EUROPEAN COMMISISON

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*Court procedural documents*

**IN THE GENERAL COURT OF THE EUROPEAN UNION**

# REJOINDER

lodged by the European Commission, represented by Mr Luigi MALFERRARI, Ms Greta KOLEVA and Mr Martin FARLEY, Members of its Legal Service, acting as Agents, with an address for service at the office of Ms Merete Clausen, also a Member of its Legal Service, who consent to service via e-Curia

**In Case T-851/14**

**SLOVAK TELEKOM A.S.**

**- Applicant -**

**v.**

**EUROPEAN COMMISSION**

**- Defendant -**

relating to an application pursuant to Article 263 TFEU seeking the annulment of the Commission Decision of 16 October 2014 (C(2014) 7465 final), in the version revised through the corrigendum C(2014) 10119 final of 16 December 2014 and the decision C(2015) 2484 of 17 April 2015, in Case AT.39523 – *Slovak Telekom* – adopted pursuant to Article 102 TFEU and Article 54 of the EEA Agreement.

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## 1. INTRODUCTION

1. At the heart of the present case is a sophisticated telecommunications operator holding a dominant position on the relevant market that, when faced with a national regulatory obligation requiring it to grant ULL access to its copper network to alternative operators (AOs) embarked on a strategy to make it as difficult as possible for those AOs to obtain ULL access. That strategy was, by all accounts, extremely successful. The Applicant managed to prevent any of its local loops being unbundled for more than four years following the publication of the RUO in 2005, despite interest being shown by multiple AOs. Furthermore, when an AO, GTS Slovakia, finally did succeed in getting access on 18 December 2009 (i.e. four years and four months after publication of the RUO) only very few of the Applicant's local loops were unbundled and were used exclusively by GTS Slovakia to provide broadband retail services to business customers.

2. Even for those AOs that might have had the incentive and financial strength to compete with the Applicant in densely populated areas of Slovakia by way of alternative technologies, such as fibre, such alternatives were not a viable option for competing with the Applicant on a large scale, because the investments required to roll-out such technology beyond densely populated areas was not economically viable.[1] As such, even these AOs had a distinct interest in complementing the networks that they rolled out in densely populated areas with ULL access in adjacent sub-urban areas or in smaller cities not yet within the reach of their own networks.[2]

3. In implementing its strategy, the Applicant raised hurdles, delayed access, and reduced the scope of its access obligations, in particular through the terms of the RUO. Such conduct included:

    (a) Withholding from AOs basic network information that was necessary for AOs to assess their business opportunities and to prepare appropriate business plans for their future retail services based on ULL access. Without such information, AOs could not take a sufficiently well-informed decision as to whether it was even worth investing in providing services by ULL.[3]

    (b) Using the terms of the RUO unjustifiably to limit the scope of the access obligation by:

        i. excluding passive lines from the RUO. Passive lines are those over which the Applicant did not, at the time, provide services. As such, by excluding passive lines from the scope of the access obligation the Applicant reserved for itself those potential customers that were most susceptible to competition from AOs operating via ULL – i.e. those

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1 Contested Decision, recitals (394) and (395).

2 Contested Decision, recital (384). Contrary to the Applicant's assertion at paragraphs 2 to 3 of the Reply, paragraph 634 of the SO does not accept that ULL access is not important for AOs wishing to compete on the mass market for broadband services from a fixed location in Slovakia. Rather paragraph 634 of the SO is limited to stating that ULL access will not be an economically viable option for AOs for the whole of the Slovak territory. The possibility of having ULL access in specific areas or as a compliment to the AO's own network remained an important means by which AOs could compete with the Applicant.

3 Contested Decision, recitals (431) to (534).

customers that were covered by the copper network, but which were not purchasing the Applicant's services.[4]

ii. unjustifiably reducing access for AOs to 25% of the lines covered by the unbundling obligation on the basis of spectrum management concerns that were not justified from a technological perspective.[5]

iii. unilaterally and arbitrarily being able to designate at any time a certain product as a "*conflicting service*", with the effect that the lines dedicated to the provision of such services could not be unbundled by AOs. AOs thus faced considerable uncertainty as to whether any of the Applicant's services were already or could be deemed as "conflicting services" in the future, and as such were unable to estimate the number of local loops that might be affected by that limitation.[6]

(c) Imposing unfair collocation terms in the RUO that made collocation (an important pre-condition for successful ULL unbundling) unfeasible for AOs, in particular by failing to provide upfront pricing information needed by AOs to establish their business decisions for the roll-out of their network, and implementing a strategy whereby collocation costs became prohibitive.[7]

(d) Including forecasting terms in the RUO that made ULL access difficult, unattractive and more expensive for AOs.[8]

(e) Withholding, through the terms of the RUO, the necessary information concerning the basic preconditions for unbundling until the successive qualification phase instead of providing that information within its network database information at an early stage. This allowed the Applicant to further slowdown the unbundling process and to charge AOs additional unjustified fees.[9]

(f) Imposing unfair terms in the RUO regarding repairs, service and maintenance, which are of vital importance for the quality of the AO's service, and consequently, the AO's ability to attract customers and prevent them from switching to another operator, which in turn discouraged AOs from seeking ULL access.[10]

(g) Setting out in the RUO disproportionate and non-transparant terms in respect of the bank guarantee (which is one of the major cost factors for AOs wishing to have ULL access) that prevented AOs from assessing their real costs and further contributed to rendering the unbundling of the Applicant's local loops unfeasible for AOs.[11]

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4 Contested Decision, recitals (535) to (569).

5 Contested Decision, recitals (605) to (651).

6 Contested Decision, recitals (570) to (604).

7 Contested Decision, recitals (652) to (718).

8 Contested Decision, recitals (719) to (739).

9 Contested Decision, recitals (740) to (776).

10 Contested Decision, recitals (777) to (799).

11 Contested Decision, recitals (800) to (819).

4. In addition to all of the above, the Applicant also set the ULL prices at a level that it knew would squeeze the margins of AOs seeking to obtain ULL access and make market entry via ULL unprofitable.[12]

5. None of the above is disputed by the Applicant.

6. What the Applicant does pincipally dispute is the legal test applied by the Commission for concluding that the conduct summarised in paragraph 3 above constitutes an abuse of Article 102 TFEU (the First Plea); and the procedural and substantive steps taken by the Commission in conducting its margin squeeze calculations (the Second and Third Pleas). As demonstrated below, the Applicant's First Plea is predicated on a complete misunderstanding of the abuse identified by the Commission in the Contested Decision. With respect to the Second and Third Pleas, the Applicant's arguments are unfounded and out of line with the EU Courts' case law.

7. The following sections address the Applicant's specific pleas, as well as the substantive points raised by the Applicant in the Introduction to the Reply to the extent that they have not already been addressed in the Defence. Before turning to these pleas, however, the Commission notes the following with regard to certain additional points raised by the Applicant in the Introduction of the Reply (paragraphs 1 to 17).

   (a) At paragraph 1 of the Reply, the Applicant puts forward the unsubstantiated claim that it would be "*easier, and cheaper, for AOs to develop their own infrastructure*," and claims that, in any event, its "*copper network was not of sufficient quality or ubiquity to be of real interest to AOs for ULL access*." The Commission respectfully refers the General Court to paragraphs 54 to 66 of the Defence, which address these claims, as well as to Section 7.3 of the Contested Decision in which the Commission explains in detail why access to xDSL via ULL is important for AOs wishing to compete with the Applicant, as well as recitals (1062) to (1066) of the Contested Decision. The claim that AOs were not interested in acquiring access to the Applicant's copper network[13] is also unfounded given that, as set out at recitals (394) and (395) of the Contested Decision, six requests were initially received by the Applicant to open negotiations for ULL access, while more undertakings were interested in having ULL access.[14] Moreover, through its conduct the Applicant took away from AOs the choice of whether and to what extent they would use ULL access as a means of market entry. [15]

   (b) At paragraphs 11 and 12 of the Reply the Applicant challenges the Commission's reliance on the *Microsoft*[16] and *Tomra*[17] cases, which show that

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[12] See in particular recitals (1024) to (1039) of the Contested Decision.

[13] A claim that is, in essence, repeated at paragraph 16 of the Reply. With regard to the Applicant's statement that it has not received any further requests for access since the end of the infringement period identified in the Contested Decision, the Commission has already responded to this point at paragraph 14 of the Defence.

[14] See also recitals (397) to (426) as well as recitals (1086) to (1096) of the Contested Decision which evidences AOs' interest in accessing the Applicant's copper network and the reasons why they did not complete negotiations with the Applicant.

[15] Contested Decision, recital (1094).

[16] Case T-201/04 *Microsoft v Commission*, EU:T:2007:289.

[17] Case C-549/10 P *Tomra v Commission*, EU:C:2012:221.

it is not necessary for all competition to be foreclosed for a dominant undertaking's conduct to be abusive. The Commission notes that such criticism is predicated on the false assumption that the EU Courts' case law in *Bronner* is applicable, which, when imposing an access obligation under Union competition law for essential facilities, requires that all competition in the market must be foreclosed. Because, for the reasons set out in Section 2 of the Rejoinder, the *Bronner* case and essential facilities case law is not relevant in the present case, it is not necessary for the Commission to demonstrate that all competition must be foreclosed for the Applicant's conduct to be abusive. Rather it is sufficient for the Commission to demonstrate that the conduct is liable to restrict competition, as per the EU Courts' rulings in, *inter alia*, *Microsoft*[18] and *Tomra*.

(c) With regard to the Applicant's statements at paragraphs 14 and 15 of the Reply concerning the relevance of the ladder of investment theory, the Commission notes, firstly, that while the Contested Decision refers in general to the ladder of investment theory as an important method of market entry and development, the Commission's theory of harm is not predicated on a strict application of that theory. Rather, as set out in recital (1086) of the Contested Decision, "*the Commission considers that by depriving AOs of access to ULL, ST made it more difficult or even impossible for AOs to enter the market on the basis of their own infrastructure*". In this respect, recital (1081) of the Contested Decision concludes that "*effective ULL-access for AOs would have allowed them to reduce their entry costs, to gain a customer base and generate revenues more quickly, develop their retail broadband services and differentiate their offerings as compared to ST's. Therefore, if competition on the merits by AOs had not been hampered, it is likely that competition would have developed more quickly and vigorously in comparison to a scenario where the incumbent leaves to each and every AO no other opportunity to enter the market than to build completely new own infrastructures."*

(d) While the Commission addresses the Applicant's substantive arguments concerning margin squeeze in Section 4 below, the Commission notes that the Applicant's claim at paragraph 17 of the Reply that the relevant input needs to be indispensable before an undertaking's margin squeeze practices can be abusive was flatly rejected by the Court of Justice in *TeliaSonera*. The Court of Justice specifically envisaged the possibility of a margin squeeze practice being abusive under Article 102 TFEU even where the input in question was not indispensable, where it can be shown that the practice is capable of making it more difficult for competitors to enter the market.[19]

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[18] Furthermore, and contrary to the impression that the Applicant seeks to give at paragraph 12 of the Reply, the Commission notes that in Case T-201/04 *Microsoft v Commission*, EU:T:2007:289, which did, unlike the present case, concern the imposition by Article 102 TFEU of an obligation to grant access, the General Court specifically left open the possibility that an obligation to supply could potentially arise under Article 102 TFEU even when the *Bronner* criteria had not been met (see at paragraph 336 in conjunction with paragraph 317). In the case itself, however, it was not necessary for the General Court to examine this issue as, on the facts, the General Court determined that the *Bronner* criteria had been satisfied.

[19] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, paragraphs 58, 63 and 70-72.

## 2. FIRST PLEA: THE COMMISSION CORRECTLY ESTABLISHED THAT THE APPLICANT BREACHED ARTICLE 102 TFEU BY HAMPERING EFFECTIVE ULL ACCESS FOR AOS

### 2.1. *Bronner* is not the default legal test for the present case

8. The Reply, and in particular paragraphs 18 to 23 thereof, demonstrates that the Applicant misunderstands the Contested Decision with respect to: (i) the Commission's conclusions concerning the Applicant's refusal to grant ULL access to its copper network; and (ii) the scope of application of the Court of Justice's ruling in *Bronner*.[20] In the Reply the Applicant reiterates that it considers that a refusal to supply can only constitute an abuse of Article 102 TFEU if the input in question is indispensable, and failure to supply would result in the elimination of all competition on the market (the so-called *Bronner* criteria) and that the Commission committed a manifest error of law in the Contested Decision by failing to demonstrate that the *Bronner* criteria had been met.

9. At the heart of the Applicant's case is the mistaken belief that the Commission was seeking to impose under Union competition law an access obligation to the Applicant's copper network similar to that sought in *Bronner* and the "essential facility" line of case law. This is not, however, the Commission's case.

10. As explicitly set out at recital (376) of the Contested Decision, the Commission has not sought to impose *ex-novo* an obligation on the Applicant to provide ULL access on the basis of Article 102 TFEU. This fundamental element distinguishes the present case from the situation in *Bronner* and the subsequent "essential facilities" line of case law. In *Bronner* the EU Courts were faced with a situation where the question was whether, and under what conditions, Article 102 TFEU can impose an obligation on an undertaking to supply an asset in which that undertaking has invested with a view to reserving it to itself. As recalled at paragraph 33 of the Defence, the General Court confirmed this interpretation of the *Bronner* ruling in its judgment in *Van den Bergh Foods*, where it held that the *Bronner* judgment was not relevant in situations where the Commission's decision does not oblige the dominant undertaking "*to transfer an asset or to conclude contracts with persons which it has not selected*".[21]

11. In the Contested Decision the Commission has never sought to demonstrate that the Applicant owed a duty to grant ULL access to its copper network on the basis of Article 102 TFEU or on that basis to conclude contracts with persons that it has not selected.[22] Rather, the question that faced the Commission was whether, having regard to the fact that (i) the Applicant was under a pre-existing obligation to grant ULL access as a matter of national law and (ii) offered access on the basis of the RUO, the Applicant's conduct,

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[20] Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, EU:C:1998:569.

[21] Case T-65/98 *Van den Bergh Foods Ltd v Commission*, EU:T:2003:281, paragraph 61, confirmed by the Court of Justice in Case C-552/03 P *Masterfoods v Unilever Bestfoods*, EU:C:2007:605, paragraphs 113 and 117.

[22] Consequently, the arguments raised by the Applicant at paragraphs 49 to 52 of the Reply, in which it disputes the relevance of the General Court's ruling in *Van den Bergh Foods*, are ineffective and do not advance the Applicant's case.

by which it sought to hinder AOs' market entry by hampering their effective ULL access, constitutes an abuse of the Applicant's dominant position.[23]

12. Firstly, the Commission notes that the Applicant agrees, at paragraphs 51 and 52 of the Reply, that the effect of the Court of Justice's ruling in *Van den Bergh Foods* was that the *Bronner* line of case law does not apply in situations where the Commission decision involved neither an essential facility nor any other obligation to transfer an asset or conclude a contract. As such, given that in the Contested Decision the Commission neither claimed that the Applicant's copper network was an essential facility nor imposed a duty to grant ULL access to the copper network, it ought to be common ground that the *Bronner* line of case law does not apply.

13. Secondly, the possibility that a dominant undertaking's failure to respect a pre-existing legal obligation to contract could constitute an abuse of Article 102 TFEU was recognised by the Court of Justice in its recent *Huawei* judgment, where it held that, "*having regard to the fact that an undertaking to grant licences on FRAND terms creates legitimate expectations on the part of third parties that the proprietor of the SEP will in fact grant licences on such terms, a refusal by the proprietor of the SEP to grant a licence on those terms may, in principle, constitute an abuse within the meaning of Article 102 TFEU*." [24]

14. This is also in line with the EU Courts' previous rulings in *Telefónica* [25] and *TeliaSonera*.[26] In this respect, at paragraph 179 of its judgment in *Telefónica*, the General Court noted that "*the Commission did not require Telefónica to give access to the wholesale products to its competitors, as the obligation to do so arises under the Spanish regulatory framework.*" The General Court went on to hold at paragraph 180 of its judgment, in reliance on the Court of Justice's ruling in *TeliaSonera*, "*that it cannot be inferred from Bronner* […] *that the conditions to be met in order to establish that a refusal to supply is abusive 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 on which there might be no purchaser. Such conduct may, in itself, constitute an independent form of abuse distinct from that of refusal to supply*."

15. On this basis, in the Contested Decision the Commission demonstrated that the Applicant enjoyed a dominant position (Section 6 of the Contested Decision) and that it was under a regulatory obligation under national law to offer access to its ULL (Section 7.2 Contested Decision), such obligation having been imposed *inter alia*, in the interest of ensuring sustainable competition on the retail market for broadband service (see

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[23] Annex A.5 to the Application, Recitals (363) and (370) of the Contested Decision.

Contrary to the Applicant's assertions at paragraph 22 of the Reply, the Commission does not seek to limit the application of the *Bronner* case to the factual circumstances of that case, or that access to inputs should be judged on a case-by-case basis without regard to the *Bronner* criteria. Rather, the *Bronner* criteria are applicable where the obligation to grant access is imposed directly by virtue of Article 102 TFEU, but do not apply in circumstances where the issue is whether, despite being under a regulatory obligation to grant access and having offered access on specific terms, a dominant undertaking's conduct is likely or liable to distort competition.

[24] Case C-170/13 *Huawei Technology Co. Ltd v ZTE Corp. and ZTE Deutschland GmBH*, EU:C:2015477, paragraph 53.

[25] Case T-336/07 *Telefónica and Telefónica de España v Commission*, EU:T:2012:172.

[26] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83.

recitals (372) to (377) of the Contested Decision). As summarised at paragraph 3 above, the Commission identified at Sections 7.4 to 7.6 of the Contested Decision over 20 different terms and conditions in the RUO covering multiple stages of the procedure for accessing the Applicant's copper network that it considered to be unreasonable, unfair or disadvantageous to the requesting AO or that contributing to delaying access by the requesting AO,[27] as well as the Applicant's margin squeeze practices (Section 8 of the Contested Decision). At Sections 9 and 10 of the Contested Decision, the Commission explained how the Applicant's practices had the cumulative effect of artificially raising barriers to entry on the retail mass-market for broadband services at a fixed location in Slovakia. Furthermore, as set out at recitals (394) and (403) of the Contested Decision, despite initial interest by multiple AOs to enter into negotiations for ULL access, testimonials from the relevant AOs reveal that one of the principal reasons for undertakings cancelled their intention to negotiate was due to the terms of the RUO (see Contested Decision, recitals 394 et seq.).

16. None of the Commission's findings in Sections 6, 7.6, 9 and 10 of the Contested Decision have been challenged by the Applicant.[28] As such, once it is recognised that the nature of the abuse identified by the Commission in the Contested Decisions differs fundamentally from that of the *Bronner* and the essential facilities line of case law, the entirety of the Applicant's First Plea falls away.

17. In support of its position that the *Bronner* criteria do not form the default legal test in all cases where the dominant undertaking is accused of breaching Article 102 TFEU by failing to supply specific products or grant specific access rights on fair terms, at paragraphs 18 to 26 of the Defence, the Commission provided the General Court with an overview of previous case law in which the EU Courts have considered the question of the relevant legal test under Article 102 TFEU in respect of a refusal to supply. In this way, the Commission distinguishes the approach taken by the EU Courts in *Commercial Solvents*,[29] *United Brands*[30] and *Sot Lelos Kai*,[31] as compared to the "essential facilities" scenarios such as those that arose in *Bronner*, *Volvo/Veng*,[32] *Magill*,[33] *and IMS Health*.[34]

18. Despite criticising the Commission's references to the Court of Justice's judgments in *Commercial Solvents, United Brands* and *Sot Lelos Kai,* it is clear from paragraphs 28 to 32 of the Reply that the present case is much more akin to the situations arising in those cases than in the essential facilities cases. As the Applicant notes at paragraph 31 of the Reply, a key factor that the Court of Justice took into consideration in *Commercial*

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[27] See further paragraph 43 of the Defence.

[28] It should be noted that similar terms and equivalent behaviour were part of the infringement of Article 102 TFEU committed by Telekomunikacja Polska and were considered in substance to be abusive by the General Court in its recent judgment of 17 December 2015 (see Case T-486/11 *Orange Polska (ex Telekomunikacja Polska) v Commission*, EU:T:2015:1002, paragraphs 130, 133, 134, 150, 154).

[29] Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents Corporation v Commission*, EU:C:1974:18.

[30] Case 27/76 *United Brands Company and United Brands Continental BV v Commission*, EU:C:1978:22.

[31] Joined Cases C-468 and 478/06 *Sot. Lélos Kai Sia EE and others v GlaxoSmithKlein AEVE Farmakeftikon Proïonton*, EU:C:2008:504.

[32] Case C-238/87 *AB Volvo v Erik Veng*, EU:C:1988:477.

[33] Joined Cases C-241 and 242/91 P *RTE and ITP v Commission*, EU:C:1995:98.

[34] Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co*, EU:C:2004:257.

*Solvents*, *United Brands* and *Sot Lelos Kai* was the fact that the contracting parties had already been supplied by the dominant undertaking and "*had a legitimate expectation that* […] *supplies would not be discontinued*." As per paragraphs 11 to 14 above, the regulatory obligation imposed on the Applicant to give AOs access to its copper network is an important factual and legal element which is relevant in the present case, just as it was relevant in the *Telefónica* case and, in the language of the Court of Justice in *Huawei*, such a pre-existing obligation creates a legitimate expectation on other market actors, breach of which can constitute an abuse of Article 102 TFEU. The existing customers in *Commercial Solvents* and *United Brands* had a right to expect that supplies would be continued. In a similar way, AOs had the right to expect that the terms of the RUO would comply with its regulatory obligation to grant ULL access to its copper network. The fact that the *United Brands* and *Sot Lelos Kai* cases concerned finished rather than input products does not undermine their relevance for the present case. In those cases, just like the present, the recognised abuse manifested itself in the application of unfair terms which had the effect of distorting competition on the relevant market.

19. As such, in view of the nature of the abuse in question, in line with the Court of Justice's previous case law,[35] the Commission was not under an obligation to demonstrate that the *Bronner* criteria needed to be met in order for the Commission to conclude that the Applicant's conduct was abusive.

20. In this regard, in Sections II. B, C and D of the Reply,[36] the Applicant mischaracterises the Commission's position by presenting the factors identified by the Commission as distinguishing the present case from the essential facilities line of case law as "exceptions" to the *Bronner* test. As set out above, the question facing the Commission in the present case was whether the application of unfair terms in the RUO, amounting to a constructive refusal to supply, notwithstanding a pre-existing regulatory obligation to grant ULL access to its copper network, was abusive, and is a wholly different question to that raised in *Bronner*. It is not, as the Applicant would portray to the General Court, the case that absent the purported "exceptions" the *Bronner* criteria would apply. Nevertheless, in the interests of clarity, the Commission follows the same structure as the Applicant by responding to each of the arguments raised by the Applicant in Sections II. B, C and D of the Reply in turn.

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[35] On several occasions throughout the Reply (see for example paragraphs 28, 50 and 83) the Applicant questions why certain case law cited by the Commission in the Defence was not included in the Contested Decision. The Commission recalls that the duty to state reasons requires that the Commission provide sufficient reasons so as to enable the person concerned to ascertain the matters justifying the measure adopted so that, if necessary, he can defend his rights and the Court is able to exercise its power of review as to the legality of the Contested Decision (See for example, C-367/95 P *Commission v Sytraval and Brink's France*, EU:C:1998:154, paragraph 20). This does not translate into an obligation to cite all possible judgments of the EU Courts that might be relevant to the Commission's Contested Decision. Rather, the Commission is simply required to set out the facts and legal considerations that are of decisive importance in the context of the Contested Decision in question (see for example Case T-44/90 *La Cinq v Commission* EU:T:1992:5, paragraph 42). Furthermore, the Commission cannot be prohibited from providing additional explanations for the position taken in the Contested Decision in response to a direct argument raised by an applicant in judicial proceedings.

[36] See also paragraphs 5 to 8 of the Reply.

### 2.2. The importance of the existence of an ex-ante regulatory access obligation

21. At paragraphs 35 to 52 of the Reply the Applicant contends, in essence, that the Commission committed an error of law because it relied on the existence of an obligation under national law for the Applicant to grant access to its ULL to absolve it from the need to examine the *Bronner* criteria. As such, the Applicant effectively alleges that the Commission used the national access obligation as a proxy for determining whether a similar obligation would exist as a result of Article 102 TFEU.[37] The Applicant states at paragraphs 43 to 46 of the Reply that the Commission cannot assume that the assessment under *ex ante* regulation would be identical to Article 102 TFEU, because the objectives of the *ex ante* regulation are different to those pursued by the *ex post* assessment under Article 102 TFEU.

22. This position is unfounded. The Commission has never sought to claim that the assessment conducted by the TUSR for the purposes of imposing an *ex ante* access obligation is a proxy for the essential facilities assessment under Article 102 TFEU – although the Commission does note that the need to ensure effective competition on the retail market for broadband services in Slovakia was a central pillar on which the TUSR was under a legislative obligation to base its decision.[38] Rather, the Commission expressly acknowledged at recital (376) of the Contested Decision that it was not seeking to impose *ex-novo* an access obligation.

23. Rather, as explained at recital (376) of the Contested Decision and paragraphs 35 and 36 of the Defence, the Commission took into account the existence of the national access obligation, in line with the Court of Justice's ruling in *Deutsche Telekom*, because such obligation defines the legal framework applicable to the Applicant and is "*a relevant factor in the application of Article 82 EC to the conduct of that undertaking*", including for the purposes of "*assessing the abusive nature of such conduct*".[39] The Court of Justice expressly noted that the fact that the national legislation may have different objectives to that of Union competition law does not have any "*bearing on the issue whether legislation […] may be taken into account for the purposes of the application of Article 82 EC to the conduct of the dominant undertaking*."[40]

24. As such, and contrary to the Applicant's assertion at paragraphs 38 to 42 of the Reply, the Commission does not rely on the Court of Justice's ruling in *Deutsche Telekom* to justify *ipso facto* "*entirely disregarding all the usual (strict) conditions for access to inputs under the Bronner line of case-law*". Rather, the Commission takes the regulatory access obligation into account because such obligation is a relevant factor that influences the anticipated behaviour of the Applicant, which in turn feeds in to the Commission's assessment of whether the Applicant's conduct is abusive. This approach is perfectly in line with the Court of Justice's ruling in *Deutsche Telekom*.

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[37] This argument is repeated at paragraph 56 of the Reply in which the Applicant states that the " 'different objectives' between the two sets of rules precludes the 'cut and paste' approach suggested by the Commission".

[38] See paragraphs 28 to 32 of the Defence, and (373) to (374) of the Contested Decision.

[39] See also to this effect the extracts of the General Court's ruling in Case T-336/07 *Telefónica* set out at paragraph 14 above.

[40] Case C-280/08 P *Deutsche Telekom AG v Commission*, EU:C:2010:603, paragraphs 224 and 227.

25. At paragraphs 53 to 58 the Applicant maintains its argument that the Commission breached its duty to state reasons under Article 296 TFEU because it did not explain sufficiently that "*the NRA's* ex ante *regulatory obligation justified the Commission's disregarding entirely the Bronner conditions*". Again, as is the case with the Applicant's arguments on the substance of the Commission's findings, the Applicant's position is based on the false premise that the Commission is seeking to impose an access obligation by virtue of Article 102 TFEU and use the TUSR's decision as a proxy for the relevant analysis under Article 102 TFEU. Given that, as explained above, this is not the abuse that the Commission identified in the Contested Decision, it is little wonder that the Commission did not seek to demonstrate that the *Bronner* criteria were fulfilled. Indeed, such an analysis would be wholly out of place given the nature of the abuse investigated by the Commission: the Commission was facing a different form of abuse that is subject to a different legal test.

26. As set out in paragraph 37 of the Defence, the Commission discharged its duty to state reasons in the present case by setting out the facts and legal considerations which are of decisive importance in the context of the decision in question.

### 2.3. The relevance of the Applicant having benefitted from a legal monopoly

27. At paragraphs 60 to 64 and 69 of the Reply, the Applicant reiterates the argument set out at paragraphs 67 to 73 of the Application, that the Commission relied on the established fact that the Applicant had benefitted from a legal monopoly, as an "exception" from the need to apply the *Bronner* criteria.

28. Not only does this claim suffer from the same mischaracterisation of the Commission's case as set out above, but it also greatly exaggerates the weight attributed to this factor by the Commission in its assessment. The interpretation, set out at paragraph 59 of the Reply, of the Commission's position can find no basis in the Contested Decision. As explained at paragraphs 38 to 40 of the Defence, it is clear from recital (370) of the Contested Decision, that the only claim made by the Commission is that the fact that the network in question was developed under a monopolistic regime is a relevant factor that needs to be taken into account by the Commission when conducting its assessment under Article 102 TFEU – such position being supported by the Court of Justice's ruling in *Post Danmark*[41] and the General Court's ruling in *Orange Polska*.[42] This is a long way short the Commission claiming that this fact alone means that the *Bronner* case law is not applicable. Indeed, such a statement would be strange, given that this was not the question that faced the Commission in the present case.

29. Furthermore, the Court of Justice in *TeliaSonera* clarified why the development of a network on the basis of a legal monopoly is a relevant consideration. As set out at paragraph 109 of the *TeliaSonera* judgment, which the Commission cites at footnote 634 to recital (370) of the Contested Decision, the Court of Justice considered that the existence of a former monopolistic structure can have a significant influence on the market structure. As can be seen from recitals (279) to (281) and (329) of the Contested Decision, the Commission relied on the former monopolistic structure of the market as one of the elements that meant that there are no other competitors on the wholesale

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41 Case C-209/10 *Post Danmark A/S v Konkurrenceradet*, EU:C:2012:172, paragraph 23.

42 Case T-486/11 *Orange Polska v Commission*, EU:T:2015:1002, paragraphs 126, 168, 169, 170, 177, 178 180, 182, 185.

market for access to the unbundled local loops, which constituted one of the barriers to market entry.

30. The Applicant's arguments at paragraphs 65 to 69 of the Reply concerning the alleged failure to state reasons are similarly posited on the assumption that the Commission was relying on the Applicant having benefitted from monopoly rights as an "exception" to the need to satisfy the *Bronner* criteria. As this was not what the Commission sought to demonstrate the Applicant's arguments concerning the duty to state reasons fall away. For example, the idea that the Commission should be required to conduct a complex and detailed econometric calculation of the advantages/disadvantages associated with having enjoyed monopoly rights is disproportionate and unnecessary in light of the manner in which the Commission relied on this element.

31. As such, the Commission maintains the position described at paragraphs 38 to 40 of the Defence.

### 2.4. The relevance of the Applicant's abuse being a "constructive refusal to supply"

32. As is apparent from the above, the Applicant has misunderstood the Commission's case. Contrary to paragraphs 73 and 74 of the Reply, the Commission in the Contested Decision was not "imposing compulsory access" or "mandatory dealing" obligations on the Applicant, nor did it establish that the Applicant was under "a duty to assist rivals". It is this misunderstanding that renders the Applicant's position relating the Commission's finding of a constructive refusal to supply untenable.

33. In the Contested Decision the Commission found that ST's obstructive behaviour and imposition of unfair terms in the RUO, in the context of a national regulatory obligation to grant ULL access to the Applicant's copper network, is abusive. The possibility of such unfair conduct, which the Commission categorised in *Deutsche Post* as a form of "refusal to supply"[43] and followed such categorisation in the present case,[44] constituting an abuse separate from the essential facilities abuse recognised in *Bronner*, was recognised by the Court of Justice at paragraph 55 of its *TeliaSonera* judgment, where it confirmed that not all "terms of trade" abuses need to satisfy the *Bronner* criteria.

34. In this regard, the distinction that the Applicant seeks to draw between outright refusal and constructive refusal is misleading. The true distinction is whether the circumstances are such that a compulsory access obligation stems directly from Article 102 TFEU, with failure to grant such access constituting an abuse, or whether, as is the situation in the present case, the Applicant's conduct resulted in foreclosing the relevant market through obstructive conduct and by imposing unfair terms on AOs – it being a relevant consideration that the Applicant was under a national law obligation to grant ULL access to its copper network to AOs.

35. In this regard, the Applicant errs at paragraph 76 of its Reply when it contends that the Commission's position is that the Court of Justice sought in *TeliaSonera* to limit the application of the *Bronner* criteria to the facts of that case. In its overview of the

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[43] COMP/C-1/36.915 *Deutsche Post AG*, paragraph 141; Defence paragraph 41.

[44] As well as in Case COMP/39.525 — *Telekomunikacja Polska*, which was recently upheld by the General Court in Case T-486/11 *Orange Polska v Commission*, EU:T:2015:1002.

essential facilities case law at paragraphs 18 to 26 of the Defence, the Commission recognised that the scope of the *Bronner* criteria are not limited to the specific factual background of that case, given that it summarised how the *Bronner* criteria have been applied subsequently. Rather, the Commission's position is that the *Bronner* line of case law is only applicable where the obligation to supply stems directly from Union competition law.

36. On this basis, it is clear that, contrary to the Applicant's arguments at paragraphs 77 to 80 of the Reply, there is no contradiction between the approach adopted by the Commission in its *Clearstream* decision[45] – where the Commission sought to impose an obligation to supply on the basis of Article 102 TFEU, and where it was in any event undisputed that the *Bronner* test was fulfilled – and the present case where the Commission did not seek to impose such a mandatory dealing obligation.[46]

37. With regard to the Commission's reference to its decisions in *Deutsche Post* and *Polaroid/SSI*,[47] it is clear from paragraph 41 of the Defence that the sole principle that the Commission seeks to extract from these cases is that the imposition of unfair terms on customers can constitute a constructive refusal to supply. With regard to the Applicant's attempt to equate the wording of paragraphs 142 to 143 of the *Deutsche Post* decision to an application by the Commission of the indispensability criterion under *Bronner*, this is not borne out by the decision. Not only does the decision not mention *Bronner* or essential facilities, but, more importantly, the *Deutsche Post* decision did not concern the supply of an asset in which that undertaking has invested with a view to reserving it to itself or the imposition of an obligation to deal with a customer that it has not chosen.[48] Rather it concerned the fairness of the terms on which, given that it was already providing such services, *Deutsche Post* agreed to supply incoming cross-border mail services.

38. Finally, with regard to the "surprising consequences" referred to by the Applicant at paragraphs 84 to 89 of the Reply, the "surprise" is the result of the Applicant drawing the wrong distinction.

39. The difference in the relevant tests is not based on whether the refusal to supply is constructive or outright – this is clear from the different approaches adopted in *Deutsche Post* and *Clearstream*. Rather, the question turns on whether the Union competition law is seeking to impose a supply obligation.

40. Furthermore, as set out at paragraph 52 of the Defence, there is no reason to consider that an outright refusal to supply is a more "severe" abuse than a constructive refusal to supply. Both cases result in a distortion of competition in the market. In the present case, the Applicant even succeeded in preventing entry by AOs on the mass market for broadband services in Slovakia by way of ULL from 12 August 2005 until 18 December 2009. Even then, only very few of the Applicant's local loops were unbundled. By 25

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[45] Case T-301/04 *Clearstream Banking and Clearstream International SA v Commission*; and Commission Decision in Case COMP/38.096 – *Clearstream (Clearing and settlement*).

[46] See further paragraphs 49 to 51 of the Defence.

[47] See paragraph 41 of the Defence.

[48] Case T-65/98 *Van den Bergh Foods Ltd v Commission*, EU:T:2003:281, paragraph 61.

October 2010 only 14 local loops had been unbundled and were used by GTS Slovakia exclusively to provide broadband retail services to business customers.[49]

41. In light of the foregoing, the Commission maintains its position in the Defence and respectfully requests that the General Court reject the Applicant's First Plea in its entirety.[50]

### 2.5. Inadmissibility of Annex A.9

42. The Commission's objection to the admissibility of Annex A.9 to the Application is neither surprising nor discourteous to the author. As is clear from paragraphs 67 to 70 of the Defence, the Commission's objection is to the Applicant's attempt to supplement the legal arguments in the Application by reference to an Annex. This is not, as the EU Courts' consistent case law has recognised, the purpose of annexes, which serve a purely "*evidential function*"[51] and not a means for the Applicant to elaborate its legal arguments beyond the scope of the text of the Application itself.

## 3. SECOND AND THIRD PLEAS (MARGIN SQUEEZE)

43. In its Second and Third Pleas, the Applicant challenges procedural and substantive aspects of the Commission's margin squeeze assessment. In the following paragraphs, the Commission addresses the specific points raised by the Applicant in its Reply, to the extent that they do not constitute mere repetition of the points raised in the Application that have already been addressed in the Defence.

44. At the outset, however, the Commission notes that, as is apparent from the Reply, many of the Applicant's arguments are based on two fundamental errors concerning the relevant test for establishing that an undertaking's pricing constitutes an abusive margin squeeze for the purposes of Article 102 TFEU. In this respect the Applicant fails to recognise that:

(a) the purpose of the costs calculation in a margin squeeze assessment is to estimate the costs that an "equally efficient competitor" would incur in providing the downstream services. The Commission seeks to use the dominant undertaking's costs calculated on the basis of LRAIC in order to estimate those costs. Like all calculation methodologies, however, the results of the LRAIC calculation depend on the inputs used. As such, if inappropriate inputs are included in the calculation (for example the Applicant's optimisation adjustments) then the result will not be the costs of an as efficient competitor but of a more efficient competitor. Elements of the calculation that would render the resulting costs a less accurate approximation of an equally efficient competitor's costs must, therefore, be excluded from the calculation; and

(b) even if the spread between the relevant prices or costs remains positive, an abusive margin squeeze would still exist where it is demonstrated that the

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[49] Contested Decision recital (48).

[50] In the interests of completeness, the Commission notes that the argument raised at paragraph 88 of the Reply adds nothing to the same argument already raised in the Application, in respect of which the Commission has responded at paragraph 53 of the Defence.

[51] See paragraph 69 of the Defence and case law cited.

pricing in question was, by reason, for example, of reduced profitability, likely to have the consequence that it would be at least more difficult for equally efficient competitors to trade on the market concerned.[52]

45. As demonstrated in the following paragraphs, once the correctness of the principles set out in paragraph 44 above is accepted, the Applicant's complaints fall away.[53]

### 3.1. SECOND PLEA: The Commission respected the Applicant's rights of defence in respect of the margin squeeze assessment

46. By its Second Plea, the Applicant makes two principal arguments: (i) that the methodology used by the Commission in the Contested Decision was so different to that used in the Statement of Objections ("SO") that the Commission was obliged to send a Supplementary SO or Letter of Facts to the Applicant prior to adopting the Contested Decision. Having failed to do so, the Commission breached the Applicant's rights of Defence; and (ii) the multi-period approach applied by the Commission was contrary to the principle of legal certainty.

47. The Commission has already addressed both of these specific allegations in detail at paragraphs 86 to 100 of the Defence. In the following paragraphs, therefore, the Commission focuses on the specific elements raised by the Applicant in the Reply.

#### *3.1.1. Second Plea, Limb One (§§94 to 110 Reply): The Commission fully respected the Applicant's rights of Defence concerning the margin squeeze calculation*

48. Throughout the Reply, the Applicant adopts the mantra that the Commission applied a different "*methodology, principles and data*" when conducting the margin squeeze calculation in the Contested Decision as compared to the SO. At no point, however, does the Applicant seek to identify specific differences or the material impact that such changes had on the Applicant's ability to defend itself during the administrative procedure. Rather, the Applicant limits itself to stating that the Commission relied on the UCN spreadsheets in the SO, which were not equivalent to LRAIC and did not accept in their entirety the LRAIC calculations presented by the Applicant following the SO.

49. The vagueness of the Applicant's allegation is perhaps explained by the fact that, in reality, the underlying methodology and principles that the Commission applied for conducting the margin squeeze calculation are the same in both the SO and the Contested Decision. With respect to the data used, the differences stem from the Commission taking into account the calculations submitted by the Applicant in its submissions following the SO.[54] In this respect, the Commission accepted all of the costs figures

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[52] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, paragraph 74.

[53] The Commission notes that at paragraphs 72 to 85 of the Defence the Commission provided an overview of the relevant steps of the administrative procedure, which serves to contextualise the situation in which the Applicant's arguments should be assessed. At paragraph 93 of the Reply the Applicant alleges that material parts of this overview are either misleading or fail to deal with the Applicant's case. The Applicant, however, fails to particularise the manner in which it considers the overview to be misleading or incomplete. The Commission maintains, therefore, that its description of the administrative procedure is accurate and complete in all material regards.

[54] At paragraph 127 of the Reply the Applicant states that even prior to adoption of the Contested Decision it had abandoned its position that the Opex adjustments should be included as part of the LRAIC calculation.

submitted by the Applicant, but rejected certain of the adjustments that the Applicant argued should be applied to further reduce the cost figures (most notably the optimisation adjustments).

50. As set out at paragraph 44 above, the key step in conducting a margin squeeze assessment is to identify an adequate proxy of the costs that an equally efficient competitor would need to incur in order to provide the same downstream services as the dominant undertaking. It is common ground that the most appropriate proxy for this purpose is the dominant undertaking's own costs calculated on the basis of LRAIC. The Commission set out the guiding principles for calculating costs on the basis of LRAIC at paragraphs 996 to 1002 of the SO.[55] An equivalent explanation is set out at recitals (860) to (861) of the Contested Decision, which is not materially different to that contained in the SO.

51. As can be seen from Section 5.10.3 of the SO,[56] when conducting its margin squeeze calculation, the Commission took into account four broad costs categories for the period 2005 to 2010: wholesale charges; network costs; ISP recurrent costs; and subscriber acquisition costs. The total amount of these costs was then compared against the Applicant's revenues for the same period. An identical methodology was adopted in the Contested Decision:[57]

    (a) Tables 21 to 24 of the Contested Decision show the **wholesale charges** which are used by the Commission as part of the margin squeeze calculations and are equivalent to Tables 48 and 78 to 80 of the SO and are based on figures provided by the Applicant;[58]

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As such, the difference between the figures used by the Commission and those advocated by the Applicant is even more limited.

[55] Annex A.1 to the Application, pages 271 to 273.

[56] Annex A.1 to the Application, pages 214 to 325.

[57] For ease of comparison, the General Court may wish to refer to Annex A.12 to the Application ("*Margin Squeeze Calculation (preliminary results)*") which provides an overview of the Commission's margin squeeze calculation in the Contested Decision. The final results of the calculation as put forward in the Contested Decision differ slightly from the figures set out in Annex A.12 due to revisions of the calculation that took place following the creation of this document.

The tables set out in Annex A.12 correspond to the tables set out in the Contested Decision as follows:

- Tables 1, 2 and 4 of Annex A.12 are identical to Tables 21, 22 and 24 of the Contested Decision;
- Table 3 of Annex A.12 corresponds to the Volumes of the Applicant's retail broadband products, and is identical to Table 31 of the Contested Decision;
- Tables 5 and 7 of Annex A.12 correspond to Table 2 of Annex I of the Contested Decision (**Annex D.1** to the Rejoinder);
- Table 6 of Annex 12 corresponds to Table 25 of the Contested Decision;
- Table 8 of Annex 12 corresponds to Table 26 of the Contested Decision;
- Tables 9 and 10 of Annex A.12 corresponds to Tables 29 and 30 of the Contested Decision; and
- Table 11 of Annex A.12 corresponds to Table 31 in the Contested Decision.

The remainder of the Tables track the inputs contained in these tables through the remainder of the margin squeeze calculation.

[58] See footnote 1393 of the Contested Decision.

(b) Table 25 of the Contested Decision shows monthly **network costs** and is equivalent to Table 81 of the SO. The costs used in the Contested Decision were provided by the Applicant;[59]

(c) Table 26 of the Contested Decision shows the **ISP recurrent costs** and is equivalent to Table 82 of the SO, and the cost figures were provided by the Applicant;[60]

(d) Tables 29 and 30 of the Contested Decision show the **subscriber acquisition costs** amortised over three years – as was the case in the SO (paragraph 1135 and Table 86 of the SO) – and four years respectively (as per the Applicant's Request in its Reply to the SO);[61] and

(e) Table 31 in the Contested Decision, provides an overview of ST's relevant **revenues**, and is identical to Table 87 of SO.

52. The remainder of the Tables in the Contested Decision track through these costs and revenues and apply them to the relevant product portfolios in line with the aggregated approach described in paragraphs 1070 to 1074 of the SO,[62] which is reprised in section 8.2.2 of the Contested Decision. As such, the fundamental elements of the margin squeeze methodology, approach and calculation remained unchanged as between the SO and the Contested Decision.

53. It is clear from the preceding paragraphs, therefore, that the Commission developed, and explained in detail in the SO its methodology and principles that it was applying for its margin squeeze calculation. This methodology and approach remained unaltered in the Contested Decision. The Applicant's criticism at paragraphs 102, 103 and 126 of the Reply that the Commission failed to put forward a calculation methodology prior to the Contested Decision is, therefore, unfounded.

54. With respect to the data underlying the calculations, as explained both at recitals (875) to (877) of the Contested Decision and paragraph 82 of the Defence, at the time that the Commission adopted the SO, the Commission only had access to the Applicant's costs data calculated on the basis of Fully Allocated Costs (FAC), taken from the UCN spreadsheets. For the reasons set out in paragraphs 1038 to 1039 of the SO, costs calculated on FAC may to some extent differ from LRAIC based on current cost accounting. The difference in the present case principally has an effect on the network asset costs, while having little impact on other downstream retail costs such as customer care or marketing. Therefore, in the SO, the Commission adjusted the FAC figures so that they were a better estimate of an equally efficient competitor's costs.[63]

55. As set out at paragraph 92 of the Defence, the basis for the margin squeeze calculations in both the SO and the Contested Decision was the UCN spread sheets. In the SO the

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[59] See footnote 1405 of the Contested Decision.

[60] Recital (949) of the Contested Decision – although the Commission did not accept the subsequent optimisation adjustments that the Applicant sought to apply (see recital (950) of the Contested Decision).

[61] Annex A.2 to the Application, paragraph 1346.

[62] Annex A.1 to the Application, pages 286 to 287.

[63] Annex A.1 to the Application, paragraph 1032 and following calculations up to paragraph 1067 (pages 278 to 285).

Commission adjusted the costs set out in the UCN spread sheets so that it formed as good a proxy as possible to incremental costs of an as efficient competitor. In the Contested Decision, the Commission took the LRAIC calculations provided by the Applicant – which were also based on the UCN spreadsheets – with the exception of those adjustments that the Commission considered inappropriate for the purposes of calculating the costs of an as efficient competitor.

56. In this respect, the Commission accepted many of the adjustment (even though certain of them were liable to underestimate the Applicant's costs, and, therefore, were in the Applicant's favour), with the exception of those, such as the optimisation adjustments, which the Commission considered were not in line with the underlying principle that the aim of the costs calculation is to identify the costs of an "equally efficient competitor".

57. In light of the foregoing, sections 8.2 and 8.3 of the Contested Decision, and paragraphs 71 to 100 of the Defence, it is clear that: (i) the methodology and principles applied by the Commission in its margin squeeze calculation remained unchanged as between the SO and the Contested Decision; and (ii) differences between the data relied upon by the Commission in the Contested Decision and the SO stem from the revised calculations submitted by the Applicant following the SO. The only differences between the data submitted by the Applicant and that used by the Commission in the Contested Decision are the result of the Commission's rejection of certain adjustments, which were not in line with the "equally efficient competitor" principle. Such refutation of the Applicant's claims does not constitute new evidence that would require the Commission to address a Supplementary SO or Letter of Facts to the Applicant.[64]

58. As such, the Commission submits that no infringement of the Applicant’s rights of defence can be found.

59. At paragraphs 104 to 110 of the Reply, the Applicant raises two subsidiary points: (i) that the Commission's position that it was not required to issue a Supplemental SO or Letter of Facts is at odds with the holding of a State of Play meeting; and (ii) the Applicant did not "refuse" to provide costs information based on LRAIC upon request prior to the SO.

60. With respect to the State of Play meeting of 16 September 2014, the Applicant contends that the fact that the Commission arranged such a meeting proves that the Commission considered that it was compelled to disclose its margin squeeze calculations prior to addressing the Contested Decision to the Applicant. The Applicant further submits that, on this basis, the "Margin squeeze calculation (preliminary results)" document that was provided to the Applicant was insufficient to satisfy the Applicant's rights of defence. The Applicant's position is based on false assumptions.

61. Firstly, for the reasons set out above, and at paragraphs 87 to 94 of the Defence, the Commission was not under an obligation to disclose its final margin squeeze calculations prior to addressing the Contested Decision to the Applicant. The fact that a State of Play meeting was held with the Applicant on 16 September 2014 does not undermine that position.

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[64] See to that effect Case T-175/12 *Deutsche Börse v Commission*, EU:T:2015:148, paragraphs 352 to 353.

62. As per paragraphs 60 to 66 of the Commission's Best Practices Notice,[65] the Commission endeavours to give, on its own initiative or on request, parties subject to proceedings ample opportunity for open and frank discussions and to make their points of view known. State of Play meetings form an important part in ensuring transparency and communication between the Commission and parties under investigation and constitute one of the means that the Commission has to inform parties as to the status of the proceedings at key points in the procedure. Such State of Play meetings, however, are distinct from, and additional to, the formal occasions mandated in Regulation 1/2003 and Regulation 773/2004 by which undertakings under investigation need to be given the opportunity to respond to the objections made against them. As set out in recitals (12) to (21) of the Contested Decision, and paragraphs 72 to 85 of the Defence, the Applicant was afforded its full rights under these Regulations during the administrative procedure.[66] It cannot be implied from the fact that, in the interests of good administration and transparency, an additional State of Play meeting was held and the Applicant was invited to submit observations, that the Commission considered that the Applicant's rights of defence had not been respected.

63. Secondly, the Applicant's statement that the "Margin squeeze calculation (preliminary results)" was insufficient to enable it to understand how the Commission arrived at its calculations[67] is misleading. Firstly, as can be seen from paragraph 51 above, the calculations provided in the "Margin squeeze calculation (preliminary results)" document followed the same method and structure as applied in the SO. It also showed the respects in which the figures contained in the calculation differed from those provided by the Applicant.[68] Secondly, as evidenced by the minutes of the State of Play meeting,[69] the Commission provided the Applicant with detailed explanations of the calculations and the extent to which the Commission had taken account of the calculations provided by the Applicant following the SO. The Applicant was, therefore, fully informed not only of the Commission's approach when conducting the margin squeeze calculation, but also the detailed results of that calculation. As such, even if and to the extent that it was necessary (*quod non*), the Applicant was informed of all material elements of the Commission's margin squeeze calculation and was given an opportunity to submit its observations prior to adoption of the Contested Decision.

64. With regard to the Applicant's refusal to provide LRAIC calculations prior to the SO, Annex C.1 to the Reply clearly demonstrates the Applicant's position. In its reply to Question 15 of the Commission's information request of 17 July 2009 (that is, nearly 3 years before the date of the SO) the Applicant recalls that it does not have product profitability statements based on LRIC, and that it would have to prepare new documents to calculate its costs on this basis. As such, the Applicant considered that the Commission did not have the right to request such information and therefore, did not

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[65] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308 20.10.2011, p. 6.

[66] The correspondence between the Applicant and the Hearing Office set out in Annexes A.13 to A.18 of the Application also demonstrate that the Applicant's rights of defence have been fully respected throughout the administrative proceedings in the present case.

[67] Application, paragraph 12.

[68] Tables 5 and 7 of the *Margin Squeeze Calculation (preliminary results)* document (Annex A.12 to the Application, pages 2280 to 2281).

[69] **Annex D.3** to the Rejoinder, pages 13 to 21.

provide costs information based on LRAIC prior to the SO.[70] The Commission was not, therefore, able to express doubts regarding the proposed adjustments at the SO stage and, for the reasons set out above, was not under an obligation to express its doubts as to the appropriateness of parts of the Applicant's LRAIC calculation prior to adoption of the Contested Decision. If the dominant undertaking could frustrate the Commission's ability to investigate an infringement of Article 102 TFEU by withholding costs information then this would seriously undermine the Commission's ability to carry out its enforcement activities.

*3.1.2. Second Plea, Limb two (§§111 to 122 Reply): The Commission respected the Applicant's rights of defence with respect to the multi-period approach*

65. At paragraphs 113 to 118 of the Reply the Applicant repeats its allegations that the Commission breached the principle of legal certainty by the manner in which it had recourse to the multi-period approach in the Contested Decision. The Applicant's arguments in the Reply add little to the position set out in the Application, to which the Commission has responded in full at paragraphs 95 to 100 of the Defence.

66. The Applicant's position rests on an untenable reading of the Contested Decision; relies on the false assumption that an abuse of margin squeeze can only occur where there is a negative margin; and seeks to draw certain links between the period-by-period assessment and the multi-period approach that do not exist.

67. Firstly, as set out at paragraph 97 of the Defence, it is clear from recital (1012) of the Contested Decision that the Commission conducted its margin squeeze assessment on the basis of the period-by-period approach. The Commission, at the request of the Applicant, conducted the multi-period analysis simply as a means of verifying whether the results of the period-by-period approach, on which the Contested Decision is based, would cast doubt on the conclusions already reached. Any other interpretation distorts the clear wording and structure of the Contested Decision.

68. Secondly, the Applicant's assumption that margin squeeze practices can only constitute an abuse of Article 102 TFEU if the resulting margin is negative is incorrect. As set out in more detail in response to the Applicant's Third Plea[71] the Court of Justice has recognised that an undertaking's pricing practice can constitute a margin squeeze even in respect of periods where a positive margin exists, where such practices are likely to make it at least more difficult for the operators concerned to trade on the relevant market, in particular by forcing them to operate at artificially reduced levels of profitability.[72] In

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[70] With regard to the Commission's powers of investigation, the Commission notes that in its ruling in Case T-297/11 *Buzzi Unicem v Commission*, EU:T:2014:122 (paragraph 56 and case law cited), the General Court held that when requesting information during its investigation, "*the Commission is not confined merely to requesting the production of existing information irrespective of any involvement of the undertaking concerned. It is therefore open to the Commission to direct questions at an undertaking even if this means that the latter has to marshal the requested information*." In the present case, the Applicant held all of the relevant information on its own costs (which the principle of legal certainty requires forms the basis on which the margin squeeze calculation should be conducted) and was able to calculate those costs on the basis of LRAIC.

[71] See in particular paragraphs 90 and 91 below.

[72] See to that effect Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, paragraphs 33 and 74.

this regard, as noted at recital (998) of the Contested Decision, the size of the initial investments and the long-term investment view adopted by telecommunications operators when deciding whether to enter a market is relevant in this context, given that the positive margin only lasted for a period of four months. As such, the Commission was not required to – and did not – rely on the results of the multi-period analysis to determine that the period of the infringement began on 12 August 2005.

69. Thirdly, the Applicant cannot advance its case in reliance on the fact that the phrase "*on a lasting basis*" is used both in respect of the both period-by-period approach and the multi-period approach. Firstly, as set out at recitals (857) to (859) of the Contested Decision and paragraphs 81 and 128 of the Defence, and as the Applicant itself noted during the administrative proceedings,[73] undertakings in the broadband industry do not make investment decisions on the basis of a single year's cash-flows and account needs to be taken of the high initial start-up costs for an AO entering the broadband sector. On this basis, the Commission concluded that the existence of a positive margin for four months in 2005 did not disprove the finding of a margin squeeze for the entire infringement period.

70. Fourthly, looking at a competitor's ability to operate profitably on a lasting basis is fully in line with the Commission's previous practice in the telecommunications sector.[74]

71. Finally, it is unsurprising that the same phrase is used for both the period-by-period analysis and the multi-period analysis considering that the underlying relevant question is the same in both cases – can an AO operate on the market on a lasting basis in light of the Applicant's pricing conduct? This in no way suggests, however, that the results of the period-by-period analysis were modified in light of the multi-period analysis in the present case.

72. With respect to the allegation raised by the Applicant at paragraphs 119 to 122 of the Reply that the Commission did not follow the multi-period analysis proposed by the Applicant, the Commission has already explained at paragraph 98 of the Defence that the multi-period analysis applied in the Contested Decision mirrors that put forward by the Applicant in its Reply to the SO.

73. With regard to the Applicant's claim at paragraph 121 of the Reply that what the Applicant was really seeking was for the Commission to conduct a DCF analysis such as that used in the *Telefónica* case,[75] this position is untenable and at odds with the Commission's approach in the *Telefónica* case.

74. Firstly, in the *Telefónica* case, it was Telefónica that requested that the Commission verify its margin squeeze findings by having recourse to a DCF analysis in addition to the period-by-period analysis, and it was Telefónica that put forward the DCF methodology to be used. The Commission simply applied the methodology proposed by Telefónica to verify whether such an analysis would undermine the conclusions reached

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[73] Annex A.2 to the Application, paragraph 1281, page 947.

[74] See for example: Case COMP/38.784 *Wanadoo España vs. Telefónica*, paragraph 318: "*Therefore, in accordance with the economic theory and with the practice of the Commission on margin squeeze where the ability of competitors to operate profitably in the long term was assessed*" (emphasis added).

[75] Case COMP/38.784 *Wanadoo España vs. Telefónica.*

on the basis of a period-by-period analysis.[76] As set out above, the Commission adopted an identical verification approach in the present case.

75. Secondly, and in contrast to Telefónica, the Applicant did not provide the Commission with the relevant data to carry out a DCF calculation. As set out in recitals (850) and (858) of the Contested Decision, different inputs would have been required for the Commission to carry out an analysis on the basis of DCF. Such inputs were not provided by the Applicant. Rather, it put forward the analysis described in paragraphs 1498 to 1500 of the Reply to the SO, which the Commission took into consideration in recitals (1013) to (1015) of the Contested Decision.

76. Thirdly, the idea that the DCF should be carried out over the lifetime of a customer or contract (see paragraph 122 of the Reply) would not only lack legal certainty given that customer churn rates vary over time according to the competitive dynamics of the relevant market, but also, the Applicant's subscribers' average lifetime is likely to be higher than it would be in a competitive market, as a consequence of the market power of the dominant undertaking.[77] Furthermore, a calculation conducted over a much longer period would not be meaningful as AOs cannot be expected to soak up losses over a period of more than five years on the hope that they might recover costs at some point in the future.[78]

77. Fourthly, the purpose of a margin squeeze assessment is to determine whether a given behaviour in a specific period of time is prone to foreclose competitors in the downstream market. It is consistent with this purpose, therefore, that the period taken for the multi-period analysis corresponds to the infringement period as determined on the basis of the period-by-period approach.

78. Fifthly, even though the Commission did not conduct the multi-period assessment on the basis of DCF, there remains a number of material similarities between the analyses conducted in the two cases. For example: both analyses were conducted on the basis of historic, rather than future costs;[79] such costs were calculated over a period of approximately five years, corresponding to the life-time of the relevant assets;[80] the multi-period analysis was carried out for the infringement period established on the basis of the period-by-period analysis;[81] and was applied to the portfolio of the dominant undertaking's downstream products.[82]

79. In light of the foregoing, the Commission respectfully maintains its position that the General Court should reject the Applicant's Second Plea in its entirety.

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76 Contested Decision recital (853).

77 See to this effect Case COMP/38.784 *Wanadoo España vs. Telefónica*, recitals (477) and following.

78 Case COMP/38.784 *Wanadoo España vs. Telefónica*, recitals (351) to (359).

79 Case COMP/38.784 *Wanadoo España vs. Telefónica*, recitals (378) to (382).

80 Case COMP/38.784 *Wanadoo España vs. Telefónica*, recitals (351) to (359).

81 Case COMP/38.784 *Wanadoo España vs. Telefónica*, recital (349).

82 Case COMP/38.784 *Wanadoo España vs. Telefónica*, recitals (381) and (388).

### 3.2. THIRD PLEA: The Commission correctly examined and assessed all relevant matters of law and fact in concluding that the Applicant had engaged in margin squeeze

80. At paragraphs 123 to 151 of the Reply, the Applicant challenges the substance of the Commission's margin squeeze assessment. The following paragraphs respond to each of the specific allegations raised by the Applicant to the extent that they have not already been addressed at paragraphs 101 to 141 of the Defence.

81. The Commission notes at the outset, however, that paragraph 123 of the Reply shows clearly the fundamental contradiction that lies at the heart of the Applicant's position. The Applicant correctly states that a margin squeeze assessment under Article 102 TFEU should be conducted on the Applicant's costs. At the same time, however, it criticises the Commission for not taking into account its proposed optimisation adjustments, which represent the costs of a modern, optimised network – i.e. a different network to that operated by the Applicant, and which, therefore, is not reflective of the Applicant's costs. As set out in recitals (895) to (902) of the Contested Decision and paragraphs 109 to 117 of the Defence, such a position is squarely at odds with the "as efficient competitor" test, which forms the basis of the margin squeeze assessment. The Commission did not, therefore, err when it concluded that the optimisation adjustments should not be included when calculating the relevant costs to be used in the margin squeeze calculation.

#### *3.2.1. Third Plea, Limb One (§§123 to 137 Reply): The Commission conducted the margin squeeze calculation correctly*

82. At paragraphs 128 to 129 and 134 to 137 of the Reply the Applicant rehearses its claim that the Commission acted inconsistently by accepting the Applicant's adjustments to take account of Current Cost Accounting ("CCA") while rejecting the optimisation adjustments. The Commission has already responded to this argument at paragraphs 109 to 117 of the Defence.[83]

83. The Commission notes, however, that the Applicant mistakenly seems to consider that the relevant benchmark to be applied for the margin squeeze assessment is a strict application of LRAIC. As set out at recitals (828) to (830) of the Contested Decision, however, the relevant test is that of the costs of a competitor that is equally efficient to the dominant undertaking. LRAIC is the cost measure that the Commission uses to best estimate the costs of an equally efficient competitor. In applying that cost measure, however, regard has to be had to the ultimate aim – that is, seeking to estimate the costs of an equally efficient competitor at the time of the infringement. It is by failing to keep this objective in mind that the Applicant concludes that there is an inconsistency in the Commission's treatment of the cost calculations put forward by the Applicant.

84. As explained in detail at recitals (885) to (894) of the Contested Decision, notwithstanding the fact that such adjustments were likely to underestimate the Applicant's costs (and thus go in the Applicant's favour), the Commission accepted the Applicant's CCA adjustments because this was the best available data that reflected the

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[83] With respect to the MEA adjustments, the argument raised at paragraphs 110 to 114 is neither new nor opportunistic as the Applicant contends at paragraphs 136 to 137 of the Reply. The Commission's concerns with respect to the use of the modern equivalent asset approach is detailed in recitals (900) to (902) and in particular recital (901).

Applicant's incremental broadband asset costs and was a closer proxy to the costs that would be incurred by an equally efficient competitor in 2005 to 2010 than the Applicant's costs calculated on historic cost accounting and FAC, even accounting for the adjustments carried out by the Commission in the SO. However, had the Commission accepted the optimisation adjustments advocated by the Applicant, which are based on a forward-looking projection rather than a historical estimate of an equally efficient competitor's costs during the period 2005 to 2010, the resulting costs would not have reflected the costs of an equally efficient competitor as the dominant undertaking and, therefore, would not constitute an appropriate comparator on which to perform the margin squeeze assessment of the dominant undertaking's pricing. By accepting a calculation that renders the costs a closer proxy for those of an equally efficient competitor while rejecting adjustments that made the figures a worse proxy, the Commission acted entirely consistently and in line with the EU Courts' case law.[84]

85. With respect to paragraph 130 of the Reply, regarding the Applicant's proposed optimisation adjustments to take account of excess spare capacity, recitals (895) to (903) of the Contested Decision set out in detail why taking into account such optimisation adjustments would not be in line with the equally efficient competitor test. In short, such an adjustment would result in the margin squeeze calculation being conducted on the basis of assets that do not correspond to those held by the Applicant, but rather, on a hypothetical, different set of assets that, from an *ex-post* perspective, were suited to the level of demand. As set out by at recital (902) of the Contested Decision, unused capacity is of no particularity to the Applicant and, therefore, there is no objective reason to define a hypothetical set of assets that differs from, and would be more efficient than, that held by the Applicant.

86. In concrete terms, therefore, and as set out at paragraphs 51 and 56 above, the Commission accepted all of the Applicant's proposed network costs, except that the Commission applied 100% of the costs associated with network costs and OPEX rather than adjusting those costs downwards by the percentages set out in the Applicant's LRAIC calculation.[85] At paragraphs 131 to 133 of its Reply, the Applicant contends that by declining to accept the optimisation adjustments, the Commission took too rigid an approach in applying the equally efficient competitor test. In reliance on the Court of Justice's judgments in *Deutsche Telekom* and *TeliaSonera*, the Applicant recalls that in certain circumstances it can be appropriate to have regard to the costs of rivals rather than those of the dominant undertaking. The Applicant considers that such exceptions should apply in this case because it did not have readily available costs information calculated on the basis of LRAIC. In this regard, the Applicant misunderstands the Court of Justice's rulings.

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[84] Contrary to the Applicant's statements at paragraph 126 of the Reply, the Commission has never argued that the optimisation adjustments were improper simply because they do not represent the "actual" costs of Applicant, within the meaning of the term "actual" as used by the Applicant in paragraph 126 of the Reply (the Applicant defines "actual" as the historic cost data set out on a FAC basis in the Applicant's internal UCN system). The Commission has always acknowledged the need for such costs data to be adjusted so as to constitute a closer proxy for the costs of an equally efficient competitor. This is reflected in the adjustments made by the Commission at the SO stage and the adjustments proposed by the Applicant that the Commission accepted in the Contested Decision.

[85] **Annex D.2** to the Rejoinder, page 5.

87. In *Deutsche Telekom*,[86] the Court of Justice ruled that it was appropriate to take into consideration discontinuation charges payable by competitors that were not payable by the dominant undertaking. This was a foreseeable charge, which formed part of the total costs incurred by a competitor – independently of whether the competitor was as efficient as the dominant undertaking. Failing to take this charge into account would clearly and unjustifiably underestimate the costs incurred by a competitor and is fully consistent with the principle that the wholesale charges charged by the dominant undertaking are included when calculating the costs of an equally efficient competitor even though the dominant undertaking itself is not subject to such charges. This is wholly different to the situation in the present case, in which the Applicant is attempting to estimate the costs of an "optimal" network based on an *ex-post* assessment of customer demand rather than identifying an objective and foreseeable charge, unrelated to efficiency, that distinguishes the Applicant's position from that of its competitors.

88. Similarly, in *TeliaSonera*,[87] the Court of Justice envisaged having recourse to costs other than those of the dominant undertaking in situations where the dominant undertaking's cost structure was not identifiable for objective reasons, or would not reflect the situation faced by competitors. Such an exception is clearly not intended to cover situations where the Applicant is capable of identifying and calculating its costs and has failed to identify any objective reason why such costs would not constitute an appropriate benchmark for estimating the costs of an equally efficient competitor.[88]

#### *3.2.2. Third Plea, Limb Two (§§138 to 151 Reply): The Commission correctly applied the period-by-period and multi-period analyses*

89. At paragraphs 138 to 140, 147 and 149 of the Reply the Applicant, in essence repeats its allegation that the Commission's conclusions based on the period-by-period analysis were influenced by its conclusions based on the multi-period analysis, and that the Commission did not apply the same multi-period methodology as proposed by the Applicant. The Commission has already responded to these allegations and, therefore, respectfully refers the General Court to paragraphs 97 and 118 to 136 of the Defence and paragraphs 65 to 71 above. As set out in these paragraphs, the Applicant's position is based on a distorted interpretation of the clear wording of the Contested Decision and an incomplete and misleading reading of the EU Courts' case law.

90. The arguments raised by the Applicant in paragraphs 142 to 146 of the Reply cannot assist the Applicant with regard to the position established by the EU Courts. As recalled at paragraph 126 of the Defence,[89] the Court of Justice explicitly recognised the

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[86] Case C-280/08 P *Deutsche Telekom v Commission*, EU:C:2010:603, paragraph 210.

[87] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, paragraphs 45 and 46.

[88] See further recitals (900) to (903) of the Contested Decision where the Commission sets out why the optimisation adjustments were not objectively appropriate for estimating the costs of an equally efficient competitor.

[89] At paragraph 145 of the Reply the Applicant calls into question the relevance of the case law cited by the Commission in support of its position that the existence of a positive margin does not automatically exclude the possibility of a pricing practice constituting an abusive margin squeeze. The Commission finds this position surprising. As can be seen from paragraphs 123 and 124 of the Defence (the paragraphs referred to by the Applicant at paragraph 145 of the Reply), the principal cases on which the Commission relies are Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*; T-336/07 *Telefónica and Telefónica de España v Commission*, EU:T:2012:172; and Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603 – each

possibility of the existence of an abusive margin squeeze even where margins remain positive, but where the dominant undertaking's practices have the consequence that it is likely that it would be at least more difficult for the operators concerned to trade on the market by reason, for example, of artificially reduced profitability, where such practice is not economically justified.[90] This position is perfectly in line with the underlying principle that margin squeeze practices are abusive by virtue of the "*exclusionary effect which it may create for competitors who are at least as efficient as the dominant undertaking in the absence of any objective justification*" because in "*such circumstances, although the competitors may be as efficient as the dominant undertaking, they may be able to operate on the retail market only at a loss or at artificially reduced levels of profitability*."[91]

91. In line with the Court of Justice's ruling in *TeliaSonera*, the Commission demonstrated in Sections 9 and 10 of the Contested Decision that the Applicant's pricing practices were likely to have the effect of excluding equally efficient competitors from the market. These conclusions have not been challenged by the Applicant.

92. The Court of Justice's ruling in *Post Danmark*,[92] which regarded a case of selective pricing and not margin squeeze, does not – contrary to the Applicant's statements – preclude the possibility of the existence of an abusive margin squeeze where margins remain positive. The Court of Justice simply recalls in its judgment that the holding of a dominant position is not, in itself, contrary to Article 102 TFEU, and the fact that an undertaking may enjoy a dominant position does not deprive it of the right to compete on the merits – even if such competition leads to the exit of less efficient competitors from the market. This is a very different situation to pricing practices which have the likely effect of excluding equally efficient competitors from the market, as the Commission has demonstrated is the situation in the present case.

93. At paragraph 146 of the Reply the Applicant questions the relevance of the Commission's reference at paragraphs 129 to 130 of the Defence to the fact that the Applicant was aware from the outset that the prices that it set for wholesale ULL access to its copper network were capable of squeezing competitors' margins. It is settled case law that "*in order to assess the lawfulness of the pricing policy applied by a dominant undertaking, reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy*" (emphasis added).[93] The Applicant's claim that a dominant undertaking's strategy is irrelevant with respect to whether its practices constitute an abusive margin squeeze is clearly erroneous.

94. At paragraphs 150 to 151 of the Reply, the Applicant draws again on the hypothetical example that it created at paragraph 135 of the Application to illustrate its argument that

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of which deal with the legal test applicable under Article 102 TFEU in the case of margin squeeze, and which the Applicant has sought to rely on throughout its own pleadings.

90 Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, paragraphs 74 to 75.

91 Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, paragraphs 31 to 34. See to that effect Case T-398/07 *Kingdom of Spain v Commission*, §§66-68, 93; Case C-280/08 P *Deutsche Telekom*, §172, 175-177.

92 Case C-209/10 *Post Danmark A/S v Konkurrenceradet*, EU:C:2012:172.

93 Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, paragraph 41, in which the Court of Justice was specifically confronted with the legal test for assessing margin squeeze practices.

the multi-period analysis contravenes the principle of legal certainty.[94] In this respect, the Commission has always acknowledged the shortcomings of multi-period approaches,[95] which explains why the Commission's practice is based on a period-by-period analysis – as was done in the present case. As is clear both from recitals (843) to (859) and (1012) to (1015) of the Contested Decision, the Commission applied the multi-period analysis following a request by the Applicant with the sole purpose of verifying the conclusions already reached on the period-by-period analysis. As set out at paragraphs 118 to 121 of the Defence, and paragraphs 66 to 72 above, the idea that the Commission used the multi-period analysis to turn a positive margin into a negative margin is incorrect and, once again, is based upon the Applicant's erroneous fixation that a margin squeeze cannot exist in situations where there is a positive margin, no matter how low this margin is. When viewed from the correct position of whether the Applicant's practices had an exclusionary effect on AOs who are as efficient as the Applicant, any inconsistencies claimed by the Applicant fall away.

95. Concerning the Applicant's proposition that the multi-period analysis could be based on the lifetime of a customer or contract, as set out at paragraph 76 above, such a position should be rejected precisely on the grounds of legal certainty that the Applicant seeks to invoke. In *Telefónica*, as in the present case, the multi-period approach was conducted over a period of approximately five years corresponding both to the years of the infringement and the life-time of the relevant assets.[96]

96. In light of the foregoing, the Commission respectfully maintains its position that the General Court should reject the Applicant's Third Plea in its entirety.

## 4. FOURTH PLEA: PARENTAL LIABILITY

### 4.1. Admissibility

97. At paragraphs 153 to 154 of the Reply, the Applicant contends that it has an interest in challenging the finding in the Contested Decision that the Applicant forms a single undertaking with Deutsche Telekom because: (i) the General Court could exercise its unlimited jurisdiction to amend the level of the fine and the Applicant has an interest in ensuring that the 10% cap set out in Article 23 of Regulation 1/2003 is calculated by reference to only the Applicant's turnover and does not include Deutsche Telekom's turnover; and (ii) if Deutsche Telekom and the Applicant did form a single undertaking, then this could have an impact on the jurisdictions in which potential claimants could bring actions for damages. The Applicant's arguments in this respect are unconvincing.

98. Firstly, the fine imposed by the Commission on the Applicant (EUR 38 838 000) is significantly less than 10% of the Applicant's own turnover, which in 2013 amounted to EUR 828 million (Contested Decision, recital (1540)). As such, the General Court would need to more than double the fine imposed on the Applicant before the threshold in Article 23 of Regulation 1/2003 is reached. While such an increase is hypothetically possible, not only would it be unprecedented, but in the context of the present

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[94] The hypothetical nature of the Applicant's worked example is discussed at paragraph 135 of the Defence.

[95] See recital (848) of the Contested Decision; Case COMP/38.784 *Wanadoo España vs. Telefónica*, recitals (333) to (335); and Case COMP/38.233 *Wanadoo Interactive*, recitals (90) to (92).

[96] See further paragraph 78 above.

proceedings, where no request for an increase has been made and it is not readily apparent what the basis for such an increase would be, the Applicant's concerns in this regard are little more than theoretical.

99. With regard to the possibility of potential damages actions being brought against the Applicant in jurisdictions other than Slovakia if the Applicant formed a single undertaking with Deutsche Telekom, such a consideration, even if it were correct, would be irrelevant for the purposes of establishing whether the Applicant's Fourth Plea is admissible. As per the case law cited at footnote 174 of the Defence, the relevant question for judging the admissibility of an action by a subsidiary against the part of the fine imposed on its parent is whether any positive consequence would ensue from an annulment of the Commission decision *as regards the amount of the fine* imposed by the Contested Decision. The potential impact of the Contested Decision on potential future private enforcement measures is irrelevant for the purposes of determining the Applicant's fine.

### 4.2. Substance

100. At paragraph 155 of its Reply the Applicant simply summarises the position set out in the Application, to which the Commission has already responded in full at paragraphs 147 to 186. The Commission, therefore, respectfully refers the General Court to the relevant sections of the Defence, and, accordingly, requests that General Court reject the Applicant's Fourth Plea in its entirety.

## 5. FIFTH PLEA: THE COMMISSION CORRECTLY DETERMINED THE LEVEL OF THE FINE IN LINE WITH ITS 2006 FINING GUIDELINES

### 5.1. First limb: No error in the Commission's use of the sales of the last business year of the infringement

101. The Commission has used the correct legal test to determine whether the general rule under paragraph 13 of the 2006 Fining Guidelines (i.e. that the basic amount of the fine should be calculated by reference to the relevant undertaking's turnover in the final year of the infringement) is applicable in the present case. As set out at recital (1494) of the Contested Decision, during the final four years of the infringement, the Applicant's revenue only grew by a total of 9%. Given that the infringement lasted a total of 5 years and 4 months, using as a basis for the fine calculation the turnover from the last year of the infringement was representative of the Applicant's turnover for the vast majority of infringement period and was not, as the Applicant claims, "out of kilter" with the value of sales in other years.

102. At recital (1494) of the Contested Decision the Commission's reference to the Applicant's turnover not being "exponential" was in direct response to the Applicant's attempt to rely on the approach adopted by the Commission in the *Telekomunikacja (Orange) Polska* case. In that case, the undertaking' growth was indeed exponential. In particular, as regards the relevant market on which the abuse took place (see Defence paragraph 190). The Commission's reference to "exponential", therefore, seeks to demonstrate the differences between the situation in *Telekomunikacja (Orange) Polska* and the Applicant's situation. The Commission at no point sought to apply a new or different legal test as the Applicant contends at paragraph 160 of the Reply.

### 5.2. Second limb: The Commission correctly assessed the duration of the infringement

103. At paragraphs 163 to 167 of the Reply, the Applicant alleges that the Commission erred in finding that the Applicant breached Article 102 TFEU as of 12 August 2005 – i.e. the date on which the RUO was published.

104. Contrary to the Applicant's arguments, in light of the fact that the relevant abuse consisted largely in the imposition of unfair conditions contained in the RUO (see paragraph 3 above and paragraphs 2 and 43 of the Defence) the Commission was correct to establish the start of the infringement as corresponding to the date of publication of the RUO. It was in particular because of the unfair content of the RUO that AOs either could not gain access or were discouraged from starting altogether negotiations with the Applicant regarding ULL access.[97] For example, as set out at recitals (394) and (395) of the Contested Decision, six requests were initially received by the Applicant to open negotiations for ULL access, although more undertakings were interested in having ULL access. Only five companies signed non-confidentiality agreements and, ultimately, only two undertakings entered into negotiations in 2005/2006 (recital (403) of the Contested Decision). As set out at recitals (396) to (402) of the Contested Decision, one of the principal reasons for undertakings cancelling their intention to negotiate was due to the terms of the RUO. The terms of the RUO, from the very date of its publication, were liable to limit competition on the retail mass market for broadband services offered at a fixed location in the Slovak Republic.

105. In that regard, Articles 1(a) to (c) of the Contested Decision specifically refer to aspects of the provisions of the RUO that were abusive. It follows that, by virtue of the dissuasive impact that the inclusion of such terms in the RUO could have on AOs even to begin negotiations for ULL access (as per paragraph 104 above), as well as hampering or delaying effective ULL access to the Applicant's copper network by AOs, the Commission was justified in concluding that the infringement period commenced on 12 August 2005 (i.e. the date of publication of the RUO).

106. With regard to the Applicant's arguments concerning the existence of abusive margin squeeze practices as from 12 August 2005 (paragraphs 165 to 166 of the Reply), the Commission has rebutted these arguments in full in its response to the Applicant's Third Plea.

107. In any event, the Commission notes that the Applicant errs at paragraph 167 of the Reply when it states that both the margin squeeze and the refusal to supply components of the abuse needs to be made out from 12 August 2005 for the start date to be justified. Even assuming (*quod non*) that the Commission made a partial error as to one or the other element of the infringement, a reduction of the fine would not be justified in the present case. Indeed, the Commission did not impose two separate fines for the margin squeeze and refusal to supply elements of its Decision. As is clear from Article 1(2) of the Contested Decision, the Commission identified a breach of Article 102 TFEU resulting from a number of practices, any one of which, independently, was capable of

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[97] For example, Orange emphasised that "*given that the RUO was incomplete (did not even contain the templates of the contracts), in contradiction with the law and the TUSR decision, and the prices were disproportionately high, Orange Slovensko, a.s., except for the request for the RUO change and the initiation of the RUO change through the regulator, did not take any other step*." (Contested Decision, recital 424).

constituting a very serious breach of Article 102 TFEU[98] and which, together formed part of an overall strategy to foreclose competitors from the market. The Commission is entitled, therefore, to determine the amount of the fine with regard to the infringement seen as a whole, in accordance with settled case law.[99]

108. In light of the foregoing, the Commission respectfully maintains its position that the Applicant's Fifth Plea should be rejected in its entirety.

## 6. CONCLUSION

109. On those grounds, the Commission respectfully submits that the General Court should:

- reject the Applicant's application for annulment in its entirety; and
- order the Applicant to bear the costs of the present proceedings.

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*Agents of the Commission*

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98 Case T-486/11 *Orange Polska v Commission*, EU:T:2015:1002., paragraph 184 and case law cited therein.

99 Cases T-83/91, *Tetra Pak*, EU:T:1994:246, paragraph 241; T-203/01, *Michelin v Commission* EU:T:2003:250, paragraphs 228 and 265 to 267; T-201/04, *Microsoft v Commission*, EU:T:2007:289, paragraphs 1288, 1293, 1343-1345; Commission decision relating to proceedings under Article 82 of the Treaty and Article 54 of the EEA Agreement (Case COMP/E-1/38.113 – *Prokent-Tomra*), upheld in Case T-155/06 *Tomra v Commission*, EU:T:2010:370 (confirmed in Case C-549/10 P *Tomra v Commission*, EU:C:2012:221); T-336/07 *Telefónica v Commission*, cit., paragraphs 370 et seq. and 419 (confirmed by C-295/12 P); Commission Decision of 13 May 2009 in Case COMP/C-3/37.990 - *Intel* (see in particular Sections VII.4.5 and IX), upheld in Case T-256/09 *Intel v Commission*, EU:T:2014:547.