

OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 2 September 2010¹

1. In the present reference for a preliminary ruling the Stockholms tingsrätt (Stockholm District Court) (Sweden) has asked the Court of Justice a series of 10 questions on the interpretation of Article 102 TFEU (formerly Article 82 EC) concerning an alleged abuse of a dominant position in the form of a margin squeeze.² The reference was made in the course of proceedings between the Swedish telecoms operator TeliaSonera Sverige AB ('TeliaSonera') and the Konkurrensverket (the National Competition Authority, 'the NCA'). On 21 December 2004, the NCA asked the referring court to order TeliaSonera to pay an administrative fine of SEK 144 million (now approximately EUR 15.1 million) for infringement of national competition law as well as Article 102 TFEU.

I — Facts and the questions referred

2. The case relates to the technological change which occurred at the end of the 1990s and the beginning of the 2000s, when many Swedish end-users of internet services began to switch from dial-up internet connections to various types of broadband connection (with considerably higher transmission speeds). Common forms of broadband at that time were ADSL (asymmetric digital subscriber line) connections via a fixed telephone network and connections via a cable TV network or a local area network (LAN).

3. TeliaSonera, formerly Telia AB, had for a long time owned a metallic access network able in principle to reach all households in Sweden. It is the historical operator of the fixed telephone network and previously enjoyed a State monopoly as regards the right to determine what equipment was to be used on its own fixed network. Apart from providing broadband services on the end-user market (downstream or retail market), TeliaSonera offered access to its metallic access network

1 — Original language: English.

2 — See the definition of a margin squeeze in point 12 below.

(that is, that part of the telephone network connecting individual households to the nearest local telecommunications exchange) to other operators (upstream or wholesale market) who were also active on the end-user market. Access was offered in two ways. TeliaSonera offered so-called LLUB (local loop un-bundling) access, whereby in return for payment an operator could obtain either full or shared access to TeliaSonera's metallic access network in accordance with Regulation (EC) No 2887/2000.³ However, the alleged abuse of a dominant position does not relate to the LLUB access covered by regulation; it relates to access offered by TeliaSonera to its competitors to the fixed network via a particular input product for ADSL connections (such as Skanova Bredband ADSL).

on competition (Konkurrenslagen (1993:20)). For the period thereafter up to and including January 2003, however, both the Law on competition and Article 102 TFEU are relevant. Tele2 Sverige Aktiebolag ('Tele2') has sought leave to intervene in the proceedings in support of the NCA.⁴ It is clear from the order for reference that the parties to the main proceedings do not agree on a series of important and, in my view, crucial factual elements (such as the definition of the relevant market on which TeliaSonera holds a dominant position or even the very existence of such a position). However, having regard to national procedural rules, the referring court submits that it is already at this stage necessary to refer questions to the Court. In particular, the evaluation of evidence and legal appraisal must in the case in the main proceedings take place at the same time as the deliberation on the judgment after the main hearing has been held.

4. The NCA alleges that TeliaSonera abused its dominant position on the wholesale market by applying a margin between the wholesale price for input ADSL products and the retail price for ADSL services it offers to consumers which would not have been sufficient to cover TeliaSonera's incremental costs on the retail market. Because of the way in which the NCA has structured its action, the period from April 2000 to 1 January 2001 is examined only in relation to section 19 of the Law

5. Even if no effect on EU trade is considered to have arisen, or that an abuse occurred only

3 — Regulation 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).

4 — In 2005 Tele2 brought an action in Sweden against TeliaSonera claiming compensation of some EUR 240 million for the damage caused by the alleged abuse of a dominant position. Those proceedings have been stayed pending the outcome of the case in the main proceedings. See Case T 10956-05, Tele2 Sverige AB mot TeliaSonera AB.

during the period from April 2000 to 1 January 2001, the referring court considers that there is nevertheless a need for a preliminary ruling. Against that background, the referring court has decided to stay the proceedings in the case and to refer the following questions to the Court of Justice:

- (1) Under what conditions does an infringement of Article [102 TFEU] arise on the basis of a difference between the price charged by a vertically integrated dominant undertaking for the sale of input ADSL products to competitors on the wholesale market and the price which the same undertaking charges on the end-user market?
- (2) Is it only the prices of the dominant undertaking to end-users which are relevant or should the prices of competitors on the end-user market also be taken into account in the consideration of question 1?
- (3) Is the answer to question 1 affected by the fact that the dominant undertaking does not have any regulatory obligation to supply on the wholesale market but has, rather, chosen to do so on its own initiative?
- (4) Is an anti-competitive effect required in order for a practice of the kind described in question 1 to constitute abuse and, if so, how is that effect to be determined?
- (5) Is the answer to question 1 affected by the degree of market strength enjoyed by the dominant undertaking?
- (6) Is the dominant position on both the wholesale market and the end-user market of the undertaking engaging in the practice required in order for a practice of the kind described in question 1 to constitute abuse?
- (7) For a practice such as that described in question 1 to constitute abuse, must the product ... supplied by the dominant undertaking on the wholesale market be indispensable to competitors?
- (8) Is the answer to question 1 affected by the question whether the supply is to a new customer?
- (9) Must there be an expectation that the dominant undertaking will be able to recoup the losses it has incurred in order for a practice of the kind described in question 1 to constitute abuse?

(10) Is the answer to question 1 affected by the question whether a change of technology is involved on a market with a high investment requirement, for example with regard to reasonable establishment costs and the possible need to sell at a loss during an establishment phase?’

remaining nine questions. In particular, as I will explain below, I am of the opinion that it follows from the order for reference that – for the purposes of the resolution of the dispute in the main proceedings – Question 1 together with Questions 3 and 7 are of particular importance which is why I concentrate on those questions. This is warranted not least because the answers to the other questions are already covered to a large extent by or may draw upon existing European Community (and now European Union (EU)) case-law.

6. The NCA, TeliaSonera, Tele2, the Finnish and Polish Governments and the European Commission submitted written observations. At the hearing on 18 March 2010, the same parties, with the exception of the Finnish and Polish Governments, made oral submissions.

Question 1 – conditions establishing an abusive margin squeeze – Question 3 – lack of a regulatory obligation to supply – and Question 7 – indispensability of the product

II — Assessment

7. As noted in point 4 above, the referring court explained that due to national procedural rules the questions referred must focus on principles of competition law only. Having regard to the nature of the questions referred, the following considerations will also of necessity be limited to matters of principle. It will fall to the national court to find the facts and apply the law to them. Suffice it to state at this stage that I consider that the full answer to the referring court’s Question 1 will follow from the answers given to the

8. It is settled case-law that ‘the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal

competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'.⁵

reasonable steps as it deems appropriate to protect them.⁹ It may use the methods of normal competition in products or services in the sense of competition on the merits; however, a business practice which deviates from normal market behaviour and is capable of weakening existing competition is an abuse under Article 102 TFEU.¹⁰ Indeed, not all competition by means of price can be regarded as legitimate.¹¹ Finally, the fact remains that, in principle, EU case-law provides dominant undertakings with the possibility of demonstrating an objective justification for their conduct.¹²

9. Furthermore, 'a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market'.⁶ The actual scope of that special responsibility must be considered in the light of the specific circumstances of each case.⁷ A practice which would be unobjectionable under normal circumstances can be an abuse if applied by an undertaking in a dominant position.⁸ For instance, a dominant undertaking is entitled to protect its own commercial interests if they are attacked, and may also take such

10. Turning to the issue of margin squeeze, according to the Commission, the NCA and Tele2, there is essentially a margin squeeze when an undertaking dominant on the upstream market is also active on the downstream market and applies on those markets such prices that the difference between

5 — See Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 91, and Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, paragraph 69.

6 — Case 322/81 *Nederlandsche Banden Industrie Michelin v Commission* ('*Michelin I*') [1983] ECR 3461, paragraph 57, and joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others v Commission* [2000] ECR I-1365, paragraph 37.

7 — Case C-333/94 P *Tetra Pak v Commission* ('*Tetra Pak II*') [1996] ECR I-5951, paragraph 24.

8 — *Compagnie maritime belge transports and Others v Commission*, cited in footnote 6, paragraph 131.

9 — Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraph 189.

10 — See, to that effect, *Hoffmann-La Roche v Commission*, cited in footnote 5, paragraphs 91 and 123; *Michelin I*, cited in footnote 6, paragraph 70; Case 31/80 *L'Oréal v De Nieuwe AMCK* [1980] ECR 3775, paragraph 27; *AKZO v Commission*, cited in footnote 5, paragraphs 69 and 70; and Opinion of Advocate General Kokott in Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, point 24.

11 — See, inter alia, Case C-202/07 P *France Télécom v Commission* [2009] ECR I-2369, paragraph 106.

12 — See, inter alia, *United Brands v Commission*, cited in footnote 9, paragraph 184; Case 311/84 *CBEM* ('*Télémarketing*') [1985] ECR 3261, paragraph 27; and Case C-95/04 P *British Airways v Commission*, cited in footnote 10, paragraphs 69 and 86.

downstream and upstream prices is not sufficient to cover the incremental costs borne by the dominant undertaking for the supply of the downstream products.

11. In my view TeliaSonera is right when it argues that a margin squeeze is abusive only where the dominant undertaking has a regulatory obligation to supply the input in question or where that input is indispensable. If the dominant undertaking's input is not indispensable, for instance, if there are substitutes available, it cannot be the subject of an abusive margin squeeze, because competitors do not need to acquire it, either at the dominant undertaking's price or indeed at all.¹³

12. In the light of my Opinion and the General Court's judgment in *Deutsche Telekom v*

Commission,¹⁴ it is clear that there is a margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable products is negative, or insufficient to cover the product-specific costs to the dominant undertaking of providing its own retail products on the downstream market. The abusive nature of such conduct derives from the unfair nature of the price spread and the fact that the dominant undertaking's wholesale products are indispensable to enabling a competitor to enter into competition with the dominant undertaking on the downstream market in retail access products. Such a margin squeeze between the dominant undertaking's wholesale and retail prices will, in my view, hinder in principle the growth of competition in downstream markets.

13. The referring court explains that it has taken note of the judgment of the General Court in *Deutsche Telekom v Commission*.

13 — The referring court cites here Geradin, D., and O'Donoghue, R., 'The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector', [2005] *Journal of Competition Law and Economics* 1(2), 355–425, pp. 358 et seq.

14 — Case C-280/08 P [2010], case pending before the court, points 44, 46 and 64, and Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477, paragraphs 166, 167 and 237, respectively. In the latter judgment the General Court upheld the decision of the Commission against Deutsche Telekom relating to an abuse of a dominant position in the form of a margin squeeze (Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article [102 TFEU] (Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG) (OJ 2003 L 263, p. 9)).

Meanwhile, on 22 April 2010, I delivered my Opinion in the appeal brought by Deutsche Telekom against that judgment where I proposed that the Court should dismiss the appeal thereby upholding the General Court's judgment. The judgment of the Court is currently pending.¹⁵ As the referring court in the present case states, the matters at issue in the main proceedings differ in several material respects from those in *Deutsche Telekom v Commission*. In particular, contrary to *Deutsche Telekom*, there was no regulatory obligation on TeliaSonera to offer input products for ADSL connections ('the products in question'). Rather, TeliaSonera had regulatory obligations instead in respect of LLUB access, which is not at issue here. In addition, as is clear from the order for reference, the prices for the products in question were not covered by any price regulation by the Swedish National Regulatory Authority (NRA), either on the wholesale market or on the retail market.

same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market [for instance, a downstream market], with the possibility of eliminating all competition from such undertaking'.¹⁶

15. As regards the abuse of a dominant position in the form of a refusal to supply, it follows from the judgment in *Bronner*¹⁷ that such an abuse may be committed where an undertaking which is dominant in one (upstream) market refuses to supply a competitor in a neighbouring or downstream market with products which are indispensable to carrying on the competitor's business, provided that: (i) the refusal is likely to eliminate all competition on the market on the part of the person requesting the product; (ii) the refusal is incapable of being objectively justified; and (iii) the product is indispensable to carrying on the competitor's business, in the sense that there is no realistic possibility of creating a potential alternative.

14. In accordance with the case-law 'an abuse ... is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the

16. Indeed, in my view, one particular manifestation of a refusal to deal occurs in the case of an abusive margin squeeze (or 'constructive

15 — Case T-271/03, and Case C-280/08 P, respectively (both cited above in footnote 14).

16 — See *Télémarketing*, cited in footnote 12, paragraph 27.

17 — Case C-7/97 [1998] ECR I-7791, paragraphs 40 to 46, and the Opinion of Advocate General Jacobs, points 56 to 69.

refusal to deal') where, instead of refusing entirely to supply the essential/indispensable input in question, the dominant undertaking supplies the input to its competitors on the downstream market at a price which does not enable those competitors to compete effectively on the downstream market.¹⁸ EU case-law has established that the effect of an abusive refusal to supply is the elimination of competition in the downstream market and, in my view, the concern is precisely the same in margin squeeze cases. There is no independent competitive harm caused by the margin squeeze above and beyond the harm which would result from a duty-to-deal violation at the wholesale level. I consider that imposing a duty to deal on a dominant undertaking is no different from imposing a duty to deal at particular wholesale and retail prices (margin squeeze). Therefore charging a price (margin squeeze) which prevents an as-efficient competitor from competing downstream operates in effect as a refusal to deal and implies that the same framework of analysis and the general concerns about the incentives of dominant undertakings to

invest should apply.¹⁹ In the case in the main proceedings the NCA claims that there is an abusive margin squeeze merely on the basis of the insufficient spread between wholesale and retail prices, irrespective of the indispensability of the input. I consider that this approach is incorrect and insufficient. In my view, it may be inferred from both margin squeeze decisions in the telecommunications sector adopted by the Commission under Article 102 TFEU – *Deutsche Telekom and Telefónica*²⁰ – that margin squeezes and refusals to deal have the same rationale. While in the latter case the Commission rejected the application of the *Bronner* conditions in the assessment of legality of the incumbent's conduct due to 'the particular circumstances of this case [which] fundamentally differ from those in [*Bronner*]' (Telefónica had a regulatory duty to supply the input and its *ex ante* incentives to invest in its infrastructure were allegedly not at stake because its infrastructure was to a large extent the fruit of investments that were undertaken when

18 — See, by analogy, the judgment of the Court of Appeal (England and Wales) (UK) in *Albion* (Case *Dwr Cymru Cyfyngedig and Albion Water Limited v Water Services Regulation Authority* [2008] EWCA Civ 536), paragraph 36 et seq., which upheld the judgments of the UK Competition Appeal Tribunal (CAT) in *Albion Water Ltd v Water Services Regulation Authority* (*Dwr Cymru/Shotton Paper*) [2006] CAT 23 (see paragraph 861 et seq.) and [2006] CAT 36.

19 — In my view, the same arguments as those expounded by Advocate General Jacobs in his Opinion in *Bronner* (point 57) apply: 'the justification in terms of competition policy for interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it.'

20 — Decision of 4 July 2007 relating to a proceeding under Article [102 TFEU] (Case COMP/38.784 – *Wanadoo España v Telefónica*), paragraph 299 et seq. (two appeals relating to that decision are pending before the General Court: Case T-336/07 *Telefónica and Telefónica de España v Commission*, and Case T-398/07 *Spain v Commission*).

it benefited from special or exclusive rights that shielded it from competition), the Commission nevertheless reviewed the relevant facts using a *Bronner*-type analysis. In fact, it is important to point out that it was in both of those Commission decisions that the obligation to deal with competitors – that is, to give them access to the incumbent’s network – had already been imposed by the relevant NRA. In addition, in both decisions the Commission considered that no valid alternatives to the incumbents’ networks were available.

priorities,’²¹ where it is stated, under a common section entitled ‘Refusal to supply and margin squeeze’, inter alia, that ‘instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market ... does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis [“margin squeeze”²²] ... The Commission will consider these practices as an enforcement priority if all the following circumstances are present: [i] the refusal relates to a product ... that is objectively necessary to be able to compete effectively on a downstream market, [ii] the refusal is likely to lead to the elimination of effective competition on the downstream market, and [iii] the refusal is likely to lead to consumer harm’. However, ‘[i]n certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects on the input owner’s and/or their

21 — See Communication from the Commission – Guidance on the Commission’s enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), OJ 2009 C 45, p. 7, paragraph 75 et seq. This information document sets out the enforcement priorities that will guide the Commission’s action in applying Article 102 TFEU to exclusionary conduct by dominant undertakings and seeks to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning exclusionary conduct and to help undertakings better assess whether certain conduct is likely to result in intervention by the Commission under Article 102 TFEU. According to the case-law, the Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the Treaty. It follows that, although those rules, setting out the approach which the Commission proposes to follow, certainly help to ensure that it acts in a manner which is transparent, foreseeable and consistent with legal certainty, they cannot bind the Court. However, they may form a useful point of reference. See Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 52 and the case-law cited.

22 — In its decision-making practice the Commission applies an expansive interpretation to the concept of a refusal to deal. In *Deutsche Post* the Commission stated that “the concept of refusal to supply covers not only outright refusal but also situations where dominant firms make supply subject to objectively unreasonable conditions”. Such conduct is a “constructive refusal to supply” (2001/892/EC: Commission Decision of 25 July 2001 relating to a proceeding under Article [102 TFEU] (COMP/C-1/36.915 – *Deutsche Post AG – Interception of cross-border mail*) (OJ 2001 L 331, p. 40), recital 141).

17. The referring court refers to the recent ‘Guidance on the Commission’s enforcement

operators' incentives to invest and innovate upstream, whether ex ante or ex post. The Commission considers that this is particularly likely to be the case where regulation compatible with [EU] law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. This could also be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by State resources. In such specific cases there is no reason for the Commission to deviate from its general enforcement standard of showing likely anti-competitive foreclosure, without considering whether the three circumstances referred to [at the beginning of this] paragraph ... are present.'

above), from my Opinion and the General Court's judgment in *Deutsche Telekom v Commission* (cited in footnote 14), from the Commission's decision-making practice and from the Guidance on the Commission's enforcement priorities that in those cases where there is no regulatory obligation to provide the input, such as here, a dominant undertaking which through its pricing arrangements operates a margin squeeze will abuse its dominant position where that input is indispensable to enabling a competitor to enter into competition with it on the downstream market.²³ Such arrangements constitute in my view a form of refusal to deal.²⁴

19. My approach is also supported by a recent judgment by the Cour de cassation (Court of Cassation) (France) in a margin squeeze case under Article 102 TFEU and

18. I consider that it may be inferred from the judgment in *Bronner* (see points 14 to 16

23 — See, for instance, Bouckaert, J., and Verboven, F., *Price Squeezes in a Regulatory Environment*, CEPR, Discussion Paper Series: '[a margin squeeze] assumes that the incumbent has an upstream monopoly over an essential input. In practice, the incumbent's upstream market power may not be that strong. While the incumbent operator typically owns the copper line, substitute networks in the form of cable, wireless etc. are available. In other words, the incumbent's essential facility is not absolute. The downstream competitors may therefore bypass the incumbent's network and consider purchasing access from alternative providers, or investing in an own network.'

24 — Cf. Renda, A. et al., 'Treatment of Exclusionary Abuses under Article 82 of the EC Treaty: Comments on the European Commission's Guidance Paper', *Final Report of a Centre for European Policy Studies (CEPS) Task Force*, 10 September 2009.

national competition law,²⁵ where that court held unequivocally that a margin squeeze has an anti-competitive effect if a potential competitor, as efficient as the vertically integrated dominant undertaking, can only enter the downstream market by suffering losses. According to that court, an anti-competitive effect can only be presumed when the supplies provided by the dominant undertaking to its competitors are *indispensable* to compete with it on the downstream market.

coupled with the possibility that TeliaSonera's network may have been replicated²⁶ by its competitors (jointly or severally) and/or third parties, indicates that the products in question may not have constituted an indispensable input according to the case-law. In that regard, it would appear that in its observations the NCA recognised that in the long term TeliaSonera's competitors may have been capable of building their own infrastructure or buying another form of access. However, deciding whether that was indeed the case, on the basis of all the circumstances of the case in the main proceedings, and applying the relevant case-law to the facts is for the referring court alone.²⁷

20. The considerations set out above are of particular importance in this case because the order for reference states that a number of alternative technologies were available to provide end-users with broadband services. Indeed, this explains why the referring court thought it necessary to specifically refer Question 7. I would note in particular that the fact that according to the order for reference alternative technologies were available,

21. Therefore, I consider that if there was no regulatory obligation compatible with EU law on a dominant undertaking to provide

25 — Judgment *Cass. Com.* of 3 March 2009 in Case SFR and France Télécom, No 08-14.435 and 08-14.464, pertaining to decision No 04-D-48 of the French NCA of 14 October 2004. See also decision No 09-D-24 of 28 July 2009 Outremer Telecom, Mobius/France Telecom, alleging that France Telecom has abused its dominant positions on the relevant wholesale markets (local loop, internet data collection, etc.) by squeezing its competitors, and providing them with degraded services. The NCA considered that the margin squeeze was anti-competitive because the wholesale services at issue were indispensable for alternative telecommunications operators such as Mobius.

26 — See, in that connection, *Bronner*, cited in footnote 17, paragraph 41 et seq. (inter alia: 'even though other methods may be less advantageous').

27 — See Case T-5/97 *Industrie des poudres sphériques v Commission ('IPS')* [2000] ECR II-3755, paragraph 57. There the General Court found that *IPS* had alternative sources of supply available to it other than PEM. Cf., for instance, a decision of the UK Office of Telecommunications (Ofcom) where margin squeeze was rejected since alternative technologies competed on the retail market. Case *Investigation by the Director General of Telecommunications into the BT Surf Together and BT Talk & Surf Together Pricing Packages*, 4 May 2001. Meanwhile, Ofcom has been superseded as the telecommunications regulator by Ofcom (the Office of Communications).

an input which is not indispensable then the dominant undertaking should not in principle be charged with a margin squeeze abuse. If margin squeezes were prohibited purely on the basis of an abstract calculation of the prices and in the absence of any assessment of the indispensability of the input for competition in the market,²⁸ dominant undertakings' willingness to invest would be reduced and/or they would be likely to raise end-user prices lest they be charged with a margin squeeze. If a dominant undertaking could lawfully have refused to provide the products in question, then it should not be reproached for providing those products at conditions which its competitors may consider not advantageous. Indeed, it is difficult to

see how in such a case the alleged insufficient margin could be anti-competitive.²⁹

22. I shall turn now to the Commission's argument that there is case-law which indicates that if the access to an input is given voluntarily then it should not be a case of refusal to deal any more (but a case of commercial conditions under which access was given). The Commission states that in response to a similar argument in *Unilever Bestfoods v Commission*³⁰ the Court held that 'HB's contention that the legal principles laid down in *Bronner* were wrongly applied is manifestly unfounded, inasmuch as, in any event, as the [General Court held³¹], the contested decision does not oblige HB to transfer an asset or to enter into agreements with persons with whom it has not chosen to contract ... [U]nlike the situation in *Bronner*, the freezer cabinets are not assets which HB retains for

28 — That is, based solely on an inadequate margin between a dominant undertaking's wholesale and retail prices. In any event, as follows from my analysis above such a formalistic approach was implicitly rejected in my Opinion in Case C-280/08 P *Deutsche Telekom v Commission*, cited in footnote 14, and in the General Court's judgment in that case (T-271/03, cited in footnote 14). It is important to point out that neither the fact that Deutsche Telekom was subject to a regulatory obligation to supply nor the fact that Deutsche Telekom's wholesale services were indispensable to enabling a competitor to enter into competition with it on the downstream market was disputed in that case. Indeed, unlike previous margin squeeze cases where a wholesale product had to be transformed into another product in the downstream market, in *Deutsche Telekom v Commission* independent operators needed access to Deutsche Telekom's network to compete on the retail markets. Those elements indicate that that case also consisted essentially in a refusal-to-deal situation.

29 — However, as I have noted below at points 31 and 32, such anti-competitive conduct cannot a priori be excluded and the pricing practice in question may constitute other forms of abuse of a dominant position.

30 — Order in Case C-552/03 P [2006] ECR I-9091, paragraph 137. Unilever Bestfoods (Ireland) Ltd was formerly Van den Bergh Foods Ltd and previously named HB Ice Cream Ltd ('HB').

31 — T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653, paragraph 161.

its own use, but their enjoyment is voluntarily transferred to independent undertakings which pay for the right to use them. Thus, HB's contention that the contested decision imposes a duty on it which is at least as onerous as that which applies to the owner of an essential facility is manifestly unfounded.'

was not necessary for HB to transfer an asset or to conclude contracts with persons which it had not selected in complying with the decision in that case. However, in the present case we are dealing with a margin squeeze and as follows from the foregoing considerations, and in particular point 16 et seq. above, margin squeeze cases are analogous to refusal-to-deal cases and the same underlying rationale should apply. Indeed, margin squeeze is a form of refusal to deal. I consider that any other interpretation of *Unilever Bestfoods v Commission* in the present case would result in a duty to deal at particular prices being imposed on dominant undertakings, which would strongly undermine their incentives to invest in infrastructure and, as a consequence, in their choosing not to invest and/or deal with downstream competitors at all lest they be charged with a margin squeeze in spite of the fact that access to their infrastructure/input is not indispensable under the case-law on refusals to deal.

23. While I acknowledge that that judgment suggests that a distinction can be drawn under competition law between situations where a dominant undertaking refuses to deal and those where it actually chooses to deal, I consider that, for the purposes of the present case at least, that approach is not the right one. Instead, as TeliaSonera argued at the oral hearing, *Unilever Bestfoods v Commission* should not be applicable in the present case because that case manifestly concerns a different issue. *Unilever Bestfoods v Commission* related to exclusivity clauses in the supply of freezer cabinets to retailers. As the General Court held in its judgment in that case, which was then upheld by an Order of the Court of Justice, *Bronner* was irrelevant in that case because the Commission did not claim in the decision that HB's freezer cabinets were an essential facility. In addition, it

24. I will now turn to the argument raised by the NCA and the Commission that TeliaSonera's situation is special because allegedly its upstream market position has been developed under the protection of special or

exclusive rights or has been financed by State resources.³²

the companies concerned, most of which are dominant in their own areas, were free to integrate forward and discriminate in favour of their own downstream operations.”

25. In *KPN Telecom*³³ Advocate General Poirares Maduro stated that ‘[a] refusal to supply by a dominant undertaking may amount to an abuse of a dominant position in the situation of a recently deregulated industry in which the necessary inputs for a derivative market were obtained by an undertaking as a direct result of its prior position as a statutory monopolist and where access to those inputs is not regulated by sector-specific legislation. Under those conditions, where the supplier has an advantage in the secondary market which it was able to acquire because it was previously shielded from competition, the potentially deterrent effect on investment and innovation resulting from the imposition of a duty to supply is minimal and is likely to be outweighed by the interest in promoting competition. As one commentator noted, [34] measures to deregulate or liberalise sectors of industry “would be of little value if

26. While I do not disagree with the argument of Advocate General Poirares Maduro, in the course of its analysis in the case in the main proceedings the referring court may also take account of the fact that the basic property rights in question affect incentives to make investments (not only for the dominant undertaking in question, but also potentially others, including the requesting party). In addition, as Advocate General Jacobs noted in *Bronner*, property rights are recognised in the legal systems of the Member States and in some they have constitutional status. I consider it important that both the Court and the Advocate General in *Bronner* opted for a cautious approach to refusals to deal under Article 102 TFEU and displayed considerable recognition of the underlying policy and welfare considerations.³⁵

32 — That argument is also mentioned in the Guidance on the Commission's enforcement priorities, see point 17 above.

33 — Case C-109/03 [2004] ECR I-11273, point 41. See also Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723, paragraph 49, and Joined Cases C-327/03 and C-328/03 *ISIS Multimedia and Firma O2* [2005] ECR I-8877, paragraphs 45 and 46, and the Opinion of Advocate General Ruiz-Jarabo Colomer in that case, point 55.

34 — Temple Lang, J., ‘Defining legitimate competition: companies’ duties to supply competitors and access to essential facilities’, *Fordham International Law Journal*, Vol. 18 (1994), pp. 437 to 524, at 483.

35 — See, for instance, paragraph 43 of the *Bronner* judgment (cited in footnote 17) to the effect that even a less advantageous alternative to the product in question may suffice and paragraphs 45 and 46 that for the product to be regarded as indispensable it is not enough to argue that the creation of an alternative system is not economically viable by reason of the small circulation of the newspaper to be distributed; rather it is necessary to establish that it is not economically viable to create a second home-delivery scheme of newspapers with a circulation comparable to that of the daily newspapers distributed by the dominant undertaking's existing scheme.

27. In addition, it has been argued that it is not clear why a public source of funding for property should lead to a stricter legal standard – Article 102 TFEU does not allow a distinction to be made between public and private funding and Article 345 TFEU (formerly Article 295 EC) would also preclude discrimination between property rights along these lines. Indeed, it will not always be easy to say that the source of funds is unambiguously public in nature. Much of the infrastructure of former State monopolies has been the subject of significant improvements following privatisation with the result that sources of funding are now substantially mixed.³⁶ I would add that the vertically integrated undertakings may also find themselves burdened with old infrastructure which requires maintenance and often one is dealing with industries with considerable technological innovation where the incumbent must innovate in order to compete. I would note that in the present case the referring court emphasised that there was no legal monopoly on internet access services in Sweden during the 1990s or 2000s and, at all events, competition for

end-users has arisen since the beginning of the 1990s.

28. In any event, irrespective of the considerations set out above the relevance of the argument that a dominant undertaking's position has been developed under the protection of special or exclusive rights or has been financed by State resources will depend on the specifics of a given case.

29. Therefore it follows from all the foregoing considerations that if there is no regulatory obligation compatible with EU law on a dominant undertaking to supply the products in question or if those products are not indispensable then that undertaking should in principle not be charged with an abusive margin squeeze simply on the basis of the insufficient spread between wholesale and retail prices.

36 — See O'Donoghue, R., and Padilla, A.J., *The Law and Economics of Article 82 EC*, Oxford: Hart, 2006, p. 463 et seq. The authors argue that the Commission itself rejected that argument in its Decision of 14 January 1998 relating to a proceeding under Article [102 TFEU] (IV/34.801 FAG – Flughafen Frankfurt/Main AG) (OJ 1998 L 72, p. 30). The airport operator argued that its historical legal monopoly on the provision of ramp-handling services justified a refusal to deal. The Commission concluded that the historical character of the monopoly was irrelevant; what mattered was the airport operator's conduct on the market. It is arguable that the Commission is indifferent to the historical source or reason for a monopoly once the substantive conditions for a duty to deal are satisfied.

30. Even if the Court should choose not to require that the input be indispensable and rather adopt a lower standard of anti-competitive impact on the downstream market, I consider that a finding of an abusive margin squeeze may not be based merely on the spread between wholesale and retail prices of the dominant undertaking without any demonstration of a negative impact

on competition on the downstream market. The primary purpose of Article 102 TFEU is to protect competition and to safeguard the interests of consumers rather than to protect the position of particular competitors.³⁷

31. However, it must be added that the fact remains that the general case-law on abuse of dominant position is applicable and if it is dominant TeliaSonera obviously has a special responsibility under Article 102 TFEU to maintain genuine undistorted competition on the relevant markets (see, in particular, points 8 and 9 above).

32. It should certainly not be inferred from my analysis in all the foregoing paragraphs that the prices of a vertically integrated dominant undertaking cannot be abusive unless the input in question is indispensable

or there is a regulatory obligation to supply that input. The upstream price may be excessive under Article 102(a) TFEU.³⁸ The downstream price may be predatory.³⁹ Moreover, the dominant undertaking may be foreclosing its downstream competitors in breach of Article 102(b) TFEU. In addition, the dominant undertaking may be discriminating between competitors and its own downstream operations under Article 102(c) TFEU.⁴⁰ None of those abuses is in principle limited to cases where the product or service is indispensable.⁴¹

37 — See the Opinion of Advocate General Jacobs in *Bronner*, cited in footnote 17, point 58. It may be pointed out that courts normally avoid direct price administration, relying on more appropriate methods (see, to that effect, the judgment of the Court of Appeal (England and Wales) in *Attheraces Ltd v The British Horseracing Board Ltd* [2007] EWCA Civ 38, paragraph 119: as stated in *Bronner*, the law on abuse of dominant position is about distortion of competition and safeguarding the interests of consumers in the relevant market. It is not a law against suppliers making 'excessive profits' by selling their products to other producers at prices yielding more than a reasonable return on the cost of production, that is at more than what the judge described as the 'competitive price level'. Still less is it a law under which the courts can regulate prices by fixing the fair price for a product on the application of the purchaser who complains that he is being overcharged for an essential facility by the sole supplier of it).

38 — See Case 26/75 *General Motors v Commission* [1975] ECR 1367, and *United Brands v Commission*, cited in footnote 9.

39 — See, most recently, Case C-202/07 P *France Télécom v Commission*, cited in footnote 11, and my Opinion in that case.

40 — See Case C-242/95 *GT-Link* [1997] ECR I-4449. See also Commission Decision 97/624/EC of 14 May 1997 relating to a proceeding pursuant to Article [102 TFEU] (IV/34.621, 35.059/F-3 - Irish Sugar plc.) (OJ 1997 L 258, p. 1), upheld by Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, and Order in Case C-497/99 P *Irish Sugar v Commission* [2001] ECR I-5333; and Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article [102 TFEU] (Case No IV/30.178 *Napier Brown - British Sugar*) (OJ 1988 L 284, p. 41).

41 — Some academic commentators have suggested that *Deutsche Telekom v Commission* (cited in footnote 14) should have more properly been analysed as a predatory pricing case, while *France Télécom v Commission* (cited in footnote 11) should have been a margin squeeze case (at the oral hearing the Commission did not disagree with the latter point; however, it pointed out that it decided to treat *France Télécom* as a predatory pricing case because the downstream unit (Wanadoo) was not 100% owned by France Télécom). See, inter alia, Ferrari Bravo, L., and Siciliani, P., 'Exclusionary pricing and consumers harm: the European Commission's practice in the DSL market', *Journal of Competition Law and Economics*, 3(2), 2007, pp. 243 to 279.

33. It is in the light of the above considerations that I shall deal with the outstanding questions referred by the Stockholms tingsrätt. Those questions find, in my view, to a large extent their answers in, or may draw upon, existing EU case-law.

36. In my view the Commission, the NCA, the Finnish and Polish Governments and Tele2 are correct in their submissions that the As-Efficient-Competitor-Test is, in principle, the most appropriate test, in so far as it is an objective test and does not protect inefficient competitors.

Question 2 – what prices should be taken into consideration?

34. The existence of an abusive margin squeeze may in theory be assessed on the basis of at least two different criteria, that is the As-Efficient-Competitor-Test, which is based on the dominant undertaking's own costs, and the Reasonably-Efficient-Competitor-Test, which is based on the costs of competitors.⁴²

37. Indeed, I considered in my Opinion in *Deutsche Telekom v Commission*, where both tests were discussed at length, that it follows from the case-law that, in principle, it is the prices of the dominant undertaking which are relevant.⁴³ Moreover, the fact that the As-Efficient-Competitor-Test should apply in the present case has been largely recognised by all the parties, including TeliaSonera.⁴⁴ In addition, a large body of opinion holds that, in general, the As-Efficient-Competitor-Test constitutes an appropriate criterion. It follows that in margin squeeze cases it is, in principle,

35. TeliaSonera submits essentially that projected costs and prices charged by other undertakings as well as all other known assessments for the relevant period may be of interest in an assessment.

43 — Ibid., point 49. This was also confirmed by the Court of Appeal (England and Wales) in *Albion*, cited in footnote 18, paragraph 105, and by the UK Competition Appeal Tribunal (CAT) in *Genzyme Ltd v Office of Fair Trading* [2004] CAT 4. On margin squeeze in general, see also *Freemove.com v Director General of Telecommunications* [2003] CAT 5.

42 — See my Opinion in Case C-280/08 P *Deutsche Telekom v Commission* and the judgment of the General Court in that case (T-271/03) for a more detailed analysis of both tests (both cases cited in footnote 14).

44 — In my Opinion in Case C-280/08 P *Deutsche Telekom v Commission*, cited in footnote 14 above, in footnote 26 I recognised that it is not inconceivable that there may be cases in which the Reasonably-Efficient-Competitor-Test may be appropriate as a secondary and additional test.

only the prices of the dominant undertaking which are relevant.

Question 4 – is an anti-competitive effect required for a margin squeeze to be abusive?

38. According to the Commission, the NCA, the Polish and Finnish Governments and Tele2, it follows from EU case-law that a concrete anti-competitive effect on the market concerned is not required in order for a practice to constitute abuse under Article 102 TFEU. On the other hand, Telia-Sonera refers to *Hoffmann-La Roche v Commission*⁴⁵ and submits that the concept of abuse is directed at conduct which prevents the maintenance or development of competition.

39. In my Opinion in *Deutsche Telekom v Commission*⁴⁶ I stated that in margin squeeze cases the Commission, or as in this case the NCA, is required to demonstrate that the dominant undertaking's pricing practices

have potential anti-competitive effects. It was clear in *Deutsche Telekom v Commission*⁴⁷ that the General Court correctly considered that the anti-competitive effect which the Commission was required to demonstrate related to the possible barriers which the appellant's pricing practices could have created for the growth of competition in the market in question. Thus while the General Court did not require that the Commission demonstrate actual anti-competitive effects, it rightly required proof of the creation of barriers to entry to the market and thus a demonstration of potential anti-competitive effects.

40. In that regard, the General Court at paragraph 237 of that judgment found that, given that Deutsche Telekom's wholesale services were indispensable to enabling a competitor to enter into competition with it on the downstream market in retail access services, a margin squeeze between Deutsche Telekom's wholesale and retail charges will, in principle, hinder the growth of competition in the downstream markets. Thus the General Court correctly emphasised in my view the fact that in that case the wholesale services were indispensable and that, without access to those services, Deutsche Telekom's competitors would not even be able to enter

45 — Cited in footnote 5.

46 — Case C-280/08 P, cited in footnote 14, point 64.

47 — Case T-271/03, cited in footnote 14, paragraphs 233 to 245.

the downstream market in retail services.⁴⁸ In paragraphs 238 to 245 of that judgment the General Court then analysed in some detail the observations made regarding the anti-competitive effects on the German market. This is in line with the approach developed by the General Court in its case-law, which has been confirmed by the Court of Justice, that the effect required does not necessarily relate to the actual effect of the abusive conduct complained of; for the purposes of establishing an infringement of Article 102 TFEU, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect.⁴⁹ In my view, it clearly follows that the Commission, or here the NCA, must demonstrate that in the specific market context in

question there are potential anti-competitive effects.⁵⁰ Thus a mere claim that there may be remote, abstract anti-competitive effects will not suffice.⁵¹

Question 5 – to what extent should the concept of margin squeeze be applied at different degrees of dominance on the market?

41. TeliaSonera submits that margin squeeze may constitute an abuse under Article 102 TFEU only where the market power upstream is very significant. I agree with the Commission, the NCA, and the Polish and Finnish Governments that what matters is that the undertaking holds a dominant position on the upstream market. Admittedly,

48 — In that regard, if Deutsche Telekom's retail prices are lower than its wholesale charges, or if the spread between Deutsche Telekom's wholesale and retail charges is insufficient to enable an equally efficient operator to cover its product-specific costs of supplying retail access services, a potential competitor who is just as efficient as Deutsche Telekom would not be able to enter the retail access services market without suffering losses.

49 — Case C-95/04P *British Airways v Commission*, cited in footnote 10, paragraph 30, relating to the judgments of the General Court in Case T-203/01 *Michelin v Commission* ('*Michelin II*') [2003] ECR II-4071, paragraphs 238 and 239, and Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 293. See also Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-468/06 to C-478/06 *Sot. Léllos kai Sia and Others* [2008] ECR I-7139, point 50. See, on the subject, Advocate General Kokott, *Economic thinking in EU competition law*, Madrid, 29 October 2009.

50 — This approach is in line with the judgment in *Sot. Léllos kai Sia and Others*, *ibid.*, where the Court implicitly rejected the notion of a *per se* abuse and proceeded to examine objective justifications, taking account of the specific market context. In particular, while rejecting the argument that parallel trade in pharmaceuticals mainly benefits the parallel traders and not so much the end customers, the Court indicated that a dominant producer may be entitled to reduce its sales of medicines to wholesalers in order to curb parallel trade, as long as the natural demand of end customers situated in the exporting country is plentifully satisfied. Declining a formalistic approach the Court instead underscored that state regulation that gives rise to parallel trade must be taken into account when assessing the merits of arguments concerning the objective justification invoked by a dominant undertaking when reducing its sales to exporting countries. See Wahl, N., 'Recent case-law on exclusionary behaviour', *16th St. Gallen International Competition Law Forum 2009* (2010), pp. 225-232. Cf. also Case CW/00615/05/03, *Vodafone/O2/Orange/T-Mobile*, Ofcom Decision, May 2004, and BTOpenworld's consumer broadband products, Ofcom Decision, November 2003.

51 — Cf. Prof. Vickers, J. (at the time Chairman of the UK Office of Fair Trading (OFT)), *Abuse of Market Power*, 31st EARIE conference in Berlin on 3 September 2004, p. 23, available at the OFT's website: http://www.offt.gov.uk/shared_offt/speeches/spe0304.pdf.

there is case-law of the General Court that the greater the extent of an undertaking's dominance, the higher the probability that a practice which seeks to protect the undertaking's position will result in a restriction on competition.⁵² In my view, however, the degree of market power of the dominant undertaking should not be decisive for the existence of the abuse. Indeed, the concept of a dominant position arguably already implies a high threshold so that it is not necessary to grade market power on the basis of its degree. As the Commission noted, it is not clear whether and to what extent such grading would contribute to a better analysis of a given case. Finally, it should be borne in mind that Article 102 TFEU clearly relates to abuse of a dominant position and it makes no reference to a 'super-dominant' position.

Question 6 – does the undertaking need to be dominant on both the wholesale market and the retail market?

43. The referring court refers here to the judgment in Case T-271/03 *Deutsche Telekom v Commission*,⁵³ paragraph 235, where the General Court noted that until 1998 Deutsche Telekom had a monopoly on the retail market. It adds that the question of the kind of dominance required is of interest not least because in *Deutsche Telekom v Commission* the operator had a dominant position on all relevant product and service markets. However, there is no contention in the case in the main proceedings that TeliaSonera was dominant on the retail market.

42. The answer to Question 1 is thus, in principle, not affected by the degree of market strength enjoyed by the dominant undertaking.

44. TeliaSonera considers that the abusive character of the conduct in question presupposes a very strong position of the dominant undertaking on the retail market. According to the NCA, TeliaSonera's market share on the downstream market was some 50%. Accordingly, it cannot be excluded that it held a dominant position also on that market.

52 — Some judgments of the General Court suggest that differences in the degree of market power may be relevant: Case T-228/97 *Irish Sugar v Commission* (cited in footnote 40), paragraph 186; Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie maritime belge and Others v Commission* [1996] ECR II-1201; and Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601. Cf. also Advocate General Fennelly in Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others v Commission*, cited in footnote 6, point 137.

53 — Cited in footnote 14.

45. As pointed out by the Commission, the Finnish Government and Tele2, it may be inferred from *IPS*⁵⁴ that there is no requirement to show that the undertaking engaging in a margin squeeze is also dominant on the downstream market. In fact, the margin squeeze could be aimed at obtaining a dominant position on that market.

47. Therefore, I consider that a dominant position both on the wholesale and on the retail market is not required for Article 102 TFEU to apply to margin squeeze cases.⁵⁷

Question 8 – is the answer to Question 1 affected by the question whether the supply is to a new customer?

46. In my view, the case-law on leveraging should in principle also apply to margin squeeze cases. In *Tetra Pak II*⁵⁵ the Court held essentially that Article 102 TFEU is applicable independently of whether an unlawful practice of a dominant undertaking negatively affects competition on a market which is different from the one where that undertaking holds a dominant position.⁵⁶

48. The Commission, the NCA and the Finnish Government contend that the identity of the customer is not relevant in margin squeeze cases. TeliaSonera submits that the Court has systematically established a certain distinction between a refusal to deal with a new customer and a refusal to deal with an existing customer and that, therefore, the same distinction should also apply to margin squeezes.

⁵⁴ — Cited in footnote 27.

⁵⁵ — Cited in footnote 7. See, inter alia, also *Télémarketing*, cited in footnote 12.

⁵⁶ — In that same case, the General Court stated that ‘Tetra Pak’s practices on the non-aseptic markets are liable to be caught by Article [102 TFEU] without its being necessary to establish the existence of a dominant position on those markets taken in isolation, since that undertaking’s leading position on the non-aseptic markets, combined with the close associative links between those markets and the aseptic markets, gave Tetra Pak freedom of conduct compared with the other economic operators on the non-aseptic markets, such as to impose on it a special responsibility under Article [102 TFEU] to maintain genuine undistorted competition on those markets’. Case T-83/91 *Tetra Pak v Commission* (*Tetra Pak II*) [1994] ECR II-755, paragraph 122.

⁵⁷ — This position would appear to be confirmed by the Court of Appeal (England and Wales) in *Albion*, paragraph 88 (cited in footnote 18), and by the UK CAT in *Genzyme*, paragraphs 534 and 560 (cited in footnote 43). The Polish Government pointed out essentially that in Commission decisions in *Deutsche Telekom*, footnote 14, as well as in Decision 76/185/ECSC of 29 October 1975, *National Carbonising Company* (OJ 1976 L 35, p. 6), in *Napier Brown – British Sugar*, cited in footnote 40, and in *Wanadoo* the undertaking in question was dominant on both upstream and downstream markets.

49. According to point (b) of the second paragraph of Article 102 TFEU, an abuse of a dominant position may, in particular, consist in limiting production, markets or technical development to the prejudice of consumers. The established case-law of the Court shows that the refusal by an undertaking occupying a dominant position on the market of a given product to meet the orders of an existing customer constitutes abuse of that dominant position under Article 102 TFEU where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor.⁵⁸ In addition, there is case-law which shows that a refusal to deal may occur where a dominant undertaking withholds supplies from a new customer.⁵⁹

the dominant undertaking dealt in the past with a given undertaking, which made relationship-specific investments in order to use the subsequently refused input, the undertaking in question is inevitably bound to suffer losses. Furthermore, the fact that the dominant undertaking which owns the wholesale product (essential input) previously considered that it was advantageous for it to supply that product is an indication that supplying the input allowed the dominant undertaking to obtain an adequate remuneration (that it was a profitable activity), which in turn may make it more difficult for the dominant undertaking to justify the refusal on purely commercial grounds.⁶⁰

50. I consider that it is arguable that ceasing supply under an existing arrangement may be more likely to be found abusive than a refusal to supply a new customer. As the Commission pointed out with regard to refusals to deal, if

51. Finally, to the extent that this question could be understood as referring to a situation where a dominant undertaking applies a margin squeeze only in respect of new customers (downstream competitors), while applying more favourable conditions to other existing customers (downstream competitors), it would be necessary to examine

58 — See, to that effect, Joined Cases 6/73 and 7/73 *Istituto Chemitoterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223, paragraph 25, and *United Brands v Commission*, cited in footnote 9, paragraph 183. See also *Sot. Lélou kai Sia and Others*, cited in footnote 49.

59 — See *Bronner*, cited in footnote 17; Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission ('Magill')* [1995] ECR I-743; and Case C-418/01 *IMS Health* [2004] ECR I-5039. For a general overview of the case-law, see the Opinion of Advocate General Jacobs in Case C-53/03 *Syfait and Others* [2005] ECR I-4609.

60 — Indeed, when objective justifications for the conduct are examined the two situations (termination of supply to an existing customer and the refusal to supply a new customer) may be dealt with differently. Faull, J., and Nikpay, A., *The EC law of competition*, Oxford University Press, 2007, p. 357.

whether the dominant undertaking is not infringing point (c) of the second paragraph of Article 102 TFEU.

52. It follows that the answer to Question 1 may, depending on the specific circumstances of a given case, be affected by the question whether the supply is to a new customer.

possibility of recouping losses should be required in predatory pricing cases.⁶¹ Predatory prices are based on the premiss that the dominant undertaking suffers losses because the prices charged do not cover its costs. However, it is probable that the undertaking will recoup its losses later when it benefits from a stronger position on the market and from the higher barriers to entry created by the predatory prices. By contrast, margin squeeze does not require such an economic sacrifice on behalf of the dominant undertaking because there may not necessarily be any ‘losses’ to recoup.⁶² In a margin squeeze case the downstream prices may be high because the prices are high on the upstream market. The prices may be high on both of those markets, but what characterises the margin squeeze is the spread between the prices on the upstream market and the prices on the downstream market.

Question 9 – is the possibility of recouping losses required in margin squeeze cases?

54. It follows that an expectation that the dominant undertaking will be able to recoup the losses it has incurred is not required in order for a practice of the kind described in the answer to Question 1 to constitute abuse.

53. I consider that as I stated in my Opinion in *France Télécom v Commission* the

61 — See my Opinion in Case C-202/07 P *France Télécom v Commission*, cited in footnote 11. See, however, the judgment of the Court in that case where it was held that proof of the possibility of recoupment of losses does not constitute a necessary precondition to a finding of predatory pricing. The Court added, however, that that interpretation does not preclude the Commission from establishing such a possibility of recoupment of losses.

62 — TeliaSonera argues that in those margin squeeze cases where, however, there are losses to be recouped by the dominant undertaking, the possibility of recouping losses should remain relevant to the assessment.

Question 10 – is the answer to Question 1 affected by the question whether a change of technology is involved on a market with a high investment requirement?

a major adjustment to the application of the AKZO predation test in the sense of greater flexibility in its analysis of the costs in a market subject to a change in technology. It should be noted that the Commission decision was later upheld by the General Court and by the Court of Justice.⁶⁵

55. All parties are agreed that, as a matter of principle, in *France Télécom v Commission*⁶³ the General Court correctly pointed out that the market in question in that case was ‘a fast-growing market, but [that] fact cannot preclude [the] application of the competition rules, in particular Article [102 TFEU]’.

56. The referring court noted⁶⁴ that in its analysis in *Wanadoo* the Commission made

57. Therefore, while dynamic or fast-growing markets are not exempted from the application of Article 102 TFEU the fact remains that, wherever justified, the Commission and the NCAs should intervene in such markets with particular caution, modifying if necessary their standard approach as was done successfully in *Wanadoo*.

63 — Case T-340/03 [2007] ECR II-107; see Decision of 16 July 2003 relating to a proceeding under Article [102 TFEU] (Case COMP/38.233 – Wanadoo Interactive), recitals 261 to 262 in the preamble to the Decision.

64 — The referring court has rightly noted that losses incurred in a preliminary phase of a market which is in a state of dynamic development may well constitute a normal market phenomenon. See Colley, L., and Burnside, S., ‘Margin squeeze abuse’, *European Competition Journal Special Issue on Article 82*, July 2006, pp. 185-210.

65 — See Case T-340/03 *France Télécom v Commission*, cited in footnote 63, and my Opinion and judgment in Case C-202/07P *France Télécom v Commission*, cited in footnote 11.

III — Conclusion

58. In the light of the above considerations, I suggest that the Court give the following answers to the questions referred by the Stockholms tingsrätt:

- Questions 1, 3 and 7: There is a margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable products is negative, or insufficient to cover the product-specific costs to the dominant undertaking of providing its own retail products on the downstream market.

The abusive nature of such conduct derives from the unfair nature of the spread between the dominant undertaking's prices for wholesale access and its retail prices and the fact that the dominant undertaking's wholesale products are indispensable to competition on the downstream market.

The fact remains that the condition of indispensability is not required where the dominant undertaking is subject to a regulatory obligation compatible with EU law to supply the wholesale products.

- Question 2: In abusive margin squeeze cases it is, in principle, only the prices of the dominant undertaking which are relevant.

- Question 4: The relevant competition authority is required to demonstrate in the specific market context in question that the dominant undertaking's pricing practices have potential anti-competitive effects. A mere claim that there may be remote, abstract anti-competitive effects will not suffice.

- Question 5: The answer to Question 1 is, in principle, not affected by the degree of market strength enjoyed by the dominant undertaking.

- Question 6: A dominant position on both the wholesale market and the end-user market of the undertaking engaging in the practice is not required in order for a practice of the kind described in the answer to Question 1 to constitute abuse.

- Question 8: The answer to Question 1 may in certain circumstances be affected by the question whether the supply is to a new customer.

- Question 9: An expectation that the dominant undertaking will be able to recoup the losses it has incurred is not required in order for a margin squeeze to constitute abuse as the dominant undertaking may not in fact suffer any losses pursuant to such a practice.

- Question 10: Article 102 TFEU is applicable to a case where a change of technology is involved on a market with a high investment requirement. The fact remains, however, that the relevant competition authority should intervene in such markets with particular caution, modifying if necessary its standard approach.