ABUSE OF DOMINANT POSITION (INTERNET): THE WANADOO CASE

Subject: Abuse of dominant position
Predatory pricing
Market share
Market entry
Fines

Industry: Internet service provision
(Some implications for other industries)

Parties: Commission of the European Communities
Wanadoo Interactive

Source: Commission Statement IP/03/1025, dated 16 July 2003

(Note. In the hands of a corporation with a dominant position on the market, predatory pricing is a powerful tool for putting competitors at a serious disadvantage and sometimes of putting them out of business altogether. Wanadoo suffered losses as the result of its policy – this is inevitable where pricing is below actual or economic cost – but gained a substantial share of the market: from January 2001 to September 2002, its market share rose from 46% to 72%, in a market which saw more than a five-fold increase in size over the same period. Whether the increased market share was enough to offset both the early losses and the relatively heavy fine imposed by the Commission is another matter.)

Commission Decision

The Commission has adopted a decision against Wanadoo Interactive, a subsidiary of France Télécom, for abuse of a dominant position in the form of predatory pricing in ADSL-based Internet access services for the general public. The Commission found that, up to October 2002, the retail prices charged by Wanadoo were below cost. This practice restricted market entry and development potential for competitors, to the detriment of consumers, in a market which is essential to the development of the information society. In view of the gravity of the abuse and the length of the period over which it was committed, the Commission is imposing a fine of €10.35 million.

From the end of 1999 to October 2002, Wanadoo, a 72% owned subsidiary of France Télécom, marketed its ADSL services known as Wanadoo ADSL and eXtense at prices which were below their average costs. It emerged from the Commission's investigations that the prices charged by Wanadoo were well below variable costs until August 2001 and that in the subsequent period they were approximately equivalent to variable costs, but significantly below total costs. Since the mass marketing of Wanadoo's ADSL services began only in March 2001, the Commission considers that the abuse started only on that date.

Wanadoo suffered substantial losses up to the end of 2002 as a result of this practice. The practice coincided with a company plan to pre-empt the strategic market for high-speed Internet access. While Wanadoo was suffering large-scale losses on the relevant service, France Télécom, which at that time held almost 100% of the market for wholesale ADSL services for Internet service providers (including Wanadoo), was anticipating considerable profits in the near future on its own wholesale ADSL products.

Wanadoo's policy was deliberate, since the company was fully aware of the level of losses which it was suffering and of the legal risks associated with the launch of its eXtense service. According to in-house company documents, the company was still expecting at the beginning of 2002 to continue selling at a loss in 2003 and 2004.

Market shares

The abuse on which the Commission has taken action was designed to take the lion's share of a booming market, at the expense of other competitors. From January 2001 to September 2002, Wanadoo's market share rose from 46% to 72%, in a market which saw more than a five-fold increase in its size over the same period. This level of market penetration by Wanadoo is roughly what Wanadoo was expecting by 2004. The level of losses required in order to compete with Wanadoo had a dissuasive effect on competitors. At the end of the period during which the abuse was committed, no competitor held more than 10% of the market, and Wanadoo's main competitor had seen its market share tumble. One ADSL service provider (Mangoosta) went out of business in August 2001. The effects of Wanadoo's conduct were not confined to competitors on the ADSL segment, but extended to cable operators offering high-speed Internet access.

The abuse came to an end in October 2002, with the entry into force of new wholesale prices charged by France Télécom, more than 30% down on the previous prices charged. Since then, the French high-speed Internet access market has been growing much more rapidly and in a more balanced way as far as the various competitors are concerned. Between December 2000 and September 2002, the market had seen a five-fold increase in size. Later, market growth picked up strongly, with the ending of the abuse, and the number of Internet subscribers grew more between September 2002 and March 2003 (seven months) than between March 2001 and August 2002 (seventeen months).

The Commission's decision marks the end of an investigation initiated in September 2001 on the basis of information obtained as part of the sector enquiry into local loop unbundling. Although the abuse has been discontinued, the Commission felt it important to adopt a decision because of the risk of the abuse being repeated. The Commission considers that practices designed to capture strategic markets such as the high-speed Internet access market call for particular vigilance.

The decision follows the decision of 21 May in which the Commission fined Deutsche Telekom for the prices it charged for access to the local loop. The two decisions reflect the Commission's determination to prevent exclusionary practices by incumbent operators on strategic markets. The Commission may undertake investigations in other Member States of the same type as that carried out in the Wanadoo case.

Background

High-speed Internet access allows download speeds ten times faster than those possible with low-speed Internet access. The ease of Internet use and the volumes of data exchange which it allows mean that it is a strategic market essential to the development of the information society. ADSL (assymetric digital subscriber line) provides high-speed Internet access using a telephone line. Cable modem technology, which uses cable television networks, is an alternative to ADSL technology in areas served by cable networks.
The decision relates to two ADSL services provided by Wanadoo, both allowing download speeds of 128 kbit/s and upload speeds of 512 kbit/s: the first is the Wanadoo ADSL service, launched in November 1999, while the other is the eXtense service, launched in January 2001. The two services are very comparable. However, in the case of the ADSL service, the subscriber concludes two separate contracts, one with France Télécom for the supply of the ADSL access service known as Netissimo, the other with Wanadoo for the supply of the Internet access service proper. In the case of the eXtense service, the subscriber concludes a single contract, with Wanadoo, which provides the whole of the service (ADSL access plus Internet access). The inception of the abuse coincided with the deployment of the eXtense facility, which came at the same time as the stepping-up of Wanadoo's commercial efforts.

Community case law (Case C-62/86, Akzo v Commission; Case C-333/94, Tetra Pak) applies two tests to establish whether an abuse in the form of predatory pricing has been committed: where variable costs are not covered, an abuse is automatically presumed; where variable costs are covered, but total costs are not, the pricing is deemed to constitute an abuse if it forms part of a plan to eliminate competitors. The two tests have been applied in the Commission's decision, for the periods before and after August 2001. In this instance, the Commission carried out adjustments to costs and revenue so as to take account of the characteristics of a strongly growing market. In particular, customer acquisition costs were spread and written off over a number of years.

The investigations began in September 2001. An initial statement of objections was sent to Wanadoo in December 2001. Following an inspection on the company's premises carried out in April 2002, a further statement of objections was sent to Wanadoo in August 2002. ■

The Court cases reported in this Newsletter are taken from the website of the Court of Justice of the European Communities. The contents of this website are freely available. Reports on the website are subject to editing and revision.