Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber, Extended Composition)

13 December 2018 *

(Competition — Abuse of dominant position — Slovakian market for broadband telecommunications services — Access by third-party undertakings to the 'local loop' of the incumbent operator on that market — Decision finding an infringement of Article 102 TFEU and Article 54 of the EEA Agreement — Single and continuous infringement — Definition of 'abuse' — Refusal to grant access — Margin squeeze — Calculation of margin squeeze — Equally efficient competitor test — Rights of the defence — Imputation to the parent company of the infringement committed by its subsidiary — Decisive influence of the parent company over the subsidiary's commercial policy — Actual exercise — Burden of proof — Calculation of the amount of the fine — 2006 Guidelines on the method of setting fines — Separate fine imposed only on the parent company in respect of repeated infringement and application of a multiplier for deterrence)

In Case T-827/14,

**Deutsche Telekom AG**, established in Bonn (Germany), represented by K. Apel and D. Schroeder, lawyers,

applicant,

v

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

defendant,

supported by

**Slovanet, a.s.**, established in Bratislava (Slovakia), represented by P. Tisaj, lawyer,

intervener,

APPLICATION under Article 263 TFEU for, primarily, annulment, in whole or in part, in so far as it concerns the applicant, 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 also by Commission Decision C(2015) 2484 final of 17 April 2015, and, in the alternative, annulment or reduction of the amount of the fines imposed on the applicant by that decision,

* Language of the case: German.

THE GENERAL COURT (Ninth Chamber, Extended Composition),

composed of M. van der Woude, acting as President, S. Gervasoni, L. Madise, R. da Silva Passos (Rapporteur) and K. Kowalik-Bańczyk, Judges,

Registrar: N. Schall, Administrator,

having regard to the written part of the procedure and further to the hearing on 19 April 2018,

gives the following

## Judgment [1]

### I. Background to the dispute

1 The applicant, Deutsche Telekom AG, is the incumbent telecommunications operator in Germany and the parent company of the Deutsche Telekom group. From 4 August 2000 and throughout the relevant period in the present case, the applicant owned 51% of the capital of Slovak Telekom, a.s., which is the incumbent telecommunications operator in Slovakia. The other part of the capital of Slovak Telekom was owned, respectively, by the Slovak Ministry of the Economy, which owned 34%, and by the National Property Fund of the Slovak Republic, which owned 15% (together 'the Slovakian State').

2 On 15 October 2014, the European Commission adopted Decision C(2014) 7465 final relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39523 — Slovak Telekom), rectified by Commission Decision C(2014) 10119 final of 16 December 2014, and also by Commission Decision C(2015) 2484 final of 17 April 2015, addressed to the applicant and also to Slovak Telekom ('the contested decision'). Slovak Telekom brought a separate action on 26 December 2014, whereby it also seeks annulment of the contested decision (Case T-851/14).

### A. Technological, factual and regulatory background to the contested decision

3 Slovak Telekom, the indirect successor to the public posts and telecommunications undertaking that ceased to exist in 1992, is the largest telecommunications operator and broadband provider in Slovakia. The legal monopoly which it enjoyed on the Slovak telecommunications market came to an end in 2000. Slovak Telekom offers a full range of data services and voice services and owns and operates fixed copper and fibre optic networks and a mobile telecommunications network. The copper network and the mobile network cover almost the entire territory of Slovakia.

4 The contested decision concerns anticompetitive practices on the Slovakian market for broadband internet services. It relates, in essence, to the conditions laid down by Slovak Telekom for unbundled access by other operators to the copper local loop in Slovakia between 2005 and 2010.

5 The local loop means the physical twisted metallic pair circuit (also called 'the line') that connects the network termination point at the subscriber's premises to the main distribution frame or any other equivalent facility in the fixed public telephone network.

6 Unbundled access to the local loop allows new entrants — usually called 'alternative operators', as opposed to the incumbent telecommunications network operators — to use the existing telecommunications infrastructure belonging to those incumbent operators in order to offer various

1 Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

services to end users, in competition with the incumbent operators. Among the various telecommunications services that may be provided to end users via the local loop is high-speed data transmission for fixed access to the internet and for multimedia applications on the basis of digital subscriber line or DSL technology.

7 Local loop unbundling was organised at EU level, in particular, by 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) and by 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 (OJ 2002 L 108, p. 33). Under Regulation No 2887/2000, operators 'having significant market power' were required to grant unbundled local loop, or ULL, access and to publish a reference offer on unbundling. Those provisions were implemented in Slovakia by Zákon z 3. decembra 2003 č. 610/2003 Z.z. o elektronických komunikáciách, v znení neskorších predpisov (Law No 610/2003 of 3 December 2003 on electronic communications), as amended, which, with certain exceptions, entered into force on 1 January 2004.

8 In essence, that regulatory framework required the operator identified by the national regulatory authority as the operator with significant market power, which is generally the incumbent operator, to grant alternative operators unbundled access to its local loop and to related services under transparent, fair and non-discriminatory conditions, and to maintain an updated reference offer for such unbundled access. The national regulatory authority was required to ensure that charging for unbundled access to the local loop, set on the basis of cost-orientation, fostered fair and sustainable competition. To that end, the national regulatory authority was entitled inter alia to require changes to be made to the reference offer.

9 Following a market analysis, on 8 March 2005 the Slovakian national regulatory authority for telecommunications ('TUSR') adopted a first-instance decision — Decision No 205/14/2005 — designating Slovak Telekom 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. Consequently, TUSR imposed a number of obligations on Slovak Telekom, including requiring it to submit a reference offer within 60 days. That decision, which Slovak Telekom challenged, was confirmed by the Chairman of TUSR on 14 June 2005. Pursuant to that confirmatory decision, Slovak Telekom was required 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, on that basis, to offering their own services on the 'retail mass market' for broadband services at a fixed location in Slovakia. The decision of 14 June 2005 also ordered Slovak Telekom to publish all intended changes to the reference unbundling offer at least 45 days in advance and to submit them to TUSR.

10 Slovak Telekom published its reference unbundling offer on 12 August 2005 ('the reference offer'). That offer, which was amended on nine occasions between that date and the end of 2010, sets out the contractual and technical conditions for access to Slovak Telekom's local loop. On the wholesale market, Slovak Telekom offers access to unbundled local loops in or next to a main distribution frame on which the alternative operator seeking access has rolled out its own backbone network.

11 According to the contested decision, Slovak Telekom's local loop network, which could be used to supply broadband services after the lines concerned have been unbundled from that operator, covered 75.7% of all Slovakian households between 2005 and 2010. That coverage extended to all local loops in Slovak Telekom's metallic access network that could be used to transmit a broadband signal. However, during that same period, only very few of Slovak Telekom'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.

## B. Procedure before the Commission

12 The Commission opened an investigation on its own initiative into, inter alia, the conditions for unbundled access to Slovak Telekom's local loop. Following requests for information sent to alternative operators on 13 June 2008 and an unannounced inspection at Slovak Telekom's premises which took place between 13 and 15 January 2009, the Commission decided, on 8 April 2009, to initiate proceedings against Slovak Telekom, within the meaning of Article 2 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18).

13 Further steps were taken in the investigation, consisting of additional requests for information sent to alternative operators and TUSR, as well as an announced inspection at Slovak Telekom's premises on 13 and 14 July 2009.

14 In several discussion documents sent to the Commission between 11 August 2009 and 31 August 2010, Slovak Telekom argued that there were no grounds for finding that it had infringed Article 102 TFEU in the present case.

15 Within the framework of the investigation, Slovak Telekom objected to the provision of information dating from the period prior to 1 May 2004, the date of accession of the Slovak Republic to the European Union. It brought an action for annulment, first, of Commission Decision C(2009) 6840 of 3 September 2009 relating to a proceeding pursuant to Articles 18(3) and 24(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) and, second, of Commission Decision C(2010) 902 of 8 February 2010 relating to a proceeding pursuant to Articles 18(3) and 24(1) of Regulation No 1/2003. By judgment of 22 March 2012, *Slovak Telekom* v *Commission* (T-458/09 and T-171/10, EU:T:2012:145), this Court dismissed the actions brought against those decisions.

16 On 13 December 2010, following requests for information addressed to the applicant, the Commission decided to initiate proceedings against it within the meaning of Article 2 of Regulation No 773/2004.

17 On 7 May 2012, the Commission sent a statement of objections to Slovak Telekom. That statement of objections was sent to the applicant on the following day. In that statement of objections, the Commission concluded, on a preliminary basis, that Slovak Telekom might have infringed Article 102 TFEU on account of a practice resulting in margin squeeze as regards unbundled access to local loops in its network as well as national and regional wholesale broadband access to its competitors, and might have refused alternative operators access to some wholesale products. It also set out the preliminary view that the applicant might be liable for the infringement in its capacity as parent company of Slovak Telekom during the infringement period.

18 After obtaining access to the investigation file, Slovak Telekom and the applicant each replied to the statement of objections on 5 September 2012. A hearing was then held on 6 and 7 November 2012.

19 On 21 June 2013, Slovak Telekom sent the Commission a proposal for commitments intended to address its objections from the standpoint of competition law and asked the Commission to adopt a commitments decision within the meaning of Article 9 of Regulation No 1/2003 instead of a prohibition decision. The Commission nonetheless considered those commitments to be insufficient and therefore decided to continue the proceedings.

20 On 6 December 2013 and 10 January 2014 respectively, the Commission sent Slovak Telekom and the applicant a letter of facts intended to afford them the opportunity to comment on the additional evidence collected after the statement of objections had been issued. The Commission stated that that evidence, to which Slovak Telekom and the applicant were given access, could be used in a possible final decision.

21 Slovak Telekom and the applicant replied to the letter of facts on 21 February and 6 March 2014 respectively.

22 At meetings held with Slovak Telekom on 16 September 2014 and with the applicant on 29 September 2014, the Commission provided information on the decision which it planned to adopt pursuant to Article 7 of Regulation No 1/2003.

## C. Contested decision

23 In the contested decision, the Commission finds that the undertaking comprising Slovak Telekom and the applicant committed a single and continuous infringement of Article 102 TFEU and Article 54 of the EEA Agreement concerning broadband services in Slovakia between 12 August 2005 and 31 December 2010 ('the period under consideration').

### *1. Definition of the relevant markets and Slovak Telekom's dominant position on those markets*

24 In the contested decision, the Commission identifies two relevant product markets, namely:

– the retail mass market for broadband services at a fixed location;

– the wholesale market for access to unbundled local loops.

25 According to the contested decision, the relevant geographical market is the entire territory of Slovakia.

26 The Commission states that, during the period under consideration, Slovak Telekom held a monopoly position on the wholesale market for unbundled access to local loops and there were no direct constraints in the form of actual or potential competition or countervailing buying power limiting its market power. Slovak Telekom therefore held a dominant position on that market during the period under consideration. The Commission also finds that Slovak Telekom held a dominant position during that period on the retail mass market for broadband services at a fixed location.

### *2. Slovak Telekom's conduct*

#### *(a) Refusal to supply unbundled access to Slovak Telekom's local loops*

27 In the first part of its analysis, entitled 'Refusal to supply', the Commission observes that, although several alternative operators had expressed great interest in being granted access to Slovak Telekom's local loops in order to compete with it on the retail market for broadband services, Slovak Telekom set unfair terms and conditions in its reference offer rendering such access unacceptable. Slovak Telekom thereby delayed, complicated or prevented entry on the retail broadband market.

28 In that regard, the Commission states that, first, unbundled access to the local loop by an alternative operator is based on the premiss that that operator must first obtain sufficient and adequate information concerning the incumbent operator's network. That information must enable the alternative operator concerned to assess its business opportunities and to prepare appropriate business plans for its future retail services based on unbundled access to the local loop. In the present case, the reference offer did not satisfy that information requirement with respect to alternative operators.

29 Thus, in spite of the requirements laid down in the relevant regulatory framework (see paragraphs 7 and 8 above), the reference offer does not provide any basic information regarding the locations of physical access sites and the availability of local loops in specific parts of the network. Alternative operators had access to such information only upon request, in exchange for payment of a fee, within 5 days of the entry into force of a confidentiality agreement with Slovak Telekom and solely after the provision of a bank guarantee. The Commission considers, in essence, that those requirements unreasonably delayed and complicated disclosure of the relevant information to alternative operators and thus discouraged those operators from accessing Slovak Telekom's local loops.

30 Even in the case of access upon request, the Commission finds that the information provided by Slovak Telekom was insufficient. In particular, Slovak Telekom did not provide any information on the availability of its local loops, even though such information was crucial to enable alternative operators to prepare their business models in time and to identify the business potential of unbundling. The Commission takes the view that Slovak Telekom should have disclosed not only the list of main distribution frames and similar facilities, but also a description of their geographical coverage; information on the ranges of telephone numbers served by those exchanges; information on the actual use of cables (as a percentage) for DSL technologies; information on the ratio of pulse code modulation (PCM) equipment deployment regarding the cables connected to the different main distribution frames; the names or functions of the distribution frames and information on how they are used in that company's technical and methodological regulations; and the maximum lengths of homogeneous local loops. Slovak Telekom was, moreover, well aware of the problems faced by alternative operators as a result of those terms of access to information and the information's limited scope. The Commission also points out that, although Slovak Telekom did not publish a template for the unbundling requests to be submitted by alternative operators until May 2009, its reference unbundling offer made provision at the very outset for the imposition of financial penalties if a request for access were deemed incomplete.

31 Second, according to the contested decision, Slovak Telekom unjustifiably reduced the scope of its obligation relating to unbundled access to its local loops.

32 Thus, in the first place, Slovak Telekom improperly excluded from that obligation 'passive' lines, namely lines which existed physically but were not in use. By doing so, Slovak Telekom reserved for itself a significant number of potential customers who were not yet purchasing its broadband services but to whom its network was available, even though the market was growing and the relevant regulatory framework did not restrict the unbundling obligation to active lines only. The restriction applied by Slovak Telekom was not, in the Commission's view, justified by any objective technical reasons.

33 In the second place, Slovak Telekom unjustifiably excluded from its unbundling obligation the services which it classed as 'conflicting services', namely services that it was likely to offer and which might be in conflict with access to the local loop by an alternative operator. In addition to the fact that the actual concept of conflicting services is vague, the list of such services — drawn up unilaterally by Slovak Telekom — is open and, in consequence, creates uncertainty for alternative operators. That limitation deprived alternative operators of a large number of potential customers, customers which were reserved for Slovak Telekom and therefore withdrawn from the retail market.

34 In the third place, the Commission classifies as unjustified the rule imposed by Slovak Telekom in the reference offer, whereby only 25% of local loops contained in a multi-pair cable could be used for the provision of broadband services, in order to avoid cross-talk and interferences. That rule is not justified because it is of a general and abstract nature and thus does not take account of the characteristics of the cables and the specific combination of transmission techniques. The Commission points out, in that regard, that the practice followed in other Member States demonstrates that there are alternatives to such upstream abstract limitations on access, for instance the principle of 100% cable fill-in together

with the a posteriori resolution of any specific problems stemming from spectrum interferences. Finally, Slovak Telekom applied to itself a maximum fill-in rule of 63%, which is less strict than the rule it applied to alternative operators.

35 Third, and last, Slovak Telekom established a number of unfair terms and conditions in the reference offer concerning unbundled access to its local loops.

36 In that regard, in the first place, according to the contested decision, Slovak Telekom included unfair terms and conditions in the reference offer relating to collocation, defined in that offer as 'the provision of the physical space and the technical equipment necessary for the appropriate placement of the telecommunication equipment of the Authorised Provider with the purpose of provision of services to the end users of the Authorised Provider via access to the local loop'. The barrier thus erected for alternative operators was the result of, in particular, the following factors: (i) the conditions required a preliminary inquiry into the possibilities of collocation which was not objectively necessary; (ii) alternative operators were only able to challenge the determination of the form of collocation decided by Slovak Telekom by paying an additional fee; (iii) the consequence of the expiry of the reservation period after delivery to the alternative operator of the notice regarding the outcome of the preliminary or detailed inquiry, without any collocation agreement being concluded, was that the preliminary or detailed inquiry had to be repeated in full; (iv) Slovak Telekom was not bound by any deadlines in the event of additional detailed inquiries triggered by negotiations and was entitled to withdraw — without stating reasons and without any legal consequences — a proposed collocation agreement during the term for acceptance of the proposal by the alternative operators within the established deadlines; (v) Slovak Telekom was not bound by any precise time limit for implementing collocation; (vi) Slovak Telekom unilaterally imposed unfair and non-transparent fees for collocation.

37 In the second place, the Commission finds that, under the reference offer, alternative operators were required to submit forecasts of the requests for qualification of the local loop 12 months in advance for each collocation space, on a month-by-month basis, before being able to submit a request for qualification for access to the relevant local loop. The Commission considers that such a requirement obliges alternative operators to submit forecasts at a time when they are not in a position to estimate their needs in terms of unbundled access. It also criticises the fact that failure to comply with the forecasting terms triggered the payment of penalties and complains about the mandatory nature of the forecasting obligation and the lack of any deadline for Slovak Telekom to respond to a request for qualification in the event that such a request did not comply with the forecasted volume.

38 In the third place, the Commission considers that the mandatory qualification procedure, which was designed to enable alternative operators to determine whether a specific local loop was suitable for DSL technology or any other broadband technology they might intend to use before placing a firm unbundling order, was such that those operators were deterred from requesting unbundled access to Slovak Telekom's local loops. Thus, while conceding that it is necessary to verify the suitability of local loops for unbundling or the basic preconditions for unbundling a specific line, the Commission states that the splitting of that qualification process from the very request for access to the local loop unnecessarily delayed unbundling and generated additional costs for alternative operators. Furthermore, a number of aspects examined in the context of the qualification process are superfluous. The Commission considers to be unjustified the validity period limited to 10 days applying to the qualification of a local loop, after which a request for access could no longer be made.

39 In the fourth place, according to the contested decision, the reference offer included disadvantageous terms as regards repairs, service and maintenance, due to (i) the lack of an appropriate definition of 'planned works' and 'unplanned works'; (ii) the unclear distinction between 'unplanned works' and straightforward 'defaults', liable to give rise to unjustified conduct on the part of Slovak Telekom; (iii) the very short deadlines for informing alternative operators of such works and for transmitting that

information to their customers; and, finally, (iv) the shifting of responsibility to the alternative operator for service interruptions caused by repairs where that operator has been deemed to be uncooperative.

40 In the fifth place, the Commission regards as unfair several terms and conditions applying to the bank guarantee that must be provided by all alternative operators wishing to conclude a collocation agreement with Slovak Telekom and ultimately to secure access to its local loops. Therefore, first of all, Slovak Telekom enjoys an overly wide discretion in deciding whether to accept or refuse a bank guarantee and is not subject to any deadline in that regard. Next, the amount of the guarantee, set at EUR 66 387.84, is disproportionate in the light of the risks and costs borne by Slovak Telekom. That is all the more so since the reference offer allowed Slovak Telekom to multiply that amount by up to 12 where it called on the guarantee. Furthermore, Slovak Telekom was able to call on the bank guarantee to cover not only the failure to pay for actual services it provided, but also to cover any claims for damages that it could submit. Moreover, Slovak Telekom was entitled to trigger the bank guarantee without having to show that it had first asked the debtor to pay and without the debtor having the option of raising a counterclaim. Lastly, the Commission notes that alternative operators do not benefit from any similar guarantee even though they may incur losses as a result of Slovak Telekom's conduct in respect of unbundled access to local loops.

41 The Commission concludes that those aspects of Slovak Telekom's conduct, taken together, amounted to a refusal on its part to provide unbundled access to its local loops.

***(b) Margin squeeze of alternative operators in the provision of unbundled access to Slovak Telekom's local loops***

42 In the second part of its analysis of Slovak Telekom's conduct, the Commission makes a finding of margin squeeze as a result of the behaviour of that operator in connection with unbundled access to its local loops, which constitutes an independent form of abuse of a dominant position. Accordingly, the spread between the prices charged by Slovak Telekom for the grant of such access to alternative operators and the prices charged to its own customers was either negative or insufficient for an operator as efficient as Slovak Telekom to cover the specific costs which it had to incur to supply its own products or services on the downstream market, namely the retail market.

43 Where the service portfolio under consideration includes only broadband products, the Commission notes that an equally efficient competitor would have been able, by means of unbundled access to Slovak Telekom's local loops, to replicate the entirety of Slovak Telekom's retail DSL offering as it evolved over time. The 'period-by-period' margin analysis (namely the calculation of the available margins for each year of the period between 2005 and 2010) demonstrates that a competitor as efficient as Slovak Telekom faced negative margins and would not therefore have been able to replicate profitably the retail broadband portfolio offered by Slovak Telekom.

44 Where the portfolio examined includes voice telephony services in addition to broadband services by means of full access to the local loop, the Commission also concludes that a competitor as efficient as Slovak Telekom would not have been able, due to the prices charged by Slovak Telekom on the upstream market for unbundled access, to operate profitably on the relevant retail market during the period between 2005 and 2010. An equally efficient competitor would not therefore have been able to replicate profitably, over that same period, Slovak Telekom's portfolio. The addition to that reference portfolio of multi-play services, available as from 2007, would not alter that finding.

45 Since neither Slovak Telekom nor the applicant put forward during the administrative procedure any objective justification for their exclusionary conduct, the Commission concludes that Slovak Telekom's conduct during the period under consideration constitutes an abusive margin squeeze.

### *3. Analysis of the anticompetitive effects of Slovak Telekom's conduct*

46 The Commission considers that those two types of conduct on the part of Slovak Telekom, namely the refusal to provide unbundled access to the local loop and the margin squeeze of the alternative operators, were likely to prevent alternative operators from relying on unbundled access in order to enter the Slovakian retail mass market for broadband services at a fixed location. According to the contested decision, its conduct made competition less effective on that market because there was no genuine profitable alternative for competing operators to wholesale access to DSL broadband based on the unbundling of local loops. The impact of Slovak Telekom's conduct on competition was all the more significant because the retail market for broadband services showed strong potential for growth during the period under consideration.

47 The Commission also states, in essence, that, according to the 'investment ladder' concept, that barrier to access to the unbundling of the local loop deprived alternative operators of a source of income which would have allowed them to make further investments in the network, particularly by developing their own access network to connect their customers directly.

48 The Commission concludes that Slovak Telekom's anticompetitive conduct on the mass market for broadband services at a fixed location in Slovakia was likely to have negative effects on competition and, in the light of its geographical reach across the entire territory of the Slovak Republic, was able to affect trade between Member States.

### *4. Addressees of the contested decision and fines*

49 According to the contested decision, not only was the applicant in a position to exercise decisive influence over Slovak Telekom's commercial policy during the entire period under consideration, but it actually exercised such influence. Since Slovak Telekom and the applicant form part of the same undertaking, both are held liable for the single and continuous infringement of Article 102 TFEU forming the subject matter of the contested decision.

50 As regards the penalty for that infringement, the Commission states that it set the amount of the fines by reference to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines').

51 First of all, the Commission calculates the basic amount of the fine by taking 10% of Slovak Telekom's turnover on the market for unbundled access to the local loop and for fixed retail broadband services in the last full financial year of its participation in the infringement, in the case at hand 2010, and by multiplying the resulting figure by 5.33 to take account of the duration of the infringement (5 years and 4 months). The basic amount of the fine arrived at following that calculation comes to EUR 38 838 000. This is the first fine imposed for the infringement in question and for which, according to point (a) of the first paragraph of Article 2 of the contested decision, Slovak Telekom and the applicant are held jointly and severally liable.

52 Next, the Commission applies a twofold adjustment to the basic amount. In the first place, it finds that when the infringement in question occurred, the applicant had already been held liable for an infringement of Article 102 TFEU, on account of a margin squeeze in the telecommunications sector, in Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 [EC] (Cases COMP/37.451, 37.578, 37.579 — Deutsche Telekom AG) (OJ 2003 L 263, p. 9, 'the Deutsche Telekom Decision'), and that, when the decision was adopted, the applicant already held 51% of Slovak Telekom's shares and was in a position to exercise decisive influence over it. Consequently, the Commission finds that, for the applicant, the basic amount of the fine should be increased by 50% on account of repeated infringement. In the second place, the Commission states that the applicant's worldwide turnover for 2013 was EUR 60 123 billion and that, in order to give the fine sufficient

deterrent effect, a coefficient multiplier of 1.2 should be applied to the basic amount. The product of that twofold adjustment of the basic amount, namely EUR 31 070 000, gives rise, under point (b) of the first paragraph of Article 2 of the contested decision, to a separate fine imposed on the applicant alone.

### *5. Operative part of the contested decision*

53 Articles 1 and 2 of the contested decision read as follows:

*'Article 1*

1. The undertaking consisting of Deutsche Telekom AG and Slovak Telekom a.s. has committed a single and continuous infringement of Article 102 of the Treaty and Article 54 of the EEA Agreement.

2. The infringement lasted from 12 August 2005 until 31 December 2010 and consisted of the following practices:

(a) withholding from alternative operators network information necessary for the unbundling of local loops;

(b) reducing the scope of its obligations regarding unbundled local loops;

(c) setting unfair terms and conditions in its Reference Unbundling Offer regarding collocation, qualification, forecasting, repairs and bank guarantees;

(d) applying unfair tariffs which do not allow an equally efficient competitor relying on wholesale access to the unbundled local loops of Slovak Telekom a.s. to replicate the retail broadband services offered by Slovak Telekom a.s. without incurring a loss.

*Article 2*

For the infringement referred to in Article 1, the following fines are imposed:

(a) a fine of EUR 38 838 000 on Deutsche Telekom AG and Slovak Telekom a.s., jointly and severally;

(b) a fine of EUR 31 070 000 on Deutsche Telekom AG.

…'

## II. Procedure and forms of order sought

…

70 The applicant claims that the Court should:

– annul the contested decision in whole or in part, in that it concerns the applicant, and, in the alternative, annul or reduce the fines imposed on the applicant;

– order the Commission to pay the costs.

71 The Commission and the intervener, Slovanet, contend that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

## III. Law

72 The applicant puts forward five pleas in law in support of both its principal claim, whereby it seeks annulment of the contested decision in whole or in part, and its alternative claim, whereby it seeks annulment of the fines imposed on it or a reduction of the amount of those fines. The first plea alleges errors of fact and of law in the application of Article 102 TFEU as regards Slovak Telekom's abusive conduct and also a breach of the rights of the defence. The second plea alleges errors of law and of fact as regards the duration of Slovak Telekom's abusive conduct. The third plea alleges errors of law and of fact in the imputation of Slovak Telekom's abusive conduct to the applicant on the ground that those companies are part of the same undertaking. The fourth plea alleges misinterpretation of the concept of 'undertaking' within the meaning of EU law and breach of the principle that the penalty must be specific to the offender and the offence, in that the contested decision also imposes a separate fine on the applicant, and failure to state reasons. Last, the fifth plea alleges errors in calculating the amount of the fine imposed jointly and severally on Slovak Telekom and the applicant.

### A. The principal claims put forward, seeking annulment of the contested decision

73 It is appropriate to examine in turn the five pleas put forward by the applicant and referred to in paragraph 72 above.

#### *1. First plea: errors of law and of fact in the application of Article 102 TFEU as regards Slovak Telekom's abusive conduct and breach of the rights of the defence*

74 The first plea consists of three parts, alleging, first, infringement of Article 102 TFEU, since the Commission found that there had been an infringement within the meaning of that provision without considering whether the telecommunications infrastructures in question were indispensable; second, breach of the applicant's right to be heard as regards the calculation of the margin squeeze; and, third, errors in the calculation of the long run average incremental costs ('the LRAIC').

75 Furthermore, the applicant states that it supports, in the context of its first plea, the argument put forward by Slovak Telekom in the action which it brought against the contested decision on 26 December 2014 (Case T-851/14). The applicant also claims, referring in particular to the judgment of 22 January 2013, *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), that, if a plea put forward in that action should be upheld, it should also benefit from such an outcome in the present case.

…

##### *(b) First part: infringement of Article 102 TFEU on the ground that the Commission found that there had been an infringement within the meaning of that provision without considering whether the telecommunications infrastructures at issue were indispensable*

81 By the first part of its first plea, the applicant maintains that the Commission incorrectly failed, in the contested decision, to examine whether access to Slovak Telekom's copper DSL network was indispensable in order to operate on the retail market for broadband services in Slovakia. In doing so,

the Commission failed to have regard to the principle established in the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), that a refusal to supply or to grant access constitutes abuse of a dominant position only where it is capable of eliminating all competition on the secondary market and the upstream inputs at issue are indispensable to the exercise of the downstream activity. The application of that principle in the present case is not called into question by the fact that the present case concerns an implied refusal of access and not, as in the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), a complete refusal to supply. There is no valid reason why the existence of abuse owing to an implied refusal of access should be subject to less strict requirements than the existence of abuse owing to a complete refusal of access. The distinction which the Commission draws in that sense is based on a misreading of paragraphs 55 and 58 of the judgment of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83) and leads, moreover, to the illogical result that proof of the most serious infringement (namely a complete refusal of access) would be subject to stricter conditions than those applicable to the less serious infringement (namely the implied refusal of access). The applicant submits, on the latter point, that at least one undertaking obtained access to Slovak Telekom's local loops, which would have been precluded had there been a complete refusal of access.

82 The applicant also claims that that requirement of proof would not be reduced by the fact that Slovak Telekom was subject to a regulatory obligation to grant competing suppliers unbundled access to its local loop, as that obligation pursues other objectives and is subject to other conditions than the a posteriori review of abuse for the purposes of Article 102 TFEU. Such an obligation, laid down in 2005 by TUSR, is not of such a kind as to replace the specific examination of the indispensable nature of access to Slovak Telekom's local loops at a later time. However, the Commission failed to carry out such a specific examination in the present case, even though the telecommunications markets are constantly evolving.

83 Likewise, the applicant disputes the Commission's viewpoint that, in essence, the principle arising from the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), would not apply in the present case because the telecommunications network at issue was developed in monopoly conditions by the Slovakian Government. It submits that the Commission does not show how that circumstance enabled it to find that there was a dominant position without ascertaining that access to Slovak Telekom's copper DSL network was indispensable. As the existence of abuse must always be assessed independently of the conditions in which a dominant position arises, there is no reason why former State monopolies should be treated differently from other undertakings in the context of the application of Article 102 TFEU. The applicant further submits that Slovak Telekom's copper-based DSL network originally had a very low rate of coverage and was of poor quality and that that led Slovak Telekom, as is apparent from recital 891 of the contested decision, to invest in broadband assets consistently between 2003 and 2010, or after it had lost its monopoly.

84 In any event, the fact that several competing suppliers have succeeded in entering the broadband retail market using their own infrastructure shows that unbundled access to Slovak Telekom's local loop was not indispensable to the development of competing offers.

85 The Commission disputes those assertions.

86 In that regard, according to established case-law, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market (see judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 135 and the case-law cited), and the fact that such a position has its origins in a former legal monopoly must, in that regard, be taken into account (judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 23).

87 That is why Article 102 TFEU prohibits, in particular, a dominant undertaking from adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits. From that point of view, not all competition on price can be regarded as legitimate (see judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 136 and the case-law cited).

88 It has been held, in that regard, that abuse of a dominant position prohibited by 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 on the market or the growth of that competition (see judgments of 19 April 2012, *Tomra Systems and Others* v *Commission*, C-549/10 P, EU:C:2012:221, paragraph 17 and the case-law cited, and of 9 September 2009, *Clearstream* v *Commission*, T-301/04, EU:T:2009:317, paragraph 140 and the case-law cited).

89 Article 102 TFEU covers not only those practices that directly cause harm to consumers but also practices that cause consumers harm by interfering with the free play of competition (see, to that effect, judgments of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 20 and the case-law cited, and of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T-336/07, EU:T:2012:172, paragraph 171).

90 The effect on competition referred to in paragraph 88 above 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 necessary 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 (judgment of 19 April 2012, *Tomra Systems and Others* v *Commission*, C-549/10 P, EU:C:2012:221, paragraph 68; see, also, judgments of 9 September 2009, *Clearstream* v *Commission*, T-301/04, EU:T:2009:317, paragraph 144 and the case-law cited, and of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T-336/07, EU:T:2012:172, paragraph 268 and the case-law cited).

91 Moreover, as regards the abusive nature of a practice resulting in a margin squeeze, it should be noted that subparagraph (a) of the second paragraph of Article 102 TFEU expressly prohibits a dominant undertaking from directly or indirectly imposing unfair prices (judgments of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 25, and of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T-336/07, EU:T:2012:172, paragraph 173). Since the list of abusive practices contained in Article 102 TFEU is nevertheless not exhaustive, the list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position prohibited by EU law (judgments of 21 February 1973, *Europemballage and Continental Can* v *Commission*, 6/72, EU:C:1973:22, paragraph 26; of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 26; and of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T-336/07, EU:T:2012:172, paragraph 174).

92 In the present case, it should be pointed out that the argument presented by the applicant in the first part of this plea refers only to the legal test applied by the Commission, in the seventh part of the contested decision (recitals 355 to 821), in order to classify a range of conduct of the applicant during the period under consideration as 'refusal to supply'. By contrast, the applicant does not dispute the existence itself of the conduct noted by the Commission in that part of the contested decision. As is apparent from recitals 2 and 1507 of the contested decision, that conduct, which contributed to the identification by the Commission of a single and continuous infringement of Article 102 TFEU (recital 1511 of the contested decision), consisted, first, in concealing from alternative operators information relating to Slovak Telekom's network, which is necessary for the unbundling of that

operator's local loop, secondly, in a reduction by Slovak Telekom of its obligations relating to unbundling under the applicable regulatory framework and, thirdly, in the establishment by that operator of a number of unfair terms and conditions in its reference offer relating to unbundling.

93 Moreover, as the applicant confirmed during the hearing, the first part of the first plea does not call into question the analysis of Slovak Telekom's conduct consisting in a margin squeeze carried out by the Commission in the eighth part of the contested decision (recitals 822 to 1045 of the contested decision). In its action, the applicant does not dispute that that type of conduct constitutes an independent form of abuse distinct from that of refusal to provide access and the existence thereof is therefore not subject to the criteria laid down in the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569) (see, to that effect, judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 75 and the case-law cited).

94 Thus, in essence, the applicant takes issue with the Commission for having classified the conduct referred to in paragraph 92 above as 'refusal to supply' access to Slovak Telekom's local loop without having verified the 'indispensable' nature of such access, for the purposes of the third condition set out in paragraph 41 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569).

95 In that judgment, the Court of Justice indeed considered that, in order for the refusal by a dominant undertaking to grant access to a service to constitute an abuse within the meaning of Article 102 TFEU, that refusal must be likely to eliminate all competition on the market on the part of the person requesting the service, such refusal must not be capable of being objectively justified, and the service must in itself be indispensable to carrying on that person's business (judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569, paragraph 41; see, also, judgment of 9 September 2009, *Clearstream* v *Commission*, T-301/04, EU:T:2009:317, paragraph 147 and the case-law cited).

96 Moreover, it is clear from paragraphs 43 and 44 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), that, in order to determine whether a product or service is indispensable for enabling an undertaking to carry on business in a particular market, it must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, alternative products or services. According to paragraph 46 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), in order to accept the existence of economic obstacles, it must be established, at the very least, that the creation of those products or services is not economically viable for production on a scale comparable to that of the undertaking which controls the existing product or service (judgment of 29 April 2004, *IMS Health*, C-418/01, EU:C:2004:257, paragraph 28).

97 However, in the present case, since the legislation relating to the telecommunications sector defines the legal framework applicable to it and, in so doing, contributes to the determination of the competitive conditions under which a telecommunication undertaking carries on its business in the relevant markets, that legislation constitutes a relevant factor in the application of Article 102 TFEU to the conduct of that undertaking, in particular for assessing the abusive nature of such conduct (judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 224).

98 As the Commission correctly points out, the conditions referred to in paragraph 95 above were laid down and applied in the context of cases dealing with the question of whether Article 102 TFEU could be such as to require the undertaking in a dominant position to supply to other undertakings access to a product or service, in the absence of any regulatory obligation to that end.

99 Such a context differs from that of the present case, in which TUSR, by a decision of 8 March 2005 confirmed by the director of that authority on 14 June 2005, required Slovak Telekom to grant all reasonable and justified requests for unbundling of its local loop, in order to enable alternative operators, on that basis, to offer their own services on the retail mass market for broadband services at a fixed location in Slovakia (paragraph 9 above). That requirement resulted from the public authorities' intention to encourage Slovak Telekom and its competitors to invest and innovate, whilst ensuring that competition in the market is maintained (recitals 218, 373, 388, 1053 and 1129 of the contested decision).

100 As is stated in recitals 37 to 46 of the contested decision, TUSR's decision, taken in accordance with Law No 610/2003, implemented in Slovakia the requirement of unbundled access to the local loop of operators with significant market power on the market for the provision of fixed public telephone networks, provided for in Article 3 of Regulation No 2887/2000. The EU legislature justified that requirement, in recital 6 of that regulation, by the fact that '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[, since a]lternative infrastructures … do not generally offer the same functionality or ubiquity'.

101 Therefore, given that the relevant regulatory framework clearly acknowledged the need for access to Slovak Telekom'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 of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), was not required.

102 That conclusion is not called into question by the applicant's argument that the existence of a regulatory obligation to provide access to Slovak Telekom's local loop does not mean that such access should also have been granted under Article 102 TFEU, since such an *ex ante* regulatory obligation pursues other objectives and is subject to conditions other than the *ex post* control of the conduct of a dominant undertaking, pursuant to that article.

103 In order to reject that argument, it is sufficient to state that the elements set out in paragraphs 97 to 101 above are not based on the premiss that Slovak Telekom's obligation to grant unbundled access to its local group is the consequence of Article 102 TFEU, but merely emphasise, in accordance with the case-law cited in paragraph 97 above, that the existence of such a regulatory obligation constitutes a relevant element of the economic and legal context in which the question whether Slovak Telekom's practices examined in the seventh part of the contested decision might be classified as abusive practices within the meaning of that provision must be appraised.

104 Furthermore, the reference which the applicant makes to paragraph 113 of the judgment of 10 April 2008, *Deutsche Telekom* v *Commission* (T-271/03, EU:T:2008:101), in order to support the argument referred to in paragraph 102 above is irrelevant. The General Court did indeed observe, in that paragraph, that the national regulatory authorities operated under national law, which may have objectives which differ from those of EU competition policy. That point was intended to support the Court's rejection of the applicant's argument put forward in that case that, in essence, the *ex ante* control of its tariffs by the German regulatory authority for telecommunications and post precluded Article 102 TFEU from being applied to any margin squeeze resulting from its tariffs for unbundled access to its own local loop. That point therefore had no bearing on the question whether the existence of a regulatory obligation to provide access to the local loop of the dominant operator is relevant for the purposes of assessing the conformity of its conditions of access with Article 102 TFEU.

105 It follows from the foregoing that the Commission cannot be criticised for having failed to establish the indispensable nature of access to the network at issue.

106 Nor, it should be added, could such a complaint be made against the Commission if it had to be considered that the implied refusal of access at issue was covered by the considerations in the judgment of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83). In that judgment, the Court of Justice held that it cannot be inferred from paragraphs 48 and 49 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), that the conditions to be met in order to establish that a refusal to supply is abusive, which was the object of the first question for a preliminary ruling examined in that case, must necessarily also apply when assessing the abusive nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or in which the purchaser might not be interested (judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 55). In that regard, the Court of Justice held that such conduct may, in itself, constitute an independent form of abuse distinct from that of refusal to supply (judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 56).

107 The Court of Justice, moreover, stated that if the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), were to be interpreted otherwise, that would amount to a requirement that before any conduct of a dominant undertaking in relation to its terms of trade could be regarded as abusive the conditions to be met to establish that there was a refusal to supply would in every case have to be satisfied, and that would unduly reduce the effectiveness of Article 102 TFEU (judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 58).

108 The applicant correctly notes, concerning that point, that the practice at issue in the main proceedings examined by the Court of Justice in the judgment of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83), merely consisted, as is apparent from paragraph 8 of that judgment, in a possible margin squeeze by the historical Swedish fixed telephone network operator in order to discourage requests by alternative operators for access to its local loop. It cannot be deduced therefrom that the interpretation given by the Court of Justice in that judgment of the scope of the conditions set out in paragraph 41 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), is limited to that sole form of abusive conduct and does not cover practices which are not strictly related to pricing such as those examined in the present case by the Commission in the seventh part of the contested decision (see paragraphs 27 to 41 above).

109 It should, first of all, be noted that, in paragraphs 55 to 58 of the judgment of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83), the Court of Justice did not refer to the particular form of abuse constituted by the margin squeeze of competitor operators in a downstream market, but rather to the supply of 'services or selling goods on conditions which are disadvantageous or in which the purchaser might not be interested' and to 'terms of trade' fixed by the dominant undertaking. Such wording suggests that the exclusionary practices to which reference was therefore made concerned not solely a margin squeeze, but also other business practices capable of producing unlawful exclusionary effects for current or potential competitors, like those classified by the Commission as an implicit refusal to supply access to Slovak Telekom's local loop (see, to that effect, recital 366 of the contested decision).

110 That reading of the judgment of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83), is supported by the reference made by the Court of Justice, in that part of its analysis, to paragraphs 48 and 49 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569). Those paragraphs dealt with the second question for a preliminary ruling referred to the Court of Justice in that case and did not concern the refusal by the dominant undertaking at issue in the dispute in the main proceedings to give access to its home-delivery scheme to the publisher of a rival newspaper, examined in the context of the first question, but the possible classification as abuse of a dominant position of a practice which consisted for that undertaking in making such access subject to the condition that the publisher at issue entrust to it the carrying out of other services, such as sales in kiosks or printing.

111 In that regard, the applicant's argument that, in essence, the application in the present case of the reasoning followed in paragraphs 55 to 58 of the judgment of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83), would have the illogical consequence that an implied refusal to supply would be easier to prove than a simple refusal to supply, even though the latter type of conduct constitutes a more serious form of abuse of a dominant position, cannot be upheld. It is sufficient to state that that argument is based on a false premiss, namely that the gravity of an infringement of Article 102 TFEU consisting in a refusal by a dominant undertaking to supply goods or services to other undertakings would depend solely on the form of that refusal. The gravity of such an infringement may depend on numerous factors that are independent of the explicit or implied nature of the refusal, such as the geographic scope of the infringement, its intentional nature or its effects on the market. The 2006 Guidelines confirm that analysis when they state, in point 20, that the assessment of the gravity of an infringement of Article 101 or 102 TFEU is made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.

112 Last, it must be borne in mind that, in paragraph 69 of the judgment of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83), the Court of Justice observed that the indispensable nature of the wholesale product could be relevant in order to assess the effects of a margin squeeze. However, in the present case, it must be pointed out that the applicant invoked the Commission's obligation to show the indispensable nature of the unbundled access to Slovak Telekom's local loop only in support of its claim that the Commission failed to apply the legally appropriate criteria during its assessment of the practices examined in the seventh part of the contested decision (see, by analogy, judgment of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T-336/07, EU:T:2012:172, paragraph 182), and not in order to call into question the Commission's assessment of the anticompetitive effects of those practices, carried out in the ninth part of that decision (recitals 1046 to 1109 of the contested decision).

113 As for the reference which the applicant makes to point 79 of the Communication on Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings (OJ 2009 C 45, p. 7), it is irrelevant in the present case.

114 First, as the Commission correctly observes, the distinction made in that point between a simple refusal and a 'constructive refusal' to supply is not accompanied by any detail as to the relevant legal criteria for the purpose of arriving, in each of those situations, at a finding of infringement of Article 102 TFEU. Second, and in any event, that communication states that its sole purpose is to set out the enforcement priorities that will guide the Commission in applying Article 102 TFEU to exclusionary conduct by dominant undertakings, and not to constitute a statement of the law (see points 2 and 3 of the communication).

115 Having regard to the foregoing, it must be concluded that the classification of the conduct of Slovak Telekom examined in the seventh part of the contested decision as abusive practices within the meaning of Article 102 TFEU did not assume that the Commission was required to establish that access to Slovak Telekom's local loop was indispensable for the exercise of the activity of the operators competing on the retail market for fixed broadband services in Slovakia, within the meaning of the case-law cited in paragraph 96 above.

116 It follows from all of the foregoing that the first part of the first plea must be rejected as unfounded.

### *(c) Second part: breach of the applicant's right to be heard concerning the calculation of the margin squeeze*

117 By the second part of its first plea, the applicant maintains that the Commission breached its right to be heard at the administrative procedure stage, in two respects.

118 First, it claims that the Commission informed it of a body of new evidence at an information meeting held on 29 September 2014. A document entitled 'Margin squeeze calculation (preliminary results)', communicated to the applicant on that occasion, revealed that Slovak Telekom's margin in 2005 was positive on the basis of a calculation of the margins period by period (year by year). That document also contained figures to which the applicant had not had access before the information meeting. Last, the Commission stated at that meeting that it intended to apply a multi-period (multi-year) approach when calculating the margins between 12 August 2005 and 31 December 2010 and, moreover, that it thus found a negative margin for 2005 as well. That statement came as a surprise to both the applicant and Slovak Telekom, neither of which had thus far suggested such a method.

119 Following a request by the applicant, the Commission informed it, on 1 October 2014, that it could provide it with its comments on that evidence by 3 October 2014 at the latest. Since that date was a national holiday in Germany, the applicant had less than two working days to submit its comments. As some of the figures used in the revised calculation of the margin squeeze had been supplied by Slovak Telekom in its reply to the account of the facts and the applicant had not had access to that document, the Commission, by letter of 7 October 2014, authorised the applicant to consult that reply and to submit its comments on it by no later than the evening of 9 October.

120 In the applicant's submission, those very tight deadlines deprived it, in practice, of any genuine possibility of revealing its views on the new evidence brought to its knowledge on 29 September 2014, even though that evidence was taken into account in the contested decision. The applicant submits that the figures presented by the Commission for the first time on that date were not only new, owing in particular to the use of the LRAIC, but also complex. It was not in a position to submit those new figures to economists, which would certainly have allowed it to influence the Commission's assessment of the duration of the margin squeeze forming the subject matter of the investigation.

121 Second, the applicant takes issue with the Commission for having corrected and adjusted, in the contested decision, the figures supplied by Slovak Telekom in order to calculate the LRAIC, without having first informed the applicant of its objections in that respect and, consequently, having thus deprived it of any possibility of expressing its views.

122 The Commission disputes those arguments.

123 It should be recalled that observance of the rights of the defence in the conduct of administrative procedures relating to competition policy constitutes a general principle of EU law whose observance the Courts of the European Union ensure (see judgment of 18 June 2013, *ICF* v *Commission*, T-406/08, EU:T:2013:322, paragraph 115 and the case-law cited).

124 That principle requires that the undertaking concerned 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 and on the documents used by the Commission to support its claim that there has been an infringement of the rules on competition. To that end, Article 27(1) of Regulation No 1/2003 provides that the parties are to be sent a statement of objections. That statement must set out clearly all the essential elements on which the Commission is relying at that stage of the procedure (judgment of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraphs 41 and 42).

125 That requirement is satisfied where the final decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and only takes into consideration facts on which the persons concerned have had the opportunity of stating their views in the course of the procedure (see, to that effect, judgments of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 266, and of 18 June 2013, *ICF* v *Commission*, T-406/08, EU:T:2013:322, paragraph 117).

126 However, the essential facts on which the Commission is relying in the statement of objections may be set out summarily and the decision is not necessarily required to be a replica of the statement of objections, because that statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature (see, to that effect, judgments of 17 November 1987, *British American Tobacco and Reynolds Industries* v *Commission*, 142/84 and 156/84, EU:C:1987:490, paragraph 70; of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 42 and the case-law cited; and of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 267). Thus, it is permissible for the Commission to supplement the statement of objections in the light of the parties' replies, whose arguments show that they have actually been able to exercise their rights of defence. The Commission may also, in the light of the administrative procedure, revise or supplement its arguments of fact or law in support of its objections (judgment of 9 September 2011, *Alliance One International* v *Commission*, T-25/06, EU:T:2011:442, paragraph 181). Consequently, until a final decision has been adopted, the Commission may, in view, in particular, of the written or oral observations of the parties, abandon some or even all of the objections initially made against them and thus alter its position in their favour or decide to add new complaints, provided that it affords the undertakings concerned the opportunity of making known their views in that respect (see judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 115 and the case-law cited).

127 It results from the provisional nature of the legal classification of the facts made in the statement of objections that the Commission's final decision cannot be annulled on the sole ground that the definitive conclusions drawn from those facts do not correspond precisely with that provisional classification (judgment of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 43). The taking into account of an argument put forward by a party during the administrative procedure, without it having been given the opportunity to express an opinion in that respect before the adoption of the final decision, cannot as such constitute a breach of its rights of defence, where taking account of that argument does not alter the nature of the complaints against it (see, to that effect, order of 10 July 2001, *Irish Sugar* v *Commission*, C-497/99 P, EU:C:2001:393, paragraph 24; judgments of 28 February 2002, *Compagnie générale maritime and Others* v *Commission*, T-86/95, EU:T:2002:50, paragraph 447; and of 9 September 2011, *Alliance One International* v *Commission*, T-25/06, EU:T:2011:442, paragraph 182).

128 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 their defence (see judgments of 3 September 2009, *Prym and Prym Consumer* v *Commission*, C-534/07 P, EU:C:2009:505, paragraph 40 and the case-law cited, and of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 44 and the case-law cited).

129 Last, it should be recalled that, according to established case-law, there is a breach of the rights of the defence where it is possible that, as a result of an error committed by the Commission, the outcome of the administrative procedure conducted by the latter might have been different. An applicant undertaking establishes that there has been such a breach where it adequately demonstrates, not that the Commission's decision would have been different in content, but rather that it would have been better able to ensure its defence had there been no error, for example because it would have been able to use for its defence documents to which it was denied access during the administrative procedure (see judgments of 2 October 2003, *Thyssen Stahl* v *Commission*, C-194/99 P,

EU:C:2003:527, paragraph 31 and the case-law cited, and of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 269 and the case-law cited; judgment of 9 September 2015, *Philips* v *Commission*, T-92/13, not published, EU:T:2015:605, paragraph 93).

130 It is in the light of those principles that the Court must first of all examine the applicant's first complaint, that its right to be heard was infringed since it was not in a position to put forward its views, during the administrative procedure, on new material brought to its knowledge at the information meeting held by the Commission on 29 September 2014 and taken into account in the contested decision. That material consists, first, in new figures relating to the calculations of Slovak Telekom's margin squeeze; second, in the fact that the margin for 2005 was positive on the basis of a calculation of the margins period by period (year by year); and, third, in the intention which the Commission showed at that meeting of applying to the surplus a multi-period (multi-year) method of calculating the margins that allowed it to conclude that there was also a negative margin for 2005.

131 As regards the first two items, it should indeed be observed that, according to recital 1010 of the contested decision, the margins identified for 2005 were positive as regards the three service portfolios analysed. That contrasts with the calculation of the margin squeeze for access to Slovak Telekom's local loop that appeared in the statement of objections, which revealed that the margin calculated for that year was negative (see Table 88 and recital 1203 of the statement of objections). Furthermore, it is common ground that, in the contested decision, the Commission did not reproduce all the figures used in order to calculate the margin squeeze in the statement of objections and that that modification resulted in different margins being identified in the contested decision from those provisionally calculated in the statement of objections.

132 However, as the Commission correctly observes in its written pleadings, without being contradicted by the applicant, those changes concerning the calculations of the margins were the result of the figures and calculations supplied by Slovak Telekom itself in reply to the statement of objections being taken into consideration. The fact that those figures and calculations were taken into consideration is apparent, in particular, from recitals 910, 945, 963 and 984 of the contested decision. It is also apparent from recitals 946 (footnote 1405) and 1000 of the contested decision that the Commission took into account, when adopting that decision, the updated calculations of the margin squeeze supplied by Slovak Telekom in its response to the letter of facts (see paragraph 21 above).

133 In doing so, as regards its assessment of the margin squeeze, the Commission did not modify, in the contested decision, the nature of the complaints against Slovak Telekom and, by extension, against the applicant in its capacity as parent company, by holding them liable for facts on which they were not given the opportunity to express their views during the administrative procedure. It merely took account of the objections put forward by Slovak Telekom during that procedure in order to adjust and supplement its analysis of margin squeeze in the statement of objections. As it did so with the specific intention of satisfying the requirements set out in paragraph 128 above, the parties' right to be heard during the administrative procedure did not require that they be given a fresh opportunity to make known their views on the revised calculations of the margin squeeze before the contested decision was adopted.

134 As regards the third item referred to in paragraph 130 above, relating to the multi-period (multi-year) method of calculating the margin squeeze, it should be emphasised that, in paragraph 1281 of its reply to the statement of objections, reproduced in the Commission's defence, Slovak Telekom objected to the exclusive use of the period-by-period (year-by-year) method, which had been proposed by the Commission in the statement of objections.

135 Slovak Telekom claimed, in essence, that, in the telecommunications sector, operators studied their capacity to obtain a reasonable return over a period longer than a year. It thus suggested, in particular, that the examination of a margin squeeze should be supplemented by a multi-period

analysis, in which the total margin would be evaluated over several years. It follows from recital 587 of the applicant's reply to the statement of objections, moreover, that the applicant supported that objection.

136 As is apparent from recital 859 of the contested decision, the Commission used a multi-period (multi-year) approach in order to take account of that objection and in order to establish whether that approach altered its finding that the tariffs charged by Slovak Telekom to the alternative operators for unbundled access to its local loop had entailed margin squeeze between 2005 and 2010.

137 In the context of that additional examination, the result of which is set out in recitals 1013 and 1014 of the contested decision, the Commission identified a total negative margin for each portfolio of services, first, for the period between 2005 and 2010 (Table 39 in recital 1013 of the contested decision) and, second, for the period between 2005 and 2008 (Table 40 in recital 1014 of the contested decision). The Commission inferred, in recital 1015 of the contested decision, that the multi-year (multi-period) analysis did not alter its conclusion as to the existence of margin squeeze resulting from a period-by-period (year-by-year) analysis.

138 It follows from the foregoing that, in the context of the establishment of a margin squeeze in the contested decision, the multi-period (multi-year) analysis was carried out following the objection, by Slovak Telekom in its reply to the statement of objections, and which was supported by the applicant, concerning the period-by-period (year-by-year) calculation method. Furthermore, the multi-period (multi-year) analysis of the margins for unbundled access to Slovak Telekom's local loop was meant to be added to the period-by-period (year-by-year) analysis set out in recitals 1175 to 1222 of that decision, without replacing that analysis. Moreover, the additional multi-period (multi-year) analysis led the Commission to support its finding that there was a margin squeeze on the Slovakian market for broadband services between 12 August 2005 and 31 December 2010.

139 Therefore, as the Commission maintains in essence, the multi-period (multi-year) analysis did not result in the applicant and Slovak Telekom being held liable for facts on which they did not have the opportunity to explain their views during the administrative procedure, owing to the modification of the nature of the objections against them, but resulted only in an additional analysis of the margin squeeze resulting from the tariffs charged by Slovak Telekom for unbundled access to its local loop being carried out, in the light of an objection raised by Slovak Telekom in answer to the statement of objections.

140 In those circumstances, in accordance with the case-law cited in paragraphs 127 and 128 above, the applicant's right to be heard did not require that the Commission, before adopting the contested decision, should give it the opportunity to present fresh observations on the multi-period analysis of margin squeeze for unbundled access to Slovak Telekom's local loop. It should be emphasised that a different solution would be incompatible with the case-law referred to in paragraph 127 above, since it would amount to preventing the contested decision from containing elements on which the parties were not given the specific opportunity to comment during the administrative procedure, even when those elements do not alter the nature of the objections made against them.

141 That conclusion is not called into question by the applicant's argument that, in essence, the method of calculating margin squeeze applied by the Commission in the context of that additional examination would not correspond to the method proposed by Slovak Telekom in its reply to the statement of objections and alleged to be based on the Commission's practice in taking decisions, whereas in the present case it used the multi-period (multi-year) analysis with the aim of increasing the duration of the infringement.

142 First, that argument is based on a misreading of the contested decision in so far as, following the period-by-period (year-by-year) analysis, the Commission had already reached the conclusion that a competitor as efficient as Slovak Telekom could not have replicated profitably between 12 August 2005

and 31 December 2010 Slovak Telekom's retail portfolio comprising broadband services (recital 1012 of the contested decision). It is apparent, in particular, from recital 998 of the contested decision that, according to the Commission, the fact that there was a positive margin between August and December 2005 did not preclude that period being included in the infringement in the form of margin squeeze, since operators consider their ability to earn a reasonable return over a longer period. In other words, the Commission established the duration of the practice leading to the margin squeeze on the basis of the period-by-period (year-by-year) approach and the multi-period (multi-year) approach was used solely as an additional measure.

143 Second, and in any event, it follows from the case-law cited in paragraph 128 above that respect for the applicant's right to be heard required only that the Commission should take account, when adopting the contested decision, of the criticism concerning the method of calculating the margins presented by Slovak Telekom in reply to the statement of objections and shared by the applicant (see paragraph 135 above). On the other hand, that right did not in any way mean that the Commission must necessarily arrive at the result to which the applicant aspired by supporting the criticism submitted by Slovak Telekom, namely the finding that there was no margin squeeze between 12 August 2005 and 31 December 2010.

144 In the interest of completeness, that is to say on the assumption that the Commission was required to offer the applicant a specific opportunity to be heard about the matters referred to in paragraph 130 above before adopting the contested decision, it should be stated that such a requirement would have been met. Admittedly, the time limits which the Commission allowed the applicant to submit its comments on those elements were particularly short. However, it cannot be inferred that they deprived the applicant of any opportunity to be properly heard in that respect, having regard, first, to the very advanced stage of the administrative procedure at which the meeting of 29 September 2014 took place, that is to say, more than 2 years and 4 months after the statement of objections was issued, and, second, to the high degree of knowledge of the file which the applicant may reasonably be considered to have acquired at that time.

145 It follows that the first complaint in the second part of the present plea must be rejected.

146 The second complaint, whereby the applicant maintains that the Commission breached its right to be heard by not allowing it to put forward its point of view during the administrative procedure concerning the corrections and adjustments made in the contested decision of the data supplied by Slovak Telekom for the calculation of the LRAIC, must also be rejected.

147 In that regard, it is indeed the case that, in the contested decision, the Commission did not accept in full the new data concerning the calculation of the LRAIC supplied by Slovak Telekom following the issue of the statement of objections. That finding may be inferred, in particular, from recitals 910, 945 and 963 of the contested decision. However, by analogy with the reasoning followed in paragraph 143 above, the Commission cannot be required to hear the parties again when it envisages that it will not uphold in its final decision all of the objections put forward by them in response to the statement of objections, except where it is induced to modify the nature of the objections upheld against them.

148 As the circumstance referred to in the preceding paragraph did not have the effect of modifying the principal elements of fact and of law on which the accusations upheld against the applicant during the administrative procedure were based, the second part of the first plea must be rejected in its entirety as unfounded.

### *(d) Third part: errors in the calculation of the long run average incremental costs (LRAIC)*

149 In the third part, the applicant takes issue with the Commission for not having correctly calculated Slovak Telekom's LRAIC, that is to say, the costs which Slovak Telekom would not have had to bear if it had not offered the corresponding services. The consultancy report produced by Slovak Telekom as an annex to its reply to the statement of objections ('the consultancy report') proposed that Slovak Telekom's assets be adjusted to the level of an efficient operator that would design a network in an optimal manner in order to respond to current and future demand ('the optimisation adjustments'). However, the Commission did not eventually make such adjustments. More specifically, the Commission did not agree that the current assets should be replaced by their modern equivalents (modern asset equivalent). Nor did it take into account the reduction of the assets on the basis of currently used capacity. That approach calls for criticism on the grounds that the Commission also accepted a re-evaluation of Slovak Telekom's assets in the contested decision, that the adjustment proposed in the consultancy report was indeed based on Slovak Telekom's historical costs and not on the costs of a hypothetical competitor and that those costs had to be assessed by reference to an efficient competitor. In addition, the applicant claims that the calculation of the LRAIC in the consultancy report took account of sufficient reserve capacity for Slovak Telekom and, contrary to the Commission's assertion, did not take a fully efficient competitor as a reference. In the applicant's submission, if that calculation error had not occurred, the Commission would necessarily have concluded that the margins were higher, indeed positive for certain years, owing to a downward re-evaluation of the LRAIC.

150 The Commission disputes that argument.

151 As regards the arguments put forward by the applicant, it should first of all be observed that Slovak Telekom proposed in its reply to the statement of objections, relying on the consultancy report, a method based on current cost accounting, by means of the estimate of upstream costs for 2005 to 2010 on the basis of data from 2011 (recital 881 of the contested decision). In particular, Slovak Telekom maintained, in that reply, that it was necessary, when calculating the LRAIC, to re-evaluate the assets and to take account of the inefficiencies of its network for the broadband offer. As regards, in particular, the taking into account of those inefficiencies, Slovak Telekom proposed that optimisation adjustments should be made, namely, first, the replacement of current assets by their modern, more efficient and less costly equivalents (modern asset equivalent); second, the maintenance as far as possible of technological coherence; and, third, the reduction of assets on the basis of currently used capacity by contrast to installed capacity.

152 In its own calculations of the LRAIC, the applicant thus adjusted the capital cost of the assets and their written-down values in the years 2005 to 2010, as well as the operating costs of those assets, by relying on the weighted average adjustment factor calculated by the author of the consultancy report for 2011 (recital 897 of the contested decision). The applicant claims that the suggested optimisation adjustments reflected the spare capacity identified in the elements of that network, namely assets removed from that network because they were not in productive use, but which had not yet been sold by that operator (recital 898 of the contested decision).

153 The Commission nevertheless refused to make those optimisation adjustments in the contested decision.

154 In the first place, as regards the replacement of existing assets with their more modern equivalents, the Commission stated, in recital 900 of the contested decision, that such a replacement could not be accepted since it amounts to adjusting the costs without properly adjusting the depreciations. The Commission referred to that point in recitals 889 to 893 of the contested decision, in which it expressed doubts about the adjustment, as it was proposed by the applicant, of the costs of assets for the period between 2005 and 2010 suggested by Slovak Telekom. Moreover, the Commission considered, in recital 901 of the contested decision, that such a replacement of existing assets was not

compatible with the equally efficient competitor criterion. The case-law confirmed that the abusive nature of the pricing practices of a dominant operator is in principle determined in relation to its own position. In the present case, the adjustment of the LRAIC suggested by the applicant is based on a collection of hypothetical assets and not on the same assets as those held by that operator.

155 In the second place, as regards the taking into account of the excess capacity of the networks on the basis of 'actually' used capacity, the Commission concluded, in recital 902 of the contested decision, that, since investments are based on a forecast of demand, it was inevitable that, in the context of an *ex post* examination, a certain capacity remains sometimes unused.

156 None of the complaints put forward by the applicant against that part of the contested decision can be upheld.

157 First, the applicant is wrong to claim that there is a contradiction between, on the one hand, the rejection of the optimisation adjustments of the LRAIC and, on the other hand, the acceptance, in recital 894 of the contested decision, of the asset re-evaluation which it proposed. The applicant also cannot claim in the reply that the Commission should have accepted the optimisation adjustments proposed by it on the ground that, as for the asset re-evaluation, the Commission did not have reliable historical costs concerning the optimisation adjustments.

158 The re-evaluation of the assets was based on the assets held by Slovak Telekom in 2011. With respect to that re-evaluation and as is apparent from recitals 885 to 894 of the contested decision, the Commission noted that it did not have at its disposal data better reflecting Slovak Telekom's incremental broadband asset costs for the period between 2005 and 2010. As a result, in the analysis of the margin squeeze in the contested decision, the Commission included Slovak Telekom's current assets proposed by the latter. However, the Commission pointed out that that re-evaluation was capable of leading to an underestimation of downstream asset costs.

159 By comparison, as is apparent from recital 895 of the contested decision, the optimisation adjustments proposed by Slovak Telekom 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. Those adjustments were based on a forecast and on an optimal network model, and not on an estimate reflecting the incremental costs of Slovak Telekom's existing assets.

160 It follows 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 Slovak Telekom. Furthermore, the taking into consideration, by the Commission, of the re-evaluation of current assets proposed by Slovak Telekom, due to the absence of other more reliable data on the LRAIC of that operator, did not suggest that the Commission necessarily accepted the optimisation adjustments of the LRAIC. The Commission was thus 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 Slovak Telekom.

161 Second, the applicant cannot be followed when it disputes the conclusion, in recital 901 of the contested decision, that the optimisation adjustments would lead to a calculation of the LRAIC on the basis of the assets of a hypothetical competitor and not on the assets of the incumbent operator in question, Slovak Telekom.

162 In that regard, it should be noted that, according to settled case-law, the assessment of the lawfulness of the pricing policy applied by a dominant undertaking, in the light of Article 102 TFEU, requires that reference be made, in principle, to pricing criteria based on the costs incurred by the dominant undertaking and on its strategy (see judgments of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 41 and the case-law cited, and of 29 March 2012, *Telefónica and Telefónica*

*de España* v *Commission*, T-336/07, EU:T:2012:172, paragraph 190; see also, to that effect, judgment of 10 April 2008, *Deutsche Telekom* v *Commission*, T-271/03, EU:T:2008:101, paragraph 188 and the case-law cited).

163 In particular, as regards a pricing practice resulting in a margin squeeze, the use of such analytical criteria can establish whether, in accordance with the equally efficient competitor test referred to in paragraph 87 above, that undertaking 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 (judgments of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 42, and of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T-336/07, EU:T:2012:172, paragraph 191; see, to that effect, judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 201).

164 The validity of such an approach is reinforced by the fact that it also conforms to the general principle of legal certainty, since taking into account the costs and prices of the dominant undertaking enables that undertaking, in the light of its special responsibility under Article 102 TFEU, to assess the lawfulness of its own conduct. While a dominant undertaking knows its own costs and prices, it does not as a general rule know those of its competitors (judgments of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 202; of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 44; and of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T-336/07, EU:T:2012:172, paragraph 192).

165 The Court of Justice admittedly stated, in paragraphs 45 and 46 of the judgment of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83), that it could not be ruled out that the costs and prices of competitors may be relevant to the examination of the practice resulting in the margin squeeze. It is apparent however from that judgment that it is only where it is not possible, in the light of the particular circumstances, to refer to the prices and costs of the dominant undertaking that the prices and costs of competitors on the same market should be examined, which the applicant has not claimed in the present case (see, by analogy, judgment of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T-336/07, EU:T:2012:172, paragraph 193).

166 In the present case, first, 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 (recital 900 of the contested decision). That replacement led to a calculation of the margin squeeze on the basis of hypothetical assets, namely assets which do not correspond with those held by Slovak Telekom. The costs relating to Slovak Telekom's assets were thus underestimated (recitals 893 and 900 of the contested decision). Moreover, taking into consideration the excess capacity of the networks on the basis of the 'currently' used capacity would result in excluding Slovak Telekom's assets which are not in productive use (see paragraph 152 above).

167 Therefore, in the light of the principles noted in paragraphs 162 to 165 above, the Commission was able to conclude without committing an error that the optimisation adjustments of the LRAIC proposed by Slovak Telekom would have resulted, during the calculation of the margin squeeze, in the costs incurred by that operator itself between 12 August 2005 and 31 December 2010 being disregarded.

168 Last, the applicant cannot be followed when it claims that, in the contested decision, the Commission infringed the principle that the examination of a margin squeeze must be based on an effective competitor, when it concluded in essence that it was inevitable that there sometimes remains unused capacity (recital 902 of the contested decision). It follows from the principles referred to in paragraphs 162 and 163 above that the examination of a pricing practice resulting in a margin squeeze consists, in essence, in assessing whether a competitor as efficient as the dominant operator is capable of offering the services concerned to final customers otherwise than at a loss. Such an examination is

therefore not carried out by reference to a perfectly efficient operator in the light of market conditions at the time of such a practice. If the Commission had accepted the optimisation adjustments linked to excess capacity, the calculations of Slovak Telekom'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, namely the costs of a competitor more efficient than Slovak Telekom. Therefore, in the present case, although it is not disputed that part of Slovak Telekom's relevant assets remained unused between 12 August 2005 and 31 December 2010, the Commission was able without committing an error to include that part of the assets, in other words the excess capacity, in the calculation of the LRAIC.

169 It follows from the foregoing that the third part of the first plea must be rejected as unfounded, as must that plea in its entirety.

### *2. Second plea: errors of law and of fact with respect to the duration of Slovak Telekom's abusive conduct*

170 By its second plea, the applicant, embracing the argument put forward on this point by Slovak Telekom in Case T-851/14, maintains that the contested decision is vitiated by a manifest error of assessment and infringes the principles of equal treatment and legal certainty in so far as it makes a finding of infringement as from 12 August 2005. The applicant relies in that regard on three complaints. By its first complaint, the applicant claims, in essence, that the Commission was wrong to consider that the implied refusal of access to the local loop began on 12 August 2005, that is to say, on the date on which Slovak Telekom published its reference offer. By its second and third complaints, the applicant maintains in essence that the Commission was wrong to make a finding of margin squeeze in 2005.

#### *(a) Preliminary observations*

…

172 Second, on the substance, it should first of all be borne in mind that, as stated in paragraph 90 above, from the aspect of proving an abuse of a dominant position within the meaning 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 that the conduct is capable of having such an effect. Thus, although the practice of an undertaking in a dominant position cannot be characterised as abusive in the absence of any anticompetitive effect on the market, such an effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is a potential anticompetitive effect (see judgment of 6 December 2012, *AstraZeneca* v *Commission*, C-457/10 P, EU:C:2012:770, paragraph 112 and the case-law cited).

173 In addition, as is apparent from the case-law cited in paragraph 89 above, practices that interfere with the free play of competition, for example by preventing or delaying the entry of competitors to the market, are covered by the prohibition set out in Article 102 TFEU even where they do not cause immediate harm to consumers.

174 In the present case, the infringement of Article 102 TFEU identified by the Commission consisted, according to recital 1497 of the contested decision, in diverse practices of Slovak Telekom constituting a refusal to provide unbundled access to its local loop and a margin squeeze of alternative operators in the context of that access. The practices entailing a refusal to supply consisted, first, in withholding from alternative operators information relating to Slovak Telekom's network that was necessary for the unbundling of local loops; second, in the reduction by Slovak

Telekom of its obligations regarding unbundling resulting from the applicable regulatory framework; and, third, in the fixing by Slovak Telekom of several unfair clauses and conditions in its reference offer in relation to unbundling (see paragraph 92 above).

175 The Commission also found, in recitals 1507 to 1511 of the contested decision, that those diverse practices formed part of the same strategy of exclusion employed by Slovak Telekom, designed to restrict and distort competition on the retail market for fixed broadband services in Slovakia and to protect Slovak Telekom's revenues and market position. It concluded that those practices, for which the applicant also had to be held liable in its capacity as Slovak Telekom's parent company, formed part of an overall plan to restrict competition and thus constituted a single and continuous infringement (recital 1511 of the contested decision).

176 In the present case, and as it confirmed at the hearing, the applicant does not call that classification as a single and continuous infringement into question in its action. On the other hand, by its second plea, it disputes the finding set out in recital 1184 of the contested decision that that single and continuous infringement commenced on 12 August 2005, the date on which Slovak Telekom published its reference offer for unbundled access to its local loop.

177 The Commission rejected, on that point, the arguments put forward by Slovak Telekom during the administrative procedure that, in particular, the infringement for which it is held liable could not have begun at the time of publication of its reference offer, since that offer constituted only a framework contract describing the conditions of access to the local loop and therefore assumed that there would be negotiations with the alternative operators interested in such access, and the refusal to supply could be identified only if such negotiations failed. The Commission emphasised on that point, in recital 1520 of the contested decision, that it had shown that several modalities and conditions set out in the reference offer in order for an alternative operator to obtain unbundled access to Slovak Telekom's local loop were unfair. It considered that the reference offer, which was intended to implement the regulatory unbundling obligation, was required to contain fair modalities and conditions from the outset.

178 In addition, the Commission rejected, in recital 1521 of the contested decision, the applicant's argument that the practice consisting in margin squeeze by Slovak Telekom could not have begun before 1 January 2006, since it had not been possible to identify any negative margin in 2005. First, it referred to its analysis, in recital 998 of the contested decision, according to which that fact did not disprove the existence of margin squeeze between 12 August and 31 December 2005, since, in essence, no alternative operator decided to enter the market in question following a prospective analysis of returns relating to such a short period. Second, the Commission emphasised that that fact could not have an impact on the duration of the infringement, since it also consists in other practices with which it forms a single and continuous infringement.

179 It is against those preliminary observations that it is appropriate to examine the applicant's first complaint, alleging that the Commission was wrong to consider that the implicit refusal of access to the local loop began on 12 August 2005 and, furthermore, the second and third complaints, alleging, in essence, that the Commission erred in concluding that there was a margin squeeze in 2005.

### *(b) The setting of 12 August 2005 as the beginning of the implied refusal of access to Slovak Telekom's local loop*

180 By its first complaint, the applicant claims that the reference offer was limited to fixing a framework, which could not in itself entail any margin squeeze, but had to be supplemented by individual negotiations with prospective candidates for unbundled access to the local loop. In practice, those negotiations led to more favourable conditions for those candidates. Likewise, a refusal to supply can be identified only where such negotiations fail. The applicant submits that the contested decision is

not consistent on that point with the Commission's practice in previous decisions, citing in that regard Decisions C(2004) 1958 final of 2 June 2004 (Case COMP/38.096 — Clearstream, 'the Clearstream Decision') and C(2011) 4378 final of 22 June 2011 (Case COMP/39.525 — Polish telecommunications, 'the Polish Telecommunications Decision'). The limited demand for unbundled access to Slovak Telekom's local loop may be explained, in particular, by the fact that certain alternative operators considered that it was more advantageous to enter the market by using broadband access or by developing their own local infrastructures.

181 The Commission, supported by the intervener, disputes that argument.

182 In that regard, it is common ground that the Chairman of TUSR, by his decision of 14 June 2005, required that Slovak Telekom provide unbundled access to its local loop on fair and reasonable conditions and that it was in order to satisfy that obligation that Slovak Telekom published a reference unbundling offer on 12 August 2005 (see paragraphs 9 and 10 above).

183 Furthermore, the applicant does not dispute the description of the content of the reference offer set out in section 7.6 of the contested decision ('[Slovak Telekom's] unfair terms and conditions'), following which the Commission concluded, in recital 820 of that decision, that the terms and conditions of that offer had been set in such a way as to render unbundled access to the local loop unacceptable for alternative operators.

184 It is apparent from that part of the contested decision that the abusive practices classified by the Commission in that part as 'refusal to supply' result, essentially, from the reference offer itself.

185 Thus, as regards, first, the withholding from alternative operators of information relating to Slovak Telekom's network, which was necessary for the unbundling of the local loop, it is apparent, first of all, from recital 439 of the contested decision that the Commission considered that the reference offer did not contain the basic information concerning the locations of the physical access points and the availability of the local loops in very specific parts of the access network. Furthermore, in recitals 443 to 528 of the contested decision, the Commission did admittedly examine the network information supplied by Slovak Telekom at the request of an alternative operator with a view to unbundling. However, it is also apparent from that part of the contested decision that the modalities of access to such information which the Commission considered to be unfair and therefore to constitute a disincentive for alternative operators resulted from the reference offer itself. The Commission criticised, in particular, in the first place, the fact that the reference offer had not determined the exact scope of the network information that Slovak Telekom would make available to alternative operators, by specifying the categories of information concerned (recital 507 of the contested decision); in the second place, that the reference offer did not provide access to information from non-public information systems until after the framework agreement on access to the local loop had been concluded (recital 510 of the contested decision); and, in the third place, that that offer made such access to information on Slovak Telekom's network conditional on payment of high fees by the alternative operator (recitals 519 and 527 of the contested decision).

186 As regards, second, Slovak Telekom's reduction of the scope of its regulatory obligation concerning unbundled access to the local loop, first of all, it follows from recitals 535 and 536 of the contested decision that the limitation of that obligation to only active lines (see paragraph 32 above), for which the Commission held Slovak Telekom liable, resulted from paragraph 5.2 of the introductory part of its reference offer. Next, it follows, in particular, from recitals 570, 572, 577, 578 and 584 of the contested decision that it was in the light of the stipulations contained in Annex 3 to the reference offer that the Commission inferred that Slovak Telekom had wrongly excluded the conflicting services from its obligation relating to unbundled access to the local loop (see paragraph 33 above). Last, it follows from recital 606 of the contested decision that the rule limiting the use of cable to 25%, imposed by Slovak Telekom for unbundled access to the local loop and considered by the Commission to be unjustified (see paragraph 34 above), followed from Annex 8 to the reference offer.

187 As regards, third, Slovak Telekom's fixing of unfair unbundling conditions regarding collocation, forecasting, repairs, service and maintenance and the provision of a bank guarantee, these all resulted, as shown in section 7.6.4 of the contested decision, from the reference offer published by Slovak Telekom on 12 August 2005. Also, the terms considered unfair by the Commission were contained in Annexes 4, 5, 14 and 15 to that offer as regards collocation (recitals 653, 655 and 683 of the contested decision), in Annexes 12 and 14 as regards the obligation for alternative operators to submit forecasts (recitals 719 and 726 to 728 of the contested decision), Annex 5 as regards the qualification of the local loops (recitals 740, 743, 767, 768 and 774 of the contested decision), Annex 11 as regards the terms and conditions relating to repairs, service and maintenance (recitals 780, 781, 787, 790 and 796 of the contested decision) and Annexes 5 and 17 as regards the bank guarantee required of a candidate alternative operator for unbundled access (recitals 800, 802 to 807, 815 and 816 of the contested decision).

188 It follows that, even on the assumption that certain of those modalities of access were capable of being made more flexible in the context of bilateral negotiations between Slovak Telekom and candidate operators for access, which the applicant merely asserts without providing supporting evidence, the Commission was correct to conclude that the reference offer published on 12 August 2005 had been able to deter from that date the submissions for requests for access by alternative operators, owing to the unfair terms and conditions which they contained.

189 In those circumstances, the Commission was not wrong to consider that, owing to the modalities on access set out in its reference offer published on 12 August 2005, Slovak Telekom had made it more difficult or impossible for alternative operators to enter the retail mass-market for broadband services at a fixed location in Slovakia, in spite of its obligation to do so under the TUSR Decision, and that that conduct was therefore capable of having such negative effects on competition from that date (see, in particular, recitals 1048, 1050, 1109, 1184 and 1520 of the contested decision).

190 That conclusion is not contradicted by the applicant's assertion in the reply that the limited demand of alternative operators to obtain unbundled access to Slovak Telekom's local loop was explained by the fact that wholesale broadband access (WBA) or bitstream, offered through products called 'ISP Gate/ADSL Partner', represented for those operators an interesting alternative for entering the retail market, having regard to the significantly lower investments which it required, and, moreover, by the preference shown by certain alternative operators for entering the market by means of their own local infrastructures. It is sufficient to state that that assertion, whereby the applicant seeks generally to dispute the anticompetitive effects of the practices at issue, is wholly unsubstantiated and is therefore not capable of calling into question the Commission's analysis of those effects in recitals 1049 to 1183 of the contested decision.

191 Nor can the applicant be followed when it disputes the starting date of the infringement taken by the Commission in the present case by reference to the approach taken in the Clearstream Decision and in the Polish Telecommunications Decision. Without there even being any need to establish whether such decisions are capable of coming within the relevant legal framework for assessing the legality of the contested decision, which the Commission disputes, it is sufficient to state that they were adopted in a different context from that of the present case and that they are therefore not capable of establishing that the Commission departed in the contested decision from its previous practice in adopting decisions.

192 Thus, in the case of the Clearstream Decision, it is sufficient to point out that that decision, unlike the contested decision in the present case, was adopted in a context characterised by the absence of any regulatory obligation for the undertaking owning the infrastructure in question to grant other undertakings access to that infrastructure and also by the absence of any obligation placed on that undertaking to publish a reference offer setting out the modalities and conditions of such access.

193 As regards the Polish Telecommunications Decision, the Commission found in that decision that the incumbent operator in question had abused its dominant position on the Polish wholesale market for broadband access and unbundled access to the local loop, by refusing access to its network and refusing to provide wholesale products relating to those markets in order to protect its position on the retail market. In addition, the context of the Polish Telecommunications case was characterised by a regulatory obligation to provide access analogous to the obligation borne by Slovak Telekom in the present case and also by the requirement for the Polish telecommunications operator in question to publish a reference offer for unbundled access to its local loop. However, it is apparent from a detailed analysis of the Polish Telecommunications Decision that the approach followed in that decision is not in any way inconsistent with the approach taken in the contested decision. In the Polish Telecommunications Decision, the Commission observed that the anticompetitive strategy of the dominant operator had essentially materialised only during the negotiations with alternative candidate operators seeking unbundled access to the local loop and access to the dominant operator's wholesale broadband services. Thus, the unreasonable conditions of access resulted from the draft access contracts drawn up by the dominant operator in question in the course of the negotiations with alternative operators. Furthermore, the delay in the process of negotiating the access agreements had by definition not been capable of being identified at the time of publication of the dominant operator's first reference offer. In addition, the limitation of access to its network by the dominant operator was developed at a stage subsequent to the conclusion of the wholesale access agreements with the alternative operators. Furthermore, effective access to subscriber lines was limited after the alternative operator concerned had obtained access to a collocation space or had been authorised to install a correspondence cable. Last, the problems of access to reliable and accurate general information indispensable for alternative operators to take decisions on access had become apparent at each stage of the process of access to the dominant operator's network. The conduct of the dominant operator in the Polish Telecommunications case was therefore different from the practices characterised by the Commission as 'refusal to supply' in the contested decision, which, as is apparent from the analysis set out in paragraphs 184 to 189 above, essentially resulted from the reference offer for unbundled access to Slovak Telekom's local loop itself. Those differences mean that, unlike in the Polish Telecommunications Decision, in which the starting point of the infringement of Article 102 TFEU was set at the date on which the first access negotiations between the dominant operator in question and an alternative operator had begun, several months after the publication of the first reference offer (recital 909 and footnote 1259 of the contested decision), the Commission was justified in taking 12 August 2005, the date of publication of the reference offer, as the starting date of the implied refusal of access to the local loop in the present case.

194 The first complaint, alleging that the Commission erred when it considered that the implied refusal of access to the local loop had begun on 12 August 2005, must therefore be rejected as unfounded.

195 It should be added that the applicant does not dispute the classification as a single and continuous infringement which the Commission applied to all the practices referred to in Article 1(2) of the contested decision, namely (a) withholding from alternative operators network information necessary for the unbundling of local loops; (b) reducing the scope of its obligations regarding unbundled local loops; (c) setting unfair terms and conditions in its Reference Unbundling Offer regarding collocation, qualification, forecasting, repairs and bank guarantees; (d) applying unfair tariffs which do not allow an equally efficient competitor relying on wholesale access to the unbundled local loops of Slovak Telekom to replicate the retail broadband services offered by Slovak Telekom without incurring a loss.

196 In those circumstances, and in so far as the applicant's first complaint, alleging that the Commission erred when it considered that the implied refusal of access to the local loop had begun on 12 August 2005, was rejected (see paragraph 194 above), the Commission was correct to find that the single and continuous infringement forming the subject matter of the contested decision had commenced on 12 August 2005.

197 However, that conclusion does not prevent the Court from examining the second and third complaints put forward by the applicant and from appraising whether Article 1(2)(d) of the contested decision might be annulled in part in that it finds that, during the period between 12 August and 31 December 2005, the applicant applied unfair tariffs which did not allow an equally efficient competitor relying on wholesale access to Slovak Telekom's unbundled local loops to replicate the retail broadband services offered by Slovak Telekom without incurring a loss (see, by analogy, judgment of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraphs 864 and 865 and paragraph 1 of the operative part).

### *(c) The existence of margin squeeze during 2005*

198 By its second and third complaints, the applicant maintains, in essence, that the Commission was wrong to find that margin squeeze had existed during 2005.

199 By its second complaint, the applicant maintains that Slovak Telekom's margin during 2005 was positive, irrespective of the scenario envisaged. As such a positive margin necessarily means that competitors as efficient as Slovak Telekom would not suffer any loss if they entered the market, the Commission was wrong to conclude that there was margin squeeze during that year. It is untrue, moreover, that a decision by a competitor to enter the market in 2005 was not conceivable for a period as short as 4½ months. At that time, the figures for future years were by definition not yet known and could therefore have no influence whatsoever on such an investment decision.

200 By its third complaint, the applicant maintains that the multi-period (multi-year) method of calculating margins, which until then had been applied only additionally and in favour of the undertaking concerned, would have enabled the Commission to identify artificially margin squeeze during years preceding those during which such margin squeeze could actually be established. However, that method cannot be used in order to extend margin squeeze in the past. Since neither Slovak Telekom nor the applicant could foresee the development of tariffs after 2005, the finding that they committed an infringement during that period is contrary to Article 23 of Regulation No 1/2003. The fact that the Commission itself took several years before it was in a position to present a calculation of margin squeeze shows that neither the applicant nor Slovak Telekom could be aware that Slovak Telekom was committing an abuse in the form of such a margin squeeze at the material time.

201 The Commission responds, as regards the second complaint, that the slight positive margin that may have existed in 2005 is without prejudice to the finding that there was margin squeeze from 12 August of that year. That margin squeeze prevented competitors who entered the market from amortising their investments linked with that entry. In addition, contrary to the applicant's assertion, no operator would envisage entering a market without a reasonable prospect of returns over several years.

202 Furthermore, the Commission responds to the third complaint by stating that it did not fix the starting point of the infringement at 12 August 2005 in an arbitrary manner, but did so because that was the date of publication of the reference order and it took account of the period from which Slovak Telekom was required to unbundle access to its local loops. As for the argument alleging infringement of Article 23 of Regulation No 1/2003, the Commission observes that it is sufficient that an undertaking was aware of the elements of fact relating to the abuse of a dominant position which it is alleged to have committed to establish its liability under Article 102 TFEU. In the present case, Slovak Telekom was aware that an equally efficient competitor had, in 2005, no chance of achieving a sufficiently positive margin by entering the market. Contrary to the applicant's assertion, the costs of access to the wholesale market were not essentially at issue. Nor does the applicant explain why the multi-period (multi-year) method can be used only when it is advantageous for the dominant undertaking in question.

203 Last, the Commission maintains that, since it demonstrated the existence of two forms of abuse throughout the infringement period, any finding that there was no margin squeeze in 2005 would not in any event mean that 12 August 2005 could not be taken as the starting date of the infringement. It follows that such a finding would be of no advantage to the applicant.

204 In that regard, it should be borne in mind that the Commission concluded, relying on the 'period-by-period' (year-by-year) approach, that Slovak Telekom had engaged in margin squeeze practices from 12 August 2005. It is apparent from recital 997 of the contested decision that, on the basis of an analysis relating to every year during the period under consideration, an equally efficient competitor using wholesale access to Slovak Telekom's local loop was faced with negative margins and could not replicate profitably the applicant's retail broadband portfolio. In recital 998 of the contested decision, the Commission pointed out that the fact that there was a positive margin for 4 months in 2005 did not disprove that conclusion, given that an entry over 4 months could not be considered as entry on a lasting basis. According to the Commission, operators consider their ability to earn a reasonable return over a longer period, which extends over several years (recital 998 of the contested decision). On that basis, the Commission concluded, in recital 1012 of that decision, that, in the period between 12 August 2005 and 31 December 2010, a competitor as efficient as Slovak Telekom could not have replicated profitably that operator's retail portfolio.

205 However, as was noted in paragraph 162 above, in order to assess the lawfulness of the pricing policy applied by a dominant undertaking, it is necessary, in principle, to refer to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy.

206 In particular, as regards a pricing practice resulting in a margin squeeze, the use of such analytical criteria can establish whether that undertaking 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 paragraph 163 above and the case-law cited).

207 The validity of such an approach is all the more justified by the fact that it also conforms to the general principle of legal certainty, since taking into account the costs and prices of the dominant undertaking enables that undertaking, in the light of its special responsibility under Article 102 TFEU, to assess the lawfulness of its own conduct. While a dominant undertaking knows what its own costs and charges are, it does not, as a general rule, know what its competitors' costs and charges are. Furthermore, an exclusionary abuse also affects potential competitors of the dominant undertaking, which might be deterred from entering the market by the prospect of a lack of profitability (see paragraph 164 above and the case-law cited).

208 It follows that, in order to establish the constituent elements of the practice of a margin squeeze, the Commission, in recital 828 of the contested decision, correctly had recourse to the equally efficient competitor criterion, by demonstrating that the dominant undertaking's downstream operations could not trade profitably on the basis of the wholesale price applied in respect of its downstream competitors and on the retail price applied by the downstream arm of that undertaking.

209 As is apparent from Tables 32 to 35 of the contested decision, the analysis carried out by the Commission resulted, in all the scenarios envisaged and as the latter itself acknowledged in recital 998 of that decision, in a positive margin for the period between 12 August and 31 December 2005.

210 In such circumstances, the Court of Justice has already held that, to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it is, as a general rule, possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term (judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 38).

211 It follows that, during the period between 12 August and 31 December 2005, a competitor as efficient as Slovak Telekom had, in principle, the possibility to compete with the latter on the retail market for broadband services in so far as unbundled access to the local loop was granted to it, and without suffering losses that were unsustainable in the long term.

212 The Court of Justice has indeed held that, if a margin is positive, it is not ruled out that the Commission can, in the context of the examination of the exclusionary effect of a pricing practice, demonstrate that the application of that practice was, by reason, for example, of reduced profitability, likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned (see, to that effect, judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 74). That case-law can be read in conjunction with Article 2 of Regulation No 1/2003, according to which, in any proceedings for the application of Article 102 TFEU, the burden of proving an infringement of that article rests on the party or the authority alleging the infringement, namely, in the present case, the Commission.

213 However, in the present case, it must be noted that the Commission did not demonstrate in the contested decision that Slovak Telekom's pricing practice, during the period between 12 August and 31 December 2005, resulted in such exclusionary effects. However, such a demonstration was required particularly given the presence of positive margins.

214 The mere claim, in recital 998 of the contested decision, that the operators consider their ability to earn a reasonable return over a longer period, lasting several years, cannot constitute such proof. Such a fact, assuming it is established, is based on a prospective examination of profitability, which is necessarily hypothetical. Furthermore, in the present case, those positive margins appeared at the very beginning of the period under consideration, at a time when no negative margin could yet have been found. In those circumstances, it must be concluded that the reason set out in recital 998 of the contested decision does not satisfy the requirement arising from the principle of legal certainty noted in paragraph 164 above, according to which a dominant undertaking must be in a position to assess the conformity of its conduct with Article 102 TFEU.

215 For that same reason, the finding of the negative margins, by means of the application of the multi-period (multi-year) approach, cannot undermine that assessment, since, in the present case, that approach resulted in such a finding only by means of a weighting of the positive margins for 2005 with the negative margins found respectively for the years 2006 to 2010 (recital 1013 of the contested decision) and 2006 to 2008 (recital 1014 of the contested decision).

216 Moreover, in recital 1026 of the contested decision, on the basis of the documents established by Slovak Telekom's regulatory department in April 2005 and relating to a strategy of submission of the reference offer concerning unbundled access to the local loop and ULL prices, the Commission considered that Slovak Telekom knew, from 12 August 2005, that the prices for wholesale access at local loop level were squeezing the margins of alternative operators.

217 Nevertheless, it should be noted that, in the light of positive margins between 12 August and 31 December 2005, the Commission was subject to a specific obligation with regard to the proof of exclusionary effects of the practice of a margin squeeze alleged against Slovak Telekom during that period (see the case-law referred to in paragraph 212 above).

218 Therefore, the Commission's allegation and the documents invoked in support thereof are not sufficient to demonstrate the exclusionary effect of the practice of a margin squeeze alleged against Slovak Telekom and, for example, a reduction of profitability, likely to make it at least more difficult for the operators concerned to exercise their activities on the market at issue.

219 Moreover, sections 9 and 10 of the contested decision, which deal with the anticompetitive effects of Slovak Telekom's conduct, do not contain any examination of the effects of the practice of a margin squeeze alleged during the period between 12 August and 31 December 2005.

220 Therefore, in the light of settled case-law according to which any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed (judgments of 8 July 2004, *JFE Engineering and Others* v *Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, EU:T:2004:221, paragraph 177, and of 12 July 2011, *Hitachi and Others* v *Commission*, T-112/07, EU:T:2011:342, paragraph 58), it must be concluded that the Commission has not provided proof that the practice leading to a margin squeeze by Slovak Telekom had begun before 1 January 2006. Since the contested decision is, consequently, vitiated by an error of assessment on that point, it is not necessary to examine whether that approach also infringed Article 23 of Regulation No 1/2003, as the applicant claims.

221 In the light of the foregoing, the applicant's second plea must be upheld in part and Article 1(2)(d) of the contested decision must be annulled in so far as it declares that, over the course of the period between 12 August and 31 December 2005, the applicant applied unfair tariffs which did not allow an equally efficient competitor relying on wholesale access to Slovak Telekom's unbundled local loops to replicate the retail broadband services offered by Slovak Telekom without incurring a loss.

…

### *4. Fourth plea: misinterpretation of the concept of 'undertaking' within the meaning of EU law and breach of the principle that the penalty must be specific to the offender and the offence, and failure to state reasons*

474 By its fourth plea, the applicant maintains, in the first part, that the contested decision misinterprets the concept of 'undertaking' and infringes the principle that the penalty must be specific to the offender and the offence, in that it imposed on the applicant, for a repeated infringement and for deterrent purposes, a fine of EUR 31 070 000, separate from the fine imposed jointly and severally on Slovak Telekom and the applicant, and, in the second part, that the contested decision is vitiated on that point by a failure to state reasons.

475 It is appropriate to examine, first, the alleged failure to state reasons and, second, the alleged misinterpretation of the concept of 'undertaking' and breach of the principle that the penalty must be specific to the offender and the offence.

#### *(a) The alleged failure to state reasons*

476 By the second part of the fourth plea, the applicant takes issue with the Commission for not having provided in the contested decision any reason why the applicant should bear on its own the increased amounts imposed for a repeated infringement and for a deterrent effect, and for thus having failed to fulfil its obligation to state reasons. It submits that the Commission merely established the aggravating grounds that justified an adjustment of the basic amount of the fine and then announced that the increases in the fine should be borne by the applicant alone. The contested decision does not enable the applicant to understand the reason justifying such an approach, a fortiori because its liability in the present case arises solely from the fact that an infringement committed by its subsidiary Slovak Telekom was imputed to it. As for recitals 1533 and 1535 of the contested decision, cited by the Commission in the context of these proceedings, they do indeed show that the applicant's turnover is higher than Slovak Telekom's. However, those passages of the contested decision do not reveal why Slovak Telekom should escape the fine specifically imposed on the applicant.

477 The Commission, supported by the intervener, disputes that argument.

478 According to settled case-law, the purpose of the obligation to state reasons on which an individual decision is based is to enable the Courts of the European Union to review the legality of that decision and to provide the person concerned with sufficient information to know whether the decision is well founded or whether it may be vitiated by an error enabling its validity to be challenged (see, to that effect, judgments of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, 322/81, EU:C:1983:313, paragraph 14, and of 29 February 2016, *Schenker* v *Commission*, T-265/12, EU:T:2016:111, paragraph 230).

479 In the present case, as regards the part of the fine imposed solely on the applicant and reflecting the increase for repeated infringement of the amount of the fine imposed jointly and severally on the applicant and Slovak Telekom, it follows unambiguously from recitals 1525 to 1531 of the contested decision that that increase was justified by the fact that the applicant, whose liability for the infringement in question was established, had already been penalised for a similar infringement in the Deutsche Telekom decision. Although that passage of the contested decision does not explain why the applicant alone had to be required to bear the consequences of that repeated infringement, and not Slovak Telekom, it follows implicitly from that decision that that result was due to the fact that only the applicant had been held liable for the infringement at issue in the Deutsche Telekom decision and on that basis had been the addressee of that decision.

480 As regards the part of the fine imposed solely on the applicant and reflecting the application of a multiplier of 1.2 for deterrent purposes, the Commission stated in recital 1533 of the contested decision, first, that the applicant's worldwide turnover in 2013 was EUR 60 132 million; second, that the value of sales of the products relevant for the infringement at issue represented less than 0.067% of that turnover; and, third, that the applicant was liable for the infringement committed by Slovak Telekom. The Commission inferred, in recitals 1534 and 1535 of the contested decision, that the applicant had, on the basis of point 30 of the 2006 Guidelines, to be fined a greater amount than the basic fine increased by 50% for repeated infringement, in order to ensure that the fine would have a sufficiently deterrent effect. Although that passage of the contested decision does not explain why the application of the multiplier of 1.2 was not also to be borne by Slovak Telekom, it follows implicitly from the reasoning followed by the Commission that the reason for that approach was that that subsidiary's turnover was much lower than the applicant's at the time when the contested decision was adopted, and that the fine of EUR 38 838 000 thus had a sufficiently deterrent effect for that subsidiary.

481 It follows that, even though the reasoning on which the contested decision is based appears to be cursory so far as the fine imposed individually on the applicant is concerned, it provided the applicant with sufficient information to ascertain whether the contested decision was well founded on that point and thus enabled the applicant to challenge its validity. Likewise, that reasoning allowed the Court to review the legality of the contested decision as regards the fine imposed individually on the applicant.

482 The second part of the fourth plea, alleging failure to state reasons, must therefore be rejected.

***(b) Misinterpretation of the concept of 'undertaking' within the meaning of EU law and breach of the principle that the penalty must be specific to the offender and the offence***

483 By the first part of its fourth plea, the applicant observes that the specific fine imposed on it in the contested decision is the consequence of two circumstances which the Commission took into account in the contested decision, namely, first, the size of the undertaking of which it forms part, which according to the Commission justified the application of a multiplier of 1.2 to the fine, and, second, the fact that it had already been held liable for a similar infringement in the Deutsche Telekom Decision, which justified an increase of the basic amount of the fine of 50%. However, the applicant emphasises that, in the contested decision, the Commission holds it liable not because of its direct participation in the facts constituting the infringement, but because of its links with Slovak Telekom. In addition, according to the contested decision, the applicant and Slovak Telekom were part of the

same undertaking not only throughout the infringement period but also on the date on which it adopted the Deutsche Telekom Decision, as the applicant's majority shareholding in Slovak Telekom's capital dates from 4 August 2000 and the structure of that shareholding has since remained unaltered.

484 Having regard to those circumstances, the applicant maintains that the Commission misinterpreted the concept of 'undertaking' in EU law and infringed the principle that the penalty must be specific to the offender and the offence when it imposed a separate fine on the applicant. That principle requires, in accordance with Article 23(3) of Regulation No 1/2003, that the amount of the fine be determined by reference to the gravity of the infringement in respect of which the undertaking concerned is held individually liable and the duration of that infringement. Thus, it follows from the case-law of the Court of Justice that the Commission may impose different fines only on different undertakings and not on different companies when they form part of the same undertaking. The principle that the penalty must be specific to the offender and the offence does not apply to the internal relationship between different legal persons of which an undertaking is composed. As the Commission's previous practice in adopting decisions confirms, a separate fine is justified only where, from a legal point of view, the composition of the undertaking concerned has evolved during the relevant period and where different undertakings may therefore be identified. Since that was not the position in the present case, the Commission could not impose a higher fine on the applicant than that imposed on Slovak Telekom without disregarding the principle that the penalty must be specific to the offender and the offence. Furthermore, subject to changes in the structure of the undertaking liable for the infringement, the upper limit of 10% laid down in Article 23(2) of Regulation No 1/2003 must be calculated on the basis of the overall turnover of the undertaking concerned. As regards repeated infringement, the applicant maintains that, since it was the applicant itself that committed the infringement penalised in the Deutsche Telekom Decision, it is not appropriate to determine whether Slovak Telekom was already part of the undertaking liable for that infringement at the time when it was committed. The only relevant consideration at that stage lies in the fact that the latter undertaking committed that infringement and that the company in the group that is to be penalised now is currently part of the same undertaking.

485 The applicant further adds, as regards the risk of repeated infringement, that it might in any event be considered in the present case that Slovak Telekom not only already formed part of the undertaking responsible for the infringement penalised in the Deutsche Telekom Decision, but had been aware of that infringement, given the wide publicity attending the decision penalising the infringement. As regards the deterrent effect, the applicant emphasises in essence that, if the Commission's reasoning is followed, it and Slovak Telekom are part of the same undertaking and it is therefore incorrect to rely on their different sizes for the purposes of calculating the amount of the fine.

486 Last, the applicant maintains, in the alternative, that the Commission does not have a discretion to decide freely, without an objective reason, to impose a fine on one company in a group and not on another company in the same group. In the present case, it is inappropriate to favour the company that carried out the acts constituting the infringement and to afford less favourable treatment to its parent company, whose liability is purely derivative.

487 The Commission disputes those arguments. It contends that the mere fact that the applicant owned 51% of Slovak Telekom's share capital at the time when the infringement penalised in the Deutsche Telekom Decision was committed does not mean that Slovak Telekom belonged to the undertaking that committed that infringement. The applicant's argument is based, on that point, on a false premiss, since the undertaking responsible for the abuse of a dominant position at issue in the Deutsche Telekom Decision was composed solely of Deutsche Telekom and not the applicant and Slovak Telekom. Contrary to the applicant's contention, when the Commission penalises an infringement of competition law, it has a broad discretion to take account of the separate situations of the companies within a group. The Court of Justice has never suggested that such a discretion is limited to situations in which the composition of the undertaking concerned has changed.

488 That conclusion is not incompatible with the principle that the penalty must be specific to the offender and the offence, which implies only that the amount of the fine must be determined by reference to the gravity of the infringement for which the undertaking concerned is held to be individually liable. It follows that the penalty applied to the legal persons that make up the undertaking that committed the infringement cannot exceed what is justified having regard to the infringement. On the other hand, it does not follow from the principle that the penalty must be specific to the offender and the offence that the Commission is required to impose the same fine on all the legal persons that make up the undertaking in question.

489 In the present case, the Commission used its broad discretion when it considered that Slovak Telekom, which is a relatively small company, was not to be held liable for payment of all the fines imposed. Conversely, an increase for deterrent purposes was justified in the applicant's case, since it is a very large company and since a smaller fine would not have had a deterrent effect on it. The Commission emphasises in that regard that, since the case-law accepts that it is free not to penalise a parent company even though it belongs to an undertaking that has infringed EU competition law, it should a fortiori be in a position, for objective reasons, to impose on a company belonging to an undertaking that is liable for an infringement only part of the overall fine imposed. The applicant, moreover, has put forward no argument capable of establishing that it was unlawful for the Commission to apply to it the aggravating circumstance of repeated infringement as well as the increase for deterrent purposes.

490 The Commission further emphasises that a presumption that the applicant exercised decisive influence over Slovak Telekom's conduct on the market did not apply either when it committed the infringement that gave rise to the Deutsche Telekom Decision or during the period when it committed the infringement penalised in the contested decision. In the absence of actual proof that Slovak Telekom and the applicant were already part of the same undertaking at the time when the infringement at issue in the Deutsche Telekom Decision was committed, the Commission could not increase the fine imposed on Slovak Telekom on the ground of repeated infringement. On the other hand, since the applicant was the addressee of the Deutsche Telekom Decision, the Commission considers that it had to be in a position to apply an increase for repeated infringement to the applicant, without a more thorough investigation being necessary in order to determine whether it and Slovak Telekom already formed the same undertaking at the time of the infringement penalised in that decision. As for the increase in the fine for deterrent purposes, the Commission indeed accepts that it could also have applied that increase to Slovak Telekom, since it formed part of the undertaking liable for the infringement of competition law penalised in the present case. The Commission maintains, however, that it was on the basis of its broad discretion that it was able to consider it more appropriate not to take such an approach.

*(1) A reminder of the principles*

491 It should first of all be borne in mind that the authors of the Treaties chose to use the concept of 'undertaking' to designate the perpetrator of an infringement of competition law, who is liable to be punished pursuant to Article 101 or 102 TFEU (see judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 46 and the case-law cited).

492 EU competition law thus refers to the activities of undertakings and the concept of an 'undertaking' covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (see judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 47 and the case-law cited). In that context, the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (see judgments of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraph 64 and the case-law cited, and of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 48 and the case-law cited).

493 It follows that, when such an economic entity infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement (see judgments of 20 January 2011, *General Química and Others* v *Commission*, C-90/09 P, EU:C:2011:21, paragraphs 35 and 36 and the case-law cited, and of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 49 and the case-law cited).

494 Furthermore, for the purposes of applying and enforcing decisions adopted by the Commission pursuant to Articles 101 and 102 TFEU, it is necessary to identify an entity possessing legal personality to be the addressee of the decision finding and penalising an infringement of one of those provisions (see, to that effect, judgment of 27 March 2014, *Saint-Gobain Glass France and Others* v *Commission*, T-56/09 and T-73/09, EU:T:2014:160, paragraph 312 and the case-law cited). An infringement of EU competition law must thus be imputed unequivocally to a legal person on whom fines may be imposed and to whom the statement of objections will be addressed (see, to that effect, judgments of 5 March 2015, *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 89 and the case-law cited; of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 50; and of 27 March 2014, *Saint-Gobain Glass France and Others* v *Commission*, T-56/09 and T-73/09, EU:T:2014:160, paragraph 312 and the case-law cited).

495 In that regard, neither Article 23(2)(a) of Regulation No 1/2003 nor the case-law determines which legal or natural person the Commission is obliged to hold responsible for the infringement or to punish by the imposition of a fine (see judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 51 and the case-law cited).

496 On the other hand, the unlawful conduct of a subsidiary may be imputed to its parent company in particular where, although it has separate legal personality, that subsidiary does not decide independently on its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (see judgments of 10 September 2009, *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraphs 58 and 72 and the case-law cited, and of 18 January 2017, *Toshiba* v *Commission*, C-623/15 P, not published, EU:C:2017:21, paragraph 45 and the case-law cited).

497 In such a case, according to the settled case-law of the Court of Justice, the parent company to which the unlawful conduct of its subsidiary is attributed is held individually liable for an infringement of the EU competition rules which it itself is deemed to have infringed, because of the decisive influence which it exercised over the subsidiary and by which it was able to determine the subsidiary's conduct on the market (see judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 56 and the case-law cited).

498 Thus, where the parent company's liability is purely derivative, that is to say, when it is incurred solely because of one of its subsidiary's direct participation in the infringement, that liability arises from the subsidiary's unlawful conduct, which is attributed to the parent company in view of the economic unit formed by those companies. Consequently, the parent company's liability necessarily depends on the facts constituting the infringement committed by its subsidiary and to which its liability is inextricably linked (judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 61).

499 It is for that reason that the Court of Justice has made clear that, in a situation in which the parent company's liability is purely derived from that of its subsidiary and in which no factor individually reflects the conduct for which the parent company is held liable, the parent company's liability cannot exceed that of its subsidiary (see judgments of 17 September 2015, *Total* v *Commission*, C-597/13 P, EU:C:2015:613, paragraph 38 and the case-law cited, and of 19 January 2017, *Commission* v *Total and*

*Elf Aquitaine*, C-351/15 P, EU:C:2017:27, paragraph 44 and the case-law cited; see also, to that effect, judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 62).

500 It is in the light of those principles that the Court must examine, in the first place, the part of the fine imposed solely on the applicant in respect of repeated infringement and, in the second place, the part of the fine imposed solely on the applicant for deterrence.

*(2) The part of the fine imposed on the applicant alone in respect of repeated infringement*

501 By the argument which it puts forward in support of the first part of the fourth plea, the applicant claims that, in so far as its purely derivative liability for the infringement at issue in the present case should be confirmed, the Commission was not entitled to impute to it alone, without imputing to Slovak Telekom, the consequences of the repeated infringement resulting from the similar infringement previously penalised in the Deutsche Telekom Decision.

502 However, that argument cannot be accepted.

503 Admittedly, as the applicant submits, the Court of Justice has held that the EU law principle of personal liability for an infringement and the principle that the penalty must be specific to the offender and the offence, which must be complied with when the Commission exercises its power to impose penalties for infringements of competition law, relate only to the undertaking per se, not the natural or legal persons forming part of the undertaking (judgment of 10 April 2014, *Commission and Others* v *Siemens Österreich and Others*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 56).

504 The fact nonetheless remains that the principle that the penalty must be specific to the offender and the offence must be reconciled with the principle, resulting from the case-law cited in paragraph 499 above, that certain factors that individually characterise the parent company's own conduct may justify the imposition on the parent company of a heavier penalty than that resulting from the imputation to it of the infringement committed by its subsidiary.

505 In that regard, this Court has already held that, although the unity of the conduct of an undertaking on the market justifies that, in the case of an infringement of the competition rules, the different companies that formed part of the undertaking throughout the infringement period being, in principle, all held jointly and severally liable for payment of the same amount of the fine, an exception must be made where there are aggravating or mitigating circumstances and, more generally, circumstances that justify a variation in the amount of the fine which apply only in respect of some of those companies and not others. The Court thus inferred that an entity in respect of which the aggravating circumstance of repeated infringement has not been found cannot be held jointly and severally liable, with an entity in respect of which that circumstance has been found, for the part of the fine corresponding to the increase for repeated infringement (see, to that effect, judgment of 23 January 2014, *Evonik Degussa and AlzChem* v *Commission*, T-391/09, not published, EU:T:2014:22, paragraph 271).

506 It follows that the aggravating circumstance of repeated infringement may constitute a factor that individually characterises the conduct of a parent company and justifies the extent of its liability exceeding that of its subsidiary from which that liability is wholly derived (see, to that effect, judgment of 29 February 2016, *UTi Worldwide and Others* v *Commission*, T-264/12, not published, EU:T:2016:112, paragraph 332).

507 In the present case, first, the applicant does not deny that it was the only addressee of the Deutsche Telekom Decision and that Slovak Telekom was not held liable for the infringement penalised in that decision.

508 Thus, the applicant's liability established in the Deutsche Telekom Decision, which in the meantime has become final, is a factor that individually characterises the conduct in respect of which the applicant was held liable in the present case.

509 Second, it is true that Slovak Telekom was already part of the Deutsche Telekom group during a significant part of the infringement penalised in the Deutsche Telekom Decision and also at the time of adoption of that decision, which was not addressed to it.

510 However, it follows from the case-law that the liability of a company which was not an addressee of a decision finding a first infringement of EU competition law, but which is an addressee of a decision imposing a fine on it in respect of its participation in a new similar infringement, can be increased on the ground of repeated infringement only in so far as the Commission provides, in the latter decision, a statement of reasons that enables that company to understand in what capacity and to what extent it was involved in the first infringement (see, to that effect, judgments of 8 May 2013, *Eni* v *Commission*, C-508/11 P, EU:C:2013:289, paragraph 129, and of 5 March 2015, *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 98 and the case-law cited).

511 In the present case, there is nothing to suggest that Slovak Telekom was involved, in any capacity whatsoever, in the infringement penalised by the Commission in the Deutsche Telekom Decision and that that infringement could also be imputed to it.

512 In those circumstances, if the applicant's argument that the Commission ought to have applied the aggravating circumstance of repeated infringement to Slovak Telekom were upheld, that would amount to holding that subsidiary liable for the earlier conduct of the applicant, its parent company. However, the Court of Justice has held that it was not possible to impute to a company all of the acts of a group if that company was not identified as the legal person at the head of that group with responsibility for coordinating the group's activities. (judgment of 2 October 2003, *Aristrain* v *Commission*, C-196/99 P, EU:C:2003:529, paragraph 98).

513 In the present case, it is common ground that Slovak Telekom was not at the head of the undertaking that committed the infringement penalised by the Deutsche Telekom Decision, as that infringement was committed directly by the applicant alone. It follows that only the applicant took part in both the infringement penalised in the Deutsche Telekom Decision and the infringement penalised in the contested decision in the present case, which individually characterises its conduct.

514 In the light of the foregoing, it must be concluded that the Commission did not err when, in the contested decision, it increased the fine on the ground of repeated infringement with regard to the applicant alone.

*(3) The part of the fine imposed on the applicant alone for deterrence*

515 It should be borne in mind that the concept of 'deterrence' is one of the factors to be taken into account in calculating the amount of the fine. It is settled case-law that the fines imposed for infringements of Articles 101 and 102 TFEU, as laid down in Article 23(2) of Regulation No 1/2003, are designed to penalise the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other economic operators from infringing, in future, the rules of EU competition law. The link between, first, undertakings' size and global resources and, second, the need to ensure that a fine has deterrent effect cannot be denied. Thus, when the Commission calculates the amount of a fine it may take into consideration, inter alia, the size and the economic power of the undertaking concerned (see judgments of 17 June 2010, *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 102 and the case-law cited, and of 5 June 2012, *Imperial Chemical Industries* v *Commission*, T-214/06, EU:T:2012:275, paragraph 142 and the case-law cited).

516 The fact that the size and global resources of the undertaking in question are taken into consideration in order to ensure that the fine has sufficient deterrent effect is justified by the impact it should have on that undertaking, since the penalty must not be negligible in the light, particularly, of its financial capacity (see, to that effect, judgments of 5 June 2012, *Imperial Chemical Industries* v *Commission*, T-214/06, EU:T:2012:275, paragraph 143 and the case-law cited, and of 6 February 2014, *Elf Aquitaine* v *Commission*, T-40/10, not published, EU:T:2014:61, paragraph 312 and the case-law cited). Thus, it has been held inter alia that the objective of deterrence which the Commission is entitled to pursue when setting the amount of a fine can be properly achieved only if regard is had to the situation of the undertaking at the time when the fine is imposed (see judgment of 5 June 2012, *Imperial Chemical Industries* v *Commission*, T-214/06, EU:T:2012:275, paragraph 143 and the case-law cited; see, to that effect, judgment of 9 December 2014, *Lucchini* v *Commission*, T-91/10, EU:T:2014:1033, paragraph 314 and the case-law cited).

517 Moreover, in so far as an undertaking with a very high turnover is more readily able to raise the necessary funds to pay its fine, the Commission is entitled, as stated in point 30 of the 2006 Guidelines, to increase the fine on that basis in order to ensure that it has a sufficiently deterrent effect (see, to that effect, judgments of 17 May 2011, *Elf Aquitaine* v *Commission*, T-299/08, EU:T:2011:217, paragraph 253; of 6 March 2012, *UPM-Kymmene* v *Commission*, T-53/06, not published, EU:T:2012:101, paragraph 76 and the case-law cited; and of 6 February 2014, *Elf Aquitaine* v *Commission*, T-40/10, not published, EU:T:2014:61, paragraph 352).

518 It has also been held that the total turnover of the undertaking concerned is the figure that gives an indication of the size of the undertaking and of its economic power, which must be known in order to assess whether a fine will deter it (see, to that effect, judgment of 9 July 2003, *Cheil Jedang* v *Commission*, T-220/00, EU:T:2003:193, paragraph 96 and the case-law cited; see also, to that effect, judgment of 22 May 2008, *Evonik Degussa* v *Commission*, C-266/06 P, not published, EU:C:2008:295, paragraph 120).

519 In the circumstances of the present case, first of all, it should be emphasised that, as the Commission correctly found, the applicant and Slovak Telekom formed the same economic unit during the period in question and that the applicant's liability for the infringement forming the subject matter of the contested decision is purely derivative from that of its subsidiary.

520 Next, it should be borne in mind that the case-law does indeed accept that a parent company may receive a fine greater than that imposed on its subsidiary, even though the former's liability is purely derived from the latter's. However, that may be so only where there is a factor that individually characterises the conduct of the parent company (see the case-law cited in paragraph 499 above). Where, as in the present case, the Commission, in order to assess the gravity of the infringement committed by the undertaking and to calculate the fine to be imposed on it, relies on the subsidiary's turnover, the turnover of the parent company, even if it is considerably higher than the subsidiary's, is not a factor of such a kind as to characterise the individual conduct of the parent company in committing the infringement attributed to the undertaking, as the parent company's liability in that regard is purely derivative from the liability of its subsidiary. Furthermore, the mere finding of a turnover is an element of fact that cannot individualise the parent company's conduct. The Commission was therefore not entitled, in order to justify the application of the specific weighting for deterrence to the applicant, to take its turnover into consideration.

521 Last, the Commission cannot be followed when it relies on the discretion which it has when setting the amount of fines penalising infringements of Article 101 and 102 TFEU. It is the case that, according to the case-law, Article 23(2) of Regulation No 1/2003 leaves the Commission a discretion in that regard. However, that provision limits the exercise of that discretion by establishing objective criteria to which the Commission must adhere (see, to that effect, judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 55). Such objective

factors do indeed include the concept of 'undertaking' to which that provisions refers and which, as observed in paragraph 492 above, must be understood as designating an economic unit even if in law that economic unit is made up of several natural or legal persons.

522 In the present case, the Commission has established that the applicant exercised decisive influence over Slovak Telekom during the period under consideration and for that reason imputed liability for the infringement forming the subject matter of the contested decision to the economic unit consisting of those two companies. It must therefore be considered that the Commission's approach, consisting in imposing on the applicant the consequences of the application of a multiplier of 1.2, has no objective justification.

523 It follows from the foregoing that the Commission misinterpreted the concept of 'undertaking' in EU law when, in the contested decision, it imposed on the applicant a multiplier of 1.2 for deterrent purposes.

524 The fourth plea must therefore be upheld to that extent alone and point (b) of the first paragraph of Article 2 of the contested decision must be annulled on the ground that it imposes on the applicant the multiplier of 1.2 for deterrent purposes.

### *5. Fifth plea: errors in the calculation of the amount of the fine imposed jointly and severally on Slovak Telekom and the applicant*

525 By its fifth plea, the applicant maintains that the Commission made a number of errors when calculating the amount of the fine imposed jointly and severally on it and Slovak Telekom. This plea, in which the applicant declares that it supports the arguments set out by Slovak Telekom in its own action, is divided into two parts, which should be examined in turn.

#### *(a) First part: manifest error of assessment and breach of the principle of equal treatment on the ground that the amount of the fine was calculated by reference to Slovak Telekom's turnover in 2010*

526 The applicant maintains, in the first part, that, in calculating the basic amount of the fine by reference to Slovak Telekom's turnover in 2010 on the market for unbundled access to the local loop and on the retail market for broadband services at a fixed location, the Commission not only made a manifest error of assessment but also infringed the principle of equal treatment. Although the contested decision is consistent in that regard with point 13 of the 2006 guidelines, it follows from the Commission's previous practice in taking decisions that that rule must not be applied when the turnover during the last full year of participation in the infringement is significantly different from the annual average of relevant sales during the first years of such participation. In the present case, Slovak Telekom's relevant turnover rose by 133% between 2005 and 2010. As such an increase is significant, the turnover achieved in 2010 is not on its own sufficiently representative.

527 In those circumstances, in the applicant's submission, it was for the Commission to calculate the basic amount of the fine by reference to the average annual turnover achieved throughout the infringement period, namely between 2005 and 2010. By departing from its previous practice in taking decisions on the ground that the abovementioned increase in turnover was not exponential, the Commission infringed the principle of equal treatment. Last, the Commission's assertion that that increase in turnover may be explained by Slovak Telekom's alleged abusive conduct on the market is the result of mere speculation. That increase is attributable to the rapid growth of broadband markets throughout the infringement period and not to an increase in Slovak Telekom's market shares over that period.

528 The Commission, supported by the intervener, disputes those arguments.

…

530 As regards the substance, it is necessary, first of all, as regards the first part of the plea, to note that Article 23(3) of Regulation No 1/2003 provides that, in fixing the amount of the fine, regard must be had both to the gravity and to the duration of the infringement.

531 Moreover, it should be noted that, according to point 13 of the 2006 Guidelines, 'in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA' and that, for that purpose, it 'will normally take the sales made by the undertaking during the last full business year of its participation in the infringement'.

532 It is apparent, moreover, from the case-law that the proportion of the turnover accounted for by the goods or services in respect of which the infringement was committed gives a proper indication of the scale of the infringement on the relevant market, since the turnover in those goods or services constitutes an objective criterion giving a proper measure of the harm which that practice does to normal competition (see, to that effect, judgment of 28 June 2016, *Portugal Telecom* v *Commission*, T-208/13, EU:T:2016:368, paragraph 236 and the case-law cited).

533 Point 13 of the 2006 Guidelines thus aims, as regards an infringement of Article 102 TFEU, to adopt as the starting point for the calculation of the amount of the fine imposed on the undertaking at issue an amount which reflects the economic significance of the infringement (see, to that effect, judgments of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 76; of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 57; and of 23 April 2015, *LG Display and LG Display Taiwan* v *Commission*, C-227/14 P, EU:C:2015:258, paragraph 53).

534 However, it should also be noted that the self-limitation of the Commission's discretion arising from the adoption of the 2006 Guidelines is not incompatible with that institution maintaining a substantial margin of discretion. Those guidelines display flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with the provisions of Regulation No 1/2003, as interpreted by the EU Courts (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 96 and the case-law cited), and with other rules and principles of Union law. In particular, point 13 of the 2006 Guidelines itself states that the Commission must 'normally' use the sales made by the undertaking during the last full business year of its participation in the infringement for the calculation of the amount of the basic fine (see, to that effect, judgment of 9 September 2015, *Samsung SDI and Others* v *Commission*, T-84/13, not published, EU:T:2015:611, paragraph 214).

535 In the present case, it is apparent from recitals 1490 to 1495 of the contested decision that, in order to determine the basic amount of the fine imposed jointly and severally on the applicant and on Slovak Telekom, the Commission took account of the sales made by Slovak Telekom during the last full business year of its participation in the infringement, namely the turnover achieved by that operator on the market for access to unbundled local loops for fixed retail broadband in 2010. The Commission thus applied point 13 of the 2006 Guidelines.

536 The applicant cannot be followed when it claims that the Commission made a manifest error of assessment by not deviating from that rule in the present case, despite the sharp increase in Slovak Telekom's turnover during the period under consideration.

537 On the one hand, although the applicant claims that, between 2005 and 2010, Slovak Telekom's relevant turnover increased by 133%, from EUR 31 184 949 to EUR 72 868 176, it does not however put forward any evidence to establish that the latter turnover, achieved during the last full business

year of the infringement, did not constitute, at the time when the Commission adopted the contested decision, an indication of its true size, its economic power on the market and the extent of the infringement in question.

538 On the other hand, the applicant cannot be followed when it takes issue with the Commission for having infringed the principle of equal treatment in the present case, in that it departed from its previous practice in taking decisions on the ground that the abovementioned increase in turnover was not exponential.

539 In that regard, it is indeed true that respect for the principle of equal treatment, which precludes comparable situations being treated differently and different situations being treated in the same way, unless such treatment is objectively justified, is binding on the Commission when it imposes a fine on an undertaking for infringement of the rules on competition, as on every institution in all of its activities (judgments of 29 June 2012, *E.ON Ruhrgas and E.ON* v *Commission*, T-360/09, EU:T:2012:332, paragraph 261, and of 9 September 2015, *Philips* v *Commission*, T-92/13, not published, EU:T:2015:605, paragraph 204).

540 Nonetheless, it is clear from settled case-law that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there might be discrimination since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same (see judgment of 24 September 2009, *Erste Group Bank and Others* v *Commission*, C-125/07 P, C-133/07 P and C-137/07 P, EU:C:2009:576, paragraph 233 and the case-law cited; judgments of 16 June 2011, *Heineken Nederland and Heineken* v *Commission*, T-240/07, EU:T:2011:284, paragraph 347; and of 27 February 2014, *InnoLux* v *Commission*, T-91/11, EU:T:2014:92, paragraph 144).

541 Thus, previous decisions by the Commission imposing fines can be relevant from the point of view of observance of the principle of equal treatment only where it is demonstrated that the facts of the cases in those other decisions, such as markets, products, the countries, the undertakings and periods concerned, are comparable to those of the present case (see judgments of 13 September 2010, *Trioplast Industrier* v *Commission*, T-40/06, EU:T:2010:388, paragraph 145 and the case-law cited; of 29 June 2012, *E.ON Ruhrgas and E.ON* v *Commission*, T-360/09, EU:T:2012:332, paragraph 262 and the case-law cited; and of 9 September 2015, *Philips* v *Commission*, T-92/13, not published, EU:T:2015:605, paragraph 205 and the case-law cited).

542 However, in the present case, the applicant puts forward no evidence to establish that the facts of the cases relating to the previous decisions to which it refers, namely the Polish Telecommunications Decision, Decision C(2010) 8761 final of 8 December 2010 (Case COMP/39.309 — LCD — Liquid Crystal Display) and Decision C(2009) 5355 final of 8 July 2009 (Case COMP/39.401 — E.ON/GDF), are comparable with those of the present case. The applicant merely cites those three decisions, observing that the undertakings concerned had shown a steep increase in their turnover throughout the infringement period and that the Commission had in each case used those undertakings' average annual turnovers in order to calculate the basic amount of the fine.

543 In any event, it should be stated that the increases in turnover established over the infringement periods in question in those three decisions were significantly higher than in the present case. Thus, the Commission stated in its written pleadings that the net increase in turnover stated in recital 896 of the Polish Telecommunications decision came, over the infringement period, to more than 3 000%. Furthermore, in answer to a written question put by the Court, the Commission stated at the hearing that, over the whole period of the infringements in question, the relevant increases came to 521.58% on one market and to 422.65% on a second market in the case of the infringement penalised in Decision C(2010) 8761 final and to 261% in the case of the infringement penalised in Decision C(2009) 5355 final.

544 It follows from the foregoing that, by taking into account in the present case the turnover achieved by Slovak Telekom during the year ending 31 December 2010, namely the last full business year of participation in the infringement, and by thus complying with its own rule set out in point 13 of the 2006 Guidelines, the Commission did not exceed the limits of its discretion concerning the determination of the amount of fines.

545 The first part of the fifth plea must therefore be rejected as unfounded.

***(b) Second part: an error of calculation resulting from the inclusion of 2005 in the infringement period***

546 In the second part, the applicant claims that, since 2005 was incorrectly included in the infringement period, it is wrong that that year was taken into account for the purpose of calculating the basic amount of the fine imposed jointly and severally on it and Slovak Telekom.

547 The Commission contends that this argument must be rejected, since in its view the inclusion of 2005 in the infringement period was correct.

548 It follows from the reasoning set out in paragraphs 172 to 196 above, in answer to the second plea, that the Commission did not err when it concluded that the reference offer published by Slovak Telekom on 12 August 2005 might have deterred from that date the submission of requests for unbundled access to Slovak Telekom's local loop by alternative operators owing to the unfair terms and conditions which it contained and that, accordingly, the Commission had been correct to conclude that the single and continuous infringement forming the subject matter of the contested decision had begun on that date.

549 On the other hand, and still in answer to the second plea, the Court considered that Article 1(2)(d) of the contested decision must be annulled in so far as that provision found that, during the period between 12 August and 31 December 2005, the applicant applied unfair tariffs which did not allow an equally efficient competitor relying on wholesale access to Slovak Telekom's unbundled local loops to replicate the retail broadband services offered by Slovak Telekom without incurring a loss (see paragraph 221 above).

550 It follows from all of the foregoing that Article 1(2)(d) of the contested decision must be annulled in so far as it declares that, during the period between 12 August and 31 December 2005, the applicant applied unfair tariffs which did not allow an equally efficient competitor relying on wholesale access to Slovak Telekom's unbundled local loops to replicate the retail broadband services offered by Slovak Telekom without incurring a loss. As a result, and for the reasons adopted in paragraphs 515 to 524 above, Article 2 of that decision must also be annulled in so far as it concerns the applicant. The remainder of the claim for annulment of the contested decision must be rejected.

**B. The claims, put forward in the alternative, for cancellation or reduction of the amount of the fines imposed on the applicant**

551 The applicant also requests the Court, in the alternative, to cancel or reduce the amount of the fines which were imposed on it by the contested decision.

552 It should be noted, in that regard, that, according to settled case-law, the review of legality provided for in Article 263 TFEU entails the Courts of the European Union conducting a review, in respect of both the law and the facts, of the contested decision in the light of the arguments relied on by an applicant, which means that they have the power to assess the evidence, annul the decision and to alter the amount of the fines (see, to that effect, judgments of 3 September 2009, *Prym and Prym Consumer* v *Commission*, C-534/07 P, EU:C:2009:505, paragraph 86 and the case-law cited; of 26 January 2017,

*Duravit and Others* v *Commission*, C-609/13 P, EU:C:2017:46, paragraph 30 and the case-law cited; and of 27 March 2014, *Saint-Gobain Glass France and Others* v *Commission*, T-56/09 and T-73/09, EU:T:2014:160, paragraph 461 and the case-law cited).

553 The review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union are afforded by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (judgments of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 63, and of 8 December 2011, *KME Germany and Others* v *Commission*, C-389/10 P, EU:C:2011:816, paragraph 130; see, also, judgment of 26 January 2017, *Duravit and Others* v *Commission*, C-609/13 P, EU:C:2017:46, paragraph 31 and the case-law cited).

554 It should be noted that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes*. Therefore, with the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, it is for the applicant, in principle, to raise pleas in law against the contested decision and to adduce evidence in support of those pleas (see, to that effect, judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 213 and the case-law cited).

555 It is in the light of those principles that it is necessary to determine whether the amount of the fines imposed by the Commission in the contested decision must be modified.

556 In the first place, it should be observed that the arguments presented by the applicant in support of its alternative claims, whereby it seeks cancellation of the fines imposed on it or a reduction in the amount of those fines, cannot be distinguished from the arguments put forward in support of its claims for annulment. In those circumstances, the complaints put forward in support of that alternative claim which have already been rejected in so far as they sought to maintain the claims for annulment must be rejected.

557 In the second place, as is apparent from paragraphs 204 to 221 above, the Commission has not provided evidence that the practice leading to a margin squeeze engaged in by Slovak Telekom could have started before 1 January 2006 and, consequently, Article 1(2)(d) of the contested decision must be annulled to the extent that it concerns the applicant and that it includes a margin squeeze which was applied between 12 August and 31 December 2005 in the single and continuous infringement.

558 As regards the impact of that error on the basic amount of the fine for which the applicant is jointly and severally liable, the Court considers, in the exercise of its unlimited jurisdiction, that it is necessary to reduce the proportion of the applicant's relevant sales applied by the Commission and to establish that proportion at 9.8% instead of 10%. Since Slovak Telekom achieved over the course of the last full year of the infringement a relevant turnover of EUR 72 868 176, the amount which must be used to calculate the basic amount of the fine for which the applicant is jointly and severally liable is EUR 7 141 081.20. The basic amount of that fine corresponds to the multiplication of that amount by a coefficient of 5.33, reflecting the duration of the infringement, and must therefore be set at EUR 38 061 963.

559 In the third place, it is appropriate to draw the necessary conclusions from the finding, in paragraph 523 above, that the Commission misconstrued the concept of 'undertaking' under EU law when, in the contested decision, it imposed on the applicant alone the weighting of 1.2 for dissuasive purposes, in order to take account of the size and economic weight of the undertaking held liable for the infringement in question. That error means that the amount of the separate fine imposed on the applicant in order to ensure that it would bear the consequences of the repeated offending identified

by the Commission in the contested decision must be re-calculated. That fine, which represents 50% of the basic amount of the fine for which the applicant is held jointly and severally liable before the application of the weighting of 1.2, must thus be set at EUR 19 030 981.

560 In the fourth place, in the case that gave rise to the judgment of today's date, *Slovak Telekom* v *Commission* (T-851/14), the Court found that the Commission had erred in finding that, during the period between 12 August and 31 December 2005, Slovak Telekom had implemented a practice resulting in margin squeeze. In consequence, the Court annulled in part Article 1(2) of the contested decision and also Article 2 of that decision, in so far as they related to Slovak Telekom, and reduced the amount of the fine for which Slovak Telekom was held liable under point (a) of the first paragraph of Article 2 of that decision.

561 In the present case, the Court drew the same conclusions from the error referred to in paragraph 560 above (see paragraphs 557 and 558 above). Thus, the applicant cannot ask the Court to draw, in the present case, the necessary conclusions from the judgment of today's date, *Slovak Telekom* v *Commission* (T-851/14). The request which the applicant bases on the judgment of 22 January 2013, *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), must therefore be rejected.

562 Consequently, the amount of the fine imposed jointly and severally on Deutsche Telekom is set at EUR 38 061 963 and the amount of the fine for which Deutsche Telekom alone is held liable is set at EUR 19 030 981. The claim for cancellation of the fine or a reduction of the amount of the fine is rejected as to the remainder.

## IV. Costs

563 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Furthermore, under Article 134(3) of the Rules of Procedure, the parties are to bear their own costs where each party succeeds on some and fails on other heads. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

564 In the present case, the Commission and the intervener have been partially unsuccessful. Nevertheless, the applicant has not applied for the intervener to be ordered to pay the costs, but only for the Commission to be so ordered.

565 In those circumstances, the applicant must be ordered to bear four fifths of its own costs, as well as four fifths of the costs of the Commission and the intervener, in accordance with the form of order sought by them. The Commission is to bear one fifth of its own costs and of those of the applicant. The intervener is to bear one fifth of its own costs.

On those grounds,

THE GENERAL COURT (Ninth Chamber, Extended Composition)

hereby:

1. **Annuls Article 1(2)(d) 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) in so far as it declares that, over the course of the period between 12 August and 31 December 2005, Deutsche Telekom AG imposed unfair tariffs**

**that did not allow an equally efficient operator relying on wholesale access to Slovak Telekom's unbundled local loops to replicate the retail broadband services offered by Slovak Telekom without incurring a loss;**

2. **Annuls Article 2 of Decision C(2014) 7465 final in so far as it sets the amount of the fine imposed jointly and severally on Deutsche Telekom at EUR 38 838 000 and the amount of the fine imposed on Deutsche Telekom alone at EUR 31 070 000;**

3. **Sets the amount of the fine imposed jointly and severally on Deutsche Telekom at EUR 38 061 963 euros and the amount of the fine imposed on Deutsche Telekom alone at EUR 19 030 981 euros;**

4. **Dismisses the action as to the remainder;**

5. **Orders Deutsche Telekom to bear four fifths of its own costs and to pay four fifths of the costs of the European Commission and four fifths of the costs of Slovanet, a.s.;**

6. **Orders the Commission to bear one fifth of its own costs and to pay one fifth of the costs incurred by Deutsche Telekom;**

7. **Orders Slovanet to bear one fifth of its own costs.**

Van der Woude Gervasoni Madise

da Silva Passos Kowalik-Bańczyk

Delivered in open court in Luxembourg on 13 December 2018.

[Signatures]