JUDGMENT OF THE COURT (First Chamber)

2 April 2009 *

In Case C-202/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 10 April 2007,

France Télécom SA, established in Paris (France), represented by J. Philippe, H. Calvet, O.W. Brouwer and T. Janssens, avocats,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by E. Gippini Fournier, acting as Agent, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: French.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Tizzano (Rapporteur), A. Borg Barthet and J.-J. Kasel, Judges,

Advocate General: J. Mazák,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 3 April 2008,

after hearing the Opinion of the Advocate General at the sitting on 25 September 2008,

gives the following

Judgment

1 By its appeal, France Télécom SA ('France Télécom') asks the Court to set aside the judgment of the Court of First Instance of the European Communities of 30 January 2007 in Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107 ('the judgment under appeal') by which the Court of First Instance dismissed its application for annulment of the Commission decision of 16 July 2003 relating to a proceeding under Article 82 EC (Case COMP/38.233 — Wanadoo Interactive) ('the contested decision').

Background to the dispute, proceedings before Court of First Instance and the judgment under appeal

2 At the material time, Wanadoo Interactive SA ('WIN') was part of the France Télécom group active in France in the Internet access services sector including ADSL (asymmetric digital subscriber line) services.

3 In Article 1 of the contested decision, the Commission of the European Communities found that from March 2001 to October 2002 '[WIN] infringed Article 82 [EC] by charging for its eXtense and Wanadoo ADSL services predatory prices that did not enable it to cover its variable costs until August 2001 or to cover its full costs from August 2001 onwards, as part of a plan to pre-empt the market in high-speed Internet access during a key phase in its development'. In Article 2 of that decision, the Commission ordered WIN to bring the infringement to an end and, in Article 4 of the decision, imposed a fine on it of EUR 10.35 million.

4 On 2 October 2003, WIN, which merged with France Télécom on 1 September 2004, resulting in France Télécom succeeding to WIN's rights, brought an action before the Court of First Instance seeking the annulment of the contested decision. That action was dismissed by the judgment under appeal.

5 In its action for annulment, WIN raised in particular a plea alleging infringement by the Commission of Article 82 EC. By one of the parts of that plea, WIN claimed that the Commission had failed to establish to the requisite legal standard that WIN had abused its dominant position by charging predatory prices for the services concerned from March 2001 to October 2002 and had erred in law on a number of occasions.

6 The part of the plea in question was made up of two groups of arguments relating to the method used by the Commission to calculate the rate of recovery of costs and the application by the Commission of the test of predation, respectively.

7 With regard to the arguments relating to the method of calculating the rate of recovery of costs, the Court of First Instance first recalled in paragraphs 129 and 130 of the judgment under appeal, the broad discretion which the Commission has in matters involving complex economic assessment and the tests identified by the case-law for determining whether a price can be found to be predatory.

8 Referring inter alia to Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359 and Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, in paragraph 130 of the judgment under appeal, the Court of First Instance noted that, 'first, prices below average variable costs give grounds for assuming that a pricing practice is eliminatory and that, if the prices are below average total costs but above average variable costs, those prices must be regarded as abusive if they are determined as part of a plan for eliminating a competitor'.

9 Having so stated, the Court of First Instance, first, found that, in the present case, the Commission, in order to calculate the rate of recovery of costs, had chosen the adjusted costs method of calculation. That method is described in paragraph 132 of the judgment under appeal in the following terms:

'… According to the principle of depreciation of assets, the Commission spread the costs of acquiring customers over 48 months. On that basis, it made a separate assessment of adjusted variable costs and adjusted full costs, stating that the Court of Justice lays down two tests for cost recovery, depending on whether or not the actions of the dominant firm form part of a plan to eliminate competitors. …'

10 As the Court of First Instance stated in paragraph 138 of the judgment under appeal, in applying the adjusted costs method, the Commission held as follows:

'… the prices applied by WIN did not enable it to recover its variable costs until August 2001 or its full costs from January 2001 to October 2002 …, there being no doubt that, considering the level of recovery of variable costs, the full costs were not recovered by August 2001.'

11 Rejecting, next, WIN's allegations seeking to show that the method chosen by the Commission was static and did not take into consideration the variations in costs over the course of the 48-month period concerned, the Court of First Instance observed, in paragraph 143 of the judgment under appeal, that the Commission had indeed integrated in respect of each period of infringement investigated and for all subscribers the successive reductions in tariffs occurring during the period that the infringement lasted and had structured its analysis according to those reductions.

12 In addition, the Court ruled in paragraph 152 of the judgment under appeal that the Commission was entitled to consider that the revenue and costs applicable later than October 2002 and, accordingly, after the infringement could not be relevant for the purposes of assessing the rate of recovery of costs during the period.

13 Lastly, in paragraph 153 of the judgment under appeal, the Court of First Instance found that, even if, as WIN claimed, it might have been appropriate in this case to apply another calculation method, in particular one seeking to calculate the discounted net value of the subscribers, that circumstance would be insufficient to prove that the method finally adopted by the Commission was unlawful.

14 WIN also objected at first instance that, when applying the method chosen for determining the rate of recovery of costs, the Commission had taken certain erroneous elements into account.

15 In that regard, the Court of First Instance, at paragraphs 165 and 169 of the judgment under appeal, took the view that, irrespective of whether that argument was admissible, even if the erroneous elements had not been taken into account, the revenues generated by the services concerned, as WIN itself conceded, would in any event have been lower than the total costs of those services. That circumstance alone would have entitled it to reject the argument on the ground that it was irrelevant.

16 With regard to the arguments concerning the test of predation, first, in paragraphs 182 to 186 of the judgment under appeal, the Court rejected the arguments put forward by WIN concerning the existence of an absolute right for an economic operator to align its prices, in good faith, with those previously charged by one of its competitors where those prices are lower than that operator's costs.

17 Having stated that neither Commission practice nor Community case-law accords any such absolute right to an undertaking in a dominant position, the Court pointed out that dominant undertakings have specific obligations and may, accordingly, be deprived of the right to adopt courses of conduct which are not in themselves abuses and which would be acceptable if adopted by a non-dominant undertaking.

18 In paragraph 187 of the judgment under appeal, the Court held as follows:

'WIN cannot therefore rely on an absolute right to align its prices on those of its competitors in order to justify its conduct. Even if alignment of prices by a dominant

undertaking on those of its competitors is not in itself abusive or objectionable, it might become so where it is aimed not only at protecting its interests but also at strengthening and abusing its dominant position.'

19 Second, the Court rejected WIN's allegation that it did not have a plan of predation and reduction in competition.

20 According to WIN, the Commission committed a serious infringement of Article 82 EC in finding that a plan to eliminate competition existed. Such a plan could not be considered rational in the market conditions concerned, particularly since the barriers to entry to that market are low.

21 In that regard, the Court first of all noted in paragraphs 195 to 198 of the judgment under appeal that the case-law provides that in order for it to find that predatory prices are being charged, the Commission is required to provide sound evidence of the existence of a strategy of 'pre-emption' of the market where the prices applied by an undertaking in a dominant position are not sufficient to cover its total costs. Next, having noted that the Commission had provided such indications, it held in paragraph 204 of that judgment that WIN's application relied on factors which were too vague to enable the Court to give a ruling on that argument and therefore rejected it. For the sake of completeness, the Court found, in paragraphs 206 to 215 of the judgment, that the evidence on which the Commission relied was sufficiently sound, as confirmed by other evidence, so that the Commission was justified in finding that a strategy of 'pre-emption' of the market existed throughout the period of the infringement.

22 Third, according to WIN, the Commission erred in law in finding that it was not necessary to demonstrate the possibility of recouping the losses which WIN suffered as a result of the application of the pricing policy. WIN also claimed that the Commission committed a manifest error of assessment, coupled with an error of law, by considering that it had furnished proof of such a possibility.

23 Under reference to *AKZO* v *Commission* and *Tetra Pak* v *Commission*, the Court held, in paragraph 228 of the judgment under appeal that the Commission was not required to provide such evidence. Where the prices applied by an undertaking in a dominant position are lower only than its full costs, the Commission, although required to adduce evidence of an additional factor, that is, of the existence of a plan to 'pre-empt' the market, is not also required to establish the possibility of recouping the losses.

Forms of order sought

24 In its appeal, France Télécom claims that the Court of Justice should:

— set aside the judgment under appeal; and, consequently,

— refer the case back to the Court of First Instance for judgment; or

— give final judgment and annul the contested decision by granting the forms of order sought in the application filed by the appellant at first instance; and

— order the Commission to pay the costs.

25 The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

The appeal

The first ground of appeal, alleging a failure to state reasons in the judgment under appeal

26 In its first ground of appeal, the appellant relies on a failure to state reasons in the judgment under appeal. That ground is divided into two parts.

The first part of the first ground of appeal, alleging the need to prove the possibility of recouping the losses

— Arguments of the parties

27 In support of the first part of the first ground of its appeal, the appellant claims that the Court of Justice held in *Tetra Pak* v *Commission* that it was not necessary to demonstrate the possibility of recouping the losses which the undertaking in a dominant position suffered as a result of the application of the pricing policy in the circumstances of that case. As the Court of First Instance followed the approach adopted in *Tetra Pak* v *Commission*, it should have stated the reasons why the circumstances of the present case were similar or not to those in *Tetra Pak* or justified the same solution as that adopted in that judgment.

28 The Commission contends, essentially, that the case-law does not require it to demonstrate the possibility of recouping the losses and that the Court of First Instance stated sufficient reasons for the judgment under appeal in that respect.

— Findings of the Court

29 The first point to be noted is that, according to settled case-law, the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the Court of First Instance's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review (see, inter alia, Case C-259/96 P *Council* v *de Nil and Impens* [1998] ECR I-2915, paragraphs 32 and 33, and Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 70).

30 However, as the Court has also pointed out, the requirement that the Court of First Instance give reasons for its decisions cannot be interpreted as meaning that it is obliged to respond in detail to every single argument advanced by a party, particularly if the argument was not sufficiently clear and precise and was not adequately supported by evidence (Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 121, and Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 81).

31 It is, therefore, in the light of these principles that the first part of the first ground of appeal should be examined.

32 Contrary to the appellant's argument, it must be stated in the present case that the Court of First Instance gave sufficient reasons why the Commission was not required to prove that WIN had the possibility of recouping its losses.

33 In paragraph 224 of the judgment under appeal, the Court of First Instance first of all pointed out that in *AKZO* v *Commission*, paragraphs 71 and 72, and *Tetra Pak* v *Commission*, paragraph 41, the Court held, first, that prices below average variable costs must always be considered abusive and, second, that prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate can be shown.

34 The Court, next, recalled, in paragraph 225 of the judgment under appeal, the circumstances of the case in *Tetra Pak* v *Commission*. In particular, it referred to paragraphs 42 and 43 of that judgment, in which the Court specifically explained the following:

> '42 … For sales of non-aseptic cartons in Italy between 1976 and 1981, [the Court of First Instance] found that prices were considerably lower than average variable costs. Proof of intention to eliminate competitors was therefore not necessary. In 1982, prices for those cartons lay between average variable costs and average total costs. For that reason, in paragraph 151 of its judgment, the Court of First Instance was at pains to establish — and the appellant has not criticised it in that regard — that Tetra Pak [International SA] intended to eliminate a competitor.
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> 43 The Court of First Instance was also right, at paragraphs 189 to 191 of the judgment under appeal, to apply exactly the same reasoning to sales of non-aseptic machines in the United Kingdom between 1981 and 1984.'

35 Lastly, in paragraph 226 of the judgment under appeal, the Court of First Instance cited paragraph 44 of *Tetra Pak* v *Commission* in which the Court found that, in the light of the findings of the circumstances summarised in paragraphs 42 and 43 of the judgment, it would not be appropriate to require in addition proof that Tetra Pak International SA had a realistic chance of recouping its losses.

36 It is by applying precisely the reasoning followed by the Court of Justice in *Tetra Pak* v *Commission*, as summarised in the preceding paragraphs, to the present case that the Court of First Instance held, in paragraph 227 of the judgment under appeal, that the Commission had good grounds for finding that the pricing practice concerned was eliminatory inasmuch as the prices charged by WIN were, as in *Tetra Pak* v *Commission*, below average variable costs and that, concerning total costs, the Commission had also to provide evidence that the pricing practice adopted by WIN formed part of a plan to 'pre-empt' the market.

37 In those circumstances, it must be held that the judgment under appeal sets out sufficiently clearly the reasons which led the Court of First Instance to find that the circumstances giving rise to the present case, in particular the relationship between the level of prices applied by WIN and the average variable costs and average total costs borne by WIN, were analogous to those in *Tetra Pak* v *Commission*, and to find, accordingly, that proof of recoupment of losses does not constitute a necessary precondition to a finding of predatory pricing.

38 The first part of the first ground of appeal must therefore be rejected.

The second part of the first ground of appeal, alleging that an undertaking in a dominant position has the right to align its prices on those of its competitors

— Arguments of the parties

39 By the second part of this ground of appeal, the appellant claims that the Court of First Instance failed to state adequate reasons for rejecting the appellant's arguments based on a right to align its prices on those of its competitors. In particular, it objects that the Court confined itself to stating, in paragraph 187 of the judgment under appeal, that,

even if alignment of prices on those of competitors is not in itself abusive, it might become so where it is aimed at strengthening and abusing a dominant position, without specifying in any way whether WIN had, in the present case, the intention of strengthening its dominant position or abusing it.

40 The Commission contends that, at first instance, the appellant merely relied on the infringement, by the Commission, of the absolute right of every undertaking to align its prices on those of its competitors, even if they have a dominant position on the market and even if such an alignment results in the application of a level of prices lower than costs. The Commission is of the view that, consequently, the Court of First Instance was correct merely to rule out the existence in Community law of such an absolute right.

— Findings of the Court

41 In the context of an appeal it is necessary to bear in mind that the purpose of review by the Court of Justice is, primarily, to examine to what extent the Court of First Instance took into consideration, in a legally correct manner, all the arguments upon which the appellant relies (see, to that effect, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 128; Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933, paragraph 47; and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 244).

42 It must be stated, as the Commission contends, that the Court of First Instance in the present case responded amply to the arguments put forward by WIN at first instance seeking, essentially, to justify the pricing practice concerned on the basis of the right of every economic operator, irrespective of its position on the market, to align its prices on those of its competitors.

43 Accordingly, in paragraph 176 of the judgment under appeal, the Court of First Instance noted, first, that recital 315 of the contested decision contests WIN's right to align its prices on those charged by its competitors only in so far as the exercise of that option 'would result in its not recovering the costs of the service in question'.

44 Next, the Court explained, in paragraphs 178 to 182 of the judgment under appeal, the reasons why such a right to align could be based neither on Commission Decision 83/462/EEC of 29 July 1983 relating to a proceeding under Article [82] of the EEC Treaty (IV/30.698 — ECS/AKZO: interim measures) (OJ 1983 L 252, p. 13) nor the judgment in *AKZO* v *Commission*, upon which the appellant relies.

45 Lastly, the Court determined whether limiting WIN's right to align its prices on those of its competitors, inasmuch as it 'would result in its not recovering the costs of the service in question', was compatible with Community law.

46 To that end, the Court refers in paragraphs 185 and 186 of the judgment under appeal to the Community case-law according to which Article 82 EC imposes specific obligations on undertakings in a dominant position. In particular, the Court recalled that, although the fact that an undertaking is in a dominant position cannot deprive it of the right to protect its own commercial interests if they are attacked and such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, it is not possible, however, to countenance such behaviour if its actual purpose is to strengthen that dominant position and abuse it.

47 It was on the basis of that case-law that the Court of First Instance thus found, in paragraph 187 of the judgment under appeal, that WIN cannot rely on any absolute right to align its prices on those of its competitors in order to justify its conduct where that conduct constitutes an abuse of its dominant position.

48 Nor can the appellant object that the Court merely made such a finding without ascertaining whether, in the present case, WIN's conduct was abusive. The Court specifically rejected, inter alia in paragraphs 195 to 218 and 224 to 230 of the judgment under appeal, all the appellant's arguments seeking to question whether that abusive conduct existed, as found in the contested decision.

49 The second part of the first ground of appeal must, therefore, also be rejected and, consequently, the first ground of appeal must be rejected as unfounded in its entirety.

The second ground of appeal, alleging that the Court of First Instance infringed Article 82 EC by denying WIN the right to align its prices in good faith on those of its competitors

Arguments of the parties

50 By its second ground of appeal, the appellant claims, first, that the Court of First Instance accepted that the appellant merely aligned its prices on those of certain of its competitors. It claims, next, that the right to such alignment on competitors' prices is laid down in the decision-making practice of the Commission, the case-law of the Court of Justice and academic writing. Lastly, it objects that the Court of First Instance failed to ascertain, as settled case-law requires, whether the measures which the appellant adopted in order to align its prices on those of its competitors were, as it maintains, reasonable and proportionate.

51 The Commission contends that the appellant relies neither on an error of law committed by the Court of First Instance in the analysis of arguments concerning WIN's alleged right to align its prices on those of its competitors, nor on a contradiction in the grounds of the judgment under appeal. In fact, the appellant has raised for the

first time at the appeal stage arguments consisting in the complaint that the Commission failed to ascertain whether the measures adopted by WIN were proportionate and reasonable.

52 In any event, the appellant criticises only one paragraph of the judgment under appeal, paragraph 187, according to which 'it might [be]' that the right to align its prices on those of its competitors is denied to an undertaking where such an alignment is aimed at strengthening and abusing its dominant position. According to the Commission, prohibiting such an alignment where it would involve the application by an undertaking in a dominant position of prices below its costs, is fully compatible with the principles underpinning Article 82 EC. In the alternative, the Commission maintains that WIN did not merely align its prices on those of its competitors, but, on the contrary, forced its competitors to align their prices on its own.

Findings of the Court

53 In support of the present ground of appeal, the appellant relies on two arguments.

54 First, it complains that the Court of First Instance infringed Article 82 EC, essentially, in that it failed to recognise the appellant's right to align its prices on those of its competitors.

55 In that regard it should be pointed out that, in accordance with Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure, an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal.

56 In the present case, as the Advocate General stated in point 83 of his Opinion, the appellant does not explain in what way the Court of First Instance infringed Article 82 EC when it specifically examined, as noted in paragraph 44 of this judgment, the decision-making practice of the Commission and the case-law of the Court of Justice upon which WIN relied at first instance and consequently found that Article 82 EC could not be interpreted as guaranteeing to an undertaking in a dominant position an absolute right to align its prices on those of its competitors.

57 It follows that that argument is inadmissible.

58 Second, the appellant alleges that the Court of First Instance omitted to consider whether WIN's response was reasonable and proportionate.

59 The second argument is also inadmissible in so far as the appellant did not raise it at first instance.

60 According to settled case-law, to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal, the Court's jurisdiction is confined to review of the findings of law on the pleas argued before the Court of First Instance (see, inter alia, Joined Cases C-186/02 P and C-188/02 P *Romondín and Others* v *Commission* [2004] ECR I-10653, paragraph 60, and Case C-68/05 P *Koninklijke Coöperatie Cosun* v *Commission* [2006] ECR I-10367, paragraph 96).

61 It follows that the second ground of appeal must be declared to be inadmissible.

The third ground of appeal, alleging that the Court of First Instance erred in its assessment of the lawfulness of the method used by the Commission to calculate the rate of recovery of costs

Arguments of the parties

62 By its third ground of appeal, the appellant claims that, in failing to declare unlawful the method used by the Commission to calculate the rate of recovery of costs, the Court of First Instance distorted the test of predation established in *AKZO* v *Commission* and, accordingly, infringed Article 82 EC. The Court unlawfully approved the Commission's incorrect application of that test for both variable costs and full costs.

63 With regard to the variable costs, the appellant claims that, in order for prices lower than average variable costs to be termed abusive, the calculation method applied must demonstrate that the supply of the services concerned led to a loss.

64 Since, in its action at first instance, WIN relied on the fact that all subscribers, for practically the entire period that the infringement lasted, had individually generated a profit, the Court of First Instance could not, without infringing Article 82 EC, refrain from determining whether the Commission had established whether or not the result of each subscription constituted a loss for WIN. Conversely, the Court accepted the approach adopted by the Commission consisting of a period-by-period analysis, which did not give a complete picture of the profitability of each subscription.

65 With regard to the full costs, the appellant, under reference to its arguments concerning the variable costs, claims that, in not seeking to ascertain whether it had been proved that the full costs of the subscribers were not covered, the Court of First Instance distorted the test of predation.

66 The Commission contends, first, that the method applied in the present case is not only the same as the one used in the cases leading to the judgments in *AKZO* v *Commission* and *Tetra Pak* v *Commission*, which takes the costs simply as they appear in the undertaking's accounts, but that that method was even adapted in a manner favourable to the appellant inasmuch as the level of costs used in the calculation is in fact lower than the level of WIN's actual costs.

67 The Commission contends, next, that the appellant is not claiming that the Court of First Instance erred in its assessment or distorted the facts in its analysis of the plea concerning the static calculation method applied by the Commission. Indeed, the appellant does not contend that the Court of First Instance erred in law in its analysis of the Commission's refusal to adopt the alternative method of calculating the costs which WIN proposed.

68 As to the necessity of taking into account the entire 48-month lifetime of a subscription, the Commission is of the view that, since the rate of recovery was below 100% for all the successive short periods that were examined in the contested decision, totalling approximately one and a half years, the rate of recovery could only have been below 100% for the entire average subscription period, namely 48 months. In that respect, the Commission contends that a rate of recovery can exceed 100% over a longer period only if the situation after the period of the infringement allows the undertaking to produce, on a sustained basis, profit margins per subscriber that are considerably above a competitive level.

Findings of the Court

69 According to the case-law of the Court of Justice, an appeal cannot merely repeat the pleas in law and arguments already submitted to the Court of First Instance without putting forward arguments to establish that it erred in law (see order in Case C-30/96 P *Abello and Others* v *Commission* [1998] ECR I-377, paragraph 45, and, to that effect, Case C-248/99 P *France* v *Monsanto and Commission* [2002] ECR I-1, paragraph 69).

70 In paragraphs 129 to 156 of the judgment under appeal, the Court of First Instance replied at length to the appellant's arguments that the method of calculating of the rate of recovery of costs used by the Commission did not permit it to take into account an appropriate level of the costs borne by WIN.

71 In particular, the Court, first, found, in paragraph 138 of the judgment under appeal, that, contrary to what the appellant claims, the application of the calculation method chosen by the Commission enabled it to find that WIN's prices were lower than its costs. Second, the Court of First Instance, in its analysis of the lawfulness of that method in paragraphs 144 and 145 of that judgment, explained why the period-by-period analysis by the Commission made it possible to take into account tariff variations occurring during the period that the infringement lasted and, accordingly, to achieve a sufficiently complete view of the profitability of a subscription.

72 It must be held that by this ground of appeal the appellant fails, in fact, to identify any error of law committed by the Court of First Instance in the context of the analysis referred to in the preceding paragraphs of this judgment, and merely repeats the arguments against the methodology adopted by the Commission in the contested decision already put forward at first instance.

73 Accordingly, the third ground of appeal must be declared to be inadmissible.

The fourth ground of appeal, alleging that the Court of First Instance erred in law and contravened its duty to state reasons, inasmuch as it held that the revenues and costs subsequent to the period that the alleged breach lasted should not be taken into account in the calculation of the rate of recovery of costs

Arguments of the parties

74 With regard to the fourth ground of appeal, the appellant alleges that the Court of First Instance wrongly approved the Commission's analysis which excluded from the method for evaluating the rate of recovery of costs revenues and costs subsequent to the alleged infringement, that is, later than 15 October 2002. In that regard, it claims, in particular, that the Court of First Instance could not, without contradicting itself and infringing Article 82 EC, uphold the approach adopted by the Commission consisting in excluding from the calculation of that rate of recovery revenues and costs subsequent to the alleged infringement but included in the 48-month lifetime of a subscription and, at the same time, recognising that, as regards subscriptions, it was legitimate to spread the costs and revenues over a period of 48 months.

75 According to the Commission, that ground of appeal is merely an extension of the third ground and results from a misunderstanding. In application of the method followed by the Commission and approved by the Court of First Instance, only non-recurrent costs, that is, 'conquest-related' costs or 'customer acquisition costs', should be spread in accordance with the principle of depreciation. By contrast, income and recurring costs, such as costs subsequent to the infringement, should not be spread.

76 Next, the Commission contends that, in calculating the rate of recovery of costs, it is wrong to include positive projections of future margins. Such positive projections are based on the fact that WIN decided not to reflect in its prices the reduction of the access tariffs to France Télécom's network, which is available to all competitors. According to the Commission, the true position is that such margins could be realised only in a context of weakened competition.

77 Lastly, the Commission notes that, in any event, the appellant's exclusions do not lead to a competely positive rate of recovery of costs and that, even if the projections of extremely high margins over the 48-month lifetime of the subscription which the appellant puts forward were to be accepted, such margins can be justified only in a situation of weakened competition.

Findings of the Court

78 In paragraphs 136 and 137 of the judgment under appeal, the Court of First Instance explained that the method followed by the Commission consisted in spreading over the average lifetime of a subscription, equal to 48 months, only non-recurrent variable costs, that is, the customer acquisition costs. According to the approach adopted by the Commission in the contested decision, the undertaking's objective is not to produce an instantaneous profit but, as results from recital 76 of the decision, cited by the Court in paragraph 136 of the judgment under appeal, 'to achieve a level of recovery of recurrent costs (network costs and production costs) which is sufficient to ensure that the margin between revenue and recurrent costs will, within a reasonable time, also cover the non-recurrent variable costs invested in the commercial development of the particular product'.

79 In application of that method, the Commission analysed WIN's pricing policy between January 2001 and October 2002 and concluded that, during that period, WIN had applied prices lower than a certain level of its adjusted costs.

80 It follows that the failure to take into account the revenues and costs subsequent to the period during which the infringement lasted, but included in the period of 48 months in question, flows directly from the application to the present case of the method of calculating the rate of recovery of costs chosen by the Commission, the unlawfulness of which the appellant has not succeeded in establishing either at first instance, as is apparent from paragraph 154 of the judgment under appeal, or in the context of this appeal, as is clear from paragraphs 69 to 73 of this judgment.

81 The Court of First Instance thus did not err in law when it held, in paragraph 152 of the judgment under appeal, that 'the Commission was entitled to consider that the revenue and costs applicable after the infringement cannot be relevant for the purposes of assessing the rate of recovery of costs during the period investigated'.

82 It follows that the fourth ground of appeal must be rejected as unfounded.

The fifth ground of appeal, alleging that the Court of First Instance erred in law and infringed the duty to state reasons, inasmuch as it found that a price leading to a reduction in the undertaking's market share is capable of being found to be predatory

Arguments of the parties

83 According to the appellant, although the Court of First Instance acknowledged that WIN's market share had fallen from August 2002, it wrongly found that the alleged infringement had continued until 15 October 2002. In fact, predation assumes a significant reduction in competition and is therefore ruled out where there is a strengthening of competition.

84 The Commission argues, first of all, that WIN raised that argument at first instance only in order to dispute that it is in a dominant position and to request a reduction in the fine. The argument was raised for the first time at the appeal stage in order to dispute the existence of an abuse of dominant position and is, accordingly, inadmissible.

85 As regards the question whether the fifth ground of appeal is well founded, the Commission contends, in the alternative, that, on the basis of the information at its disposal, WIN's market share increased consistently until August 2002. Therefore, any reduction in WIN's market share during the last month and a half of the period that the infringement lasted is due only to the reduction of the wholesale tariffs charged by France Télécom for network access which WIN, unlike its competitors, decided not to reflect in its prices, thereby bringing the infringement to an end on 15 October 2002. For the sake of completeness, the Commission states that such a reduction cannot call into question the lawfulness of the contested decision, since it is capable only of having an effect on the length of the infringement, without that length, however, having an impact on the amount of the penalty, the appellant not having applied for that penalty to be revised.

Findings of the Court

86 Suffice it to state, in that regard, that, in the present case, as the Commission rightly contends and as the Advocate General stated in point 121 of his Opinion, the appellant did not challenge the contested decision on that point at first instance. Although it relied on the reduction of its market share in order, first, to dispute the existence of a dominant position and, second, to request a reduction in the fine, it did not, however, unlike the present ground of appeal, raise that argument in order to dispute the existence of the infringement.

87 It follows that, pursuant to the case-law referred to in paragraph 60 of this judgment, the fifth ground of appeal must be declared to be inadmissible.

The sixth ground of appeal, alleging that the Court of First Instance distorted the evidence and erred in law in its assessment of whether a plan of predation existed

88 The sixth ground of appeal consists of two parts.

The first part of the sixth ground of appeal, alleging distortion of the evidence

— Arguments of the parties

89 By the first part of the ground of appeal under examination, the appellant claims that the Court of First Instance distorted the evidence on which it based its analysis of whether WIN had a plan of predation. The Court relied solely on WIN's documents which merely reflect, according to the terms used by the Court itself in paragraph 214 of the judgment under appeal, 'rather ambitious commercial objectives' and on a seriously imprecise reading of a series of internal documents, using, in particular, terms such as 'pre-emption' or 'pre-empt'.

90 According to the Commission, the first part of the sixth ground of appeal is inadmissible inasmuch as, first, it seeks the re-evaluation on appeal of a plea which was rejected as inadmissible by the Court of First Instance, without disputing the fact that that Court declared it to be inadmissible. Second, the appellant puts forward no argument to substantiate the alleged distortion; it is for the Court of First Instance to assess definitively the value to be attached to the evidence submitted to it.

— Findings of the Court

91 As is apparent from paragraph 192 of the judgment under appeal, the appellant has already argued before the Court of First Instance that the Commission had distorted the evidence when it claimed that the Commission had relied, wrongly, on internal documents for its finding that a plan of predation existed.

92 However, before embarking, for the sake of completeness, on an assessment of those documents, contested by the appellant in the context of this appeal, the Court of First Instance, in paragraphs 204 and 205 of the judgment under appeal, declared that plea to be inadmissible, since it did not fulfil the requirements of precision and specificity laid down in the Community case-law.

93 In an appeal, the appellant may not rely on pleas in law declared inadmissible by that Court, where the finding that they are inadmissible is not contested (Case C-354/92 P *Eppe* v *Commission* [1993] ECR I-7027, paragraph 13).

94 Accordingly, the first part of the sixth ground of appeal must be declared to be inadmissible.

The second part of the sixth ground of appeal, alleging infringement of Article 82 EC

— Arguments of the parties

95 In the second part of this ground of appeal, the appellant claims that the Court of First Instance infringed Article 82 EC inasmuch as it found that a plan of predation existed solely on the basis of subjective factors, while the article requires proof of an objectively identifiable plan to eliminate competition based on objective indications, such as, inter alia, threats to competitors or selective price cuts in respect of competitors' customers.

96 The Commission contends, first, that the element of intention in abuse of dominant position is necessarily subjective and that, second, the requirement to prove the existence of a plan to eliminate competition on the basis of objective indications such as those to which the appellant refers find no support in the case-law.

— Findings of the Court

97 It is sufficient to state that the appellant is wrong to maintain that the Court of First Instance, in order to establish that a plan of predation existed, relied solely on subjective factors.

98 It is apparent from paragraphs 199 and 215 of the judgment under appeal that, although the Court of First Instance referred to a 'strategy to pre-empt' the market by WIN, it none the less deduced this from objective factors such as that undertaking's internal documents.

99 Accordingly, the second part of the present ground being unfounded, the sixth ground of appeal must be rejected in its entirety.

The seventh ground of appeal, alleging that the Court of First Instance infringed Article 82 EC, inasmuch as it refused to take account of the impossibility of recouping the losses

100 The seventh ground of appeal is also divided into two parts.

The first part of seventh ground of appeal, alleging the necessity of proving the possibility of recoupment of losses

— Arguments of the parties

101 By the first part of the seventh ground of appeal, the appellant claims that the Court of First Instance infringed Article 82 EC in finding that the demonstration of the possibility of recouping losses is not a precondition to making a finding of predatory pricing. In fact, the Community case-law always requires such a demonstration, without which predation cannot exist, given that it would not be economically rational for an undertaking to adopt such a practice. That position is moreover shared by numerous national courts and competition authorities as well as by a large number of academic writers.

102 The Commission contends, first, that the case-law of the Court of Justice does not require that the possibility of recoupment of losses be demonstrated. In addition, such demonstration, required by the case-law of the national courts of the United States of America, is based on a different economic logic than that of Community law. According

to the Commission, unlike the approach under United States law, the analysis of abuse within the meaning of Article 82 EC presupposes that the undertaking concerned is in a dominant position. The mere existence of such a position is sufficient to determine that recoupment of losses is possible. Finally, in the present case, the exponential growth of the market concerned made such recoupment likely.

— Findings of the Court

103 In considering the merits of the first part of this ground of appeal, it is necessary to note at the outset that, according to settled case-law, Article 82 EC is an application of the general objective of European Community action laid down by Article 3(1)(g) EC, namely, the institution of a system ensuring that competition in the common market is not distorted. Thus, the dominant position referred to in Article 82 EC relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38).

104 In that context, in prohibiting the abuse of a dominant market position in so far as trade between Member States is capable of being affected, Article 82 EC refers to conduct which is such as to influence the structure of a market where the degree of competition is already weakened and which, through recourse to methods different from those governing 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 (*Hoffman-La Roche* v *Commission*, paragraph 91; Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 70; *AKZO* v *Commission*, paragraph 69; and Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 66).

105 Therefore, since Article 82 EC refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 26), an undertaking which holds a dominant position has a special responsibility not to allow its behaviour to impair genuine undistorted competition on the common market (*Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 57).

106 As the Court has already stated, it follows that Article 82 EC prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality. From that point of view, not all competition by means of price can be regarded as legitimate (*AKZO* v *Commission*, paragraph 70).

107 In particular, it must be found that an undertaking abuses its dominant position where, in a market the competition structure of which is already weakened by reason precisely of the presence of that undertaking, it operates a pricing policy the sole economic objective of which is to eliminate its competitors with a view, subsequently, to profiting from the reduction of the degree of competition still existing in the market.

108 In order to assess the lawfulness of the pricing policy applied by a dominant undertaking, the Court, in paragraph 74 of *AKZO* v *Commission*, relied on pricing criteria based on the costs incurred by the dominant undertaking and on its strategy.

109 Thus, the Court of Justice has held, first, that prices below average variable costs must be considered prima facie abusive inasmuch as, in applying such prices, an undertaking in a dominant position is presumed to pursue no other economic objective save that of eliminating its competitors. Secondly, prices below average total costs but above

average variable costs are to be considered abusive only where they are fixed in the context of a plan having the purpose of eliminating a competitor (see *AKZO* v *Commission*, paragraphs 70 and 71, and *Tetra Pak* v *Commission*, paragraph 41).

110 Accordingly, contrary to what the appellant claims, it does not follow from the case-law of the Court that proof of the possibility of recoupment of losses suffered by the application, by an undertaking in a dominant position, of prices lower than a certain level of costs constitutes a necessary precondition to establishing that such a pricing policy is abusive. In particular, the Court has taken the opportunity to dispense with such proof in circumstances where the eliminatory intent of the undertaking at issue could be presumed in view of that undertaking's application of prices lower than average variable costs (see, to that effect, *Tetra Pak* v *Commission*, paragraph 44).

111 That interpretation does not, of course, preclude the Commission from finding such a possibility of recoupment of losses to be a relevant factor in assessing whether or not the practice concerned is abusive, in that it may, for example where prices lower than average variable costs are applied, assist in excluding economic justifications other than the elimination of a competitor, or, where prices below average total costs but above average variable costs are applied, assist in establishing that a plan to eliminate a competitor exists.

112 Moreover, the lack of any possibility of recoupment of losses is not sufficient to prevent the undertaking concerned reinforcing its dominant position, in particular, following the withdrawal from the market of one or a number of its competitors, so that the degree of competition existing on the market, already weakened precisely because of the presence of the undertaking concerned, is further reduced and customers suffer loss as a result of the limitation of the choices available to them.

113 The Court of First Instance was right therefore to hold, in paragraph 228 of the judgment under appeal, that demonstrating that it is possible to recoup losses is not a necessary precondition for a finding of predatory pricing.

114 It follows that the first part of the present ground of appeal is unfounded.

The second part of the seventh ground of appeal, alleging proof by the dominant undertaking of the impossibility of recoupment of losses

— Arguments of the parties

115 By the second part of the seventh ground of appeal, the appellant claims that it had submitted evidence proving that recoupment of losses was, in the present case, impossible. The Court of First Instance should, therefore, have adjudicated on the question whether the Commission was entitled to disregard that evidence where it is provided by the defendant undertaking.

116 The Commission contends that the appellant raised no plea at first instance regarding the question whether the Commission was entitled to disregard such evidence furnished by the defendant undertaking. In any event, the argument is rejected implicitly by paragraphs 103 to 121 and 261 to 267 of the judgment under appeal. Finally, the Commission contends that, for the sake of completeness, it did, in fact, analyse the possibility of recoupment of losses in the contested decision and considered it possible in the present case.

— Findings of the Court

117 As pointed out in paragraph 30 above, the requirement that the Court of First Instance give reasons for its decisions cannot be interpreted as meaning that it is obliged to respond in detail to every single argument advanced by a party, particularly if the argument was not sufficiently clear and precise and was not adequately supported by evidence.

118 Suffice it to state that, at first instance, the appellant did not raise any plea seeking specifically to contest the fact that the Commission unlawfully disregarded the evidence, allegedly submitted by WIN, that recoupment of losses was impossible in the present case.

119 In those circumstances, since the second part of the seventh ground of appeal is manifestly unfounded, the seventh ground must be rejected in its entirety.

120 In light of all of the foregoing considerations, the appeal must be rejected as partially inadmissible and partially unfounded.

Costs

121 In accordance with the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs.

122 Under Article 69(2) of those Rules, applicable to the procedure on appeal pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs against the appellant, and the latter has been unsuccessful, the appellant must be ordered to pay the costs of these proceedings.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders France Télécom SA to pay the costs.

[Signatures]