JUDGMENT OF THE COURT (Third Chamber)

25 March 2021 (*)

(Appeal – Competition – Article 102 TFEU – Abuse of dominant position – Slovak market for broadband internet access services – Regulatory obligation on the part of operators with significant market power to grant access to the local loop – Conditions laid down by the incumbent operator for unbundled access by other operators to the local loop – Indispensability of the access – Margin squeeze – Costs – Competitor at least as efficient as the dominant undertaking – Rights of the defence)

In Case C-165/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 22 February 2019,

**Slovak Telekom a.s.,** established in Bratislava (Slovakia), represented by D. Geradin, avocat, and R. O'Donoghue QC,

appellant,

the other parties to the proceedings being:

**European Commission,** represented by M. Farley, M. Kellerbauer, L. Malferrari, C. Vollrath and L. Wildpanner, acting as Agents,

defendant at first instance,

**Slovanet, a.s.,** established in Bratislava, represented by P. Tisaj, advokát,

intervener at first instance,

THE COURT (Third Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court of Justice, acting as Judge of the Third Chamber, N. Wahl, F. Biltgen and L.S. Rossi, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 17 June 2020,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2020,

gives the following

## Judgment

1 By its appeal, Slovak Telekom a.s. requests, first, that the Court set aside, in whole or in part, the judgment of the General Court of the European Union of 13 December 2018, *Slovak Telekom* v *Commission* (T-851/14, EU:T:2018:929; 'the judgment under appeal'), by which the General Court partially dismissed its action seeking the annulment of Commission Decision C(2014) 7465 final of 15 October 2014 relating to proceedings under Article 102 [TFEU] and Article 54 of the EEA

Agreement (Case AT.39523 – Slovak Telekom), as rectified by Commission Decision C(2014) 10119 final of 16 December 2014 and by Commission Decision C(2015) 2484 final of 17 April 2015 ('the decision at issue'), second, the annulment, in whole or in part, of the decision at issue, and, third, in the alternative, the annulment or the reduction of the fine imposed on the appellant by that decision.

## Legal context

### *Regulation (EC) No 2887/2000*

2 Recitals 3, 6 and 7 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) stated:

'(3) The "local loop" is the physical twisted metallic pair circuit in the fixed public telephone network connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility. As noted in the [European] Commission's Fifth Report on the implementation of the telecommunications regulatory package, the local access network remains one of the least competitive segments of the liberalised telecommunications market. New entrants do not have widespread alternative network infrastructures and are unable, with traditional technologies, to match the economies of scale and the coverage of operators designated as having significant market power in the fixed public telephone network market. This results from the fact that these operators rolled out their metallic local access infrastructures over significant periods of time protected by exclusive rights and were able to fund investment costs through monopoly rents.

…

(6) It would not be economically viable for new entrants to duplicate the incumbent's metallic local access infrastructure in its entirety within a reasonable time. Alternative infrastructures such as cable television, satellite, wireless local loops do not generally offer the same functionality or ubiquity for the time being, though situations in Member States may differ.

(7) Unbundled access to the local loop allows new entrants to compete with notified operators in offering high bit-rate data transmission services for continuous internet access and for multimedia applications based on digital subscriber line (DSL) technology as well as voice telephony services. A reasonable request for unbundled access implies that the access is necessary for the provision of the services of the beneficiary, and that refusal of the request would prevent, restrict or distort competition in this sector.'

3 Article 1 of that regulation, entitled 'Aim and scope', provided:

'1. This Regulation aims at intensifying competition and stimulating technological innovation on the local access market, through the setting of harmonised conditions for unbundled access to the local loop, to foster the competitive provision of a wide range of electronic communications services.

2. This Regulation shall apply to unbundled access to the local loops and related facilities of notified operators as defined in Article 2(a).

…'

4 Article 2 of that regulation contained the following definitions:

'…

(a) "notified operator" means operators of fixed public telephone networks that have been designated by their national regulatory authority as having significant market power in the provision of fixed public telephone networks …

…

(c) “local loop” means the physical twisted metallic pair circuit connecting the network termination point at the subscriber’s premises to the main distribution frame or equivalent facility in the fixed public telephone network;

…’

5 Article 3 of that regulation read as follows:

‘1. Notified operators shall publish from 31 December 2000, and keep updated, a reference offer for unbundled access to their local loops and related facilities, which shall include at least the items listed in the Annex. The offer shall be sufficiently unbundled so that the beneficiary does not have to pay for network elements or facilities which are not necessary for the supply of its services, and shall contain a description of the components of the offer, associated terms and conditions, including charges.

2. Notified operators shall from 31 December 2000 meet reasonable requests from beneficiaries for unbundled access to their local loops and related facilities, under transparent, fair and non-discriminatory conditions. Requests shall only be refused on the basis of objective criteria, relating to technical feasibility or the need to maintain network integrity. … Notified operators shall provide beneficiaries with facilities equivalent to those provided for their own services or to their associated companies, and with the same conditions and time-scales.

…’

6 Pursuant to Articles 4 and 6 of Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ 2009 L 337, p. 37), Regulation No 2887/2000 was repealed with effect from 19 December 2009.

***Directive 2002/21/EC***

7 Article 8 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (‘Framework Directive’) (OJ 2002 L 108, p. 33), as amended by Directive 2009/140, provides:

‘ …

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

…

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector, including the transmission of content;

…

5. The national regulatory authorities shall, in pursuit of the policy objectives referred to in paragraphs 2, 3 and 4, apply objective, transparent, non-discriminatory and proportionate regulatory principles by, inter alia:

…

(f) imposing *ex ante* regulatory obligations only where there is no effective and sustainable competition and relaxing or lifting such obligations as soon as that condition is fulfilled.’

## Background to the dispute

8 The background to the dispute, as set out in paragraphs 1 to 53 of the judgment under appeal, may be summarised as follows.

9 The appellant is the incumbent telecommunications operator in Slovakia. During the period between 12 August 2005 and 31 December 2010, Deutsche Telekom AG ('DT'), the incumbent telecommunications operator in Germany and the company at the helm of the Deutsche Telekom group, held a 51% shareholding in the appellant.

10 The appellant, which enjoyed a legal monopoly on the Slovak telecommunications market until 2000, is the largest telecommunications operator and broadband provider in Slovakia. The appellant's copper and mobile networks cover almost the entire Slovak territory.

11 Following a market analysis, in 2005 the Slovak regulatory authority for telecommunications ('the TUSR') designated the appellant as an operator with significant power on the wholesale market for unbundled access to the local loop within the meaning of Regulation No 2887/2000.

12 Consequently, the TUSR imposed on the appellant, inter alia, the requirement to grant all reasonable and justified requests for unbundling of its local loop in order to enable alternative operators to use that loop with a view to offering their own services on the retail mass market for broadband internet access services at a fixed location in Slovakia. In order to make it possible to fulfil that obligation, the appellant published its reference unbundling offer which set out the contractual and technical conditions for access to its local loop.

13 Following an investigation of the Commission, opened on its own initiative, into, inter alia, the conditions for unbundled access to the appellant's local loop, a statement of objections sent to the appellant and DT on 7 and 8 May 2012, respectively, a proposal for commitments and various meetings and exchanges of correspondence, the Commission adopted the decision at issue on 15 October 2014.

14 By that decision, the Commission found that the undertaking comprising the appellant and DT had committed a single and continuous infringement of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), concerning broadband internet access services in Slovakia between 12 August 2005 and 31 December 2010.

15 In particular, it stated that the appellant's local loop network could be used to supply broadband internet access services after its lines had been unbundled and that it covered 75.7% of all Slovak households between 2005 and 2010. However, during that same period, only very few of the appellant's local loops were unbundled, as from 18 December 2009, and used only by a single alternative operator to provide retail broadband services to undertakings.

16 According to the Commission, the infringement committed by the undertaking comprising the appellant and DT consisted in, first, withholding from alternative operators network information necessary for the unbundling of local loops, second, reducing the scope of the appellant's obligations regarding unbundled local loops, third, setting unfair terms and conditions in the appellant's reference unbundling offer regarding collocation, qualification, forecasting, repairs and bank guarantees, and fourth, applying unfair tariffs which did not allow a competitor as efficient as the appellant relying on wholesale access to the unbundled local loops of that operator to replicate the retail broadband services offered by that operator without incurring a loss.

17 By the decision at issue, the Commission imposed for that infringement, first, a fine of EUR 38 838 000 on the appellant and DT, jointly and severally, and second, a fine of EUR 31 070 000 on DT.

**The procedure before the General Court and the judgment under appeal**

18 By application lodged at the Registry of the General Court on 26 December 2014, the appellant brought an action seeking, primarily, the annulment of the decision at issue in so far as it concerned it and, in the alternative, the reduction of the fine which had been imposed on it.

19 In support of its action, the appellant relied on five pleas in law alleging, first, manifest errors of assessment and of law in the application of Article 102 TFEU, second, infringement of its rights of defence as regards the assessment of the practice resulting in the margin squeeze, third, errors in the finding of the margin squeeze, fourth, manifest errors of assessment and of law by the Commission in finding that the appellant constituted a single undertaking with DT and that they were both liable for the infringement in question and, fifth and in the alternative, errors in determining the amount of the fine.

20 By the judgment under appeal, the General Court rejected all the pleas put forward by the appellant, apart from the third plea in law which it upheld in part on the ground that the Commission had not provided proof that the appellant had engaged in the practice resulting in a margin squeeze between 12 August 2005 and 31 December 2005. The General Court thus partially annulled the decision at issue and set the amount of the fine for the payment of which DT and the appellant were held jointly and severally liable at EUR 38 061 963. It dismissed the action as to the remainder.

21 In particular, by its first plea in law, which contained five complaints, the appellant, in the first and fifth complaints, took issue with the Commission for classifying as a refusal to supply access to its local loop, first, its withholding from alternative operators of information relating to its network, which was necessary for the unbundling of the local loop (paragraphs 431 to 534 of the decision at issue), second, its reduction of obligations relating to unbundling under the applicable regulatory framework (paragraphs 535 to 651 of the decision at issue) and, third, its establishment of a number of unfair terms and conditions in its reference offer relating to unbundling (paragraphs 655 to 819 of the decision at issue), without having previously verified the indispensability of such access for the purposes of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569; 'the judgment in *Bronner*'). The General Court rejected those complaints in paragraphs 107 to 129 of the judgment under appeal, stating, in essence, that the legislation relating to the telecommunications sector applicable in the case at hand acknowledged the need for access to the appellant's local loop in order to allow the emergence and development of effective competition in the Slovak market for high-speed internet services with the result that the Commission was no longer required to demonstrate that such access was indispensable.

22 By the second complaint of the first plea in law, the appellant claimed that, by failing to apply the conditions of the judgment in *Bronner*, the decision at issue was at odds with the guidance derived from the judgment of 9 September 2009, *Clearstream* v *Commission* (T-301/04, EU:T:2009:317). The General Court rejected that complaint in paragraphs 138 to 140 of the judgment under appeal on the ground that the case before it was not comparable to the case which gave rise to that judgment.

23 By the third complaint of the first plea in law, the appellant claimed that if a constructive refusal to supply access were not subject to verification of indispensability, in accordance with the conditions laid down by the Court of Justice in the judgment in *Bronner*, it would be easier to establish a constructive refusal to supply access than an outright refusal to supply access. The General Court rejected that complaint in paragraphs 133 to 135 of the judgment under appeal on the ground that the gravity of an infringement was likely to depend on numerous factors independent of the explicit or implicit nature of that refusal, so that the appellant could not rely on the form of an infringement in order to assess its seriousness.

24 As regards the fourth complaint of the first plea in law, alleging errors of law and fact relating to the justifications put forward by the Commission with a view to derogating from the conditions of the judgment in *Bronner* on the ground that they do not apply where the network concerned has its historical origins in a State monopoly, the General Court rejected it in paragraphs 153 and 154 of the judgment under appeal, on the basis of settled case-law according to which the existence of a dominant position resulting from a legal monopoly must be taken into consideration in the context of the application of Article 102 TFEU.

25 By its second plea in law, the appellant claimed, inter alia, that its rights of defence had been infringed inasmuch as it had not been heard by the Commission regarding the methodology, principles and data used by the Commission in order to calculate the appellant's 'long run average incremental costs' ('LRAIC'), intended to establish to what extent the appellant had engaged in a margin squeeze. The General Court rejected that plea, holding, inter alia, in paragraphs 186 to 192 and 209 of the judgment under appeal, that the Commission had duly communicated to the appellant its calculation method and

principles and that it was not required to disclose its final calculations of margins before sending the decision at issue to the appellant.

26 By its third plea, the appellant claimed that the Commission's finding as regards the practice resulting in the margin squeeze was incorrect, in particular because of the failure to take into account the appellant's optimisation adjustments in the calculation of the LRAIC. The General Court rejected that plea in paragraphs 223 to 239 of the judgment under appeal, stating, in essence, that the rejection of the optimisation adjustments proposed by the appellant was justified inasmuch as taking those adjustments into account would have led, during the calculation of the margin squeeze, to the costs incurred by the appellant itself during the infringement period being incorrectly disregarded.

## Forms of order sought

27 By its appeal, the appellant claims that the Court should:

– set aside the judgment under appeal, in whole or in part;

– annul the decision at issue, in whole or in part;

– in the alternative, annul or further reduce the fine imposed on it, and

– order the Commission to pay the costs of the present proceedings and of the proceedings before the General Court.

28 The Commission contends that the Court should:

– dismiss the appeal and

– order the appellant to pay the costs.

## The appeal

29 The appellant raises three grounds in support of its appeal. The first ground of appeal alleges that the General Court erred in law in its classification of the restrictions imposed by the appellant on access to its local loop network as an abuse of a dominant position within the meaning of Article 102 TFEU. The second ground of appeal alleges infringement of its rights of defence in the assessment of a margin squeeze. The third ground of appeal alleges errors of law in the General Court's assessment of the existence of a margin squeeze.

30 In addition, the appellant requests that success by DT in its grounds of appeal in the related Case C-152/19 P, concerning the appeal brought by DT against the judgment of the General Court of 13 December 2018, *Deutsche Telekom* v *Commission* (T-827/14, EU:T:2018:930), in which DT denies that it formed a single undertaking with the appellant, be extended to the appellant.

### *The first ground of appeal*

*Arguments of the parties*

31 By its first ground of appeal, which consists of five parts, the appellant claims that the General Court erred in law in holding that, in order to demonstrate that the appellant had abused its dominant position, within the meaning of Article 102 TFEU, in limiting access to its local loop network, the Commission was not required to prove that such access was indispensable to carrying on the business of the economic operators concerned, within the meaning of the judgment in *Bronner*, because the appellant was already under a regulatory obligation to grant access to its local loop network.

32 By the first part of the first ground of appeal, the appellant submits that, by deciding, in paragraph 121 of the judgment under appeal, that the conditions of the judgment in *Bronner* did not apply in the case before it, the General Court wrongly failed to take account of the difference between the *ex post* review

carried out under Article 102 TFEU, aimed at stopping abusive conduct, and that carried out *ex ante* by a regulatory authority in the telecommunications field, aimed at fostering specific forms of competition. Moreover, the markets in question are not identical. The regulatory access obligation relates to the indispensable nature of access to the wholesale market for unbundled access to the local loop, whereas the abuse found by the Commission relates to a much wider retail market than that for local loop services, in which it was not established that access to that loop was indispensable. Lastly, the appellant claims that the finding that breach of a regulatory obligation automatically constitutes an infringement of Article 102 TFEU is based on an incorrect interpretation of that provision, that interpretation being stricter and leading to the differentiated treatment of a dominant undertaking subject to a pre-existing regulatory condition.

33 By the second part of the same ground of appeal, the appellant claims that, in paragraphs 126 and 127 of the judgment under appeal, the General Court wrongly inferred from the judgment of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83; 'the judgment in *TeliaSonera*') that the conditions of the judgment in *Bronner* were not applicable in the present case. According to the appellant, the judgment in *TeliaSonera* did not concern a refusal to deal as in the present case, but a margin squeeze. Furthermore, in paragraphs 55 to 58 of that judgment, the Court answered questions which do not arise in the present case.

34 By the third part of the first ground of appeal, the appellant submits that the General Court erred in law in paragraphs 138 and 139 of the judgment under appeal by holding that the judgment of 9 September 2009, *Clearstream* v *Commission* (T-301/04, EU:T:2009:317) was not relevant. According to the appellant, first, it does not follow from that latter judgment that the existence of a former State monopoly or a regulatory obligation would have made any difference to the General Court's analysis in that judgment. Second, that judgment is based on an *ex ante* regulatory condition, as in the present case. Third, in the case which gave rise to that judgment, Clearstream still held a monopoly at the time when it abused its dominant position, whereas the appellant's monopoly situation had ended five years before the alleged abuse began. Fourthly and lastly, the refusals of Clearstream and the appellant are similar.

35 By the fourth part of the first ground of appeal, the appellant submits that the General Court made an error of law, a manifest error or failed to state adequate reasons in finding, in paragraphs 133 and 134 of the judgment under appeal, that a constructive refusal was not necessarily less serious than an actual refusal and that an assessment on a case-by-case basis was required. According to the appellant, there is no basis for the General Court's approach that, in order to be classified as abusive for the purposes of Article 102 TFEU, the constructive refusal at issue in the present case need not satisfy the conditions of the judgment in *Bronner*, whereas an explicit or outright refusal must satisfy those conditions. Such an approach would lead to more serious conduct being treated more favourably than less serious conduct.

36 By the fifth and last part of that ground of appeal, the appellant submits that the General Court erred in finding, in paragraphs 153 and 154 of the judgment under appeal, that the fact that it held a former State monopoly could justify the non-application of the conditions laid down in the judgment in *Bronner*. According to the appellant, that approach is not compatible with the guidance given in the judgment of 27 March 2012, *Post Danmark* (C-209/10, EU:C:2012:172), is contrary to the obligation to take into account the conditions at the time of the alleged abuse, infringes the principles of legal certainty and non-discrimination and does not take into account investments which it made in its network.

37 The Commission submits, in essence, that the criteria of the judgment in *Bronner* did not apply in the case under consideration, given that the abuse of a dominant position in question in the case which gave rise to that judgment was different from that at issue in the present case.

*Findings of the Court*

38 By its first ground of appeal, the appellant criticises in particular paragraphs 113 to 122 of the judgment under appeal, in which the General Court upheld the merits of the decision at issue in that it was not for the Commission to establish that access to the appellant's local loop network was indispensable to alternative operators in order to classify as 'abusive' the practices of the appellant which that institution regarded as constituting a constructive refusal to supply in recital 365 of the decision at issue. Those practices consisted, first, in withholding from alternative operators network information necessary for the unbundling of local loops, second, reducing the scope of its obligations

regarding unbundled local loops deriving from the applicable regulatory framework, and third, setting several unfair terms and conditions in its reference unbundling offer ('the practices at issue').

39 In particular, the General Court found, in paragraph 121 of the judgment under appeal, that, given that the relevant regulatory framework applicable to telecommunications clearly acknowledged the need for access to the appellant's local loop, in order to allow the emergence and development of effective competition in the Slovak market for high-speed internet services, the demonstration, by the Commission, that such access was indeed indispensable for the purposes of the last condition set out in paragraph 41 of the judgment in *Bronner* was not required. It added, in essence, in paragraphs 123 to 127 of the judgment under appeal, that the conditions deriving from the judgment in *Bronner*, and more specifically the condition relating to the indispensability of a service or infrastructure belonging to a dominant undertaking, did not apply to practices other than a refusal of access, such as the practices at issue.

40 In order to assess whether those considerations are vitiated by an error of law, as asserted by the appellant, it is important to recall that Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, in so far as it may affect trade between Member States. A dominant undertaking therefore has a special responsibility not to allow its behaviour to impair genuine, undistorted competition in the internal market (judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 153 and the case-law cited).

41 In accordance with the Court's settled case-law, the concept of 'abuse of a dominant position', within the meaning of Article 102 TFEU, is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, 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 (judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 148 and the case-law cited).

42 The examination of the abusive nature of a dominant undertaking's practice pursuant to Article 102 TFEU must be carried out by taking into consideration all the specific circumstances of the case (see, to that effect, judgment in *TeliaSonera*, paragraph 68; and judgments of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 68, and of 19 April 2018, *MEO – Serviços de Comunicações e Multimédia*, C-525/16, EU:C:2018:270, paragraphs 27 and 28).

43 As follows from paragraph 37 of the judgment in *Bronner*, the case which gave rise to that judgment concerned the question whether the refusal of the owner of the only nationwide home-delivery scheme in the territory of a Member State, which uses that scheme to distribute its own daily newspapers, to allow the publisher of a rival newspaper access to it constituted an abuse of a dominant position, within the meaning of Article 102 TFEU, on the ground that such refusal deprives that competitor of a means of distribution judged essential for the sale of its products.

44 In response to that question, the Court found, in paragraph 41 of that judgment, that for that refusal to have constituted an abuse of a dominant position, it would have been necessary not only that the refusal of the service comprised in home delivery were likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal were incapable of being objectively justified, but also that the service in itself were indispensable to carrying on that person's business, inasmuch as there was no actual or potential substitute in existence for that home-delivery scheme.

45 The imposition of those conditions was justified by the specific circumstances of that case which consisted in a refusal by a dominant undertaking to give a competitor access to infrastructure that it had developed for the needs of its own business, to the exclusion of any other conduct.

46 In that regard, as the Advocate General also noted, in essence, in points 68, 73 and 74 of his Opinion, a finding that a dominant undertaking abused its position due to a refusal to conclude a contract with a competitor has the consequence of forcing that undertaking to conclude a contract with that competitor.

Such an obligation is especially detrimental to the freedom of contract and the right to property of the dominant undertaking, since an undertaking, even if dominant, remains, in principle, free to refuse to conclude contracts and to use the infrastructure it has developed for its own needs (see, by analogy, judgment of 5 October 1988, *Volvo*, 238/87, EU:C:1988:477, paragraph 8).

47 Furthermore, while, in the short term, an undertaking being held liable for having abused its dominant position due to a refusal to conclude a contract with a competitor has the consequence of encouraging competition, by contrast, in the long term, it is generally favourable to the development of competition and in the interest of consumers to allow a company to reserve for its own use the facilities that it has developed for the needs of its business. If access to a production, purchasing or distribution facility were allowed too easily, there would be no incentive for competitors to develop competing facilities. In addition, a dominant undertaking would be less inclined to invest in efficient facilities if it could be bound, at the mere request of its competitors, to share with them the benefits deriving from its own investments.

48 Consequently, where a dominant undertaking refuses to give access to an infrastructure that it has developed for the needs of its own business, the decision to oblige that undertaking to grant that access cannot be justified, at a competition policy level, unless the dominant undertaking has a genuinely tight grip on the market concerned.

49 The application, to a particular case, of the conditions laid down by the Court of Justice in the judgment in *Bronner*, set out in paragraph 44 of the present judgment, and in particular the condition relating to the indispensability of the access to the dominant undertaking's infrastructure, allows the competent authority or national court to determine whether that undertaking has a genuinely tight grip on the market by virtue of that infrastructure. Thus, that undertaking may be forced to give a competitor access to an infrastructure that it has developed for the needs of its own business only where such access is indispensable to the business of such a competitor, namely where there is no actual or potential substitute for that infrastructure.

50 By contrast, where a dominant undertaking gives access to its infrastructure but makes that access, provision of services or sale of products subject to unfair conditions, the conditions laid down by the Court of Justice in paragraph 41 of the judgment in *Bronner* do not apply. It is true that where access to such an infrastructure – or service or input – is indispensable in order to allow competitors of the dominant undertaking to operate profitably in a downstream market, this increases the likelihood that unfair practices on that market will have at least potentially anticompetitive effects and will constitute abuse within the meaning of Article 102 TFEU (see, to that effect, judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 234, and judgment in *TeliaSonera,* paragraphs 70 and 71). Nevertheless, as regards practices other than a refusal of access, the absence of such an indispensability is not in itself decisive for the purposes of the examination of potentially abusive practices on the part of a dominant undertaking (see, to that effect, the judgment in *TeliaSonera*, paragraph 72).

51 While such practices can constitute a form of abuse where they are able to give rise to at least potentially anticompetitive effects, or exclusionary effects, on the markets concerned, they cannot be equated to a simple refusal to allow a competitor access to the infrastructure, since the competent competition authority or national court will not have to force the dominant undertaking to give access to its infrastructure, as that access has already been granted. The measures that would be taken in such a context will thus be less detrimental to the freedom of contract of the dominant undertaking and to its right to property than forcing it to give access to its infrastructure where it has reserved that infrastructure for the needs of its own business.

52 To that effect, the Court of Justice has previously held, in paragraphs 75 and 96 of the judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062), that the conditions laid down by the Court of Justice in paragraph 41 of the judgment in *Bronner*, and in particular the condition relating to the indispensability of the access, did not apply in the case of abuse in the form of a margin squeeze of competitor operators in a downstream market.

53 To the same effect, the Court of Justice held, in paragraph 58 of the judgment in *TeliaSonera*, in essence, that it cannot be required that the examination of the abusive nature of any type of conduct of a

dominant undertaking towards its competitors be systematically carried out in the light of the conditions laid down by the Court of Justice in the judgment in *Bronner*, which concerned a refusal to provide a service. Therefore, the General Court was right to find, in paragraphs 125 to 127 of the judgment under appeal, that, in paragraph 58 of the judgment in *TeliaSonera*, the Court of Justice was not referring only to the particular form of abuse constituted by a margin squeeze of competitor operators in a downstream market when it assessed the practices to which the conditions of the judgment in *Bronner* did not apply.

54 In the present case, the appellant's situation was characterised in particular by the fact, referred to in paragraph 119 of the judgment under appeal, that it was subject to a telecommunications regulatory obligation, in accordance with which it was required to give access to its local loop network. Following the decision of 8 March 2005 of the TUSR, confirmed by the director of that authority on 14 June 2005, the appellant was required to grant, in its capacity as operator with significant market power, all alternative operators' reasonable and justified requests for unbundling of its local loop, in order to enable those operators, on that basis, to offer their own services on the retail mass market for broadband services at a fixed location in Slovakia.

55 Such an obligation meets the objectives of development of effective competition on the telecommunications markets laid down by the EU legislature. As indicated in recitals 3, 6 and 7 of Regulation No 2887/2000, the imposition of such an access obligation is justified by the fact that, first, as operators with significant market power were able, over significant periods of time, to roll out their local access networks protected by exclusive rights and fund investment costs through monopoly rents, it would not be economically viable for new entrants to duplicate the incumbent's local access infrastructure and, second, alternative infrastructures do not constitute a viable substitute for those local access networks. Unbundled access to the local loop would therefore be such as to allow new entrants to compete with operators with significant market power. It follows that, as the General Court recalled in paragraph 119 of the judgment under appeal, the access obligation imposed in the present case by the TUSR resulted from the intention to encourage the appellant and its competitors to invest and innovate, whilst ensuring that competition in the market is maintained.

56 That regulatory obligation applied to the appellant during the entire infringement period taken into account by the Commission in the decision at issue, or from 12 August 2005 until 31 December 2010. In addition to the fact that, pursuant to Article 8(5)(f) of Directive 2002/21, as amended by Directive 2009/140, the telecommunications regulatory authorities may impose such an access obligation only where there is no effective and sustainable competition and are required to relax or lift it as soon as that condition is fulfilled, the appellant has neither alleged nor demonstrated that it has disputed that it was subject to such an obligation during the infringement period. Moreover, the Commission stated the reasons for the existence of such an access obligation in section 5.1 of the decision at issue and noted, in recital 377 of that decision, that it had carried out its own *ex post* analysis of the markets in question to find that the situation on those markets had not significantly changed in that regard during the infringement period.

57 By analogy with the Court of Justice's findings in paragraph 224 of the judgment of 14 October 2010, *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603), referred to in paragraph 117 of the judgment under appeal, it should be considered that a regulatory obligation can be relevant for the assessment of abusive conduct, for the purposes of Article 102 TFEU, on the part of a dominant undertaking that is subject to sectoral rules. In the context of the present case, while the obligation imposed on the appellant to give access to the local loop cannot relieve the Commission of the requirement of establishing that there is abuse within the meaning of Article 102 TFEU, by taking account in particular of the applicable case-law, the imposition of that obligation has the consequence that, during the entire infringement period taken into account in the present case, the appellant could not and did not actually refuse to give access to its local loop network.

58 However, the appellant retained, during that period, decision-making autonomy, notwithstanding the abovementioned regulatory obligation, in respect of the conditions for such access. Apart from certain guiding principles, the mandatory content of the local loop unbundling reference offer, referred to in Article 3 of Regulation No 2887/2000, was not prescribed by the regulatory framework or by the

decisions of the TUSR. It was in accordance with that decision-making autonomy that the appellant adopted the practices at issue.

59 Nevertheless, as the practices at issue did not constitute refusal of access to the appellant's local loop but related to the conditions for such access, for the reasons referred to in paragraphs 45 to 51 of the present judgment, the conditions set out by the Court of Justice in paragraph 41 of the judgment in *Bronner*, referred to in paragraph 44 of the present judgment, did not apply in the present case.

60 Therefore, the General Court did not err in law when it considered, in paragraph 121 of the judgment under appeal, that the Commission was not required to demonstrate 'indispensability', for the purposes of the last condition set out in paragraph 41 of the judgment in *Bronner*, in order to find an abuse of a dominant position on the part of the appellant by virtue of the practices at issue.

61 In those circumstances, the first ground of appeal must be rejected in its entirety, since it is based on a premiss that is erroneous in law.

***The second ground of appeal***

*Arguments of the parties*

62 By its second ground of appeal, the appellant submits that the General Court erred in failing to find that its rights of defence had been infringed on the ground that the methodology, principles and data used by the Commission at the stage of the statement of objections in order to determine the costs used to verify the existence of a margin squeeze were based on historical cost data from the appellant's internal cost reporting system, namely *'účelové členenie nákladov'* ('classification of specific costs'; 'UCN data'), whereas, in the decision at issue, they were based on the LRAIC, without the Commission having allowed the appellant to comment effectively on that subject.

63 Furthermore, the appellant claims that the Commission reversed the burden of proof, in so far as that institution asked the appellant to set out its principles, methodology and data relating to the determination of the LRAIC, although as of the outset it failed to provide its own principles, methodology and data. The fact that the Commission did not as of the outset have at its disposal its own cost model to establish the existence of a margin squeeze should have been recognised by the General Court as constituting an unlawful reversal of the burden of proof. In that regard, the appellant submits that the considerations set out in paragraphs 186 and 189 of the judgment under appeal, according to which, first, the appellant had the opportunity to respond to the statement of objections and, second, the Commission had relied, in that document, on the LRAIC, are irrelevant and incorrect respectively, since, at the date of the statement of objections, there were no data relating to the LRAIC.

64 Similarly, the appellant claims that the General Court was wrong to hold, in paragraph 189 of the judgment under appeal, that the Commission did not put forward any new objections in the decision at issue with respect to the margin squeeze. The fact that, in both the statement of objections and in the decision at issue, the Commission considered, first, that a competitor as efficient as the appellant would face negative margins and, second, that the conclusion as to the negative margins did not change if certain other services were included as revenues, together with the fact that the infringement period upheld in the decision at issue was shorter than that referred to in the statement of objections, is irrelevant for the purpose of determining whether the appellant's rights of defence had been infringed on the ground that the methodology, principles and data taken into account in the statement of objections did not correspond to those upheld by the Commission in the decision at issue.

65 In addition, the appellant criticises paragraph 190 of the judgment under appeal on the ground that, contrary to what the General Court held, the network costs, the methodology and the principles applied by the Commission differ significantly at the respective stages of the statement of objections and the decision at issue. The appellant also submits that the General Court erred in finding, in paragraph 192 of the judgment under appeal, that its rights of defence had been respected because the Commission had responded to its arguments. The appellant's communication, in its response to the statement of objections or in the documents submitted in 2013, of results from new work carried out on the LRAIC is, in that regard, irrelevant, since before the adoption of the decision at issue, the Commission did not

set out all the elements of its principles, methodology and data concerning the calculation of the LRAIC.

66 Finally, the appellant submits that the General Court also erred in law and distorted the facts and the evidence in paragraph 209 of the judgment under appeal by disregarding the relevance of the 'state-of-play meeting' of 16 September 2014, to which that paragraph refers. The disclosure by the Commission for the first time at that meeting of its preliminary calculations of the LRAIC is an acknowledgment on its part of its failure to communicate them previously and its obligation to do so. That disclosure at that stage of the procedure also shows that the Commission was committed to adopting a prohibition decision, so that the appellant could no longer be heard correctly at that stage.

67 The Commission contends that the second ground of appeal must be rejected since, first, it has not been shown that the General Court distorted the facts which it took into account and, second, the appellant's rights of defence were respected.

*Findings of the Court*

68 It should be recalled that, in accordance with Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, appeals against decisions of the General Court are limited to points of law. It is settled case-law that the General Court has exclusive jurisdiction to find and appraise the relevant facts and, in principle, to examine the evidence it accepts in support of those facts. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 84 and the case-law cited).

69 In the present case, the appellant does not claim that the General Court distorted the following facts, described in paragraphs 177 and 185 to 187 of the judgment under appeal.

70 During the investigation which preceded the statement of objections, the Commission asked the appellant to provide it with the information necessary in order to calculate the costs relating to additional inputs which are necessary to transform its wholesale services into retail services. In reply, the appellant sent the Commission tables containing calculations of the costs for 2003 to 2010 based on UCN data. The costs included in those tables had therefore been calculated on the basis of fully allocated historical costs and differed from the LRAIC. The Commission therefore requested the appellant to provide it with profitability data for broadband services, recalculated using a methodology based on the LRAIC. Since the appellant replied that it did not calculate the profitability figures for broadband services according to the LRAIC methodology, the Commission used, at the statement of objections stage, the UCN data at its disposal in order to assess the margin squeeze that the appellant had engaged in. The Commission considered that, in the absence of data on the LRAIC, the UCN data constituted the best available source for carrying out that assessment. On the basis of those data, it concluded in the statement of objections that a competitor equally efficient to the appellant with access to its local loop would have faced significant negative margins if it had tried to replicate the appellant's retail portfolio over the years 2005 to 2010. In its response to the statement of objections, the appellant submitted new data to assess costs for the period from 2005 to 2010. That data was based on the data for 2011. The appellant submitted, in particular, in that response that, when calculating the LRAIC, it was appropriate, first, to re-evaluate its assets and, second, to take into account the inefficiencies of its network for broadband provision by making 'optimisation' adjustments, namely, (i) the replacement of existing assets with their modern, more efficient and less costly, equivalents, (ii) the maintenance, as far as possible, of technical coherence, and, (iii) asset reduction on the basis of currently used capacity as opposed to the installed capacity (together, 'the optimisation adjustments'). In the decision at issue, the Commission agreed to include in particular the appellant's asset re-evaluation in its margin squeeze analysis, but rejected the optimisation adjustments. In that respect, the Commission arrived at different results in the decision at issue and in the statement of objections as regards the extent of the margin squeeze by the appellant.

71 It is in the light of those facts, the distortion of which is not alleged, that it is necessary to assess whether the General Court committed the errors of law put forward by the appellant in its second ground of appeal.

– *Reversal of the burden of proof*

72 As regards the complaint that the General Court incorrectly endorsed a reversal of the burden of proof by the Commission, it must be recalled that it is for the authority alleging an infringement of the competition rules to prove it (see, to that effect, judgment of 17 June 2010, *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 29 and the case-law cited).

73 In order to establish an abuse consisting of a margin squeeze, it is important specifically for the Commission to demonstrate that the spread between the wholesale prices for the services concerned and the retail prices for downstream services to end users was either negative or insufficient to cover the specific costs of those services which the company in a dominant position has to incur in order to supply its own retail services to end users, so that that spread does not allow a competitor which is as efficient as that undertaking to compete for the supply of those services to end users (see, to that effect, judgment in *TeliaSonera*, paragraph 32).

74 The Court has also held that, in order to assess the lawfulness of the pricing policy applied by a dominant undertaking, reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy (judgment in *TeliaSonera*, paragraph 41 and the case-law cited).

75 In the present case, in the light of the facts noted by the General Court, as summarised in paragraph 70 of the present judgment, it cannot be considered that the General Court endorsed a reversal of the burden of proof by failing to hold that the Commission had not set out, from the outset, its methodology and its data concerning the calculation of the LRAIC.

76 Those facts show that, from the beginning of the administrative procedure, the Commission informed the appellant that it would base its assessment of the existence of a margin squeeze on the LRAIC methodology. Thus, following the appellant's communication of the UCN data, before the statement of objections, the Commission asked it to provide the profitability data for broadband services, recalculated using the LRAIC methodology. It is apparent from recital 870 of the decision at issue, to which paragraph 185 of the judgment under appeal refers, that, in response to that request, the appellant stated that it applied LRAIC for the calculation of the rates of interconnection services and that it had, once, in 2005, performed LRAIC calculations for broadband services. Furthermore, without any distortion being claimed in that regard, the General Court held, in paragraph 189 of the judgment under appeal, that it was apparent from paragraphs 996 to 1002 of the statement of objections that the Commission had set out the guidelines for the calculation of costs on the basis of the LRAIC. It follows from the foregoing that the Commission had set out its methodology for determining costs from the beginning of the administrative procedure and that the appellant was aware of that.

77 As regards the data taken into account, it should be recalled, as paragraph 73 above shows, that in order to establish the existence of a margin squeeze, the Commission relies, in principle, on the costs borne by the dominant undertaking. Consequently, the fact that the Commission asked the appellant to provide it with data relating to its costs does not constitute a reversal of the burden of proof. In the same way, nor does the Commission taking account of reworked data provided by the appellant following the statement of objections constitute such a reversal.

78 Lastly, contrary to what the appellant claims, the fact that the Commission was unable to apply its methodology based on LRAIC at the stage of the statement of objections, since it lacked adequate data, does not amount to a failure on the part of the Commission to draw up its own methodology for the purpose of meeting its obligation to adduce proof.

79 Accordingly, the complaint that the General Court erred in law by not recognising an unlawful reversal of the burden of proof borne by the Commission must be rejected as unfounded.

– *Infringement of the rights of the defence*

80 As regards the complaint that the General Court erred in law by failing to acknowledge an infringement of the appellant's rights of defence, it should be recalled that the rights of the defence are fundamental rights forming an integral part of the general principles of law whose observance the Court

ensures (judgment of 25 October 2011, *Solvay* v *Commission*, C-109/10 P, EU:C:2011:686, paragraph 52 and the case-law cited). That general principle of EU law is enshrined in Article 41(2)(a) and (b) of the Charter of Fundamental Rights of the European Union and applies where the authorities are minded to adopt a measure which will adversely affect an individual (see, to that effect, judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 28 and the case-law cited).

81 In the context of competition law, observance of the rights of the defence means that any addressee of a decision finding that that addressee has committed an infringement of the competition rules must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged as well as on the documents used by the Commission to support its claim that there has been such an infringement (see, to that effect, judgments of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 41, and of 14 September 2017, *LG Electronics and Koninklijke Philips Electronics* v *Commission*, C-588/15 P and C-622/15 P, EU:C:2017:679, paragraph 43).

82 To that effect, as the General Court rightly pointed out in paragraphs 179 to 183 of the judgment under appeal, Article 27(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1) provides that the parties are to be sent a statement of objections. As is apparent from the Court's settled case-law, that statement must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. However, that may be done summarily and the decision subsequently taken by the Commission is not necessarily required to be a replica of the statement of objections, since that statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature (judgment of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 42 and the case-law cited).

83 It follows that, since the legal classification of the facts in the statement of objections must, by definition, be provisional, a subsequent Commission decision cannot be annulled on the sole ground that the definitive conclusions drawn from those facts do not correspond precisely with that provisional classification. The Commission is required to hear the addressees of a statement of objections and, where necessary, to take account of their observations made in response to the objections by amending its analysis specifically in order to respect their rights of defence. The Commission must therefore be permitted to clarify that classification in its final decision, taking into account the factors emerging from the administrative procedure, in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it raises, provided however that it relies only on facts on which those concerned have had an opportunity to make known their views and provided that, in the course of the administrative procedure, it has made available the evidence necessary for the defence of their interests (judgment of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraphs 43 and 44 and the case-law cited).

84 In the present case, in the first place the appellant takes issue with the General Court for failing to find that there had been an infringement of its rights of defence on the ground that, in order to assess to what extent a margin squeeze could be imputed to the appellant, the Commission relied, as regards the calculation of costs, on a methodology, principles and data which differed, respectively, in the statement of objections and in the decision at issue.

85 In that regard, it is apparent from the facts noted by the General Court, as summarised in paragraph 70 above, that, before adopting the statement of objections, the Commission requested the appellant to provide it with profitability data recalculated using the LRAIC methodology. Since it did not obtain that data, the Commission in the statement of objections evaluated the existence of a margin squeeze on the basis of the UCN data which at that point it had at its disposal. As is apparent from recital 875 of the decision at issue, to which paragraph 185 of the judgment under appeal refers, the Commission considered that that data constituted a sufficiently reliable indicator for the purposes of the calculation of the LRAIC. Next, in its response to the statement of objections, the appellant provided new data and stated that, when calculating the LRAIC, it was necessary, first, to take into consideration a re-evaluation of its assets and, second, to take account of the inefficiencies of its network for broadband

provision. Lastly, it is not disputed that, in the decision at issue, the Commission applied the LRAIC methodology.

86 In the light of those facts, in particular the fact that the appellant submitted estimates of LRAIC for the period from 2005 to 2011 in response to the statement of objections, as well as the considerations set out in paragraph 76 of the present judgment, it must be stated that, during the administrative procedure, the appellant was fully aware of the fact that the Commission was seeking to establish the existence of a margin squeeze on the basis of a methodology and principles based on the LRAIC.

87 Furthermore, it is apparent from the factual circumstances to which the General Court had regard, as summarised in paragraph 70 above, that it was fully entitled to take the view, in paragraphs 189 and 190 of the judgment under appeal, that the Commission had applied the same methodology and the same principles of calculation of the LRAIC at the stage of the statement of objections as at that of the decision at issue. The fact that, at the stage of the statement of objections, the Commission considered that the appellant's UCN data constituted a sufficiently reliable indicator for the establishment of the LRAIC does not mean that the Commission changed its methodology and its principles for calculating those costs.

88 Moreover, the General Court was correct, in paragraph 190 of the judgment under appeal, in drawing attention to the correspondence between the tables set out in the statement of objections and in the decision at issue respectively in order to support the ground that the Commission used one and the same methodology during the procedure which led to the decision at issue. Having regard to their headings, the purpose of those tables is to collect equivalent data.

89 It follows that the appellant is wrong to allege an infringement of its rights of defence on the ground that the methodology and the principles of cost calculation in order to establish a margin squeeze were different at the respective stages of the statement of objections and the decision at issue. Accordingly, the appellant's complaint that the General Court erred in law by failing to acknowledge such an infringement of its rights of defence is unfounded.

90 In the second place, the appellant alleges that the General Court failed to acknowledge an infringement of its rights of defence in view of the difference between the data on costs set out in the statement of objections and in the decision at issue respectively.

91 In that regard, it is apparent from paragraphs 187, 190 and 192 of the judgment under appeal that the differences between the costs and margins set out in the statement of objections and in the decision at issue respectively result from the Commission's taking into account certain adjustments proposed by the appellant itself in order to respect its rights of defence. As is apparent from paragraph 83 of this judgment, the principle of respect for the rights of the defence does not mean only that the Commission must hear the addressees of a statement of objections, but also, where appropriate, that it must take account of their observations made in response to the objections raised by amending its analysis specifically in order to respect their rights of defence. Therefore, in the present case, the differences referred to by the appellant cannot demonstrate an infringement of its rights of defence.

92 Furthermore, the fact that the Commission made those adjustments as regards the calculation of the appellant's margins without hearing the appellant again does not constitute an infringement of the latter's rights of defence. Those adjustments were made on the basis of data provided by the appellant itself in accordance with LRAIC principles and methodology, as stated by the Commission during the administrative procedure.

93 In the third place, as regards the criticisms directed against paragraph 209 of the judgment under appeal concerning the 'state-of-play meeting' of 16 September 2014, it must be stated that the General Court did not err in law in holding in that paragraph that the principle of respect for the rights of the defence did not require the Commission to disclose its final calculations of margins before sending the decision at issue to the appellant. That principle merely requires the Commission to give the appellant the opportunity to make known its views on the matters of fact and of law which it will take into consideration for the purpose of adopting its decision. The appellant has not shown that the data disclosed at that meeting were derived from matters of fact or of law on which it had not had an opportunity to make known its views during the administrative procedure preceding that meeting.

94 Accordingly, the General Court did not err in law in finding, in paragraph 209 of the judgment under appeal, that the appellant had been informed about all the material elements of the calculation of margins made by the Commission and had been given the opportunity to present its observations prior to the adoption of the decision at issue.

95 In the light of all the foregoing considerations, the second ground raised by the appellant in support of its appeal must be rejected as unfounded.

***The third ground of appeal***

*Admissibility*

– *Arguments of the parties*

96 The Commission contends that the appellant's third ground of appeal is inadmissible in so far as, by that ground of appeal, the appellant submits that the Commission made a material error of assessment in failing to collect data from third parties or in failing to prepare its own calculation of the LRAIC for the purposes of applying the so-called 'equally efficient operator' test, since that complaint was not raised before the General Court.

97 The appellant denies that that complaint is inadmissible. It submits that, in its reply before the General Court, it criticised the Commission for failing to set out fully the LRAIC methodology, principles, and data on which it intended to rely.

– *Findings of the Court*

98 It should be borne in mind that, under Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. The Court's jurisdiction in an appeal is confined to a review of the findings of law on the pleas argued before the General Court.

99 A party cannot therefore put forward for the first time before the Court of Justice, in an appeal, a plea in law which it has not raised before the General Court, since that would amount to allowing that party to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court (judgment of 11 November 2004, *Ramondín and Others* v *Commission*, C-186/02 P and C-188/02 P, EU:C:2004:702, paragraph 60).

100 It must also be recalled that, when assessing whether a pricing practice which causes a margin squeeze is abusive, account should as a general rule be taken primarily of the prices and costs of the undertaking concerned on the retail services market. Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of its competitors on the same market be examined (judgment in *TeliaSonera*, paragraph 46).

101 By its third ground of appeal, alleging errors of law vitiating the General Court's rejection of the appellant's argument that the Commission wrongly rejected its requests for optimisation adjustments, the appellant claims, inter alia, that the General Court erred in law by not deciding that, since the cost structure of the appellant's LRAIC was not precisely identifiable for objective reasons, the Commission should have collected the data of the appellant's competitors or set up its own consistent database for the purposes of developing a LRAIC model.

102 However, the appellant has not shown that it raised such a complaint before the General Court. When, before the General Court, the appellant took issue with the Commission for failing to set out fully the LRAIC calculation methodology, principles, and data on which it intended to rely in order to assess the existence of a margin squeeze in the present case, the appellant alleged only an infringement of its procedural rights. It did not claim that it was incorrect, for that purpose, to rely on its costs. Moreover, the appellant has not alleged that, in paragraph 231 of the judgment under appeal, the General Court distorted its arguments. In that paragraph, the General Court expressly found that the appellant had not claimed that it was necessary to examine the prices and costs of its competitors in the case under consideration on the ground that it was impossible to refer to its own prices and costs.

103 Therefore it has not been established that the appellant claimed before the General Court that the Commission could not rely on the appellant's data to establish the relevant costs or that only the data of the appellant's competitors or entirely constructed data would have made it possible to establish those costs.

104 Accordingly, as is apparent from paragraph 98 of the present judgment, it is necessary to reject as inadmissible the complaint put forward by the appellant in support of its third ground of appeal, by which it claims that the Commission made a material error of assessment in failing to collect data from third parties or in failing to prepare its own calculation of the LRAIC for the purposes of applying the 'equally efficient operator' test.

*Substance*

– *Arguments of the parties*

105 The appellant submits that, when assessing whether there was abuse in the form of a margin squeeze, the General Court erred in law in its application of the 'equally efficient operator' test by rejecting its optimisation adjustments.

106 According to the appellant, if the Commission accepted its figures for the LRAIC in the context of asset re-evaluation and depreciation, there was no reason to reject the optimisation adjustments, since they were also based on the costs that a network built at the date of the decision at issue would incur. In its view, that is a matter of consistency or equal treatment.

107 It submits that, in the absence of a cost model established by the Commission on the basis of the LRAIC and because of the fact that its LRAIC for the period from 2005 to 2010 were based on ratios stemming from its 2011 LRAIC analysis, there was no valid reason justifying the rejection of its optimisation adjustments. Thus, it argues, the General Court could not, without erring in law, hold in paragraph 233 of the judgment under appeal that the optimisation adjustments would have resulted in the costs incurred by the appellant during the infringement period being 'disregarded' or suggest that they involved the taking into account of a modern network. Similarly, the consideration, in paragraph 226 of the judgment under appeal, that the issue of asset revaluation and depreciation, on the one hand, had a 'different objective' from that of the optimisation adjustments, on the other hand, is irrelevant in the absence of a model established by the Commission and incorrect because both those issues concern the calculation of the LRAIC. In addition, the appellant claims that, as regards the adjustments made in order to ensure that asset costs and depreciation are based on current cost accounting principles ('the CCA adjustments'), the Commission accepted the principle that it was necessary to take into consideration updating the equipment and operating costs entailed by the construction of a network at the time when the calculations based on those costs were made, whereas it rejected the optimisation adjustments, although these were based on the same principle. The appellant also disputes the assertion, in paragraph 234 of the judgment under appeal, that its optimisation adjustments were based on a 'perfectly efficient operator' since, it argues, they were based on an equally efficient operator building a network in 2011 and on its LRAIC for 2011, which were the only ones available. The costs thus obtained were the costs that the appellant would avoid if it did not offer the relevant broadband services.

108 The Commission submits that the General Court did not err in law in paragraphs 233 to 235 of the judgment under appeal, since the appellant's position takes no account either of the nature and effects of each type of adjustment or of the reasons why the Commission accepted or rejected them.

– *Findings of the Court*

109 It should be borne in mind that the implementation, by a dominant undertaking, of a pricing practice which results in the margin squeeze of its competitors as efficient as itself constitutes an abuse, within the meaning of Article 102 TFEU, where it is capable of producing exclusionary effects in respect of those competitors by making more difficult, or impossible, the entry of those competitors onto the market concerned (see, to that effect, judgment in *TeliaSonera*, paragraphs 63 to 65 and the case-law cited).

110 In addition, in order to assess the lawfulness of the pricing policy applied by a dominant undertaking, reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy. In particular, as regards a pricing practice which causes the margin squeeze of its competitors, the use of such analytical criteria can establish whether the dominant undertaking itself would have been sufficiently efficient to offer its retail services to end users otherwise than at a loss if it had first been obliged to pay its own wholesale prices for the intermediary services (see, to that effect, judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 201, and judgment in *TeliaSonera*, paragraphs 41 and 42 and the case-law cited).

111 In the present case, it is apparent from paragraphs 186, 187 and 217 of the judgment under appeal that, in order to assess the costs of a competitor at least as efficient as the appellant offering broadband internet access services via its own network, the Commission took into account the costs of the assets comprising that network. As paragraph 70 above shows, in submitting those costs to the Commission, the appellant requested the Commission, first, to re-evaluate the assets and, second, to take account of the inefficiencies of its network by means of the optimisation adjustments. The Commission agreed to include in particular the appellant's asset re-evaluation in its margin squeeze analysis and to remove, as concerns the specific fixed costs, the joint and common costs. By contrast, it rejected the optimisation adjustments.

112 In paragraphs 222 to 239 of the judgment under appeal, the General Court held that the Commission was correct to refuse to take the optimisation adjustments into account. The General Court justified that decision by considering, in particular, in paragraph 225 of the judgment under appeal, that those adjustments consisted in adjusting the assets to the approximate level of an efficient operator that would build an optimal network adapted to satisfy future demand based on 'today's' information and demand predictions. The General Court therefore considered that the optimisation adjustments were based on a forecast and on an optimal network model and not on an estimate reflecting the incremental costs of the appellant's existing assets.

113 The General Court concluded, in paragraph 226 of the judgment under appeal, that the optimisation adjustments, in general, and the replacement of existing assets by their more modern equivalents, in particular, had a different objective from the re-evaluation of assets proposed by the appellant. Moreover, it considered that the taking into consideration, by the Commission, of the re-evaluation of current assets proposed by the appellant, due to the absence of other more reliable data on the appellant's LRAIC, did not suggest that the Commission had therefore necessarily accepted the optimisation adjustments, and therefore that institution was justified in treating differently, on the one hand, the replacement of existing assets by their more modern equivalents and, on the other hand, the re-evaluation of assets proposed by the appellant.

114 Furthermore, in paragraphs 227 to 235 of the judgment under appeal, the General Court confirmed the Commission's conclusion that the optimisation adjustments would lead to a calculation of the LRAIC not on the basis of the appellant's assets, but on the basis of those of a hypothetical competitor. In particular, in paragraph 232 of the judgment under appeal, the General Court held, first, that the replacement of existing assets by their more modern equivalents sought to adjust the costs of assets by retaining the value of 'current' assets, without however properly adjusting the depreciations and, second, that taking into consideration the excess capacity of the networks on the basis of the 'currently' used capacity would result in excluding the appellant's assets which were not in productive use . The General Court inferred from this, in paragraph 233 of the judgment under appeal, that the Commission had not erred in finding that taking into account the optimisation adjustments would have resulted in the costs incurred by the appellant between 12 August 2005 and 31 December 2010 being disregarded. Lastly, in paragraph 234 of the judgment under appeal, the General Court found that the Commission had not infringed the principle that the examination of a margin squeeze must be based on the 'equally efficient operator' test when it concluded, in essence, that it was inevitable that there sometimes remains unused capacity. The General Court considered that if the Commission had accepted the optimisation adjustments linked to the appellant's excess capacity, the calculations of the appellant's LRAIC would have reflected the costs associated with an optimal network corresponding to demand and not affected by the inefficiencies of that operator's network.

115 The appellant submits that the General Court misapplied that 'equally efficient operator' test and infringed the principle of equal treatment when it endorsed the Commission's rejection of the optimisation adjustments. In support of that complaint, the appellant submits, in essence, that those adjustments related to the only LRAIC data existing, namely its data for 2011, which were used as an indication in respect of the period from 2005 to 2011. In addition, it maintains that those adjustments were intended to reflect the current equipment and operating costs incurred by a network built at the date of the decision at issue ('today'), in the same way as the CCA adjustments which the Commission had agreed to take into consideration.

116 However, the fact that the LRAIC taken into account by the Commission in respect of the period from 2005 to 2010 had been estimated on the basis of the appellant's data concerning 2011 and that the optimisation adjustments were intended to update the equipment and operating costs in relation to a network built at the date of the decision at issue is not sufficient to establish as erroneous in law the General Court's assessment, in paragraphs 225 and 232 of the judgment under appeal, that those adjustments were intended to evaluate the costs of the existing assets by replacing them by their more modern equivalents, and accordingly such costs will no longer reflect the costs of a competitor as efficient as the appellant. Therefore, the General Court did not err in law in finding, in paragraphs 226 and 233 of the judgment under appeal, that taking into account the optimisation adjustments had a different objective from the re-evaluation of the assets and would have led to the costs incurred by the appellant between 12 August 2005 and 31 December 2010 being disregarded.

117 Similarly, the fact that the only data taken into account by the Commission in order to calculate the LRAIC were the appellant's data relating to 2011 and that the optimisation adjustments were intended to update the equipment and operating costs in relation to a network built at the date of the decision at issue is not sufficient to demonstrate that the General Court erred in law or erred in the legal classification of the facts, on account of its application to the circumstances of the present case of the 'equally efficient operator' test, by holding, in paragraph 234 of the judgment under appeal, that taking into account the optimisation adjustments linked to excess capacity would have reflected the costs associated with an optimal network corresponding to demand and not affected by the inefficiencies of the appellant's network.

118 Since it has not been shown that the General Court erred in law in confirming the validity of the Commission's exclusion of the optimisation adjustments proposed by the appellant under the 'equally efficient operator' test, the fact that those adjustments were made on the basis of the same data as those which were the subject of other adjustments taken into account by the Commission, such as the appellant's CCA adjustments, is irrelevant. The taking into account of costs and their adjustments in examining a pricing practice resulting in the margin squeeze of competitors of the dominant undertaking must be assessed in the light not of the fact that other adjustments to those costs have already been accepted by the Commission, but of the test of a competitor who is at least as efficient as the dominant undertaking.

119 In any event, an incorrect application of that test as a result of certain cost adjustments being taken into account cannot, in itself, justify other adjustments being also taken into consideration for the sake of the principle of equal treatment. The principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his or her claim, on an unlawful act (judgment of 13 September 2017, *Pappalardo and Others* v *Commission*, C-350/16 P, EU:C:2017:672, paragraph 52 and the case-law cited).

120 Consequently, the General Court did not err in law, or in the legal classification of the facts, in confirming the validity of the Commission's refusal to take the optimisation adjustments into account.

121 The third ground of appeal must therefore be rejected as in part inadmissible and in part unfounded.

***The request for a potentially favourable ruling to be extended to the appellant***

122 The appellant requests that a potentially favourable ruling upholding the ground of appeal raised by DT in support of its appeal in Case C-152/19 P against the judgment of the General Court of 13 December 2018, *Deutsche Telekom* v *Commission* (T-827/14, EU:T:2018:930), by which DT criticises that judgment in so far as it held that the Commission was correct to find that the appellant

and itself formed part of a single undertaking and that they were both liable for the infringement found in the decision at issue, be extended to the appellant. In support of that request, the appellant claims that that ground of appeal has the same object as that of its fourth plea raised before the General Court.

123 The Commission contends that such a request should be rejected, since it is not a ground of appeal, that the appellant's liability does not arise from DT's conduct and that, in any event, DT's appeal in Case C-152/19 P must be dismissed.

124 In that regard, it is sufficient to state that, by judgment delivered today, *Deutsche Telekom* v *Commission* (C-152/19 P), the Court of Justice dismissed DT's appeal in that case, so that the appellant's request is ineffective, as it is devoid of purpose.

125 The appeal must therefore be dismissed in its entirety.

**Costs**

126 In accordance with Article 184(2) of its Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs.

127 Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.

128 Since the appellant has been unsuccessful and the Commission has applied for costs, the appellant must, in addition to bearing its own costs, pay those incurred by the Commission.

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

1. **Dismisses the appeal;**

2. **Orders Slovak Telekom a.s., in addition to bearing its own costs, to pay those incurred by the European Commission.**

Prechal Lenaerts Wahl

Biltgen Rossi

Delivered in open court in Luxembourg on 25 March 2021.

A. Calot Escobar A. Prechal

Registrar President of the Third Chamber

* Language of the case: English.