Provisional text

JUDGMENT OF THE COURT (Third Chamber)

25 March 2021 (*)

(Appeal – Competition – Article 102 TFEU – Abuse of dominant position – Slovak market for broadband internet access services – Regulatory obligation on the part of operators with significant market power to grant access to the local loop – Conditions laid down by the incumbent operator for unbundled access by other operators to the local loop – Indispensability of the access – Imputability of a subsidiary's conduct to the parent company – Rights of the defence)

In Case C-152/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 21 February 2019,

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

appellant,

the other parties to the proceedings being:

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

defendant at first instance,

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

intervener at first instance,

THE COURT (Third Chamber),

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

Advocate General: H. Saugmandsgaard Øe,

Registrar: D. Dittert, Head of Unit,

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

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

gives the following

Judgment

1 By its appeal, Deutsche Telekom AG requests that the Court set aside the judgment of the General Court of the European Union of 13 December 2018, *Deutsche Telekom* v *Commission* (T-827/14, EU:T:2018:930; 'the judgment under appeal'), by which the General Court partially dismissed its action seeking, primarily, the annulment, in whole or in part, in so far as it concerns Deutsche Telekom, of Commission Decision C(2014) 7465 final of 15 October 2014 relating to proceedings under Article 102 [TFEU] and Article 54 of the

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

Legal context

Regulation(EC) No 2887/2000

2 Recitals 3, 6 and 7 of Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4) stated:

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

…

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

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

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

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

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

…'

4 Article 2 of that regulation contained the following definitions:

'…

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

…

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

…’

5 Article 3 of that regulation read as follows:

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

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

…’

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

Directive 2002/21/EC

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

‘…

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

…

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

…

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

…

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

Background to the dispute

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

9 The appellant is the incumbent telecommunications operator in Germany and the company at the helm of the Deutsche Telekom group. During the period between 12 August 2005 and 31 December 2010, the appellant owned 51% of the capital of the incumbent telecommunications operator in Slovakia, Slovak Telekom a.s. (‘ST’).

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

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

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

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

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

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

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

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

The procedure before the General Court and the judgment under appeal

18 By application lodged at the Registry of the General Court on 24 December 2014, the appellant brought an action seeking, primarily, the annulment, in whole or in part, of the decision at issue and, in the alternative, the

annulment or the reduction of the fines which had been imposed on it.

19 In support of that action, the appellant relied on five pleas in law alleging, first, errors of fact and of law in the application of Article 102 TFEU as regards ST's abusive conduct, and a breach of the rights of the defence, second, errors of fact and of law as regards the duration of ST's abusive conduct, third, errors of law and of fact in the imputation of ST's abusive conduct to the appellant, in so far as, in its view, the Commission has not proved that the appellant did indeed exercise a decisive influence over ST, fourth, misinterpretation of the concept of 'undertaking' within the meaning of EU law and breach of the principle that the penalty must be specific to the offender and the offence, and failure to state reasons, and fifth, errors in the calculation of the amount of the fine for which ST and the appellant were held jointly and severally liable.

20 By the judgment under appeal, the General Court rejected all the pleas in law put forward by the appellant apart from, first, the second plea in law, which it upheld in part, on the ground that the Commission had not provided proof that ST's practice leading to a margin squeeze had taken place between 12 August and 31 December 2005, and, second, the fourth plea in law which it upheld in so far as, in its view, the Commission had misinterpreted, in the decision at issue, the concept of 'undertaking' within the meaning of EU law, by holding the appellant liable to pay a fine the amount of which had been calculated on the basis of a multiplier of 1.2, applicable for the purposes of deterrence. The General Court thus partially annulled the decision at issue and set the amount of the fine for the payment of which ST and the appellant were held jointly and severally liable at EUR 38 061 963 and the amount of the fine for the payment of which the appellant alone was held liable at EUR 19 030 981. It dismissed the action as to the remainder.

21 In particular, by the first part of its first plea in law, the appellant alleged that the Commission incorrectly failed to examine, for the purpose of establishing an abuse of a dominant position on the part of ST due to the conditions that it offered alternative operators for accessing its network, the condition relating to whether access was indispensable to those operators carrying on their business, referred to in paragraph 41 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569; 'the judgment in *Bronner*'). The General Court rejected that part of the first plea in paragraphs 92 to 116 of the judgment under appeal, stating, in essence, that the legislation relating to the telecommunications sector applicable in the case at hand constituted a relevant factor in the application of Article 102 TFEU and that that legislation acknowledged the need for access to ST's local loop, in order to allow the emergence and development of effective competition on the Slovak market for high-speed internet services, so that the Commission was no longer required to demonstrate that such access was indispensable.

22 By the second part of its first plea in law, the appellant claimed that its right to be heard had been infringed, on the ground, first, that it had not been able to acquaint itself, until the meeting of 29 September 2014, with certain information which had been taken into consideration in calculating the margin squeeze and, second, that it had been given only a very tight deadline to put forward its views on that information. The General Court rejected that second part in paragraphs 123 to 145 of the judgment under appeal, stating, in essence, that the information in question had not altered the nature of the complaints against ST and the appellant in the decision at issue and did not involve any facts which they had had no opportunity to challenge.

23 The appellant's third plea in law alleged in particular that the Commission had committed errors of law and of fact by imputing ST's conduct to the appellant, by relying on the fact that the appellant had had the possibility of exercising a decisive influence over that company, by presuming that the appellant had actually exercised such an influence over that company, and by failing to demonstrate that the appellant had exercised a decisive influence over that company. The General Court rejected those complaints in paragraphs 227 to 473 of the judgment under appeal on the ground, in particular, that the actual exercise of decisive influence by a parent company over its subsidiary's conduct may be inferred from a body of consistent evidence and that that was the case in the decision at issue, since the Commission had inter alia emphasised the presence, in ST's board of directors, of senior managers of the appellant, the provision of staff of the appellant to ST and the regular transmission of reports by ST to the appellant concerning the commercial policy of the appellant's subsidiary. The General Court found that the examination of the economic, organisational and legal links between the appellant and ST permitted it to be established that ST's general strategy on the Slovak market for broadband internet access services was defined by the appellant.

Forms of order sought by the parties

24 By its appeal, the appellant claims that the Court of Justice should:

– set aside the judgment under appeal in so far as it dismisses the action at first instance;

– annul the decision at issue, in whole or in part, in so far as it concerns the appellant, and, in the alternative, annul or reduce the fines imposed on it;

– in the further alternative, refer the case back to the General Court for reconsideration; and

– order the Commission to pay all the costs arising from the present proceedings and the proceedings before the General Court.

25 The Commission contends that the Court should:

– dismiss the appeal and

– order the appellant to pay the costs.

The appeal

26 The appellant raises four grounds in support of its appeal. The first ground of appeal alleges incorrect interpretation and incorrect application of the principle according to which, for a refusal of access to be abusive for the purposes of Article 102 TFEU, that access must be ‘indispensable’ to the person requesting such access. The second ground of appeal alleges incorrect interpretation and incorrect application of the principle according to which, in order to impute an infringement of a subsidiary to its parent company, the parent company must actually exercise a decisive influence over its subsidiary. The third ground of appeal alleges incorrect application of the principle according to which, in order to impute an infringement of a subsidiary to its parent company, the subsidiary must have carried out, in all material respects, the instructions given to it by the parent company. The fourth ground of appeal alleges an infringement of the appellant’s right to be heard.

27 Furthermore, the appellant requests that a potentially favourable ruling in the judgment to be delivered by the Court of Justice in the related Case C-165/19 P, concerning the appeal lodged by ST against the judgment of the General Court of 13 December 2018, *Slovak Telekom* v *Commission* (T-851/14, EU:T:2018:929), be extended to the appellant.

The first ground of appeal

Arguments of the parties

28 The appellant takes the view that, in paragraphs 86 to 115 of the judgment under appeal, the General Court erred in law by considering that the Commission was not required to prove that access to ST’s local loop was indispensable to alternative operators in order to classify that company’s restrictions of that access as ‘abusive’ for the purposes of Article 102 TFEU.

29 According to the appellant, in paragraphs 97, 98, 101 and 103 of the judgment under appeal, the General Court incorrectly found that the criteria laid down in the judgment in *Bronner* did not apply in the case at hand on the ground that ST was subject to a regulatory obligation to grant access to its local loop. In the appellant’s view, that obligation cannot supplant the indispensability of the access referred to in the judgment in *Bronner* for the following reasons.

30 First, the appellant claims that the existence of an obligation of a regulatory nature to provide access and the indispensability of that access are separate matters. In order to impose an obligation on ST to grant access to its local loop, the TUSR took account only of the historical position of ST on the wholesale market for unbundled access to the local loop. It did not examine whether that access was indispensable for business being

carried on in the downstream market or determine to what extent unbundled access to the local loop could have been replaced by separately owned alternative infrastructure. By contrast, when examining whether such access is 'indispensable', for the purposes of the judgment in *Bronner*, it is precisely knowing whether there is an actual or potential substitute for that access that is important. The appellant asserts that it demonstrated before the General Court that that was the case here.

31 Second, the appellant claims that the regulatory access obligation, unlike a finding of abuse of a dominant position within the meaning of Article 102 TFEU, is imposed *ex ante*. It follows that the findings of fact establishing that obligation could quickly prove to be outdated. That is specifically the case in the context of telecommunications services markets, which develop very quickly.

32 Third, the appellant asserts that the regulatory access obligation is based on extrapolations, whereas a finding of abuse of a dominant position, within the meaning of Article 102 TFEU, must be made following a specific examination, in particular, of whether access to the local loop is indispensable.

33 Fourth, the appellant asserts that the telecommunications legislation and the criteria of the judgment in *Bronner* concern different objectives. The national regulatory authorities that are competent for telecommunications matters have the task not only to foster competition but also to contribute to the development of the internal market and to promote the interests of citizens. That approach is echoed in the judgment of 14 October 2010, *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603), referred to by the General Court in paragraph 97 of the judgment under appeal.

34 In addition, the appellant is of the view that it is not possible to forgo a specific examination as to whether access to the local loop is indispensable where there is a regulatory access obligation, since this would facilitate a finding of abuse and would render meaningless the case-law of the Court of Justice.

35 Furthermore, the appellant claims that, contrary to the General Court's finding in paragraphs 106 to 112 of the judgment under appeal, an implied refusal of access to the local loop, such as the one complained of in regard to ST, is not different from that which gave rise to the judgment in *Bronner*, since, in both cases, the owner of the infrastructure has a legitimate interest in the protection of its investment, it is difficult to distinguish the two forms of refusal of access from one another, and the less serious infringement, namely the implied refusal of access, is easier to prove than the more serious infringement, namely the explicit refusal of access.

36 Finally, according to the appellant, the wording used by the Court of Justice in paragraph 55 of the judgment of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83; 'the judgment in *TeliaSonera*'), does not lead to the conclusion that the criteria of the judgment in *Bronner* do not apply to an implied refusal of access.

37 The Commission contends, in essence, that the abuse found in the decision at issue is fundamentally different from the abuse at issue in the judgment in *Bronner*, so that the criteria laid down in that judgment do not apply in the present case.

Findings of the Court

38 By its first ground of appeal, the appellant, ST's parent company to which ST's conduct was imputed, criticises in particular paragraphs 86 to 115 of the judgment under appeal, in which the General Court upheld the merits of the decision at issue in that it was not for the Commission to establish that access to ST's local loop network was indispensable to alternative operators in order to classify as 'abusive' the practices of ST which that institution regarded as constituting a constructive refusal to supply in recital 365 of the decision at issue. Those practices consisted, first, in withholding from alternative operators network information necessary for the unbundling of local loops, second, reducing the scope of its obligations regarding unbundled local loops deriving from the applicable regulatory framework, and third, setting several unfair terms and conditions in its reference unbundling offer ('the practices at issue').

39 In particular, the General Court found, in paragraph 101 of the judgment under appeal, that, given that the relevant regulatory framework applicable to telecommunications clearly acknowledged the need for access to ST's local loop, in order to allow the emergence and development of effective competition in the Slovak market for high-speed internet services, the demonstration, by the Commission, of the indispensability of that access for the purposes of the last condition set out in paragraph 41 of the judgment in *Bronner* was not required. It added, in essence, in paragraphs 106 to 114 of the judgment under appeal, that the conditions deriving from the judgment in *Bronner*, and more specifically the condition relating to the indispensability of a service or infrastructure belonging to a dominant undertaking, did not apply to practices other than a refusal of access, such as the practices at issue.

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

41 In accordance with the Court's settled case-law, the concept of 'abuse of a dominant position', within the meaning of Article 102 TFEU, is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 148 and the case-law cited).

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

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

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

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

46 In that regard, as the Advocate General also noted, in essence, in points 68, 73 and 74 of his Opinion, a finding that a dominant undertaking abused its position due to a refusal to conclude a contract with a competitor has the consequence of forcing that undertaking to conclude a contract with that competitor. Such an obligation is especially detrimental to the freedom of contract and the right to property of the dominant undertaking, since an undertaking, even if dominant, remains, in principle, free to refuse to conclude contracts and to use the

infrastructure it has developed for its own needs (see, by analogy, judgment of 5 October 1988, *Volvo*, 238/87, EU:C:1988:477, paragraph 8).

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

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

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

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

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

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

53 To the same effect, the Court of Justice held, in paragraph 58 of the judgment in *TeliaSonera*, in essence, that it cannot be required that the examination of the abusive nature of any type of conduct of a dominant undertaking towards its competitors be systematically carried out in the light of the conditions laid down by the Court of Justice in the judgment in *Bronner*, which concerned a refusal to provide a service. Therefore, the

General Court was right to find, in paragraphs 108 to 110 of the judgment under appeal, that, in paragraphs 55 to 58 of the judgment in *TeliaSonera*, the Court of Justice was not referring only to the particular form of abuse constituted by a margin squeeze of competitor operators in a downstream market when it assessed the practices to which the conditions of the judgment in *Bronner* did not apply.

54 In the present case, ST's situation was characterised in particular by the fact, referred to in paragraph 99 of the judgment under appeal, that it was subject to a telecommunications regulatory obligation, in accordance with which it was required to give access to its local loop network. Following the decision of 8 March 2005 of the TUSR, confirmed by the director of that authority on 14 June 2005, ST was required to grant, in its capacity as operator with significant market power, all alternative operators' reasonable and justified requests for unbundling of its local loop, in order to enable those operators, on that basis, to offer their own services on the retail mass market for broadband services at a fixed location in Slovakia.

55 Such an obligation meets the objectives of development of effective competition on the telecommunications markets laid down by the EU legislature. As indicated in recitals 3, 6 and 7 of Regulation No 2887/2000, the imposition of such an access obligation is justified by the fact that, first, as operators with significant market power were able, over significant periods of time, to roll out their local access networks protected by exclusive rights and fund investment costs through monopoly rents, it would not be economically viable for new entrants to duplicate the incumbent's local access infrastructure and, second, alternative infrastructures do not constitute a viable substitute for those local access networks. Unbundled access to the local loop would therefore be such as to allow new entrants to compete with operators with significant market power. It follows that, as the General Court recalled in paragraph 99 of the judgment under appeal, the access obligation imposed in the present case by the TUSR resulted from the intention to encourage ST and its competitors to invest and innovate, whilst ensuring that competition in the market is maintained.

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

57 By analogy with the Court of Justice's findings in paragraph 224 of the judgment of 14 October 2010, *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603), referred to in paragraph 97 of the judgment under appeal, it should be considered that a regulatory obligation can be relevant for the assessment of abusive conduct, for the purposes of Article 102 TFEU, on the part of a dominant undertaking that is subject to sectoral rules. In the context of the present case, while the obligation imposed on ST to give access to the local loop cannot relieve the Commission of the requirement of establishing that there is abuse within the meaning of Article 102 TFEU, by taking account in particular of the applicable case-law, the imposition of that obligation has the consequence that, during the entire infringement period taken into account in the present case, ST could not and did not actually refuse to give access to its local loop network.

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

59 Nevertheless, as the practices at issue did not constitute refusal of access to ST's local loop but related to the conditions for such access, for the reasons referred to in paragraphs 45 to 51 of the present judgment, the

conditions set out by the Court of Justice in paragraph 41 of the judgment in *Bronner*, referred to in paragraph 44 of the present judgment, did not apply in the present case.

60 Therefore, the General Court did not err in law when it considered, in paragraph 101 of the judgment under appeal, that the Commission was not required to demonstrate 'indispensability', for the purposes of the last condition set out in paragraph 41 of the judgment in *Bronner*, in order to find an abuse of a dominant position on the part of ST by virtue of the practices at issue.

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

The second ground of appeal

Arguments of the parties

62 By its second ground of appeal, which comprises two parts, the appellant submits that the General Court committed errors of law by imputing to the appellant the abuse of a dominant position committed by ST.

63 By the first part of the second ground of appeal, the appellant submits that, in order to impute to it ST's abusive conduct, the General Court erroneously considered that facts which, in its view, are solely capable of establishing the appellant's ability to exercise decisive influence over ST, can be used as indications of actual exercise of such an influence. According to the appellant, accepting that facts which suggest only an ability, on the part of a parent company, to exercise decisive influence over its subsidiary are sufficient to demonstrate actual exercise of that influence would have the consequence of removing any form of distinction between the possible and actual exercise of that influence and would constitute an unlawful extension of the presumption applicable to subsidiaries in which a parent company holds 100% of the shares.

64 The appellant is therefore of the view that the facts set out, first, in paragraphs 233 and 249 et seq. of the judgment under appeal, according to which ST's senior executives also occupy managerial posts within the appellant or senior managers of the appellant are present on ST's board of directors, second, in paragraphs 280 to 285 of the judgment under appeal, according to which the appellant provided staff to ST and, third, in paragraph 294 of the judgment under appeal, according to which ST sent the appellant reports relating to ST's commercial policy, are factual circumstances which are equally such as to establish only the appellant's potential ability to exercise decisive influence over ST, and not that it actually exercises such influence.

65 In addition, the appellant asserts that the distinction referred to in paragraph 63 of the present judgment does not prevent the Commission from taking account of all of the relevant circumstances which could lead to a finding of actual exercise of decisive influence. Moreover, the appellant disputes the relevance of the reference made by the General Court, in the judgment under appeal, and by the Commission, in its response, to the judgment of 18 January 2017, *Toshiba* v *Commission* (C-623/15 P, not published, EU:C:2017:21), since the case which gave rise to that judgment concerned the observance of decision-making rules in a joint venture and not the possibility of exercising a decisive influence. The appellant is also of the view that, contrary to what the Commission puts forward in its response, the Court of Justice did not find, in paragraph 93 of the judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce* (C-293/13 P and C-294/13 P, EU:C:2015:416), that an exchange of information constituted an indication of actual exercise of decisive influence.

66 By the second part of its second ground of appeal, the appellant asserts that, when carrying out a legal classification of the facts on which the Commission relied, the General Court wrongly applied the principle that decisive influence must actually have been exercised, by concluding, from the mere possibility of such influence, that decisive influence was actually exercised. Thus, the appellant submits that it is not only the paragraphs of the judgment under appeal criticised in the first part of that ground of appeal that are vitiated by an error of law, but also, first, paragraph 262 of that judgment, in that the General Court took account of the fact that ST's executive management board reported to the appellant's board of directors and of the appellant's approval of that executive management board's business plan, second, paragraphs 273 and 274 of that judgment,

in that the General Court found that the obligation of loyalty on the part of the administrators towards the shareholders or the non-binding nature of the advisory services provided to ST did not preclude the exercise of decisive influence by the appellant over ST, and, third, paragraph 278 of that judgment, in that the General Court found that the shareholders' agreement allowed the appellant's representatives on ST's board of directors to exercise decisive influence over all of ST's commercial decisions. Furthermore, the appellant disputes the plea of inadmissibility raised by the Commission in respect of the second part of its second ground of appeal and claims that, by that part, it does not call into question the findings of facts made by the General Court but simply invokes an error of law due to an incorrect application of the principle of actual exercise of decisive influence.

67 The Commission contends that the second part of the second ground of appeal is inadmissible in that it calls into question the findings of fact made by the General Court and entails a new assessment of the evidence by the Court of Justice. In any event, in its view, the second ground of appeal is unfounded as the finding that there was actual exercise of decisive influence may be inferred, as in the present case, from a body of consistent evidence, by taking account of all the relevant circumstances.

Findings of the Court

68 As regards the admissibility of the second part of the second ground of appeal, it should be recalled that, in accordance with the Court's settled case-law, where the General Court has determined or assessed the facts, the Court of Justice has sole jurisdiction under Article 256 TFEU to review their legal characterisation and the legal conclusions which were drawn from them. The assessment of the facts is not therefore, other than in cases where the evidence produced before the General Court has been distorted, a point of law which is subject, as such, to review by the Court of Justice (see, inter alia, judgment of 17 October 2019, *Alcogroup and Alcodis* v *Commission*, C-403/18 P, EU:C:2019:870, paragraph 63 and the case-law cited).

69 The appellant has not claimed, in the second ground of appeal, that the evidence examined by the General Court demonstrating that the appellant could be held responsible for ST's conduct was distorted, and it is not for the Court of Justice to re-examine its evidential value.

70 By the second part of that ground of appeal, however, the appellant asserts that the General Court erroneously considered that the Commission could rightly rely on a certain number of facts in order to conclude that there was actual exercise of decisive influence by the appellant over ST, whereas, in the appellant's view, those facts are only such as to demonstrate that such influence is possible. According to the appellant, it follows from that that the General Court erroneously classified those facts as constituting actual decisive influence on the part of the appellant over ST. Thus, by that part of its second ground of appeal, the appellant is not requesting that the Court of Justice carry out a new assessment of the facts but that it review their legal classification by the General Court.

71 It follows that the second part of the second ground of appeal is admissible.

72 As regards the substance, it should be recalled that the authors of the Treaties chose to use the concept of an 'undertaking' to designate the perpetrator of an infringement of competition law that may be sanctioned pursuant to Articles 101 and 102 TFEU. This autonomous concept of EU law designates any entity of personal, tangible and intangible elements, engaged in an economic activity, irrespective of its legal status and the way in which it is financed (see, to that effect, judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraphs 29, 36 and 47). Thus, the concept of 'undertaking' referred to in Articles 101 and 102 TFEU must be construed as designating an economic unit, for the purpose of the subject matter of the anticompetitive practice in question, even if in law that economic unit consists of several natural or legal persons (see, to that effect, judgments of 12 July 1984, *Hydrotherm Gerätebau*, 170/83, EU:C:1984:271, paragraph 11, and of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 53 and the case-law cited).

73 It follows from that choice, first, that, where such an economic entity infringes the competition rules, it is for that entity, consistently with the principle of personal liability, to answer for that infringement (see, to that effect, judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 53

and the case-law cited), and, second, that a legal person may, under certain conditions, be held personally jointly and severally liable for the anticompetitive conduct of another legal person belonging to the same economic entity (see, to that effect, judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 57 and the case-law cited).

74 Thus, in accordance with the Court's settled case-law, liability for the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not determine independently its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (see, inter alia, judgments of 10 September 2009, *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraph 58; of 10 April 2014, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 30; and of 18 January 2017, *Toshiba* v *Commission*, C-623/15 P, not published, EU:C:2017:21, paragraph 45). In such a situation, the instructions given by the parent company can constitute a form of decisive influence exercised by that company over its subsidiary.

75 In examining whether the parent company is able to exercise decisive influence over the market conduct of its subsidiary, account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to its parent company and, therefore, account must be taken of the economic reality (judgments of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 76, and of 18 January 2017, *Toshiba* v *Commission*, C-623/15 P, not published, EU:C:2017:21, paragraph 46).

76 Therefore, while the instructions given by the parent company to its subsidiarity affecting its market conduct can constitute sufficient evidence of such decisive influence, they are not the only permissible evidence. The exercise of decisive influence by a parent company over its subsidiary's conduct may also be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such influence (judgments of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 77, and of 18 January 2017, *Toshiba* v *Commission*, C-623/15 P, not published, EU:C:2017:21, paragraph 47).

77 As follows from paragraphs 75 and 76 of the present judgment, it can be sufficient, in order to impute liability for a subsidiary's conduct to the parent company, to examine if the parent company has the possibility of exercising such decisive influence over its subsidiary. Therefore, contrary to what the appellant asserts, the Commission may also take into consideration, in the context of an overall assessment of the situation in question, a fact that contributes to demonstrating that the parent company has the ability to exercise decisive influence over its subsidiary, where such a fact, examined in the light of or in conjunction with other facts relating to that situation, is part of a body of consistent evidence relating to actual and decisive influence of the parent company over its subsidiary.

78 It follows that the appellant is wrong to allege that the General Court erred in law by considering that facts demonstrating that the appellant was in a position to exercise decisive influence over ST cannot be taken into account as indications contributing to a finding of an actual exercise of such influence.

79 As regards whether the General Court was wrong to classify the specific aspects set out in paragraphs 233, 249 to 262, 273, 274, 278, 280 to 285 and 294 of the judgment under appeal as indications of actual exercise of decisive influence by the appellant, who owned 51% of ST's capital, over ST, it is appropriate to point out the following.

80 In the first place, as regards the taking into account of the presence of senior managers of the appellant on ST's board of directors, the General Court did not err in law when it considered, in paragraph 233 of the judgment under appeal, that it is relevant, in order to assess the actual exercise of decisive influence by the parent company over its subsidiary, to take account of the presence, in leading positions of the subsidiary, of individuals who occupy managerial posts within the parent company. Such a presence, in leading positions of the subsidiary, constitutes an indication which, when corroborated by others, may establish actual exercise of decisive influence by the parent company over its subsidiary's conduct on the market concerned.

81 In the present case, the General Court found, in particular, in paragraphs 250 to 256 of the judgment under appeal, that during the infringement period, Mr R. R., first, was a member of ST's board of directors at the same time as occupying managerial posts within the appellant, and, second, audited ST's accounts with a view to their consolidation at the level of the Deutsche Telekom group. It is also apparent from those paragraphs of the judgment under appeal that Mr R. R. was involved in the development of the financial planning and the investment policy of ST, with a view to ensuring their consistency with that group's objectives, and that he reviewed whether that subsidiary had attained its own financial goals in each reference period. The General Court also noted that such an involvement of Mr R. R. within ST was necessarily closely linked to ST's commercial policy.

82 The General Court did not err in law when it classified those factual aspects as indications of actual exercise of decisive influence by the appellant over ST. The accumulation of posts of Mr R. R. in his capacity as director of the appellant and member of the board of directors of ST, and his various tasks within ST, constitute indications that the appellant was involved in defining and monitoring ST's commercial policy.

83 As regards the appellant's claim that, in paragraph 262 of the judgment under appeal, the General Court erred in law by classifying certain facts as indications that it actually exercised decisive influence over ST, it must be noted that the passage of that paragraph contested by the appellant specifically concerned, at that stage of the reasoning, the control exercised by ST's board of directors over its executive management board, and not the control exercised by the appellant over ST via ST's board of directors. Furthermore, the General Court did not err in law when it considered that the obligation of ST's executive management board to regularly report to the board of directors on its activities and the status of that company and that of its subsidiaries, like the board of directors having competence as regards the approval of the business plan prepared by the executive management board, constituted indications of control over ST's executive management board by ST's board of directors. Thus, contrary to the appellant's assertion, that paragraph of the judgment under appeal is not vitiated by an error in the classification of the facts.

84 Likewise, as regards the appellant's criticism, first, of paragraph 273 of the judgment under appeal, according to which the obligation of loyalty on the part of the administrators towards the shareholders pursuant to the applicable Slovak law did not constitute a legal obstacle for a parent company holding a majority interest in the share capital of that subsidiary to exercise decisive influence over the latter's conduct on the market, second, of paragraph 274 of the judgment under appeal, according to which the appellant's exercise of decisive influence over ST's commercial policy was not precluded as a result of the non-binding nature of the advisory services that the appellant provided to ST under the strategic cooperation framework agreement concluded between them and, third, of paragraph 278 of that judgment, which refers to the reasons set out by the Commission in the decision at issue for the shareholders' agreement allowing the appellant's representatives on ST's board of directors to exercise decisive influence over all of ST's commercial decisions, including the approval of the budget, it must be noted that, since the appellant does not invoke any distortion of the facts examined by the General Court in those paragraphs of the judgment under appeal, the General Court could, without erring in law, classify such a presence of senior managers of the appellant on ST's board of directors as an indication of an actual exercise of decisive influence by the appellant over ST, as held by the General Court in particular in paragraphs 250 to 256 of the judgment under appeal.

85 In the second place, as regards the classification of the provision of staff of the appellant to ST as an indication of actual exercise of decisive influence by the appellant over ST, the General Court found, in paragraph 285 of the judgment under appeal, that it could reasonably be considered that that staff, even though they were no longer under the appellant's direct authority during their posting at ST, had in-depth knowledge of the appellant's commercial policy and objectives and were therefore particularly well placed to ensure that ST acts in line with the appellant's interests. Those findings are relevant for the classification of that provision as an indication of actual exercise of decisive influence by the appellant over ST, since they must be read in conjunction, in particular, with the considerations of the General Court, not contested by the appellant, set out in paragraphs 281 and 287 of the judgment under appeal, according to which the senior managers provided to ST occupied positions involving a high level of responsibility within ST, enabling the commercial policy and objectives of ST to be influenced, and they remained employees of the appellant during their posting and thus

depended on the appellant for the continuation of their career within the Deutsche Telekom group. Moreover, the General Court, in paragraphs 374 and 417 of the judgment under appeal, highlighted facts demonstrating that the persons that the appellant provided to ST had allowed the appellant to be informed about and involved in ST's commercial choices.

86 In the third place, as regards ST's reporting to the appellant, the General Court did not err in law when it considered, in paragraph 294 of the judgment under appeal, that regular reporting, by a subsidiary to its parent company, of detailed information relating to its commercial policy was liable to establish awareness on the part of the parent company of its subsidiary's conduct on the market and, consequently, to put the parent company in a position to intervene in a more informed and therefore efficient way in the commercial policy of that subsidiary. Furthermore, while the fact that a subsidiary is required to send reports to its parent company concerning its commercial policy and financial results cannot in itself constitute an indication of an actual exercise of decisive influence by a parent company over its subsidiary, that fact can contribute to supporting such indications. Thus, the General Court did not err in law by considering, in paragraph 294 of the judgment under appeal, that the regular reporting to the appellant of information concerning ST's commercial policy was capable of contributing, along with other indicators, to establishing that those companies formed a single economic unit.

87 Consequently, the second ground of appeal must be rejected as unfounded.

The third ground of appeal

Arguments of the parties

88 In support of its third ground of appeal, the appellant submits that it follows from the case-law of the Court of Justice on the imputability of an infringement of a subsidiary to its parent company and the presumption laid down in the judgment of 16 November 2000, *Stora Kopparbergs Bergslags* v *Commission* (C-286/98 P, EU:C:2000:630), that that imputability is subject to four cumulative conditions, namely, first, the parent company must be in a position to exercise decisive influence, second, the parent company must have actually exercised such decisive influence, third, the subsidiary did not, for that reason, independently decide its own conduct on the market and, fourth, the subsidiary carried out, in all material respects, the instructions given to it by the parent company. In the appellant's view, that last condition serves to verify the relevance of the decisive influence exercised by the parent company and is an expression of the principle of proportionality. According to the appellant, it seems disproportionate to impose on a parent company a fine for an infringement committed by one of its subsidiaries where that parent company exercises decisive influence over its subsidiary only to a non-essential extent and that subsidiary does not follow the instructions of its parent company in all material respects.

89 The appellant claims that nevertheless, in the present case, the General Court did not find that ST had received and followed the appellant's instructions in all material respects. According to the appellant, the General Court simply found, in paragraph 470 of the judgment under appeal, that the fact that the subsidiary enjoyed a degree of autonomy was not incompatible with its belonging to the same economic unit as its parent company, and, in paragraph 471 of that judgment, that ST's general strategy on the Slovak telecommunications market was defined by the appellant. As regards that second finding, the appellant states that this is not supported by paragraphs 237 to 464 of the judgment under appeal, to which the General Court refers in paragraph 471 of that judgment. According to the appellant, in those paragraphs the General Court merely listed several indicators that the appellant had exercised decisive influence over ST, without establishing the existence of any actual instructions given by it to ST.

90 Thus, the appellant is of the view that the General Court did not find that the conditions of the principle establishing imputability were met in the present case.

91 The appellant also claims that the General Court infringed its obligation to state reasons by not providing the reasons for its finding that ST had followed the appellant's instructions in all material respects.

92 The Commission contends, in essence, that the General Court did not fail to state reasons and did not err in law when it imputed ST's infringement to the appellant, since ST did not determine independently, in relation to the appellant, its conduct on the market concerned.

Findings of the Court

93 Contrary to what the appellant claims, the Court of Justice has not stated that the imputability of a subsidiary's conduct to the parent company is dependent on the four conditions set out in paragraph 88 above being met.

94 As is apparent from paragraph 72 of the present judgment, the possibility of imputing a subsidiary's anticompetitive conduct to its parent company constitutes one of the consequences of the choice of the authors of the Treaties to use the concept of undertaking to designate the perpetrator of an infringement of competition law that may be sanctioned pursuant to Articles 101 and 102 TFEU. Those legal persons can be regarded as forming an economic unit for the purpose of the subject matter of the anticompetitive practices referred to in those provisions where the parent company exercises control over the conduct of its subsidiary which is the perpetrator of an infringement of those provisions on the market in question. In such circumstances, the formal separation between the parent company and its subsidiary, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purpose of applying Articles 101 and 102 TFEU (see, to that effect, judgment of 14 July 1972, *Imperial Chemical Industries* v *Commission*, 48/69, EU:C:1972:70, paragraph 140).

95 That control can, as the Advocate General noted in point 156 of his Opinion, be demonstrated by the Commission either by establishing that the parent company has the ability to exercise a decisive influence over its subsidiary's conduct and, moreover, that it has actually exercised such influence (see, to that effect, judgments of 26 September 2013, *The Dow Chemical Company* v *Commission*, C-179/12 P, not published, EU:C:2013:605, paragraph 55, and of 26 September 2013, *EI du Pont de Nemours* v *Commission*, C-172/12 P, not published, EU:C:2013:601, paragraph 44), or by proving that that subsidiary does not decide independently upon its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between those two legal entities (judgment of 26 October 2017, *Global Steel Wire and Others* v *Commission*, C-457/16 P and C-459/16 P to C-461/16 P, not published, EU:C:2017:819, paragraph 83 and the case-law cited).

96 Those two means of proving that control must be regarded as being not cumulative but alternative and therefore equivalent. At most, it can be considered that a subsidiary carrying out the instructions given by its parent company on the market concerned by the anticompetitive practices in question potentially constitutes a form of decisive influence exercised by that parent company over its subsidiary and not, as submitted by the appellant, an additional condition that the Commission must demonstrate in order to be able to impute that subsidiary's conduct to the parent company.

97 Having regard to the above, the General Court did not err in law by considering, in essence, in paragraphs 470 and 471 of the judgment under appeal, that the appellant and ST formed an economic unit during the infringement period on the ground that, in the light of the elements set out in paragraphs 237 to 464 of the judgment under appeal, the appellant had exercised decisive influence over ST by defining ST's general strategy on the market concerned. The Commission was not required to prove that ST had also followed the instructions of the appellant in all material respects in order to impute to it the infringement committed by ST.

98 Finally, as regards the appellant's claim that the General Court failed to fulfil its obligation to state reasons, it must be recalled that, in accordance with the Court's settled case-law, the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review (judgment of 11 July 2013, *Gosselin Group* v *Commission*, C-429/11 P, not published, EU:C:2013:463, paragraph 52 and the case-law cited).

99 In the present case, the reasons for which the General Court considered that ST's abusive conduct could be imputed to the appellant are clearly and unequivocally disclosed in paragraphs 227 to 473 of the judgment under appeal. Those reasons have permitted the appellant to dispute them before the Court of Justice and the Court of Justice to exercise its power of review. Consequently, the complaint alleging failure to state reasons is unfounded.

100 On the foregoing grounds, the third ground of appeal must be rejected as unfounded.

The fourth ground of the appeal

Arguments of the parties

101 The appellant is of the view that the General Court erred in law by ruling, in paragraph 144 of the judgment under appeal, that its right to be heard had not been infringed as regards the calculation of the margin squeeze.

102 The appellant claims that, at the meeting of 29 September 2014, the Commission provided it with three new factors, namely, first, new figures concerning the calculation of the margin squeeze as regards ST's margins, second, the fact that the margin for 2005 was positive on the basis of a calculation of the margins year by year, and, third, its intention moreover to apply a multi-year method of calculating the margins, allowing it to conclude that there was a negative margin for 2005 as well. According to the appellant, the General Court recognised the relevance of the last two of the new factors in the context of the decision at issue, in so far as it was in respect of those two factors that it upheld in part, in paragraphs 198 to 221 of the judgment under appeal, the second plea in law put forward at first instance by the appellant.

103 Contrary to the ruling of the General Court, the appellant submits that the deadline of a total of 36 hours that it had been given to make known its views on those new factors which had thus been taken into account in the decision at issue did not allow it to put forward its point of view properly. The appellant also disputes that it can be considered that it had been aware of those factors prior to the meeting of 29 September 2014 on the ground that those factors had been supplied by ST.

104 The Commission contends that the fourth ground of appeal is inadmissible on the ground that the appellant has neither claimed nor established that the General Court distorted the facts on the basis of which it decided that the appellant had already been aware of the new factors discussed at the meeting of 29 September 2014. It also asserts that the appellant's argument, put forward for the first time in its reply, according to which knowledge on the part of ST cannot be equated with knowledge on the part of the appellant, is inadmissible. Finally, the Commission is of the view that the fourth ground of appeal is unfounded in particular because the Commission gave the parties the possibility of expressing their views at the meeting of 29 September 2014 and within a short period after that meeting.

Findings of the Court

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

106 In the context of competition law, observance of the rights of the defence means that any addressee of a decision finding that that addressee has committed an infringement of the competition rules must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged as well as on the documents used by the Commission to support its claim that there has been such an infringement (see, to that effect, judgments of 5 December 2013, *SNIA* v

Commission, C-448/11 P, not published, EU:C:2013:801, paragraph 41, and of 14 September 2017, *LG Electronics and Koninklijke Philips Electronics* v *Commission*, C-588/15 P and C-622/15 P, EU:C:2017:679, paragraph 43).

107 In the present case, the General Court held, in paragraph 144 of the judgment under appeal, that the Commission had not infringed the appellant's rights of defence by granting it only a short time limit to submit its observations on the new factors brought to its knowledge at the information meeting of 29 September 2014. The General Court considered that that short timeframe had not deprived the appellant of the opportunity to be properly heard, given that, first, the meeting of 29 September 2014 was held at a very advanced stage of the administrative procedure and, second, it was reasonable to consider that the appellant had at that time acquired a high degree of knowledge of the file.

108 Furthermore, as is expressly clear from that paragraph of the judgment under appeal, the considerations of the General Court referred to in that paragraph were made for the sake of completeness. In paragraphs 123 to 143 of the judgment under appeal, the General Court held, primarily and in essence, that the factors in question, brought to the knowledge of the appellant at the information meeting of 29 September 2014, resulted from the Commission taking account of figures, calculations and criticisms of the methodology that ST had itself made prior to that meeting.

109 According to the Court's settled case-law, complaints directed against grounds of a judgment of the General Court included purely for the sake of completeness cannot lead to the judgment's being set aside and are therefore ineffective (see, to that effect, judgments of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 105, and of 17 October 2019, *Alcogroup and Alcodis* v *Commission*, C-403/18 P, EU:C:2019:870, paragraph 52). Consequently, the fourth ground of appeal must be declared ineffective.

110 This assessment is not called into question by the appellant's assertion that it was not the appellant but ST that was aware of the new factors in question prior to the meeting of 29 September 2014. In accordance with the Court's settled case-law, it is apparent from the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that appeals are limited to points of law. The General Court therefore has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence placed before it. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts or evidence are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (judgment of 9 November 2017, *TV2/Danmark* v *Commission*, C-649/15 P, EU:C:2017:835, paragraph 36 and the case-law cited). It is also settled case-law that distortion must be obvious from the documents in the Court's file, without any need to carry out a new assessment of the facts and the evidence (judgment of 12 July 2012, *Cetarsa* v *Commission*, C-181/11 P, not published, EU:C:2012:455, paragraph 97 and the case-law cited).

111 The appellant has neither claimed nor demonstrated that the General Court distorted the facts when it stated, in paragraphs 18 and 21 of the judgment under appeal, that ST and the appellant had each replied to the statement of objections and the letter of facts. Furthermore, the appellant has neither alleged nor demonstrated a distortion of the facts in paragraphs 133, 138 and 139 of the judgment under appeal, in which the General Court found, first, that, in the decision at issue, the Commission had not modified its assessment relating to the margin squeeze by holding ST and the appellant liable for facts on which they had not been given the opportunity to express their views, and, second, that the taking into account of the multi-year analysis in order to establish a margin squeeze in the decision at issue followed the objection raised by ST in its reply to the statement of objections, which the appellant itself supported, so that the multi-year analysis did not result in the appellant and ST being held liable for facts on which they had not had the opportunity to explain their views.

112 Therefore, the General Court's assessment in accordance with which the appellant and ST had been aware, prior to the meeting of 29 September 2014, of the new factors taken into consideration by the Commission, must be regarded as an established fact. That fact supports the assessment set out in paragraph 109 above.

113 On all the foregoing grounds, the fourth ground of appeal must be rejected as ineffective.

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

114 The appellant requests that a potentially favourable ruling upholding the ground of appeal raised by ST in support of its appeal in Case C-165/19 P against the judgment of the General Court of 13 December 2018, *Slovak Telekom* v *Commission* (T-851/14, EU:T:2018:929), by which ST invokes errors of law committed in the calculation of the long run average incremental costs in order to establish an abusive margin squeeze on ST's part, be extended to the appellant. In support of that request, the appellant invokes the fact that it raised a plea of law with the same object before the General Court and claims that the conditions listed by the Court of Justice in the judgment of 22 January 2013, *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), are met in the present case.

115 The Commission contends that such a request should be rejected, since it is not a ground of appeal, not all the conditions referred to in that case-law of the Court of Justice are met in the present case, and, in any event, the ground of appeal raised by ST in support of that appeal should be rejected.

116 In that regard, it is sufficient to state that, by judgment delivered today, *Slovak Telekom* v *Commission* (C-165/19 P), the Court of Justice dismissed ST's appeal in that case, so that the appellant's request is ineffective, as it is devoid of purpose.

117 The appeal must therefore be dismissed in its entirety.

Costs

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

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

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

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

1. Dismisses the appeal;

2. Orders Deutsche Telekom AG, in addition to bearing its own costs, to pay those incurred by the European Commission.

[Signatures]

* Language of the case: German.