

Deutsche Telekom AG, v. Commission of the European Communities, (T-271/03, [2008] ECR II 000

Judgment of CFI

(NB. Highlighted passages represent notes by Val Korah)

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’). ...

From 1997, DT’s maximum prices were subject to approval by the German regulator (RegTP) (¶ 7), which imposed maximum price caps on both retail and wholesale charges for domestic and business service(¶ 11), RegTP also operated a price cap ex post for ADSL services (broad band access). It imposed no minimum levels of price, but changes in price levels had to be approved by RegTP (¶ 11).

DT lowered its charges twice in 2002 with approval from Reg TP (¶ 20-22). This was further than was required to comply with the price caps.

Fifteen competing wholesalers complained to the Commission, which adopted a decision¹ in May 2003, finding that the relevant markets were upstream markets in which competitors

¹ OJ 2002, L 262, p.9, [2004] 4 CMLR 117.

wanted access to the fixed phone network at wholesale level and the downstream market for retail access to narrowband connections and for ADSL. The geographic markets were the whole of Germany. The Commission found that DT was dominant on all the relevant markets. Moreover,

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). ...

Until 2001, DT could lawfully have ended the margin squeeze by increasing its retail prices for ADSL services, which were not subject to prior price control. Thereafter, it could have reduced, but not eliminated, the squeeze by the same method. (¶¶94 & 95)

DT appealed to the CFI and the 15 complainants were given leave to intervene in support of the Commission. The case was heard by a chamber of 5 judges

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.

Law

The Act of State defence was rejected (¶¶ 69 – 90 & 134 - 137). The Court said:-

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 (citations, including *Conorzio* (shortened to *CIF*), omitted).

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 and others *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraphs 36 to 73, and *CIF* (*Conorzio*), ...

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 Disproportion between wholesale and retail charges

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).

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.

Raising its retail prices (¶¶ 134 – 137) and reduced thereafter(¶¶

(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 ...

The CFI went on to confirm that the Commission was not wrong to find that the squeeze might lawfully have been eliminated between Jan 1998 and December 1991

The Court considered the German regulatory rules at various dates and concluded that;

- 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.

- Commission's method of calculation

The Commission went into considerable detail in points 169 - 182 to describe the Commission's method of calculation.

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.

The CFI referred at ¶185 to the limited review of the Commission's acts in relation to complex economic appraisals. ...

- 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). ,,

The CFI observed (¶189-192) that the Community judicature had not yet ruled on the method for determining a price squeeze, but in *AKZO* (CB 159) and *Case T-5/97 Industrie des poudres sphériques v Commission* it had done so impliedly and also in a decision of the Commission in *Napier Brown*. Any other approach would be contrary to the general principle of legal certainty, as *domco* would not know the costs of its competitors.

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. ...

The CFI referred (¶ 196) to the Telecoms directive to show the policy of rebalancing telephone tariffs, to correspond more closely to cost and therefore to reduce the prices of international calls at the expense of local calls and various other purposes for which a distinction was made between the initial charge and other charges and concluded that

- 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.

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.

The CFI went on to consider whether certain other costs should be included. ...

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. ...

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 indispensable 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

The CFI went on to state that there was no need for the Commission to show that either the wholesale or retail charges were unfair. It had objected only to the difference between them .

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

The applicant submitted that the Commission had encroached on the power of RegTP and had therefore infringed the principles of proportionality, legal certainty and protection of legitimate expectation. (Point 257)

The CFI found that the applicant's pricing practices were not subject to double regulation and did not thereby infringe the principles of proportionality and legal certainty. The Commission's power derived directly from Article 3(1) of Reg No17 and, since May 2004, Art 7(1) of Council Regulation (EC) No 1/2003 on the rules on competition laid down in Art 81 EC and 82 EC (Point 263)

The applicant had sufficient scope to reduce the margin squeeze and therefore its conduct falls within the scope of Art 82 EC. (Point264) Even if the German authorities also infringed Community law, this did not reduce the applicant's scope for reducing the margin squeeze. (Point 265)

The court therefore held that the applicant's submission on proportionality could not be upheld. (Point 266)

At points 267 - 269 the CFI dismissed the arguments that the price control exercised by RegTP aroused legitimate expectations and amounted to a misuse of power (points 270 - 272).

The CFI then considered several matters related to the fine imposed and whether the Commission had sufficiently explained its reasons for the decision.

On those grounds,

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

1. Dismisses the action; ...

Notes and questions on Deutsche Telekom

1. (Point 3). In much of most telecommunication networks, optical fibre has replaced copper cable and resulted in improvements in efficiency. It is far more costly to do the same for local loops, as much digging would be required to remove the old copper wires and replace them. Consequently, the main operator of fixed public service usually retained considerable market power over its local loops, which were needed to provide broad band service which can be used much faster. This power will probably not endure as cable television circuits are increasingly used to carry telecommunications. The local loop is the last part of telecommunication circuits to give market power to the provider of fixed lines.
2. (Points 37, 92, 166, 227, 234). Do you think that any margin squeeze should be treated as abusive without considering whether it forecloses competition? How would it be possible to discover foreclosure in an industry that has recently been liberalised and where new competitors are entering? The Commission's guidance on enforcement priorities (see?* above) at paras 75-82, especially at para 80 treats margin squeeze as a refusal to supply, thereby implying that only in exceptional circumstances would it be treated as abusive. The most likely circumstance would be a very high market share, coupled with having invested in sunk costs at a time when entry to the market was not free.
3. (Points 87 – 90). Note that the Act of State defence is considered in *Consortio*, above *
4. (Points 91 – 96). Does the CFI confirm the Commission's definition of margin squeeze given in ¶92? See also ¶ 187.
5. (Point 93-137). Is it surprising that the CFI considered whether DT could have raised its retail prices? Consider whether and in what circumstances predation causes consumer harm.
6. (Point 136). TKG is the law regulating telecommunications in Germany. The regulator, RegTP, divided the services into 'baskets', and averaged prices within each basket.
7. (Point 166) note the Commission's definition of margin squeeze.
8. (Point 169-182) Would the Commission or the Courts be better placed to understand the relevant costing issues in their economic context?
9. (Points 153 – 168). Note that the Court does not find DT's wholesale or retail prices abusive in themselves, but only the relationship between them.
10. (Points 175 & 176-207). Should the Commission have been required to take into account all sources of revenue derived from access to the local link that would have come from enabling DT's competitors to compete on retail markets, such as the charges for calls?

11. (Point 178). Note that the Commission allowed the cost of attracting additional customers to be spread over the average time customers stayed with the same supplier without switching. Compare *Wanadoo*² when the Commission considered predation by a subsidiary of France Telecom. Why should such an allowance be made when considering margin squeezes?
12. (Points 183-184.) The Commission's methodology is important. How did it differ from economic theory? Should the Commission not have taken into account all Domco's revenues and costs arising from the services provided during the relevant period?
13. (Point 186-7). The Commission used DT's costs and revenues, as it was considering the costs of a firm as efficient as Domco. It considered the distinction drawn between initial charges and ongoing ones for the purpose of assessing whether the applicant's pricing practices were abusive.
14. (Point 195, 203 & 238). Do you follow this argument? Should the question relate to whether call services are part of the same whole, or whether they are income that can be recovered from access to the local loop?
15. (Points 195-203). Should the CFI look at distinctions between different kinds of cost made for one purpose when considering a different purpose?
16. (Point 225) How could the Commission identify the extent of foreclosure? See question 30, iv and v below.
17. (Point 226). See para 91 of *HLR*, CB p. 141. The ECJ referred to effects when speaking of foreclosure. It is quoted in *DT*, para 133, not reproduced here.
18. (Point 227). Why should margin squeeze be compared to predation? Both are methods of make competitors' current prices uncompetitive. Should margin squeeze be treated, rather, as a constructive refusal to deal as the Commission does in its Guidance on enforcement priorities under article 82? Why should the different practices be treated differently? Are they?
19. Does point 227 make it easier to argue that the likelihood of recoupment is necessary to establish predation or margin squeeze?
20. (Point 233) The quoted passage occurs in *Hoffmann-La Roche* and has been repeated in almost every case under article 82.
21. (Point 234 – 7). Can this be reconciled with the Commission's discussion paper, para. 54 or the guidance on the Commission's enforcement priorities para 27? Do you think it is sensible policy:
 - a) Where Domco used to enjoy a statutory monopoly and still enjoys very substantial market power?
 - b) Where Domco's market power is much less?
22. (Points 235 - 237). Do these paragraphs limit the precedent to cases where Domco was super dominant and protected by the requirement for a government licence?
23. (Points 238 & 267). Does a contribution to common costs amount to a cross subsidy?

² *WANADOO* (COMP 38.233), 16 July 2003, Press Release IP/03/1025, [2005] 5 CMLR 120; on appeal by Wanadoo,), *France Télécom v. Commission* (T-340/03), 30 January 2007, Appeal pending, (C-202/07 [2007] ECR II – 107.

24. (Point 239). Does this show how hard it is to establish that the counterfactual would be more competitive or that foreclosure of further entrants is likely? See Point 30 V.*

25. (Point 239 – 243) Do you think these points are relevant? Give reasons.

26. (Point 263). Should the Court have considered whether dual powers of RegTP and the Commission were sensible policy wise? Contrast *Trinko*, 540 US 398 (2004). Note that many current US experts believe that Section 2 protects only consumer welfare whereas EC law has always considered other objectives such as freedom to enter a market whether or not that increases consumer welfare. Is the CFI being excessively formalistic? Is it part of a judge's duties to improve the practicality of the law?

27. (Point 265). Note that the government may also be treated as infringing Art. 82. Explain in the light of *Francovich v Italy* (C-6 & 9/90), [1991] ECR I-5357, para 33 and *Brasserie du Pêcheur SA v. Germany*, and *R v. SoS for Transport, ex parte Factortame Ltd & others*. [1996] ECR I-1029 paras 19- 29.

28. (Point 267). When one asset may lead to multiple streams of profit - a) and b) - should taking account of profit b) in deciding whether access to profit a) leads to a margin squeeze. Should it be treated as cross subsidization? Why? Economists welcome the reduction of double marginalization.

28, (Point 267). When a statutory monopolist becomes subject to regulation, and both Community and national policy favour the rebalancing of charges from international to local calls, should cross-subsidisation to achieve this be treated as distorting competition?

29. (Point 271). Is this consistent with *Consortio*?

30. (Generally). The main concerns about margin squeeze are:-

i. Should there be different criteria under Article 82 for different kinds of conduct? Should it be illegal to squeeze margins when the circumstances are not sufficiently exceptional to qualify for the essential facilities doctrine? Note that in its Guidance on its enforcement priorities under Article 82, the Commission treats margin squeeze under the heading refusal to supply.

ii. Was DT required to provide access to its local loops? Is the precedent limited to cases where a former statutory monopolist still enjoys very substantial market power, or the circumstances are sufficiently exceptional to give rise to a duty to supply or license generally?

iii* See question on Points 173-176.

iv. Should it matter whether margin squeeze is treated as per se illegal without investigating whether it is likely to result or has resulted in foreclosure?

v. Economists tell us so investigate whether the failure of rivals to sell more is due to other factors and whether the vertically integrated firm has an incentive to foreclose its rivals downstream. This is more likely if:-

a) Competitors downstream are unable to switch to alternative suppliers and cannot readily provide the facility themselves;

b) Domco's earnings from its downstream operation are much larger than from its upstream operation;

- c) Customers regard Domco's products as close substitutes to those of rivals, so that a significant proportion is likely to switch.
- d) The vertically integrated firm has a significant market share downstream.
- e) The vertically integrated firm can readily expand output downstream and
- f) The rivals foreclosed previously imposed an important competitive constraint. See <http://www.frontier-economics.com/europe/en/publications>, Belt and Braces, Bulletin June 2004.