a competitive price unless they find additional efficiency gains' (recital 141 to the contested decision; see also recital 108 to the contested decision).

188 Next, it must be noted that, although the Community judicature has not yet explicitly ruled on the method to be applied in determining the existence of a margin squeeze, it nevertheless follows clearly from the case-law that the abusive nature of a dominant undertaking's pricing practices is determined in principle on the basis of its own

situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors.

189 Thus, in its judgment in Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 74, the Court of Justice took into consideration only the charges and costs of the dominant undertaking, AKZO, in order to assess whether AKZO's pricing practices were abusive. The approach suggested by Advocate General Lenz, according to which it was 'necessary to analyse the cost structure of all three oligopolists [namely AKZO and its two competitors], so that a reliable picture [could] be obtained of the price level that was in fact economically justified' (point 34 of his Opinion), was not therefore followed by the Court.

190 Similarly, the Court of First Instance held in Case T-5/97 *Industrie des poudres sphériques* v *Commission* [2000] ECR II-3755 that the fact that the applicant, which had complained of an alleged practice of margin squeezing, 'cannot, seemingly because of its higher processing costs, remain competitive in the sale of the derived product cannot justify characterising [the dominant undertaking's] pricing policy as abusive' (paragraph 179).

191 Finally, in its Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article [82 EC] (Case No IV/30.178 Napier Brown — British Sugar) (OJ 1988 L 284, p. 41; 'the Napier Brown/British Sugar decision'), the Commission also took the view that a margin squeeze should be calculated on the basis of the charges and costs of the vertically integrated dominant operator (recital 66). It finds in that decision that '[t]he maintaining, by a dominant company, which is dominant in the markets for both a raw material and a corresponding derived product, of a margin between the price which it charges for a raw material to the companies which compete with the

dominant company in the production of the derived product [on the one hand] and the price which it charges for the derived product [on the other], which is insufficient to reflect that dominant company's own costs of transformation (in this case the margin maintained by British Sugar between its industrial and retail sugar prices compared to its own repackaging costs) with the result that competition in the derived product is restricted, is an abuse of dominant position' (recital 66).

192 It must be added that any other approach could be contrary to the general principle of legal certainty. If the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly their cost structure — information which is generally not known to the dominant undertaking — the latter would not be in a position to assess the lawfulness of its own activities.

193 The Commission was therefore correct to analyse the abusive nature of the applicant's pricing practices solely on the basis of the applicant's particular situation and therefore on the basis of the applicant's charges and costs.

194 Since it is necessary to consider whether the applicant itself, or an undertaking just as efficient as the applicant, would have been in a position to offer retail services otherwise than at a loss if it had first been obliged to pay wholesale access charges as an internal transfer price, the applicant's argument that its competitors are not seeking to replicate its own customer pattern and can acquire additional revenue from innovative products which they alone supply on the market (as to which the applicant provides no details however) is ineffective. For the same reasons, the argument that competitors can exclude the possibility of (pre)selection cannot succeed.

— Complaint that the Commission took into account only revenues from all access services and excluded revenues from other services, particularly those from call services

195 First, it is necessary to consider whether, for the purposes of calculating the margin squeeze, the Commission was entitled to take into account only revenues from the applicant's access services, and to exclude revenues from other services, such as call services.

196 It must be borne in mind first of all that the Community legal framework in place since 1990 aims to create the conditions for effective competition in telecommunications markets. Thus, Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13), which, as regards the tariff structure of incumbent operators, makes a distinction between the initial connection, the monthly rental, local calls, regional calls and long-distance calls, aims to effect tariff rebalancing between those different elements on the basis of actual costs, in order to ensure full competition in telecommunications markets. Specifically, that operation had to take the form of a reduction in the charges for regional and international calls and an increase in connection charges, the monthly rental and local call rates (Opinion of Advocate General Léger in Case C-500/01 *Commission* v *Spain* [2004] ECR I-583, point 7). The Member States were bound to phase out the restrictions on tariff rebalancing as soon as possible after the entry into force of Directive 96/19 and at the latest by 1 January 1998 (*Commission* v *Spain*, paragraph 32).

197 As the Commission correctly observes in recital 120 to the contested decision, '[s]eparate consideration of access charges and call charges is in fact [therefore] required by the Community-law principle of tariff rebalancing'.

198 Next, it must be noted that, by decision No 223a of the BMPT, the applicant was obliged to offer its competitors fully unbundled access to the local loop with effect from June 1997. However, a system of undistorted competition between the applicant and its competitors can be guaranteed only if equality of opportunity is secured as between the various economic operators (Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 83, and Joined Cases C-327/03 and C-328/03 *ISIS Multimedia and Firma O2* [2005] ECR I-8877, paragraph 39).

199 While it is true that, from the point of view of the end-user, access services and call services constitute a whole, the fact remains that, as far as the applicant's competitors are concerned, the provision of call services to end-users via the applicant's fixed network requires access to the local loop. Equality of opportunity as between the incumbent operator and owner of the fixed network, such as the applicant, on the one hand, and its competitors, on the other, therefore means that prices for access services must be set at a level which places competitors on an equal footing with the incumbent operator as regards the provision of call services. Equality of opportunity is secured only if the incumbent operator sets its retail prices at a level which enables competitors — presumed to be just as efficient as the incumbent operator — to reflect all the wholesale costs in their retail prices. However, if the incumbent operator does not adhere to that principle, new entrants can only offer access services to their end-users at a loss. They would then be obliged to offset losses incurred in relation to local network access by higher call charges, which would also distort competition in telecommunications markets.

200 Therefore it follows that, even if, as the applicant claims, it were true that access services and telephone calls constitute a 'cluster' as far as the end-user is concerned, the Commission was entitled to conclude in recital 119 to the contested decision that, in order to assess whether the applicant's pricing practices distort competition, it was necessary to consider the existence of a margin squeeze in relation to access services alone, and thus without including telephone call charges in its calculation.

201 Furthermore, the calculation offsetting access charges and call charges to which the applicant refers itself confirms that the applicant and its competitors are not on an equal footing as regards local network access, which is, however, a prerequisite for undistorted competition in the telephone calls market.

202 In any event, since the applicant significantly lowered its telephone call charges in the period covered by the contested decision (see paragraph 19 above), it is conceivable that competitors did not even have the economic opportunity to offset charges suggested by the applicant. In fact, the competitors, already at a competitive disadvantage by comparison with the applicant in relation to local network access, had to apply even lower call charges than the applicant in order to encourage potential customers to discontinue their subscription to the applicant and to subscribe to them instead.

203 It follows from the foregoing that, for the purposes of calculating the margin squeeze, the Commission was entitled to take account only of revenues from access services and to exclude revenues from other services, such as call services.

204 Second, as regards the applicant's argument that its competitors are interested only in higher-value markets, namely (in the present case) the broadband market in which there is no margin squeeze and therefore no need to take account of analogue access services for end-users, it must be borne in mind for the purposes of calculating the margin squeeze that, for the applicant's competitors, broadband access necessarily involves access to analogue or ISDN lines (see paragraph 148 above). Moreover, the first intervener, a competitor of the applicant, claims that its absence from the analogue access services market is the result of the abuse of the applicant's dominant position and not of its own free choice. In any event, as has been noted in

paragraphs 186 to 193 above, the abusive nature of the applicant's pricing practices must be assessed on the basis of the applicant's particular situation and therefore on the basis of its charges and costs. The assessment of the abusive nature of the applicant's pricing practices cannot therefore be influenced by any preferences which the applicant's competitors may have for one or other market.

205 The Court notes that, at the retail level, the applicant offers analogue, ISDN and ADSL access services, all of which constitute a single service at wholesale level.

206 In those circumstances, the Commission was entitled to take the view in the contested decision (recital 111) that, in order to calculate the margin squeeze, the price of wholesale access had to be compared to the weighted average of retail prices for all access services, namely analogue narrowband access, digital narrowband access (ISDN) and broadband access in the form of ADSL services.

207 This complaint cannot therefore be upheld.

— Complaint that the discontinuance charge for wholesale access was included in the margin squeeze calculation

208 As the contested decision shows (recitals 18, 149 and 151), the charge for discontinuing a connection was taken into account by the Commission in its calculation of the total cost of the applicant's wholesale access. The Commission explains in the contested decision (recital 151) that '[t]he discontinuance charge is payable for

re-connecting an unbundled line to [the applicant's] network and is imposed only on competitors at wholesale level', and that '[t]he discontinuance charge and the charge for access provision are the only one-off wholesale charges which competitors must pay to [the applicant]'.

209 As regards the applicant's argument that the discontinuance charge cannot be regarded as part of the one-off charge for wholesale access, it must be pointed out that, until 10 February 1999, the applicant itself included the discontinuance charge in the cost of taking over a connection which it charged its competitors. It follows from recitals 18 and 22 and Table 9 of the contested decision — which have not been challenged by the applicant — that a separate discontinuance charge was imposed only from 10 February 1999, giving rise to a concomitant reduction in the takeover charge.

210 It must also be noted that there is no dispute about the fact that the average end-user keeps his telephone subscription for a period of [*confidential*] months (recital 148 to the contested decision). Since the discontinuance charge is payable to the applicant by the competing recipient of wholesale access, when one of that recipient's end-users discontinues his subscription for access services, the discontinuance charge forms part of the total cost of the wholesale service which must be reflected in the retail prices of the applicant's competitors.

211 Accordingly, the Commission was correct to include the discontinuance charge in the calculation of the total cost of wholesale access for the purpose of calculating the margin squeeze.

212 Therefore, this complaint too is unfounded.

213 It follows from all the foregoing that the second part of the first plea in law must be rejected.

3. Third part: alleged calculation error in the finding of a margin squeeze

(a) Arguments of the parties

214 The applicant submits that the Commission made a mistake in calculating the margin squeeze in Table 11 of the contested decision. The table, which relates to the applicant's product-specific costs in 2001, includes in respect of ISDN narrowband connections (T-ISDN) — with the exception of data relating to T-ISDN multi-device mode, standard and comfort — data from Table 3 of the contested decision relating to 2002. In addition, the data relating to T-ISDN multi-device mode, standard and comfort in Table 11 of the contested decision do not correspond to any of the data in Tables 3 to 7 of the contested decision. In order for it to be correct, the weighting of product-specific costs for 2001 should have been based solely on the numbers of connections referred to in Table 4 of the contested decision for 2001. On the basis of those data, the weighted product-specific costs amount to only EUR [*confidential*], or EUR [*confidential*] less than the figure calculated by the Commission. The margin squeeze found by the Commission should be reduced by the same amount.

215 The Commission acknowledges the calculation error identified by the applicant but contends that the error does not affect the lawfulness of the contested decision.

(b) Findings of the Court

216 The calculation error, which has been admitted by the Commission in its defence, concerns the calculation of the applicant's product-specific costs in 2001.

217 That error does not, however, affect the lawfulness of the contested decision.

218 As regards the period from 1998 to 2001, the Commission did not take the applicant's product-specific costs into account in classifying the applicant's pricing policy as abusive. In the contested decision (recital 153), the Commission concluded from the existence of a negative spread between the applicant's wholesale and retail prices that the applicant's pricing policy constituted an infringement. The finding as to the applicant's infringement during that period is therefore not at all affected by the error in calculating the applicant's product-specific costs in 2001.

219 By contrast, from 2002 onwards, the Commission classified the applicant's pricing practices as an infringement because the applicant's product-specific costs associated with retail access services exceeded the positive spread between the applicant's wholesale and retail prices. In order to make that calculation, the Commission relied in the contested decision on the applicant's product-specific costs in 2001 (recitals 159 and 160).

220 Thus, the Commission reached the following conclusions concerning the margin squeeze calculation in Table 12 of the contested decision:

Table 12

(in euros)

	5/2002	7/2002	1/2003	2/2003	5/2003
Spread between retail and wholesale price	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]
Average product-specific cost per line	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]
Margin squeeze	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]

221 It must be observed that, so far as this part of the plea is concerned, the applicant does not object to the reference to its product-specific costs in 2001 (recital 159 to the contested decision) for the purposes of calculating the margin squeeze from 1 January 2002. It merely claims that its product-specific costs for 2001 were calculated incorrectly.

222 If the Commission had not made the calculation error complained of, the product-specific costs for 2001 should, as the applicant points out, have been fixed at EUR [*confidential*] (see paragraph 214 above). However, even if those product-specific costs were taken into account without the calculation error, there would still be a margin squeeze throughout the period of the infringement covered by the contested decision.

223 Owing to the fact that the unfair — within the meaning of Article 82 EC — nature of the applicant's pricing practices is linked in the contested decision (recitals 163 and 201) to the very existence of the margin squeeze rather than to its precise spread, the Commission's calculation error does not affect the lawfulness of the contested decision.

224 It therefore follows that the third part of this plea is ineffective.

4. Fourth part: the margin squeeze identified had no effect on the market

(a) Arguments of the parties

225 First, the applicant submits that the finding of a margin squeeze resulting from the pricing practice of a dominant undertaking does not constitute an abuse per se. The Commission should therefore have considered the actual effects of the conduct in question but failed to do so in the contested decision. In view of the fact that RegTP sets wholesale charges on the basis of the applicant's costs, the evidence of actual restriction of competition should be substantiated.

226 The applicant notes the two aspects of the concept of abuse, namely that the activities complained of (i) are characterised by the recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators and (ii) actually hinder competition (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 91). The Community

judicature thus requires evidence that the conduct complained of constitutes a barrier to the entry of other competitors or helps to remove competitors already in the market. In support of its case, the applicant refers to the case-law of the Court of Justice (*AKZO* v *Commission*, cited in paragraph 189 above, paragraph 72; Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 41; and Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraphs 111 and 119), and also to the Commission's practice in taking decisions (recital 66 to the Napier Brown/British Sugar decision), and to that of RegTP and of the FCC. It is only in the exceptional case of a sale at a price below the average variable costs that the Community judicature has deemed a pricing practice to be intrinsically abusive.

227 In its reply, the applicant explains that the principles developed by the Court in relation to predatory pricing should be applied to a margin squeeze in a case where wholesale prices are fixed by a regulatory authority. The Commission should therefore produce evidence that the margin squeeze in question actually impairs competition. Since wholesale charges are fixed by RegTP on the basis of costs, that evidence is available only where — after excluding competitors from the market — the dominant undertaking would be in a position, by increasing its retail prices, to offset the losses incurred during that exclusionary stage as a result of its low-price policy. However, in the present case, any such attempt by the applicant would immediately entail its competitors' return to the market.

228 Second, the applicant denies that its charges were a barrier to entry to the market or that they excluded its competitors from the market.

229 There are genuine opportunities for the applicant's competitors to enter the market. The applicant notes in that regard that its competitors can cross-subsidise call charges and connection charges, or variable and fixed charges, in order to make up any deficit in relation to connections. The option of excluding (pre)selection for all

connections, which is available to the applicant's competitors but not to the applicant itself (see paragraph 156 above), enables competitors to calculate their revenues from call charges much more accurately than the applicant is able to. The applicant's competitors thus have a turnover on call charges by connection that is significantly higher than that of the applicant, and moreover highly predictable. The replies of the applicant's competitors to the request for information of 19 January 2000 and RegTP's decision of 29 April 2003 confirm that those competitors can cross-subsidise connection and call charges. The applicant refers also to its observations of 29 July 2002 on the statement of objections and to the documents cited in those observations. Finally, according to research carried out by the applicant, all its competitors have been able to achieve positive margins on direct costs by cross-subsidising their fixed and variable charges for each type of connection and therefore also for analogue lines.

230 In addition, since the liberalisation of the German telecommunications market, a number of competitors have been able to gain significant market shares in urban areas. The applicant refers in that regard to KomTel, a company which, according to its own statements in a press release of 31 May 2002, achieved a 43% market share of connections in Flensburg. According to the applicant's calculations based on lines rented to its competitors, in other local areas served, the market shares of other suppliers are, for example, [*confidential*]. Thus, since 1998, the applicant has lost [*confidential*] end-users to its competitors. Once a competitor has entered a local market, it becomes economically viable for that competitor to create its own infrastructure. Entry to the market should naturally begin with lucrative customers, so that new groups of customers can be acquired with the profits thus made (letter of 15 October 2002 from Colt, one of the applicant's competitors, to the applicant). The same applies in respect of highly-urbanised areas being taken as a springboard for competition at a regional level. In any event, competition in Germany has developed more favourably than in the other Member States. Thus, in the Community as a whole, the applicant is responsible for more than 81% of rentals of unbundled local network access.

231 In its reply, the applicant states that Colt and Arcor are now active on the national market, and EWE TEL in large areas of northern Germany, as suppliers of telephone lines. The Commission failed to produce evidence of the causal link between the alleged margin squeeze and the allegedly sluggish development of competition. The applicant's market position in the broadband sector cannot be attributed to the margin squeeze, as there was no margin squeeze in that sector of the market.

232 The Commission and the first and second interveners contend that this part of the plea should be rejected.

(b) Findings of the Court

233 It must be borne in mind that an 'abuse' is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (*Hoffmann-La Roche* v *Commission*, cited in paragraph 226 above, paragraph 91; *AKZO* v *Commission*, cited in paragraph 189 above, paragraph 69; order of the Court of 23 February 2006 in Case C-171/05 P *Piau* v *Commission*, not published in the ECR, paragraph 37; *Irish Sugar* v *Commission*, cited in paragraph 122 above, paragraph 111).

234 According to the Commission, the applicant's pricing practices restricted competition in the market for retail access services. It reaches that conclusion in the contested decision (recitals 179 and 180) on the basis of the very existence of the margin squeeze. It maintains that it is not necessary to demonstrate an anti-competitive effect, although, in the alternative, it examines that effect in recitals 181 to 183 to the contested decision.

235 Given that, until the entry of a first competitor on the market for retail access services, in 1998, the applicant had a monopoly on that retail market, the anti-competitive effect which the Commission is required to demonstrate relates to the possible barriers which the applicant's pricing practices could have created for the growth of competition in that market.

236 In that respect it must be borne in mind that the applicant owns the fixed telephone network in Germany and, moreover, that it is not disputed that, as the Commission notes in recitals 83 to 91 to the contested decision, there was no other infrastructure in Germany at the time of the adoption of the decision that would have enabled competitors of the applicant to make a viable entry onto the market in retail access services.

237 Having regard to the fact that the applicant's wholesale services are thus indispensible to enabling a competitor to enter into competition with the applicant on the downstream market in retail access services, a margin squeeze between the applicant's wholesale and retail charges will in principle hinder the growth of competition in the downstream markets. If the applicant's retail prices are lower than its wholesale charges, or if the spread between the applicant's wholesale and retail charges is insufficient to enable an equally efficient operator to cover its product-specific costs of supplying retail access services, a potential competitor who is just as efficient as the applicant would not be able to enter the retail access services market without suffering losses.

238 Admittedly, as the applicant maintains, its competitors will normally resort to cross-subsidisation, in that they will offset the losses suffered on the retail access market with the profits made on other markets, such as the telephone calls markets. However, in view of the fact that, as the owner of the fixed network, the applicant does not need to rely on wholesale services in order to be able to offer retail access services and therefore, unlike its competitors, does not have to try to offset losses suffered on the retail access market on account of the pricing practices of a dominant undertaking, the margin squeeze identified in the contested decision distorts competition not only on the retail access market but also on the telephone calls market (see paragraphs 197 to 202 above).

239 Furthermore, the small market shares acquired by the applicant's competitors in the retail access market since the market was liberalised by the entry into force of the TKG on 1 August 1996 are evidence of the restrictions which the applicant's pricing practices have imposed on the growth of competition in those markets. Thus, the applicant explained at the hearing that it did not dispute the findings in the contested decision (recital 181) that, at the time of the adoption of the contested decision, all of its competitors in Germany held market shares of only '4.4% in narrowband access and 10% in [broadband] access' and that, at the 'end of 2002 all 64 competitors together held only 2.35 million of the total of 53.72 million telephone channels in Germany'.

240 In addition, it is not disputed that, taking only analogue connections into consideration — which, at the time of adoption of the contested decision, accounted for 75% of all connections in Germany — the applicant's competitors' share fell from 21% in 1999 to 10% in 2002 (recital 182 to the contested decision).

241 The applicant nevertheless maintained that numerous competitors have been able to gain significant market shares in urban areas.

242 In that respect, it must be noted that the applicant does not challenge the definition of the market contained in the contested decision (recitals 92 to 95), according to which the relevant geographic market is the German market. The progress made by some of the applicant's competitors in certain urban areas does not therefore affect the finding that the applicant's competitors have, overall, acquired only small market shares in the relevant geographic market in retail access services.

243 Moreover, the fact that competition has developed less favourably in the other Member States does not show that the applicant's pricing practices had no anti-competitive effect in Germany, which is the relevant geographic market. The purportedly less favourable situation in the other Member States could be linked to the fact that the markets in the services concerned were liberalised later, after 1 June 1997, the date on which the applicant was obliged under the relevant German law to offer its competitors fully unbundled access to the local loop (see paragraph 198 above). It must be noted in that regard that Article 3 of Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4) imposes such an obligation on incumbent operators only from 31 December 2000. The purportedly less favourable situation in the other Member States could also be linked to the existence of other infringements of Community competition law. In any event, even on the assumption that the Commission failed to fulfil certain of its obligations under Article 211 EC by failing to ensure that Community law on competition in the telecommunications sector is applied in other Member States, that fact cannot justify the applicant's infringement of Article 82 EC in this case in the same sector (*van Landewyck and Others* v *Commission*, cited in paragraph 86 above, paragraph 84; Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 127; and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 2559).

244 Finally, as regards the argument put forward in the reply that two of the applicant's competitors are 'now' active on the national market, it must be borne in mind that,

in the context of an action for annulment under Article 230 EC, the legality of a Community measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, and Case T-395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-875, paragraph 252). In any event, the applicant, which fails to quantify the extent to which competitors are present on the national market, does not produce any evidence to rebut the findings in recitals 180 to 183 to the contested decision that its pricing practices actually restrict competition on the German retail access market.

245 It follows that the final part of the first plea in law must be rejected.

B — *Second plea in law: the defective nature of the operative part of the contested decision*

1. Arguments of the parties

246 The applicant notes first of all that Article 1 of the contested decision concludes that the applicant has infringed Article 82(a) EC 'by charging its competitors and end-users unfair monthly and one-off charges for access to the local network'. According to the operative part, the applicant's wholesale charges and retail prices are therefore unfair. However, the applicant's charges as such have not been described as unfair in the grounds of the contested decision. It is only the relationship between wholesale charges and retail prices that has been deemed to be abusive as a result of the alleged margin squeeze. The operative part of the contested decision is therefore not supported by the grounds of the decision.

247 Next, the applicant notes that Article 2 of the operative part of the contested decision orders it to bring to an end the infringement referred to in Article 1 and to refrain from repeating any act or conduct described in that article. However, besides the fact that the order in Article 2 is at odds with the grounds of the contested decision, it cannot be complied with because the applicant is not in a position to influence the price of wholesale access.

248 Finally, in its reply, the applicant further submits that Article 1 of the operative part is also defective because the Commission finds there that the applicant has infringed Article 82 EC by charging unfair charges. However, the applicant has no leeway in the charging of those charges (see paragraph 73 above).

249 The Commission contends that this plea should be rejected.

2. Findings of the Court

250 Article 1 of the contested decision finds that the applicant 'has infringed Article 82(a) [EC] by charging its competitors and end-users unfair monthly and one-off charges for access to the local network, thus significantly impeding competition on the market for access to the local network'.

251 Contrary to the applicant's claim, Article 1 of the contested decision does not state that both the applicant's charges for wholesale services and its retail prices must be regarded as being unfair.

252 The operative part of the contested decision must be read in the light of the grounds of that decision (Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761, paragraph 374). Thus it is clear that '[t]he abuse committed by [the applicant] consists in the imposition of unfair prices in the form of a margin squeeze to the detriment of its competitors' (recital 201 to the contested decision). The abuse committed takes the 'form of a margin squeeze generated by a disproportion between wholesale charges and retail charges for access to the local network' (recital 57 to the contested decision) and is described as 'the unfair pricing' abuse (recital 163 to the contested decision).

253 It follows from the foregoing that Article 1 of the contested decision, read in the light of the grounds of that decision, must be interpreted as meaning that where the Commission describes the charges for opening a new connection and the monthly charge for access to the local network as being unfair, it is referring to the relationship between the applicant's wholesale charges and retail charges. There is no contradiction therefore between the grounds and the operative part of the contested decision.

254 In view of the foregoing, the order in Article 2 of the contested decision is not vitiated by illegality either. Although the applicant could not influence the charges for wholesale services, it did in any event have scope to increase its retail prices for ADSL access services (see paragraphs 141 to 151 above).

255 Finally, the distinction between charging and fixing charges, which the applicant made for the first time in its reply, must be rejected as being inadmissible under Article 48(2) of the Rules of Procedure of the Court of First Instance.

256 It follows from all the foregoing that the second plea in law must be rejected.

C — *Third plea in law: misuse of powers and infringement of the principles of proportionality, legal certainty and protection of legitimate expectations*

1. Arguments of the parties

257 The applicant submits that, by encroaching on the powers of RegTP, the Commission misused its powers and infringed the principles of proportionality, legal certainty and protection of legitimate expectations.

258 It recalls that, under Community law, principal responsibility for telecommunications price-control is vested in the national authorities, such as RegTP. It refers in that regard to the recitals of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10), Article 17 of Directive 98/10, Article 4(1) of Regulation No 2887/2000, Article 13(1) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (OJ 2002 L 108, p. 7), paragraphs 19 and 22 of the Commission's Notice of 22 August 1998 on the application of the competition rules to access agreements in the telecommunications sector, entitled 'Framework, relevant markets and principles', and page 61 et seq. of the Communication from the Commission entitled 'Unbundled access to the local loop: enabling the competitive provision of a full range of electronic communication services, including broadband multimedia

and high-speed internet communication' (OJ 2000 C 272, p. 55). In that context, the national regulatory authorities are required to take account of Community law objectives, including that underlying Article 82 EC. According to the applicant, it follows that if the Commission considered RegTP's pricing decisions to have infringed Community law, it should have initiated proceedings against Germany for failure to fulfil obligations.

259 The applicant submits furthermore that, both in the regulation of the indices of retail price ceilings and in the setting of wholesale access charges, RegTP analysed whether there was a margin squeeze between wholesale and retail prices that would actually restrict competition, and concluded that there was no such margin squeeze. The applicant refers in that regard to the decisions of RegTP of 8 February 1999, 23 December 1999, 30 March 2001, 21 December 2001, 11 April 2002, and in particular to that of 29 April 2003. The decisions of RegTP gave rise to a legitimate expectation on the part of the applicant which deserves protection (Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraphs 30 and 31).

260 RegTP has opted in its pricing policy for a slight rebalancing of connection charges and call charges (decisions of RegTP of 21 December 2001 and of 11 April 2002). The applicant explains that, for socio-political reasons, the connection charges applied by Deutsche Bundespost were low — and thus advantageous for end-users — and resulting losses were offset through cross-subsidisation with revenues from call charges, which were set high. As a result, by decisions of 9 December 1997 and 23 December 1999 in price cap proceedings, the BMPT and then RegTP initially combined connection and call charges for businesses and for individuals in one basket. The price indices thus fixed were valid until the end of 2001. Subsequently, by its price cap decision of 21 December 2001, RegTP itself directly organised the progressive price restructuring envisaged. It separated the baskets for connections and calls and set price indices in respect of four separate baskets of services (see paragraph 20 above). However, it is apparent from that same decision of RegTP of

21 December 2001 that RegTP deliberately declined to introduce a rule in which connection charges are fixed in isolation on the basis of costs.

261 Accordingly, the applicant submits that RegTP alone is responsible for the margin squeeze alleged by the Commission. The alleged margin squeeze is the direct consequence of regulatory decisions of RegTP and previously of the BMPT, and of the regulatory approach underpinning them. The Commission is wrong to find that the applicant has infringed Article 82 EC, because the applicant was simply complying with the binding decisions of RegTP, which gave rise to a legitimate expectation by the applicant. Through the medium of the contested decision, the Commission is subjecting the applicant's pricing practices to double regulation, thereby infringing the principle of proportionality and the legal certainty guaranteed by the division of powers under Community law in relation to charges in the telecommunications sector. Furthermore, by adopting the contested decision, the Commission is trying to correct the German authorities' exercise of their own regulatory powers, whereas it should to that end have initiated proceedings for failure to fulfil obligations. By proceeding in this way, the Commission has misused its powers.

262 The Commission and the first and second interveners contend that this plea should be rejected.

2. Findings of the Court

263 In the first place, as regards the applicant's complaint that the Commission has subjected the applicant's pricing practices to double regulation and thereby infringed the principles of proportionality and of legal certainty, it must be held that the legal framework to which the applicant refers in paragraph 258 above does not affect the

powers which the Commission derives directly from Article 3(1) of Regulation No 17 and, since 1 May 2004, from Article 7(1) 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) to find infringements of Articles 81 EC and 82 EC.

264 It has already been held that, between 1 January 1998 and 31 December 2001, the applicant had sufficient scope to end the margin squeeze identified in the contested decision and, from 1 January 2002, sufficient scope to reduce that margin squeeze (see paragraphs 97 to 151 above). Its conduct therefore falls within the scope of Article 82 EC.

265 While it is not inconceivable that the German authorities also infringed Community law — particularly the provisions of Directive 90/388, as amended by Directive 96/19 — by opting for a gradual rebalancing of connection and call charges, such a failure to act, if it were to be established, would not remove the scope which the applicant had to reduce the margin squeeze.

266 The first complaint cannot therefore be upheld.

267 In the second place, as regards the complaint relating to the protection of legitimate expectations, it must be borne in mind that, in a number of decisions taken in the period covered by the contested decision, RegTP did in fact consider whether a margin squeeze resulted from the applicant's charges. However, in its decisions, after finding the negative spread between the applicant's wholesale and retail prices, RegTP took the view in each case that other operators should be able to offer their end-users competitive prices by resorting to cross-subsidisation of access services and call services (see paragraphs 115 to 119 above).

268 The fact remains that RegTP's decisions do not include any reference to Article 82 EC (see paragraph 114 above). In addition, RegTP's statement that '[c]ompetitors are not so prejudiced with regard to their competitive opportunities in the local network by the slight difference between retail and wholesale prices as to make it economically impossible for them to enter the market successfully or even to remain in the market' (decision of RegTP of 29 April 2003) does not imply that the applicant's pricing practices do not distort competition within the meaning of Article 82 EC. On the contrary, it follows implicitly but necessarily from RegTP's decisions that the applicant's pricing practices have an anti-competitive effect, since the applicant's competitors have to resort to cross-subsidisation in order to be able to remain competitive on the market in access services (see paragraphs 119 and 238 above).

269 In those circumstances, RegTP's decisions could not have created for the applicant a legitimate expectation that its pricing practices were compatible with Article 82 EC. It must be observed furthermore that, in its judgment of 10 February 2004 setting aside the judgment of the Oberlandesgericht Düsseldorf of 16 January 2002, the Bundesgerichtshof confirmed that 'the administrative examination procedure [undertaken by RegTP] does not preclude the possibility in practice of an undertaking submitting a charge by which it abuses its dominant position and obtains authorisation for it because the abuse is not revealed during the examination procedure'.

270 In the third place, as regards the applicant's complaint that the Commission misused its powers, it must be observed that a measure is only vitiated by misuse of powers if it is evident, on the basis of objective, relevant and consistent evidence, that it was taken with the exclusive or main purpose of achieving an end other than that stated (see Joined Cases C-186/02 P and C-188/02 P *Ramondín and Others* v *Commission* [2004] ECR I-10653, paragraph 44, and the case-law cited).

271 In the contested decision, the Commission refers only to the applicant's pricing practices and not to the decisions of the German authorities. Even if RegTP had infringed a Community rule and even if the Commission could have initiated proceedings

against the Federal Republic of Germany for failure to fulfil obligations, such possibilities cannot affect the lawfulness of the contested decision. In that decision, the Commission merely found that the applicant had committed an infringement of Article 82 EC, a provision which concerns only economic operators, not the Member States. The Commission did not therefore misuse its powers by making that finding on the basis of Article 82 EC.

272 The final plea in law therefore cannot be upheld either.

II — *The alternative form of order sought, seeking a reduction of the fine imposed*

273 The applicant puts forward six pleas in law in support of the alternative form of order sought. The first relates to an infringement of the rights of defence and the second to an infringement of Article 253 EC. The third plea in law is based on the applicant's lack of negligence and intentional fault and the fourth on the insufficiency of the account taken of charges legislation in calculating the level of the fine. The fifth plea in law concerns the calculation of the duration of the infringement, and the sixth, the failure to take account of attenuating circumstances.

A — *First plea in law: infringement of the rights of defence*

1. Arguments of the parties

274 The applicant submits that the Commission infringed Article 19(1) of Regulation No 17 in relation to the rights of defence by failing in its statement of objections of

2 May 2002 and in its supplementary letter of 21 February 2003 to carry out a factual or legal analysis as to whether the alleged infringement had been committed 'intentionally or negligently' (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 21; order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 53; Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 311). In order to be reasonably able to defend itself, the applicant should have been informed during the administrative procedure of the facts on the basis of which the Commission was accusing it of such fault or negligence.

275 The Commission contends that this plea should be rejected.

2. Findings of the Court

276 It must be observed at the outset that the conditions which must be fulfilled to enable the Commission to impose fines (initial conditions) are set out in the first subparagraph of Article 15(2) of Regulation No 17. These include the condition that the infringement was committed intentionally or negligently (order in *SPO and Others* v *Commission*, cited in paragraph 274 above, paragraph 53).

277 Next, it must be observed that the Commission is required to give a brief provisional assessment in the statement of objections as to the duration of the alleged infringement, its gravity and the question whether, in the circumstances of the case, the infringement was committed intentionally or negligently. However, the adequacy of that provisional assessment, the purpose of which is to give the addressees of the statement of objections an opportunity to defend themselves, must be evaluated in relation not only to the wording of the measure in question but also to its context and the entirety of the legal rules governing the matter concerned (Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 146).

278 It must be held that the Commission informed the applicant in the statement of objections (paragraphs 95 to 140) that it considered the applicant's pricing practices, and in particular the margin squeeze resulting from the negative or insufficient spread between its wholesale and retail prices, to be in breach of Article 82 EC. Furthermore, in the statement of objections (paragraphs 141 to 152), the Commission examined the applicant's scope to set its charges and thus addressed the issue of the applicant's culpability with regard to the activities criticised.

279 In those circumstances, it must be concluded that the information supplied in the statement of objections concerning the initial conditions laid down by the first subparagraph of Article 15(2) of Regulation No 17 was sufficiently precise. Moreover, since infringements committed negligently are not, in competition terms, less serious than those committed intentionally (order in *SPO and Others* v *Commission*, cited in paragraph 274 above, paragraph 55), the applicant did not need to receive more detailed information about its culpability in order to be reasonably able to exercise its rights of defence.

280 In any event, it must be held that the applicant did in fact exercise its rights of defence on that point since it denied its culpability in its reply to the statement of objections, referring to the national regulation of its charges.

281 The first plea in law must therefore be rejected.

B — *Second plea in law: infringement of Article 253 EC*

1. Arguments of the parties

282 The applicant observes that the contested decision must set out the grounds on which the Commission considers that the conditions for the imposition of a fine

are satisfied (*Remia and Others* v *Commission*, cited in paragraph 185 above, paragraph 26; Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 43; and Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 30). The contested decision, which does not contain any grounds relating to the applicant's negligence or to its intention to commit the infringement, infringes Article 253 EC; the fine should therefore be annulled.

283 The Commission contends that this plea should be rejected.

2. Findings of the Court

284 It must be noted as a preliminary point that the obligation to state reasons laid down under Article 253 EC is an essential procedural requirement, unlike the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. From that point of view, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review (C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35).

285 It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*France* v *Commission*, cited in paragraph 284 above, paragraph 36, and Case C-113/00 *Spain* v *Commission* [2002] ECR I-7601, paragraph 48).

286 First, it must be held that the contested decision (second citation) contains a reference to Article 15(2) of Regulation No 17. The first subparagraph of Article 15(2) lays down the conditions which must be fulfilled to enable the Commission to impose fines (initial conditions). These include the condition that the infringement was committed intentionally or negligently (order in *SPO and Others* v *Commission*, cited in paragraph 274 above, paragraph 53).

287 Second, the Commission sets out in detail in recitals 102 to 162 and 176 to 183 to the contested decision the grounds on which it considers the applicant's pricing practices to be abuses within the meaning of Article 82 EC and, in recitals 163 to 175, the grounds on which the applicant must be deemed responsible for the infringement found, in spite of the fact that the German authorities have to approve the applicant's charges.

288 In those circumstances, it must be concluded that the contested decision contains sufficient reasoning regarding the application to the present case of the initial conditions laid down under the first subparagraph of Article 15(2) of Regulation No 17.

289 This plea must therefore also be rejected.

C — *Third plea in law: the applicant's lack of negligence or intentional fault*

1. Arguments of the parties

290 The applicant maintains that it is guilty of neither negligence nor intentional fault.

291 First of all, it observes that its wholesale and retail charges were all authorised by decisions of the BMPT, then of RegTP. The applicant could thus legitimately assume that those charges were lawful. It submits that RegTP is a neutral and independent State body. It was for RegTP, rather than the applicant, to ascertain whether the wholesale and retail prices were compatible with Article 82 EC. In addition, in its judgment of 16 January 2002, the Oberlandesgericht Düsseldorf held that responsibility for the charges set by RegTP could not be attributed to the applicant.

292 Second, the applicant was informed by agents of the Commission in a meeting on 17 April 2000 that the proceeding relating to the applicant would not be pursued because the Commission had initiated proceedings against the Federal Republic of Germany for failure to fulfil obligations. It further submits that the Commission did not carry out any measures of inquiry between January 2000 and June 2001 — a period of approximately one and a half years. The applicant was entitled to infer from the Commission's conduct that the Commission did not have sufficient grounds to accuse the applicant of an abuse of dominant position, at least in respect of the period between January 2000 and June 2001. In its reply, the applicant further submits that it inferred from the initiation of the proceedings for failure to fulfil obligations, the suspension of the abuse proceeding and the explanations given by the Commission at the meeting on 17 April 2000, that the Commission had abandoned the objection relating to the infringement of Article 82 EC.

293 Third, the applicant observes that, in the absence of Community case-law and of previous Commission practice in taking decisions on margin squeezes in the telecommunications sector, it never doubted that RegTP's assessment was correct. Furthermore, as a result of the administrative practice of RegTP, which has considered the margin squeeze issue on many occasions, the applicant could assume that the Commission would ultimately reach the same conclusion as RegTP.

294 The Commission and the second intervener contend that this plea should be rejected.

2. Findings of the Court

295 On the question as to whether the infringements were committed intentionally or negligently and are therefore liable to be punished by a fine in accordance with the first subparagraph of Article 15(2) of Regulation No 17, it has been held that that condition is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it was aware that it was infringing the competition rules of the Treaty (Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 165, and Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 238).

296 In the present case, the applicant could not be unaware that, notwithstanding the authorisation decisions of RegTP, it had genuine scope to fix its retail prices and, consequently, to reduce the margin squeeze by increasing those prices. In addition, the applicant could not be unaware that that margin squeeze entailed serious restrictions on competition, particularly in view of its monopoly on the wholesale market and its virtual monopoly on the market in retail access services (recitals 97 to 100 to the contested decision).

297 It follows that the initial conditions enabling the Commission to impose fines are fulfilled (order in *SPO and Others* v *Commission*, cited in paragraph 274 above, paragraph 53).

298 Furthermore, it must be held that the initiation of a pre-litigation procedure against the Federal Republic of Germany does not affect the initial conditions in the first subparagraph of Article 15(2) of Regulation No 17. The applicant could not be unaware that it had genuine scope to increase its retail prices and that its pricing practices were hindering the growth of competition in the market in local network access services, a market in which the degree of competition was already weakened as a result, in particular, of its presence (see, to that effect, *Hoffmann-La Roche* v *Commission*, cited in paragraph 226 above, paragraph 91).

299 Finally, the argument relating to RegTP's examination of the margin squeeze must be rejected for the reasons set out in paragraphs 267 to 269 above.

300 The third plea must therefore also be rejected.

D — *Fourth and sixth pleas: insufficient account taken of charges legislation in calculating the level of the fine, and insufficient account taken of attenuating circumstances*

1. Arguments of the parties

301 The applicant submits that the Commission was wrong to characterise the alleged infringement as serious. The applicant's contribution to the infringement was slight because the charges at issue were set by RegTP. The infringement could therefore at best be described as minor, in accordance with the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines'). The applicant maintains

that, by decision of 19 December 2002, RegTP had even rejected an application by the applicant for an increase in its retail charges beyond the ceiling prescribed, even though, in support of the application, the applicant had referred to the procedure initiated by the Commission as justification for exceeding that ceiling.

302 The 10% reduction in the basic amount of the fine to take account of the regulation of charges by RegTP is therefore insufficient. A 'reasonable doubt' as to whether the applicant's conduct 'does indeed constitute an infringement' within the meaning of the Guidelines can be justified on the basis of RegTP's decisions. The applicant refers moreover to Commission Decision 2001/892/EC of 25 July 2001 relating to a proceeding under Article 82 of the EC Treaty (COMP/C-1/36.915 — Deutsche Post AG — Interception of cross-border mail) (OJ 2001 L 331, p. 40; 'the Deutsche Post decision'), in which the Commission imposed only a symbolic fine, owing to the fact that the company in question had behaved in a manner which was in accordance with the case-law of the German courts, and no Community case-law existed concerning cross-border letter mail services.

303 The Commission should also have taken other attenuating circumstances into account when setting the fine, namely the lack of any serious restriction on competition and the fact that the applicant's low retail prices fulfil a social function.

304 In its reply, the applicant draws attention to the judgment of the Oberlandesgericht Düsseldorf of 16 January 2002. It observes that that court held that the levy of charges set by RegTP cannot constitute an abuse of the applicant's dominant position and that the mere lodging of a tariff application by the applicant is not sufficient to make the applicant responsible for an infringement of competition law. According to the Oberlandesgericht Düsseldorf, the applicant was under no obligation under competition law to make other applications. At most, a symbolic fine could have been

imposed on the applicant, in view of the fact not only that the charges are partially in accordance with the case-law of the German courts (recital 193 to the Deutsche Post decision), but also that they have been mandatorily fixed by RegTP.

305 The Commission and the second intervener contend that this plea should be rejected.

2. Findings of the Court

306 In recitals 206 and 207 to the contested decision, the Commission characterised the infringement as serious, not as very serious, in respect of the period from 1 January 1998 to 31 December 2001 on the grounds, first, that the weighted method applied to determine the margin squeeze was new and had not previously been the subject of a formal decision and, second, that the applicant had steadily reduced the margin squeeze since 1999 at least.

307 As regards the period from 1 January 2002 to May 2003, the Commission held that there was a minor infringement (recital 207 to the contested decision), because '[the applicant's] only legal means of reducing the margin squeeze [was] limited to increases in the T-DSL charges' (recital 206 to the contested decision). Furthermore, in respect of the same period, the Commission made no increase in the fine to reflect the duration of the infringement 'in view of the regulatory restrictions on [the applicant's] scope for adjusting tariffs' (recital 211 to the contested decision).

308 In recital 212 to the contested decision, the Commission treated the fact that 'the [applicant's] retail and wholesale charges in question in the current proceeding were subject to sector specific regulation since [1998] on national level until today' as an attenuating circumstance.

309 On the basis of the foregoing considerations, the Commission imposed a fine of EUR 12.6 million on the applicant in Article 3 of the contested decision. It determined the amount of the fine using the method which it had laid down in the Guidelines. Thus, in accordance with the second paragraph of Section 1A of the Guidelines, the amount of the fine to take account of the gravity of the infringement was set at EUR 10 million (recital 207 to the contested decision). Applying the first paragraph of Section 1B of the Guidelines, that amount was increased by 40% to take account of the duration of the infringement for the period from 1 January 1998 to 31 December 2001, which results in a basic amount of EUR 14 million (recital 211 to the contested decision). That figure was then reduced by 10% to take account of attenuating circumstances in accordance with Section 3 of the Guidelines.

310 It must be held that, contrary to the applicant's claim, the Commission was entitled to characterise the infringement as serious for the period from 1 January 1998 to 31 December 2001 (recital 207 to the contested decision). The pricing practices complained of strengthen the barriers to entry to the recently liberalised markets and thus jeopardise the proper functioning of the common market. In that regard, it must be borne in mind that the Guidelines (second paragraph of Section 1A) describe the exclusionary behaviour of dominant firms as serious infringements, or even very serious infringements if committed by undertakings holding a virtual monopoly.

311 As regards the intervention of RegTP in setting the applicant's tariffs, it must be borne in mind that, when the level of the penalty is set, the conduct of the undertakings concerned may be assessed in the light of the national legal framework, which

is a mitigating factor (see, to that effect, *Suiker Unie and Others* v *Commission*, cited in paragraph 89 above, paragraph 620, and *CIF*, cited in paragraph 86 above, paragraph 57).

312 At the hearing, the Commission explained that the 10% reduction of the fine to take account of the fact that 'the [applicant's] retail and wholesale charges … were subject to sector specific regulation since [1998] on national level' (recital 212 to the contested decision) relates to RegTP's intervention in setting the applicant's prices and to the fact that that national authority has, on several occasions during the period covered by the contested decision, considered the question of the existence of a margin squeeze resulting from the applicant's tariff practices.

313 Having regard to the Commission's discretion when determining the amount of a fine (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59, and Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-1165, paragraph 580), it must be held that the Commission duly took into account the matters referred to in the preceding paragraph when reducing the basic amount of the fine by 10%.

314 As regards the alleged social function fulfilled by the applicant, it must be observed that, according to Article 86(2) EC, undertakings entrusted with the operation of services of general economic interest are subject to the rules of the EC Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Even on the assumption that the applicant has been entrusted with a task of operating services of general economic interest within the meaning of that provision, the applicant fails to show why the pricing practices which have been criticised in the contested decision are necessary to the performance of that task. That argument cannot therefore be upheld.

315 The applicant refers again to the Deutsche Post decision and takes the view that the Commission should have imposed a symbolic fine on the applicant, as it did on the dominant undertaking in that decision.

316 In that regard, it must be observed first of all that, according to settled case-law, the fact that the Commission in the past imposed fines of a certain level for particular types of infringement does not mean that it is estopped from raising that level within the limits set by Regulation No 17, if that is necessary to ensure the implementation of Community competition policy. The proper application of the Community competition rules requires that the Commission be able at any time to adjust the level of fines to the needs of that policy (see *Bolloré and Others* v *Commission*, cited in paragraph 313 above, paragraph 376, and the case-law cited).

317 Next, it must be held that the applicant's situation is fundamentally different from that of the undertaking referred to in the Deutsche Post decision.

318 It follows from recitals 192 and 193 to the Deutsche Post decision, which concerned abuse in relation to the processing of cross-border letter mail, that the Commission deemed it appropriate to impose only a symbolic fine on the undertaking referred to in that decision on three grounds: (1) the undertaking concerned had behaved in accordance with the case-law of German courts; (2) there was no Community case-law relating specifically to the cross-border letter mail services concerned; and (3) the undertaking concerned had undertaken to introduce a procedure for the processing of incoming cross-border letter mailings which would avoid practical difficulties and facilitate the detection of future interference with free competition, should it occur.

319 In the present case, first, it must be noted that the only judgment of the German courts to which the applicant refers is the judgment of the Oberlandesgericht Düsseldorf, which was delivered on 16 January 2002, thus in the period during which the infringement was characterised in the contested decision as minor (recital 207). In any event, that judgment was set aside by the judgment of the Bundesgerichtshof of 10 February 2004. Second, it follows from the contested decision (recitals 106 and 206) that the Commission applied the same principles as those underlying the 1988 Napier Brown/British Sugar decision. In its Notice of 22 August 1998 on the application of the competition rules to access agreements in the telecommunications sector — framework, relevant markets and principles (paragraphs 117 to 119), the Commission had already announced that it proposed to apply the principles of the Napier Brown/British Sugar decision in the telecommunications sector. The only new element of the contested decision is 'the weighted approach which had to be used [because of] the fact that in Germany, a single wholesale tariff for local loop unbundling has been fixed, while the tariffs for the corresponding retail services differentiate between analogue, ISDN and ADSL lines' (recital 206 to the contested decision). However, the Commission took account of the novelty of that approach in characterising the infringement as 'serious', instead of as 'very serious', for the period from 1 January 1998 to 31 December 2001 (recital 206 to the contested decision). Finally, third, the applicant in the present case has not given any undertaking to avoid any other future infringement.

320 The three criteria laid down by the Deutsche Post decision have not been fulfilled in this case; therefore, the argument based on the approach adopted in that decision cannot be upheld.

321 It follows from all the foregoing that this plea must be rejected.

E — *Fifth plea: incorrect assessment of the duration of the infringement*

1. Arguments of the parties

322 The applicant notes that the Commission increased the amount of the fine on account of the purported gravity of the infringement during the period from 1998 to 2001. However, the Commission itself acknowledges in the contested decision (recital 208) that the applicant was aware of the abuse in its charge structure only from 1999.

323 The applicant claims that it was informed by agents of the Commission at the meeting on 17 April 2000 that the Commission would bring proceedings against the Federal Republic of Germany for failure to fulfil obligations. As a result of that information and the length of the administrative procedure, the Commission itself reinforced the applicant's belief that its charges did not contravene Article 82 EC, and thus helped to extend the duration of the infringement. The whole of that duration should not therefore be taken into account for the purposes of fixing the amount of the fine (Joined Cases 6/73 and 7/73 *Istituto chemioterapico italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 51).

324 The Commission contends that this plea should be rejected.

2. Findings of the Court

325 In so far as the applicant calls into question in the context of the present plea the calculation of the duration of the infringement, it must be noted that, in the form of

order sought in the alternative, the applicant seeks not only a reduction in the fine but also the partial annulment of Article 1 of the contested decision (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraphs 210 to 214).

326 As regards the assessment as to whether the plea in law is well founded, it must be borne in mind that the Commission refers in the contested decision to the complaints lodged by competitors of the applicant in 1999. According to the Commission, the applicant has therefore been aware since that time 'of the accusation of possible abuse in the charge structure for access to the local network' (recital 208 to the contested decision).

327 The fact that the applicant knew only from 1999 that it was being accused of abuse of its dominant position is irrelevant to the fact that its conduct constituted an infringement from 1 January 1998. An 'abuse' within the meaning of Article 82 EC is an objective concept (*Hoffmann-La Roche* v *Commission*, cited in paragraph 226 above, paragraph 91; *AKZO* v *Commission*, cited in paragraph 189 above, paragraph 69; order in *Piau* v *Commission*, cited in paragraph 233 above, paragraph 37; *Irish Sugar* v *Commission*, cited in paragraph 122 above, paragraph 111). The dominant undertaking's own knowledge of the abusive nature of its conduct is not, therefore, a prerequisite for the application of Article 82 EC.

328 The first argument must therefore be rejected.

329 The applicant's argument that the fine would have been lower if the decision had been adopted earlier cannot be upheld either, for it is purely hypothetical. Moreover, it must be pointed out that it is apparent from the contested decision (recital 211) that the Commission did not make any increase in the fine in respect of the period from 1 January 2002 to May 2003.

330 The second argument cannot therefore be accepted and the final plea in law must consequently be rejected in its entirety. Accordingly, the action must be dismissed.

Costs

331 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those of the Commission, in accordance with the form of order sought by the Commission.

332 In accordance with the third subparagraph of Article 87(4) of the Rules of Procedure, the interveners are to bear their own costs.

On those grounds,

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

hereby:

1. Dismisses the action;

2. **Orders Deutsche Telekom AG to bear its own costs and to pay those incurred by the Commission;**

3. **Orders (1) Arcor AG & Co. KG and (2) Versatel NRW GmbH, EWE TEL GmbH, HanseNet Telekommunikation GmbH, Versatel Nord-Deutschland GmbH, NetCologne Gesellschaft für Telekommunikation mbH, Versatel Süd-Deutschland GmbH and Versatel West-Deutschland GmbH to bear their own costs.**

Vilaras Martins Ribeiro Šváby

Jürimäe Wahl

Delivered in open court in Luxembourg on 10 April 2008.

E. Coulon M. Vilaras

Registrar President

Table of contents

Facts ..... II - 488

I — Wholesale access ..... II - 489

II — Retail access ..... II - 491

A — Charges for retail analogue lines (T-Net) and digital narrowband or ISDN lines (T-ISDN) ..... II - 492

B — Charges for ADSL lines (T-DSL) ..... II - 494

Administrative procedure ..... II - 495

The contested decision ..... II - 496

Procedure ..... II - 502

Forms of order sought by the parties ..... II - 506

Law ..... II - 507

I — Principal form of order sought: annulment of the contested decision ..... II - 507

A — First plea in law: infringement of Article 82 EC ..... II - 507

1. First part: absence of an abuse as the applicant did not have sufficient scope to avoid a margin squeeze ..... II - 508

(a) Arguments of the parties ..... II - 508

(b) Findings of the Court ..... II - 514

(i) Preliminary observations ..... II - 514

(ii) The contested decision ..... II - 516

(iii) Absence of an abuse because the applicant had insufficient scope to avoid a margin squeeze by increasing its retail prices in the period from 1 January 1998 to 31 December 2001 ..... II - 517

(iv) Absence of an abuse because the applicant had insufficient scope to reduce the margin squeeze by increasing its ADSL retail access charges from 1 January 2002 ... II - 528

2. Second part: unlawfulness of the method used by the Commission to establish a margin squeeze ..... II - 532

(a) Arguments of the parties ..... II - 532

(b) Findings of the Court ..... II - 537

(i) Whether the Commission should have demonstrated in the contested decision that the applicant's retail prices were, as such, abusive ..... II - 537

(ii) The method used by the Commission to calculate the margin squeeze ..... II - 538

Contested decision ..... II - 538

Lawfulness of the method used by the Commission ... II - 541

— Preliminary observations ..... II - 541

— The alleged unlawfulness of the method of calculating the margin squeeze on the basis of the charges and costs of a vertically integrated dominant undertaking, disregarding the particular situation of competitors on the market ..... II - 543

— Complaint that the Commission took into account only revenues from all access services and excluded revenues from other services, particularly those from call services ..... II - 546

— Complaint that the discontinuance charge for wholesale access was included in the margin squeeze calculation ..... II - 549

3. Third part: alleged calculation error in the finding of a margin squeeze ..... II - 551

(a) Arguments of the parties ..... II - 551

(b) Findings of the Court ..... II - 552

4. Fourth part: the margin squeeze identified had no effect on the market ..... II - 554

(a) Arguments of the parties ..... II - 554

(b) Findings of the Court ..... II - 557

B — Second plea in law: the defective nature of the operative part of the contested decision ..... II - 561

1. Arguments of the parties ..... II - 561

2. Findings of the Court ..... II - 562

C — Third plea in law: misuse of powers and infringement of the principles of proportionality, legal certainty and protection of legitimate expectations ..... II - 564

1. Arguments of the parties ..... II - 564

2. Findings of the Court ..... II - 566

II — The alternative form of order sought, seeking a reduction of the fine imposed ..... II - 569

A — First plea in law: infringement of the rights of defence ..... II - 569

1. Arguments of the parties ..... II - 569

2. Findings of the Court ..... II - 570

B — Second plea in law: infringement of Article 253 EC ..... II - 571

1. Arguments of the parties ..... II - 571

2. Findings of the Court ..... II - 572

C — Third plea in law: the applicant's lack of negligence or intentional fault ..... II - 573

1. Arguments of the parties ..... II - 573

2. Findings of the Court ..... II - 575

D — Fourth and sixth pleas: insufficient account taken of charges legislation in calculating the level of the fine, and insufficient account taken of attenuating circumstances ..... II - 576

1. Arguments of the parties ..... II - 576

2. Findings of the Court ..... II - 578

E — Fifth plea: incorrect assessment of the duration of the infringement .. II - 583

1. Arguments of the parties ..... II - 583

2. Findings of the Court ..... II - 583

Costs ..... II - 585